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EUROPEAN UNION CITIZENSHIP AS AN EXPERIMENTAL INSTITUTION

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The adoption of the Directive *on the Right of Citizens and their Family Members to move and reside freely within the territory of the Member States*[1] remedied the sector-by-sector and fragmented approach to free movement rights by incorporating and revising the existing Directives and amending Council Regulation 1612/68[2]. It built on, and further extended, the rights-based approach characterising the rights of free movement since the 1960s and made Union citizenship a genuine mode of associated living by establishing an unconditional right of permanent residence for Union citizens and their families[3] who have resided in the host MS for a continuous period of five years. Permanent residence brings along a formal expectation for the elimination of the barrier of nationality; Union citizens are entitled to full equal treatment in the areas covered by the Treaty in the Member State of their residence. Below the apex of permanent residence there exist two other types of residence rights; namely, free circulation during short periods of residence not exceeding three months and longer periods of residence exceeding three months. The former type of residence rights enables Union citizens to exercise their rights without any conditions or any formalities other than the requirement to hold a valid identity card or passport, but does not carry an entitlement to social assistance for non-active economic actors. In *Oulane* the Court reiterated that a MS may not refuse to recognize a person's right of residence because she did not present one of these documents and that any document that could prove that the person concerned is a Community national would suffice[4]. This is not to say that third country nationals who are family members of Union citizens do not continue to encounter problems with respect to the authorization of their entry and the issue of residence cards in practice. Periods of residence exceeding three months, on the other hand, entail a right of residence for Union citizens and their family members provided that they are active contributors to the commonwealth or self-sufficient: they are workers or self-employed persons in the host MS; or have sufficient resources and comprehensive sickness insurance cover, if they are non-active economic actors; or they are

[1] Directive 2004/38/EC, OJ 2004 L 158/77.
[2] Articles 10 and 11 of Council Reg. 1612/68 were repealed with effect from 30 April 2006.
[3] The definition of a 'family member' includes a registered partner if the legislation of the host MS treats registered partnership as equivalent to marriage.
[4] Case C-215/03 [2005] ECR I-1215. In addition, in *Commission* v *the Netherlands* the Court ruled that national provisions which required non-active and retired persons to have adequate personal resources sufficient for at least a year's stay in the host MS contravened Community law (i.e., Dir 38/360 and Directives 90/364 and 90/365); Case C-398/06 Judgment of the Court of 10 April 2008.

students enrolled at a private or public establishment, have comprehensive sickness insurance cover and are self-sufficient in order to avoid becoming a burden on the social assistance system of the host MS.[5] The Directive also makes reference to the possibility to extend the period of time during which Union citizens and their family members may reside in the territory of the host MS without any conditions[6]. The rights of family members have also been reinforced by extending family reunification to registered partners and by giving spouses and partners who are non-EU nationals independent rights of residence in the event of divorce, annulment of marriage or termination of the registered partnership. In addition, by incorporating the Court's reasoning in *Grzelczyk*[7], the Directive states that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host MS they should not be expelled.[8]

On reflection, the provisions of the Directive reveal three important trends which correspond to the increasing political importance of European integration. Firstly, they attest to a reconfiguration of community membership in ways that attribute greater importance to the observable fact of residence than the habits of loyalty and ideology associated with nationality. The right to permanent residence is an offshoot of connexive citizenship, that is, the real links and genuine connections that a Union citizen develops in a MS other than that of its origin, rather than being the byproduct of one's naturalization in the host MS.[9] As recital 17 in the preamble to the Citizenship Directive states: 'enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host MS would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion which is one of the fundamental objective of the Union'. Union citizenship thus gradually changes our understanding of community membership and fosters more inclusive forms of political association. In sum, the new Directive creates the institutional preconditions for a notion of citizenship that is more inclusive than nationality-based models of citizenship.[10] Secondly, Union citizenship has become a fundamental status of Community nationals thereby endowing them with an increasing range of rights which are exercised not within the domain of a given national polity but within the wider context of a wide

[5] Article 7 of Council Directive 2004/38.
[6] Ibid, Chapter VII, Article 39.
[7] Dir. 2004/38, note 26 above, Article 14.
[8] Article 14(1) of Directive 2004/38.
[9] D. Kostakopoulou, 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', *Journal of Ethnic and Migration Studies*, Vol. 24 (4), October 1998, 639-656; *The Future Governance of Citizenship*, Cambridge: Cambridge University Press, 2008.
[10] However, egalitarian processes co-exist with the practice of exclusion of long-term resident third country nationals from the personal scope of Union citizenship. In addition, transitional arrangements with respect to the nationals of eight Central and Eastern European states which joined the EU on the 1 May 2004 and 1 of January 2007 have resulted in a hierarchical European citizenry.

Europolity. In this way, the political and social constuctivist aspects of European integration are realized; the so called 'market Europe' is transformed into a peoples' Europe or a European society.[11] As Advocate General Maduro has stated, 'when the Court describes Union citizenship as 'the fundamental status' of nationals it is not making a political statement; it refers to Union citizenship as a legal concept that goes hand in hand with specific rights for Union citizens'.[12] And further, 'Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union'.[13]

It follows from both the preceding considerations that Union citizenship is not a simple, and weaker, corollary to national citizenship. True, the EU may lack the traditional state paraphernalia, but, as we shall see below, its supranational character rules out national sovereignty claims over the grant of migration rights to EU nationals and their family members, residence rights for them and their children enrolled at educational establishments[14] and regulatory autonomy in the grant welfare assistance and the payment of war related pensions and allowances. And this, quite unavoidably, gives rise to reactions and criticisms. It has been argued, for example, that the Citizenship Directive weakens state autonomy in matters of passport controls, extends the definition of the EU citizen's family, threatens to increase social and financial burden in the MS and prevents national executives from implementing proposals for the automatic expulsion of 'foreign criminals' who are sex offenders or are given custodial sentences'.[15]

In assessing the merits of national anxieties about, and criticisms against, the scope and the pace of creating 'an ever closer Union among the peoples' of Europe' either by legislative fiat or judicial activism, it seems to me a prior reflection on both the appropriateness and legitimacy

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[11] Compare the Opinion of Advocate General Jacobs in Case C-168/91 *Konstadinidis v Stadt Altensteig* [1993] ECR I-1191 and his reference to 'civis europeum'.

[12] See the AG's Opinion in C-524/06 *H. Huber v Bundesrepublic Deutschland*, delivered on 3 April 2008.

[13] See point 23 of Maduro's opinion in *Nerkowska*, 28 February 2008; see also the Opinion of Advocate General Trstenjak in Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-0000, points 82 to 84.

[14] See Case C-310/108 *London Borrow of Harrow* v *Nimco Hassan Ibrahim and Secretary of State for the Home Department*, Opinion of AG Mazak delivered on 20 October 2009, Case C-480/08 *Maria Teixeira* v *London Borough of Lambeth and Secretary of State for the Home Department*, Opinion of Advocate General Kokott delivered on 20 October 2009.

[15] It thus comes as no surprise that its transposition and correct implementation have been problematic. In June 2007 fifteen infringement procedures were open, four of which have been referred to the European Court of Justice and in December 2008 the Commission announced that only Cyprus, Greece, Finland, Portugal, Malta, Luxembourg and Spain had adopted more than 85% of provisions of the Directive; European Commission, 5th Report on Citizenship of the Union (1 May 2004-30 June 2007) COM(2008) 85 Final, page 5. Following this report, the Commission has recently had to adopt guidelines to ensure its transposition; COM(2009) 313.

of the yardstick to be used is necessary. Although ideology, pragmatism, normative concerns or simply convenience, which is often manifested in a belief in the fixity of the status quo, all can impact on the choice of the yardstick, in my opinion what justifies and legitimates institutional structures at all levels, functions and policies are their capacity to recognize and fulfill human needs by removing barriers, be they unacceptable inequalities, unfair applications of rules of collective action, prejudice or simply wasteful struggles. J. Dewey has brilliantly outlined such a human needs-based yardstick in another context and with respect to another political organisation, namely, the state: he observed that 'a measure of the goodness of the state is the degree in which it relieves individuals from the waste of negative struggles and needless conflict and confers upon them positive assurance and reinforcement in what he undertakes'.[16] Such a yardstick stands in sharp contrast to both the deification of state power and the belief that the commands of sovereign authorities deserve unqualified respect by the European judges as well as the false identification of the interests of national executives with the interests of the citizens they claim to represent. I demonstrate this below by discussing the link between EU citizenship and member state nationality.

EU 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 22 EC has always carried the promise of a future extension of the material scope of Union citizenship by a unanimous decision of the Council on a proposal from the Commission and following consultation with the European Parliament. Although this procedure has not been activated yet, the discussion in the previous section outlined the evolutionary and experimental character of Union citizenship. For more than a decade, the ECJ 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.

[16] J. Dewey, *The Public and Its Problems*, New York: H. Holt, 1927, reprinted by Swallow Press and Ohaio University Press, 1991, p. 72.

Having said this, one must not overlook the fact that the ECJ'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 MS nationality (Article 17 EC) 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 MS (- 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 MS but must nonetheless be exercised with due regard to Community law,[17] 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 MS 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 ECJ has made it clear that the MS 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 EC law and its exclusionary implications with respect to the rights of long-term resident third country nationals.[18] In *Micheletti*, the ECJ confirmed that determination of

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

[18] 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*, Vol. 5, 1994, 199-219; D. O'Keeffe, 'Union Citizenship' in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chichester: Wiley, 1994; M. Martiniello, 'European Citizenship, European Identity and Migrants: Towards the Postnational State?' in R. Miles and D. Thranhardt (eds), *Migration and European Integration: The Politics of Inclusion and Exclusion in Europe*, London: Pinter, 1995, 37-52; D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', *Journal of Political Philosophy*, 4 (4), December 1996, 337-358; H. Lardy, 'The Political Rights of Union Citizenship',

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[19], 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[20]. 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 European Court of Justice 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 MS 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[21].

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 MS nationality? Could it be argued that the Member States' regulatory autonomy in nationality matters would be infringed, thereby leading to a violation of Article 17(1) EC, if EU citizenship were seen to survive if the

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European Public Law, Vol. 2, 1996, 611-33; S. Peers, 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union, CMLRev, Vol. 33(1), 1996, 7-50; D Kostakopoulou, 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', *Journal of Ethnic and Migration Studies*, Vol. 24 (4), October 1998, 639-656; M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, The Hague: Kluwer Law International, 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' Citizenships in the EU: Bringing Forth the Complexity', *Columbia Journal of European Law*, Vol. 5(3), 1999, 389-413; E. Guild, *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union*, 1999; H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (1999). For a recent account, see J. Shaw, *The Transformation of Citizenship in the European Union; Electoral Rights and the Restructuring of Political Space*, Cambridge: Cambridge University Press, 2007.

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

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

[21] 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.

MS nationality link which gave it rise in the first place ceased to exist? Such questions have recently arisen by virtue of the Rottmann case which has not been decided yet.[22]

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 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 make 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 MS 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 MS.[23]

Although the analysis provided by the Advocate General is 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 MS autonomy in an area that falls

[22] Case C-135/08 *Janko Rottmann v Freistaat Bayern*, Opinion of AG Maduro on 30 September 2009.
[23] Ibid, points 24 and 25.

within the Member States' exclusive jurisdiction. But the Advocate General overlooks 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, loss of MS 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 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 MS 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 MS 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 crossborder 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 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'.[24] 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

[24] OJ C 191, 29 July 1992.

intended to replace national citizenship – a position that found concrete expression in the amended Article 17(1) at Amsterdam[25] and the Lisbon Treaty.[26]

On close reflection, however, the above mentioned possibility neither contravenes the Declaration on Nationality of a MS nor threatens to replace national citizenship. Nor does it in may way 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, 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 'complemetarity' 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 MS 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

[25] 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).
[26] 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'.

Community law[27] and Union citizens' legal positions which are protected by it. It is recognized that an individual who has activated Community law by crossing borders has the status of an EU citizen in addition to the status of a MS national. The former has been granted to him by virtue of Community law and authenticates all the rights (s)he derives in the host MS. 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 MS 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[28] 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 MS 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 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 Community law (Article 18 EC) has conferred on individuals remain fully effective thereby facilitating the attainment of the Community's objectives pursuant to the Community law doctrine of *effet utile* (the principles of effectiveness) and the fundamental status of Union citizenship.[29] For the full effectiveness of Community rules would be impaired and the protection

[27] As the ECJ has 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.

[28] D. Kostakopoulou, 'Nested 'Old' and 'New' Citizenships in the EU: Bringing Forth the Complexity', *Columbia Journal of European Law*, Vol. 5(3), 1999, 389-413; *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press, 2001.

[29] 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

of the rights granted by Article 18 EC 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 Community 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.

CONCLUSION

EU 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 and how advances citizens' rights, creates openings and unlocks potentialities which may be frustrated by unnecessary barriers. The discussion in this paper adopts 'the third party perspective', that is, the perspective of citizens, thereby transcending the familiar suprationalism/intergovernmentalism dualism and concomitant debates about contestations of power and competition between supranational institutions and the Member States.

Bettering citizens' life chances, meeting their needs and enhancing their protection should not be perceived as a matter of accident or rebellion, praise or blame of the ECJ, of defective exercise of jurisdiction and an anomalous bypassing of democratically elected legislatures. Instead, it has been for decades the ECJ's working hypothesis. True, its preference for a rights-based approach to free movement of persons and Union citizenship has often conflicted with national governments' preference for the status quo, unilateral citizenship and migration control and a power-driven approach. But as the preceding discussion has shown, concrete advances have been made that have enhanced the interests of ordinary citizens while

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Citizenship in Breach of Fundamental Rights', *European Law Review* 21, 1996, 129; *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff 1995; G.-R. de Groot, ' The Relationship Between the Nationality Legislation of the Member States of the European Union and European Citizenship', in M. La Torre (ed.) *European Citizenship: An Institutional Challenge*, The Hague: Kluwer, 1998, 115-148; 'Towards a European Nationality Law', in H. Schneider (ed.), *Migration, Integration and Citizenship: Volume 1*, (2006) Maastricht: Forum Maastricht. 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.

states have had to concede a number of important changes in their practices that bring renewed growth in associated action and promote non-discrimination. In this respect, there is nothing fundamentally wrong in the ECJ's testing of the limits of the European public or EU citizenship. After all, we cannot expect things to operate unchanged for years to come and, more importantly, the more we test the limits of the European citizenship, the broader its limits will be[30].

[30] This paper forms part of 'The European Court of Justice, Member State Autonomy and European Union Citizenship' which was written in winter 2009 for an anthology on *The European Court of Justice and the Autonomy of the Member States*, edited by B. de Witte and H.-W. Micklitz at EUI.