Special Issue
EU Citizenship: Twenty Years On

Twenty Years of CJEU Jurisprudence on Citizenship

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A. Introduction

The history of the European Union has been fraught with constant friction between the sovereignty of the Member States and the supranational powers of the Union, with the Union gaining terrain in fields of law traditionally belonging to the Member States. Despite this tension, certain legal fields are steadfastly asserted as belonging to the Member States. Notably, Member States regulate the grounds of the acquisition and loss of nationality. The Treaty of Lisbon highlights that the nationality of Member States is scarcely governed by European Union law, if at all. The sole provision governing the relationship between Member State nationality and Union law, i.e., Article 20 of the Treaty on the Functioning of the European Union (TFEU) stresses the primacy of Member State nationality.[1]

Reality, however, is often not as simple as such a cursory reading implies. European Union citizenship, once a mere complementary facet of the national citizenships, has transformed into an institution in its own right, forming a symbiotic relationship between the Member State nationality and the European Union.

This article traces the development of the European Union citizenship, beginning with its inception within the Treaty of Maastricht to the overwhelming judgment of the CJEU in *Rottmann* and beyond. On the basis of the trend established, this article also examines the possible ramifications of the European Union citizenship in the various Member States by formulating a list of principles concerning the loss and deprivation of nationality flowing therefrom, as well as from international law.

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[1] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 20(1), May 9, 2008, 2008 O.J. (C 115) 56 [hereinafter TFEU] ("Citizenship of the Union is hereby established. Every person holding the *nationality of a Member State* shall be a citizen of the Union. Citizenship of the Union shall be *additional to and not replace* national citizenship.") (emphasis added).

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B. The Road of European Union Citizenship

I. The Beginning: The Maastricht Treaty

When addressing European Union citizenship, the formal starting point is its creation by the Maastricht Treaty in 1992. The then-Article 8(1) EC describes the European Union citizenship as, "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union."[2]

At first blush, this provision seems more superficial and symbolic rather than functional. Yet this simple institution, at that time a paper tiger, caused the alarmed Member States to include a common declaration regarding its interpretation. This infamous declaration reads as follows:

> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.[3]

Clearly, the Member States feared this new institution would infringe upon their sovereign space and ultimately govern the acquisition and loss of their nationalities. At this moment in time, it was still unclear whether this fear was justified. European Union citizenship, however, has unmistakably created room for development, particularly through case law of the CJEU.

II. The Cases of Micheletti*,* Kaur*, and* Zhu and Chen*: A Bumpy Road*

In the early life of European Union citizenship, at least three important judgments were issued by the CJEU concerning European Union citizenship. Some may say that the Court seems to be unable to make up its mind, swinging back and forth between a liberalistic and a conservative reading of European Union Citizenship. Others might perceive a line of

[2] Treaty Establishing the European Community art. 8(1), Aug. 31, 1992, 1992 O.J. (C 224) 10.

[3] *Id.* at Declaration No. 2. It is remarkable that this declaration is not included in the consolidated TEU or TFEU after Lisbon nor attached to these treaties.

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thought starting to develop in this haze of uncertainty. In any event, the case law of the CJEU in *Micheletti,*[4] *Kaur,*[5] and *Zhu and Chen*[6] can be understood as essential in the development of the European Union citizenship.

Micheletti revolved around an Argentinian/Italian dual-national who was rejected in his application for residency and work in Spain as a Community national. The main issue in this case was whether Spain could, in the case of dual nationals not possessing Spanish nationality, enforce a test of effective nationality, in this case, the nationality of the last country in which the person concerned was habitually resident.[7]

The CJEU started by reiterating the international legal principle of sovereignty of States with regard to the acquisition and loss of nationality.[8] While the Court mitigated this absolute right somewhat by placing it within the boundaries set by Community law, according to Jessurun d'Oliveira, other Member States are prohibited from imposing an additional requirement of nationality for the exercise of a Community right by a dual national who possesses *the nationality of a Member State*.[9]

It is this very part of the dictum that played a central role in the *Kaur* judgment. Ms. Kaur, born in Kenya, had the status of British Overseas Citizen. As such, she did not have the right to reside in the United Kingdom. When her re-application for leave to remain within the United Kingdom was refused, she sought a ruling by the High Court of Justice of England and Wales. In particular, she indicated her desire to take up gainful employment within the UK and, more importantly, to travel to other Member States to purchase goods and services and/or to work there.[10]

While this case presents a fundamental issue–i.e., whether Union citizens can invoke their citizenship rights against their own Member State–the Court left this question unanswered. Instead, the CJEU ruled that under international law, it was completely within

[4] Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, CJEU Case C-369/90, 1992 E.C.R. I-4239.

[5] The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur, CJEU Case C-192/99, 2001 E.C.R. I-1237.

[6] Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, CJEU Case C-200/02, 2004 E.C.R. I-9925.

[7] *Micheletti*, CJEU Case C-369/90 at paras. 2–6.

[8] *Id.* at para. 10.

[9] *Id.* at paras. 10–11. *See* Hans Ulrich Jessurun d'Oliveira, *Case C-369/90, M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria, Judgment of 7 July 1992*, 30(3) COMMON MKT. L. REV. 623, 624–625 (1993).

[10] *Kaur*, Case C-192/99 at paras. 11–15.

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the UK's competence to delineate the scope of the "nationality of a Member State" to only those British citizens who had the right of residence within the territory of the UK.[11] The Court further stated that this decision would not have the effect of depriving persons of their EU citizenship, as the persons concerned, including Ms. Kaur, were never Union citizens.[12]

The final case in this trio, *Zhu and Chen*, concerned the (second) child of Ms. Chen and her husband, both Chinese nationals. Ms. Chen gave birth to Catherine Zhu in Belfast, Ireland. As a result, the child was born with Irish nationality because the Republic of Ireland maintained, at the time, the *ius soli* principle for persons born on the island of Ireland.[13] The main question is whether Catherine, as an Irish national and European citizen, and Ms. Chen, as the care-giver for an EU citizen, could invoke European Union law to take up residence within the United Kingdom.[14]

The judgment contains several important considerations. As a preliminary consideration, the CJEU noted that "[t]he situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation."[15] The Court continued with its famous dictum that, "Union citizenship is destined to be the fundamental status of nationals of the Member States."[16] Having considered that Catherine fulfilled the conditions stipulated by EU law regarding her right to reside within the host Member State, the Court further noted that, in line with the international legal principle of sovereignty in nationality matters, Catherine's legally unchallenged status as an Irish citizen could not be limited in its effect within the UK by the imposition of additional requirements for its recognition.[17]

The judgment ended with the Court's observation that, in cases such as those of Catherine and Ms. Chen, Member States may not refuse a Member State national or a third-country national, upon whom a Union citizen exercising her Union rights is dependent, the right of residence with the Union citizen, because this "would deprive the child's right of residence

[11] *Id.* at paras. 20–24.

[12] *Id.* at para. 25.

[13] Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, CJEU Case C-200/02, 2004 E.C.R. I-9925, paras. 7–12.

[14] *Id.* at para. 15.

[15] *Id.* at para. 19.

[16] *Id.* at para. 25.

[17] *Id.* at paras. 37–40.

of any useful effect."[18] This argument became a standard remark in subsequent cases before the CJEU, particularly in *Ruiz Zambrano*.[19]

III. Eman and Sevinger*: Two Steps Forward, One Step Back*

As seen in *Zhu and Chen*, though it did not play a prominent role there, one of the main weaknesses of the EU citizenship is its inability to govern the "purely internal situations." In *Eman and Sevinger*,[20] this purely internal situation becomes one of the key points around which the issue revolves.

Mr. Eman and Mr. Sevinger, both of Dutch nationality and habitual residents of the island of Aruba, were denied their application to be enrolled on the register of electors for the election of members of the European Parliament (EP) on the ground of their habitual residence in a territory of an overseas countries and territories (OCT). They challenged this decision up to the Council of State.[21]

The Court began by emphasizing that every person in possession of the nationality of a Member State is a Union citizen, regardless of whether they are habitually resident within an OCT, and thus enjoy the rights conferred by the Treaty.[22] The Court, however, declined to determine the rules regarding the persons qualified to vote and to stand in elections for the EP and whether elections should be held in the OCTs to the individual Member States. This deference is compounded by the observation of the Court that, failing express provisions to the contrary, Articles 189 and 190 EC Treaty on the European Parliament do not apply to OCTs.[23]

Despite this setback, the situation is not completely lost. The Court has held that the present situation, in which Dutch nationals are not allowed to vote in elections for the EP if they are resident on Aruba (or another OCT), while other Dutch nationals residing in a non-Member State are accorded this right, violates the principle of equal treatment, and is thus in violation of Community law.[24]

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[18] *Id.*at para. 45.

[19] Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), CJEU Case C-34/09, 2011 E.C.R. I-01177.

[20] M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag, CJEU Case C-300/04, 2006 E.C.R. I-08055.

[21] *Id.* at para. 16.

[22] *Id.* at paras. 27–28.

[23] *Id.* at paras. 40–54.

[24] *Id.* at paras. 56–60.

IV. Rottmann*: A First Crack in the Sovereignty in Nationality Matters*

To date, European Union citizenship has come a long way. It has become both the key to the territory of other Member States as well as the wall against discrimination by the Member States, including the citizen's own State. However, none of these cases have dealt with the question of whether European Union citizenship can affect the rules on acquisition and loss of the nationality of a Member State. The seminal *Rottmann* judgment,[25] however, concerned precisely the loss of the nationality of a Member State. The facts of the case were as follows.

Dr. Janko Rottmann, an Austrian national, was being prosecuted in Austria in the 1990s for fraud. He fled to Germany in 1995, where he applied for and was granted German nationality through naturalization in 1999. This resulted in the automatic loss of his Austrian nationality. Rottmann, however, failed to disclose the on-going criminal prosecution in Austria to the German authorities. When the City of Munich was informed of the criminal proceedings against Rottmann, it decided to revoke the naturalization on the grounds that it had been obtained by fraudulent conduct.[26]

While this case appears purely internal at first glance, the fact that Rottmann had lost Austrian nationality when he acquired the German nationality meant he would lose his European Union citizenship as a result of the revocation of the naturalization. The German court found this loss of EU citizenship sufficiently troubling. It stayed the proceedings and referred the case to the CJEU through a preliminary reference.

The legal questions in this case can be summarized in two main questions. The first legal hurdle is the determination of whether the present case falls within the sphere of Union law. This question was answered positively by both the Advocate General (A-G) and the CJEU, even though each reached the same conclusion differently. The A-G considered that Rottmann's invocation of his free movement rights was the principal factor leading to the possibility of the situation at hand, where Rottmann was confronted with the loss of his European Union citizenship. Therefore, the A-G concluded that this was more than just a "wholly internal situation" and thus fell within the sphere of Union law.[27]

The CJEU, however, found a shorter path to the same conclusion. The Court determined that:

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[25] Janko Rottmann v. Freistaat Bayern, Case C-135/08, 2010 E.C.R. I-1449.

[26] *Id.* at paras. 22–28; *see also* Jo Shaw, *Setting the scene: the Rottmann case introduced*, *in* HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW? 1 (2011).

[27] *Rottmann*, CJEU Case C-135/08 at paras. 11–13.

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> [I]t is clear that the situation of a citizen of the Union who . . . is faced with a decision withdrawing his naturalisation . . . and placing him . . . in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.[28]

This begs the question of the extent to which the loss of the nationality of a Member State falls within the ambit of EU law.[29] Davies argued that a logical reading of the Court's decision must lead to the conclusion that the loss of the nationality of a Member State by a person not possessing the nationality of another Member State always falls within the scope of EU law.[30]

The second central question is the consequence of EU law being applicable as regards the rules on (the loss of) nationality of the Member States. Here again it is important to take note of both the Court's ruling and the opinion of the A-G. The Court again stressed the fundamental status of European Union citizenship and the corollary, namely that Member States must have due regard to EU law when exercising their powers in the sphere of nationality.[31] The Court further considered the compatibility of the deprivation of nationality on the grounds of fraud in general with European Union law and international law—in particular, Article 15(2) of the UDHR and Article 4(2) of the ECN on the right not to be arbitrarily deprived of one's nationality.[32]

More importantly, though, the CJEU considered that each individual decision to deprive a person of a Member State's nationality must be in line with the European principle of proportionality, notwithstanding the existence of any national tests of proportionality.[33] The Court further concretized this principle by indicating the factors the national courts should take into consideration. These include the "consequences that the decision entails for the person concerned and . . . for the members of his family with regard to the loss of

[28] *Rottmann*, CJEU Case C-135/08 at para. 42.

[29] *See* Gerard-René de Groot & Anja Seling, *The Consequences of the Rottmann Judgment on Member State Autonomy - The Court's Avant-Gardism in Nationality Matters*, 7:1 EUR. CONST. L. REV. 138, 152 (2011).

[30] Gareth T. Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, *in* HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW? 7 (Jo Shaw ed., 2011).

[31] Janko Rottmann v. Freistaat Bayern, Case C-135/08, 2010 E.C.R. I-1449, paras. 43–45.

[32] *Id.* at paras. 50–54.

[33] *Id.* at para. 55.

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the rights enjoyed by every citizen of the Union," whether that loss is justified in relation to the "gravity of the offence committed by that person" and "to the lapse of time between the naturalisation decision and the withdrawal decision," and "whether it is possible for that person to recover his original nationality."[34]

Interestingly, the A-G goes much further than the CJEU. In the eyes of A-G Poaires Maduro, it is theoretically possible to invoke "any rule of the Community legal order . . . if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it."[35] This includes rules of international law, provisions of primary Community legislation, and the general principles of EU law.[36] It is particularly the latter which may be the most important factor in the boundary-setting of Union law in the field of nationality law, as these principles are many and varied in scope and content. A-G Poaires Maduro mentioned the possible role of the principle of equality, the avoidance of statelessness, the principle of sincere cooperation, and the protection of legitimate expectations.[37] De Groot further considered that the principles of legal certainty may play a role in this regard.[38]

Future cases before the CJEU specifically dealing with the acquisition or loss of European Union citizenship will likely revolve around the scope of the *Rottmann* judgment. It is therefore interesting to look at the EU case law after *Rottmann* as it might give some clues on how this scope should be interpreted.

V. The Scope of Rottmann*: The Cases of* Ruiz Zambrano*,* McCarthy*, and* Dereci

A brief look at the jurisprudence of the CJEU post-*Rottmann* leads to a number of similar cases concerning migration law and European Union citizenship. The first in this series, *Ruiz Zambrano*,[39] sets the tone for the others. *Ruiz Zambrano* concerned Mr. Ruiz Zambrano and his wife, both Colombian nationals, who applied for asylum in Belgium. Even though their applications were rejected, they could not be sent back to Colombia because of the *non-refoulement* clause. Numerous attempts by Mr. Ruiz Zambrano to regularize his

[34] *Id.* at para. 56.

[35] *Rottmann*, CJEU Case C-135/08 at para. 28.

[36] *Id.* at paras. 29–30.

[37] *See* Ngo Chun Luk, *Het Nederlanderschap na Rottmann. Over de gevolgen van Janko Rottmann v. Freistaat Bayern voor de verliesbepalingen van de Rijkswet op het Nederlanderschap* (2012) (unpublished Master's Thesis, University of Aruba, Oranjestad) (on file with author).

[38] Gerard-René de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, 5/6 ASIEL- EN MIGRATIERECHT 297 (2010).

[39] Gerardo Ruiz Zambrano v. Office national de l'emploi, CJEU Case C-34/09, 2011 E.C.R. I-1177.

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situation in Belgium had proven unsuccessful. In the meantime, Mr. Ruiz Zambrano's wife gave birth to two children. Mr. Ruiz Zambrano failed to register the birth of these children at the Colombian embassy, and thus the children could not obtain Colombian nationality. Accordingly, Belgian nationality law granted both children Belgian nationality.

The main question in the proceedings was whether Mr. Ruiz Zambrano, upon whom his children, both of Belgian nationality, were dependent, could derive a right to reside and work in Belgium on the basis of EU law. The Court chose to answer this question from the perspective of the minor European citizens. Reiterating that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States," the Court considered that Article 20 TFEU precludes measures by Member States which could deprive European citizens of "the *genuine enjoyment* of the substance of rights conferred by virtue of their status as citizens of the Union."[40] This short consideration can be seen as the key factor in determining whether national measures fall within the scope of EU law (by way of European Union citizenship).[41]

When does a measure of a Member State deprive a European Citizen of the genuine enjoyment of his or her EU Citizenship rights? In *Ruiz Zambrano*, the Court considered that the refusal to grant a third-country national the right to reside and work in a Member State, as a result of which the minor Member State nationals who were dependent on the third-country national would be forced to leave the territory of the Union, leads to the deprivation of the genuine enjoyment of Citizenship rights by Union Citizens.[42] The crucial difference between *Ruiz Zambrano* on the one hand, and *McCarthy*[43] and *Dereci*[44] on the other, may be the dependency of the Member State nationals on a third-country national. In both *McCarthy* and *Dereci*, the CJEU concluded that the Member State nationals were not in danger of being deprived of their genuine enjoyment of their Citizenship rights.[45]

C. A Road Map for European Union Citizenship: Principles on Loss and Deprivation of Nationality

As shown in *Rottmann*, European Union law defines, in certain situations, the margins in which Member States may exercise their sovereignty in matters of nationality. The proportionality principle plays a key role. This guiding principle is strongly related to the

[40] *Id.* at paras. 40–42 (emphasis added).

[41] *See* Luk, *supra* note 37, at 22–23.

[42] *Zambrano*, CJEU Case C-34/09 at paras. 43–44.

[43] Shirley McCarthy v. Secretary of State for the Home Department, CJEU Case C-434/09, 2011 E.C.R. I-3375.

[44] Murat Dereci and Others v. Bundesministerium für Inneres, CJEU Case C-256/11, 2011 E.C.R. I-11315.

[45] *McCarthy*, CJEU Case C-434/09 at paras. 49–50; see also *id.* at para. 68.

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right of every person not to be arbitrarily deprived of their nationality.[46] From this right, and the ruling of the Court in *Rottmann*, the authors propose a number of guiding principles that the courts of the various Member States should consider when dealing with cases of deprivation of nationality falling within the ambit of EU law. Several of these principles are also mentioned in an inspiring report on "*Human Rights and Arbitrary Deprivation of Nationality*"[47] which the Secretary General of the United Nations submitted to the Human Rights Council on 14 December 2009, less than three months before the *Rottmann* ruling by the CJEU.

(1) Loss or deprivation of nationality must have a firm legal basis.[48]

This principle seems self-evident in the legal order of the Member States of the EU, as all Member States adhere to the rule of law. A closer look at the rules of the Member States leads to the conclusion that this principle is not consistently applied. For example, Article 14(5) of the Kingdom Act on the Dutch Nationality (RWN)[49] states that the Dutch nationality can only be lost on the basis of the provisions in the RWN. However, literature on Dutch nationality law commonly points out that, per the ruling of the Supreme Court of the Netherlands on 30 June 2006, Dutch nationality can be lost—by way of the construction of void *ab initio*—in cases of identity fraud committed during naturalization procedures prior to 1 April 2003, despite the lack of a legal provision to that effect.[50]

(*2) A legal provision regarding loss or allowing deprivation of nationality may not be enacted retroactively: "Nulla perditio, sine praevia lege."*[51]

The loss or deprivation of nationality is often experienced by the person concerned as a form of sanction. Furthermore, loss or deprivation of nationality, especially that of a Member State, can have far-reaching consequences, not only for the person concerned but

[46] *See* Universal Declaration of Human Rights art. 15(2), G.A. Res. 217 (III) A, U.N. doc. A/RES/217(III) (Dec. 10, 1948); European Convention on Nationality art. 4(2), E.T.S. No. 166 (Nov. 6, 1997).

[47] U.N. Secretary-General, *Human rights and arbitrary deprivation of nationality: Rep. of the Secretary-General*, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009).

[48] *See* U.N. Secretary-General, *supra* note 47, at para 24; The Arab Charter of Human Rights (providing explicitly that "no one shall be arbitrarily or *unlawfully* deprived of his nationality" (emphasis added). However, it should be noted that "arbitrary" deprivation also can extend to interference provided for by law.).

[49] *Rijkswet op het Nederlanderschap*, OVERHEID 628, http://wetten.overheid.nl/BWBR0003738/.

[50] *See, e.g.*, GERARD-RENÉ DE GROOT & MATJAZ TRATNIK, NEDERLANDS NATIONALITEITSRECHT 119–123 (2010). Similarly, other Member States, such as the United Kingdom, allow for the voidance *ab initio* of the their nationality without a legal basis providing for such a loss.

[51] Literally: No loss without previous law. Compare the *nulla poena sine praevia lege poenali*- principle in criminal law (literally: No punishment without previous criminal law).

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also family members. Particularly, where the family members are third-country nationals and derive their right to reside in a Member State from their European citizen family member, the loss of the Member State nationality (and therefore the European Citizenship) means that the entire family can no longer reside in the European Union.

Consequently, Member States should not enact laws resulting in the retroactive loss or deprivation of nationality. Though, this does not preclude the possibility of Member States enacting laws retroactively to restrict the loss or deprivation of their nationality.[52]

(3) In case of the introduction of a new ground of loss a reasonable transitory provision has to be made.

In order to avoid that an individual loses his nationality due to an act which started already before the introduction of the new ground of loss, the legislature should include a reasonable transitory provision to cover possible unwanted consequences. If, for example, a State introduces voluntary acquisition of a foreign nationality as a new ground for loss of nationality, no such loss should occur if the foreign nationality is acquired after the introduction of this ground, but the application to acquire the nationality was already made prior to its introduction.

(4) A legal provision regarding the acquisition of nationality may not be repealed with retroactivity.

This principle is closely related to principle two above, as the retroactive repeal of a legal provision regarding the acquisition of nationality has the same result as the retroactive loss of nationality.

(5) The principle of "tempus regit factum."[53]

To establish whether a person acquired or had a nationality withdrawn by certain acts or facts, the legislation in force at the moment these acts or facts took place should be applied. Article 17-2(1) of the French Code civil excellently expresses this principle: "Acquisition and loss of French nationality are governed by the law that is in force at the time of the act or fact to which legislation attributes those effects."[54] Transitory provisions may allow exceptions to be made to this principle but not contrary to principles four and five above.

[52] Compare the restriction of the loss of Netherlands nationality by minors by an introduction of some exceptions in 2003 with retroactivity from 1985.

[53] Literally: The time governs the fact.

[54] *L'acquisition et la perte de la nationalité française sont régies par la loi en vigueur au temps de l'acte ou du fait auquel la loi attache ces effets*.

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(6) Loss or deprivation provisions must be predictable.

The principle of legal certainty requires that laws, particularly those regarding loss or deprivation provisions, must be predictable. The same situations must always lead to the same result, and different situations may not lead to the same result (the principle of equality). This also means that provisions on loss or deprivation of nationality may not be interpreted by analogy (applied on facts not evidently covered by the wording of the provisions involved).[55]

(7) The administrative practice based on loss or deprivation provisions may not be discriminatory.[56]

Loss or deprivation of nationality may not be based on discrimination on any ground prohibited in international human rights law, either in law or practice. These include all the grounds established in Article 2 of the ICCPR: "[R]ace, color [sic], sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(8) It must be possible to challenge the application of loss-provisions or acts of deprivation in court.

The UN Secretary-General underpinned in his 2009 Report, "Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness."[57] More specifically, "[v]iolations of the right to a nationality must be open to an effective remedy."[58]

(9) Finally, the grounds given for a deprivation-decision must be proportional.

This principle flows directly from *Rottmann*. According to the European principle of proportionality, a measure must be necessary, effective, and proportional to the goal to be achieved. This is also mentioned in the 2009 Report of the UN Secretary-General, underscoring in this respect:

> Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in

[55] *See also* U.N. Secretary-General, *supra* note 47, at para 25 (remarking on "predictability").

[56] *See* U.N. Secretary-General, *supra* note 47, at para 21.

[57] *Id.* at para. 43

[58] *Id.* at para. 46.

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> particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial. The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of appropriateness, injustice and lack of predictability also.[59]

The proportionality principle would have the following consequences for procedures on deprivation of nationality due to fraud committed during the naturalization procedure:

a. No deprivation should take place in cases of minor offences.
b. Consideration should be given to: The individual's situation, culpability of the act(s), and the circumstances in which the act(s) serving as the basis for the deprivation were committed.[60] Deprivation should not take place, for instance, if the person was not aware and could not have been aware of the fact that (a part of) the information provided during naturalization was untrue. Furthermore, due consideration should be paid to the reasons why a person committed the act(s). This is, for instance, the case if incorrect information was provided during a naturalization procedure because of fear for the safety of family members in another country.
c. The amount of time which has elapsed from when an act was committed until it is discovered by the competent authorities must be taken into consideration. The period between the time the act was discovered and the time the deprivation decision is issued is also relevant. Regrettably, only a minority of States uses such time limits, and, when doing so, these limits vary greatly.[61] The time that has passed since the act was committed is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. If this time period is lengthy, only very grave offenses may justify a deprivation of nationality.[62]

[59] *Id.* at para. 25, 27.

[60] *See, e.g.*, Nationality Act art. 33 (Fin.).

[61] From two years in France to fifteen years in Spain. Attention to the existing ties of the person concerned with the country is expressly mentioned in Article 33 of Finland's Nationality Act. In Portugal, the Nationality Act does not provide a time limit for a declaration of nullity of the entry in the register on which attribution or acquisition of nationality depends. However, in 2004 the Appeals Court decided in a case about a declaration of nullity initiated after 20 years from the entry in the register, that when the false registration is due to an error of the authorities, the principles of legal certainty and the prohibition of abuse of law would prevent the declaration of nullity. Acórdão do Tribunal da Relação de Lisboa, Case 8640/2003-6 (Jan. 29, 2004) (Portugal).

[62] In this sense, the official instruction on the application of article 14 of the Nationality Act of the Netherlands.

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d. Attention needs to be paid to the consequences of the deprivation of nationality for the person involved and his/her family members, in particular whether or not they might lose their right to reside in the country in which the person held the nationality. This includes situations where family members are third-country nationals who derive their right of residence from their relationship with the person facing deprivation of EU citizenship.
e. The proportionality test must be applied individually for each person affected by the deprivation of nationality. If, for example, a couple was naturalized in one naturalization decree, and this naturalization extended to their two children, separate deprivation decisions need to be made for all the persons involved in case.
f. Special consideration should be given to the nationality status of children of a person who committed fraud during the naturalization procedure,[63] particularly if the deprivation of nationality would make them stateless.

In conclusion, the case law of the CJEU, but also developments in the international arena, such as the 2009 Report of the UN Secretary General, show that the acquisition and loss of nationality is not and should not be solely left to the individual states. EU citizenship and the corresponding rulings of the CJEU, as well as international sources such as the aforementioned Report of the UN Secretary General, can be seen as articulating rules that the Member States of the European Union should observe in respect of the formulation and application of their rules of loss and deprivation of nationality. It will be fascinating to witness whether new judgments of the CJEU will shed more light on the limits of the autonomy of Member States in respect of their grounds for loss and deprivation of nationality.

[63] *See* Nationality Act art. 33 (Fin.).

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