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Intersection points of International and European Law

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State Succession and EU Citizenship

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At a time in which the political debate on the secession of part of the territory of an EU Member State is gaining relevance as shown by future referenda on independence to be held in Scotland and perhaps in Catalonia, multiple legal and political challenges are in need of reasoned responses both in international and European law. The effects of secession and subsequent State succession on the status of natural persons from the pre-existing State and the seceding entity constitute one of these challenges. Although this issue has not received much attention, it has nevertheless acquired particular significance in view of the existence of EU citizenship, and the will of pro-independence sectors to preserve the advantages conferred by this status and by the European integration process as a whole¹.

The aim of this short paper is therefore to explore the role and place of EU citizenship in a scenario of secession affecting an EU Member State and subsequent State succession. In particular, the subject will be addressed from two different perspectives. Firstly, it is important to determine the effects of secession and State succession on the status of EU citizens, both of nationals of the separating territories as well as of EU citizens from other Member States residing in those territories (1). Secondly, the role that the concept of EU citizenship as such may play in State succession, as basis for the controversial theory of "internal enlargement" of the EU or automatic succession to EU membership, will be tackled (2).

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¹ See the Citizens' initiative 'Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva', 1 April 2012, whose objective was ensuring that citizens from seceding territories of Member States preserve EU citizenship. The Commission's refusal was based on the lack of EU competences, 30 May 2012. See also the parliamentary questions for written answer to the Commission, E-007453/2012 and E-008133/2012; and the answers given by Mr Barroso, 28 August 2012 and 12 November 2012, respectively.

1. Effects of State succession on EU citizenship

Analyzing the effects of State succession on EU citizenship draws firstly our attention to the future status of nationals from the seceding region who, until secession occurs, have been enjoying EU citizenship and the rights associated to it. Secondly, it will also be of interest to inquiry about the consequences for EU citizens from other Member States who reside in the seceding territories.

A straight answer can be given to the first question. According to the Treaties, EU citizenship is contingent on the nationality of Member States - art. 20.1 TFEU -. As the latter concept is to be settled only by reference to national law², the EU as such lacks the autonomous power to grant its citizenship. Consequently, when part of a territory separates from a Member State, its citizens will lose the status of EU citizenship provided, of course, that they cease to be nationals of the pre-existing State. The loss of the nationality of a Member State implies the loss of EU citizenship.

Cyprus and Greenland have been put forward as examples of flexibility and pragmatism within the EU³. However, they do not seem to be pertinent precedents. Although it is true that the suspension of the application of the EU *acquis* in the North of Cyprus has not affected individual rights, the people in the North of the island continue to hold EU citizenship as long as they hold the nationality of the Republic of Cyprus, thus the nationality of a Member State. The same can be said with regard to Greenland, albeit in a different context. Despite the exclusion of this Danish autonomous territory from the EU, Greenlanders continue to hold EU citizenship because of their Danish nationality. This territory left the EU, but did not separate from a Member State, showing how EU citizenship is linked to nationality, not to a territory.

For this reason, it is necessary to determine how nationality issues will be settled in a scenario of State succession following separation of part of the territory of an EU Member State. Questions on nationality are to be governed by internal law of the States involved. Nevertheless, certain restrictions are imposed by

² Declaration on nationality of a Member State, annexed to the Treaty of Maastricht, 7 February 1992.

³ Advisory Council for the National Transition, Government of Catalonia, 'Las vías de integración de Catalunya en la Unión Europea' (14 April 2014) <http://www20.gencat.cat/docs/Departament_de_la_Presidencia/Ambits_actuacio/CATN/Informes_publicats/inf_6_vies_integracio_cat_ue_castella.pdf> accessed 24 June 2014, 14-15.

international law⁴. To this effect, the International Law Commission's Draft Articles on nationality of natural persons in relation to the succession of States must be taken into consideration⁵, together with the principles enshrined in international conventions such as the European Convention on nationality of 1997 or the Council of Europe Convention on the avoidance of statelessness in relation to State succession of 2006⁶. Once each State involved in a succession of States has enacted legislation on nationality according to the rules contained in these instruments⁷, the population of the primary State could be divided into three groups.

A first group would be composed of those persons preserving the nationality of the predecessor State. They will maintain their status as EU citizens in their capacity of nationals of a Member State. A second group of people will acquire the nationality of the successor State. Since, as a consequence of the separation from a Member State, the newly created States would cease to belong to the EU⁸, its nationals will become third-country nationals for EU law purposes in case they lose the nationality of the predecessor State in conformity with international rules. It would be possible indeed for the successor State to make the attribution of its nationality dependent on renunciation to the previous one, while the predecessor State may also provide that persons acquiring voluntarily the nationality of the successor State shall lose its own nationality⁹.

Nonetheless, there would also be possible, depending on the internal legislation of each State, to preserve both nationalities, giving rise to a third group of people composed of holders of dual nationality. In the debates that are being held in Catalonia and Scotland, dual nationality has been in fact proposed as a good solution on the basis of family, social, cultural, economic and affective connections, highlighting at the same time the fact that this will ensure their status of

⁴ See Marie Isabel Torres Cazorla, *La sucesión de estados y sus efectos sobre la nacionalidad de las personas físicas* (Universidad de Málaga, 2001).

⁵ UN General Assembly Resolution 55/153, 12 December 2000.

⁶ In force since 1 March 2000 and 1 May 2009, respectively. None of the EU Member States affected by secession debates - Spain, United Kingdom or Belgium - have ratified these conventions.

⁷ Art. 6 ILC's Draft Articles on nationality. As the EU is not able to grant its citizenship independently, EU law must not regulate or foresee the effects of a State succession on this issue.

⁸ See Araceli Mangas Martín, 'La secesión de territorios en un Estado miembro: efectos en el Derecho de la Unión Europea' (2013) 25 *Revista de Derecho de la Unión Europea* 47.

⁹ Art. 9 and 10.1 ILC's Draft Articles on nationality. See also art. 11.

EU citizens¹⁰. Applicable international or domestic rules could lead to consider that the effective nationality is the one from the new State on the basis of a criterion of domicile or residence. However, as the ECJ has set, the competences of the Member States on nationality are to be exercised “having due regard to [EU] law”, that is, to guarantee the *effet utile* of EU law and the fundamental freedoms of its internal market¹¹. The effective nationality for EU law purposes will always be the nationality of the Member State¹².

An alternative scenario would also be likely: the non-recognition of the newly created State entity by the pre-existing State after secession *stricto sensu* or unilateral secession. As the rules on the effects of State succession are only applicable to a succession occurring in conformity with international law¹³, the international principles referred to above on determination of nationality shall not apply. Individuals from the seceding territory would still be considered nationals of a Member State and thus EU citizens.

The second question that needs to be addressed in this section relates to the effects of State succession on EU citizens from other Member States who reside in the separating entity at the time of independence. Obviously, their status as EU citizens would not be altered, since it depends on the nationality of a Member State. Nevertheless, this assertion requires to be nuanced when it comes to the rights associated to the status of EU citizenship. It is true that the right to enjoy protection of diplomatic and consular authorities of any Member State in a third country in which the Member State of nationality is not represented would not be affected¹⁴; neither would the so-called ‘improper EU citizens’ rights’, that is the right to petition to the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language¹⁵. As far as the right to free movement and residence is concerned, EU

¹⁰ El Mundo, ‘Junqueras aboga por la doble nacionalidad por “el lazo emocional con España”’ (22 September 2013); Scottish Government, ‘Scotland’s Future: Your Guide to an Independent Scotland’ (26 November 2013) www.scotland.gov.uk/Publications/2013/11/9348/0 accessed 24 June 2014, 271ff.

¹¹ Case C-369/90 *Micheletti* [1992] ECR I-4239, para10.

¹² See also Case C-122/96 *Saldanha* [1997] ECR I-5325, para15, where the Court stated that the mere fact that a national of a Member State has also the nationality of a third country, in which he resides, does not deprive him of Community-based rights.

¹³ Art. 3 ILC’s Draft Articles on nationality; art. 6 Vienna Convention on Succession of States in respect of treaties, 1978; art. 3 Vienna Convention on Succession of States in respect of State property, archives and debts, 1983.

¹⁴ Art. 20.2.c) and 23 TFEU.

¹⁵ Art. 20.2.d) and 24 TFEU.

citizens will obviously lose it in the territory of the seceding entity, at least on the basis of EU law, something that will not prevent the newly created State from granting rights of free movement to EU citizens under its internal law. The exercise of the freedom of movement 'within the territory of the Member States' requires citizens, of course, to move to a Member State in the first place.

The residence in an EU Member State is also an indispensable condition to exercise the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections, at least as far as EU law is concerned. The Treaties enjoin Member States to confer the right to vote in EP elections to EU citizens residing in a Member State, without requiring this right to be conferred on EU citizens residing abroad. This will depend on the national legislation of the Member State of origin¹⁶, as EU law does not preclude it either. These lessons clearly arise from ECJ case law on EU citizens residing in OCTs, that can be applied *a fortiori* to third countries¹⁷.

2. Role of the concept of EU citizenship in State succession

The most controversial issue raised by the connections between EU citizenship and secession relates to the so-called theory of the 'internal enlargement' of the EU. According to this approach, advocated by some pro-independence positions, the new States would not have to apply for EU membership on the basis of article 49 TEU but instead would be considered members of the EU uninterruptedly after their separation from their respective Member State¹⁸. The concept of EU citizenship is used as an argument to support this theory, since it is argued that the ECJ, developing its case law on the issue, could set that the deprivation of this status and of the individual rights associated to it would serve to oppose the automatic exit of these territories from the EU.

¹⁶ See Jean-Thomas Arrighi et al., 'Franchise and electoral participation of third-country citizens residing in the European Union and of European Union citizens residing in third countries' PE 474.441 (*European Parliament study*, 2013).

¹⁷ Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paras 52-57.

¹⁸ Advisory Council for National Transition (n 3), 34ff; Jordi Matas i Dalmases, 'The Internal Enlargement of the European Union' (2010) Centre Maurits Coppieters <<http://irla.cat/documents/the-internal-enlargement-of-the-EU.pdf>> accessed 24 June 2014; The Guardian, 'Alex Salmond insists independent Scotland would remain in EU', (28 April 2014). In favour of a succession by both Scotland and the remaining UK to the UK's existing membership of the EU, see A. O'Neill, 'A quarrel in a faraway country? Scotland, independence and the EU' (*Eutopia law*, 14 November 2011) <<http://eutopialaw.com/2011/11/14/685/>> accessed 24 June 2014.

This approach is however difficult to follow¹⁹. As will be argued in the following lines, the ECJ case law on EU citizenship, and more specifically its *Rottmann* case, is not well-suited to this effect²⁰.

In this case, the Court recalled, as stated in several judgments²¹, that ‘citizenship of the Union is intended to be the fundamental status of nationals of the Member States’²². Bringing to mind the *Micheletti* formula, the Court accepted that the deprivation of the nationality of a Member State and therefore of EU citizenship constitutes a situation governed by EU law²³. Therefore, it can be argued, in our context, that the loss of nationality of an EU Member State *ex lege*, as a consequence of voluntarily acquiring the nationality of the separating State, i.e. a new third State, would fall within the ambit of EU law because that would imply the loss of EU citizenship. The fact that the case would have a collective dimension rather than an individual one does not seem to make a difference²⁴.

However, having an EU dimension did not entail that the controversial national measure in *Rottmann* was contrary to EU law. The deprivation of nationality was considered to be legitimate because of deception used in acquiring nationality; this withdrawal was validated in international law²⁵; it was not an arbitrary act; and, finally, the legitimacy of the measure was upheld even when the deprivation of nationality meant the loss of EU citizenship, provided that it was in conformity with the principle of proportionality²⁶. This principle implies, in this context, that the consequences for the individual and his family with regard to the loss of citizenship rights, the seriousness of the offence, the lapse of time between naturalization and withdrawal,

¹⁹ James Crawford, Alan Boyle, ‘Opinion: Referendum on the Independence of Scotland – International Law Aspects’, (UK Government, December 2012) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf> accessed 24 June 2014, 104ff; Spanish Ministry of Foreign Affairs and Cooperation, ‘Por la convivencia democrática’ (2014) <www.exteriores.gob.es/Portal/es/SalaDePrensa/ElMinisterioInforma/Paginas/Noticias/20140206_MINISTERIO1.aspx> accessed 24 June 2014, 104.

²⁰ The position of the ECJ on the characteristics of the EU legal order (‘whose subjects comprise not only Member States but also **their** nationals’, Case 26/62 *Van Gend en Loos* [1963] ECR 3 [emphasis added]) has also been underlined to support the automatic succession to EU membership.

²¹ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast* [2002] ECR I-7091, para 82; Case C-148/02 *García Avello* [2003] ECR I-11613, para 22.

²² Case C-135/08 *Rottmann* [2010] ECR I-1449, para 43.

²³ *Ibid.* para 42.

²⁴ Phoebus Athanassiou and Stéphanie Shaelou, ‘EU Accession from Within? – An Introduction’ (2014) *YEL* 1, 22-23.

²⁵ Art. 7.3 1997 European Convention on nationality and art. 8.2.b) 1961 Convention on the reduction of statelessness.

²⁶ *Rottmann* (n 22), paras 50-55.

and the possibility to recover the original nationality were to be taken into account²⁷.

Applied to our subject, the following question could be posed: if a withdrawal of nationality that may even lead to statelessness might be justified, wouldn't that be also the case when the loss of nationality is the consequence of a voluntary acquisition of another nationality? A measure entailing the *ex lege* loss of nationality in this case would also be validated in international law²⁸, and the proportionality would be easier to justify than when the adverse consequence is statelessness²⁹.

AG Maduro, in its Opinion to the *Rottmann* case, also considered that it was not impossible to deprive a person of nationality where such deprivation would entail the loss of Union citizenship. Otherwise, that would exclude the competence of Member States to regulate nationality and lead to the 'paradoxical solution whereby the secondary would determine the primary: maintenance of Union citizenship would serve as a basis for demanding maintenance of the nationality of a Member State'³⁰. This would be contrary not only to art. 20 TFEU, but also to the respect of national identities (art. 4.2 TEU) and the loyal cooperation principle (art. 4.3 TEU)³¹.

In this context, it could also be interesting to refer to another line of case law, in which the ECJ excluded 'national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'³². These cases concern national immigration measures ordering the expulsion of a third-country national, parent of a child holding EU citizenship. These measures were considered to be contrary to art. 20 TFEU, since that would mean to force an EU citizen to abandon the Union and not be able to exercise the essence of EU citizenship, i.e. free movement and residence. However, in my view, this reasoning would not be applicable to the situation we are tackling as, in cases of secession, EU citizens strictly speaking are not deprived of the rights associated to EU citizenship, e.g. residence in the EU, but instead lose the nationality of a Member State which is the basis of that status. The deprivation of rights is thus a consequence of

²⁷ Ibid. para 56.

²⁸ See art. 7.1.a) 1997 European Convention on nationality.

²⁹ Athanassiou and Shaelou (n 24), 23.

³⁰ Case C-135/08 *Rottmann* [2010] ECR I-1449, Opinion of AG Poiares Maduro, para 24.

³¹ Ibid. para 25.

³² Case C-34/09 *Zambrano* [2011] ECR I-1177, para 42; Case C-434/09 *McCarthy* [2011] ECR I-3375, para 47; Case C-256/11 *Dereci* [2011] ECR I-11315, para 64; Joined cases C-356/11 and 357/11, *O.S.* [2013] OJ C26/11, para 45.

the loss of the status, without following the logic of making EU citizenship not effective.

We can be critical about the approach taken by the ECJ in cases such as *Rottmann* for not being sufficiently courageous to uphold the autonomy of EU citizenship with regard to the acquisition and loss of State nationality³³. However, at this point of development, EU law cannot give a different answer to the questions we are addressing here.

Nonetheless, the most important obstacle against the idea of using EU citizenship in favour of the "internal enlargement" of the EU is that, even if it could be possible to recognize some acquired rights for individuals on the basis of this status, that would not grant the new State – a political organization which lacks any acquired rights – the automatic membership of the EU³⁴.

Another possibility to justify the preservation of EU citizenship by nationals of hypothetical new States could be an argument based on a possible customary rule of automatic succession to treaties on human rights binding on the predecessor State³⁵. As the ECtHR has stated, 'fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession'³⁶. The treaty in question would be the EU Charter on Fundamental Rights, whose Title V enshrines EU citizens' rights³⁷. Certain objections may however be presented against this argument too. Firstly, this hypothesis of automatic succession is not a consolidated rule in customary international law³⁸. Secondly, the newly created States could recognize the rights in the Charter to all EU citizens, but that would not support the recognition of their nationals as EU citizens by EU Member States. EU citizenship is not defined in the

³³ For an in-depth discussion on the *Rottmann* case, see J. Shaw (ed.), 'Has the European Court of Justice challenged Member State sovereignty in nationality law?' (2011) 62 EUI Working Paper <http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3> accessed 24 June 2014.

³⁴ Ignacio Molina, 'Independientismo e integración europea (I): la imposible adhesión automática a la UE de un territorio secesionado' (2012) 80 *ARI* Real Instituto Elcano <www.realinstitutoelcano.org> accessed 24 June 2014, 8.

³⁵ See Yves Gounin, 'Les dynamiques d'éclatements d'États dans l'Union européenne: casse-tête juridique, défi politique' (2013) 4 *Politique étrangère* <<http://politique-etrangere.com/2014/01/06/les-dynamiques-declatement-detats-dans-lunion-europeenne-casse-tete-juridique-defi-politique/>> accessed 24 June 2014, 21, n 28.

³⁶ *Bjelic v Montenegro and Serbia* App no 11890/05 (ECHR, 28 April 2009), para 69.

³⁷ Art. 39 to 46.

³⁸ See A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?' (2003) 14(1) *EJIL* 141. For an opposite view, see M.T. Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 *EJIL* 469.

Charter and the rest of Member States would continue to define it by reference to art. 20.1 TFEU, and thus to Member States' nationality. Thirdly, although the political and residence rights linked to EU citizenship might be considered as fundamental rights, would that be the case of EU citizenship in itself? In any case, this argument of automatic succession to treaties on human rights would not be useful for upholding the theory of 'internal enlargement', as EU Treaties as a whole cannot be considered treaties on the protection of human rights³⁹.

Consequently, EU citizenship is not suitable to sustain an automatic succession to EU membership by new States created after the separation of part of the territory of an EU Member State⁴⁰. A hypothetical independence of Scotland or Catalonia from the United Kingdom and Spain, respectively, will entail their exit from the EU. In case of being interested in being part of the EU, these newly created States would need to apply for accession, following the procedure regulated in art. 49 TEU.

In particular, this would mean the end of the enjoyment of EU citizenship and the rights associated to it by the individuals who lose the nationality of a Member State. Would it be possible, for nationals of the hypothetical new States, to retain the essence of that status, i.e. the right to free movement and residence in the EU? Apart from the option of applying for EU membership, the only alternative, in my view, would be the signature of an international agreement between the EU and the new State in order to extend freedom of movement in reciprocal terms. Nevertheless, the demanding requirement of unanimity in Council, needed for accession, could not be avoided, since an association agreement would be required⁴¹. In my view, it would not be feasible to deduce implied external competences from the free movement rules of the Treaties, as the conclusion of international agreements with third countries does not seem to facilitate the objective of EU competences on this issue. Neither the use of implied external competences on immigration would be possible for these purposes, since the logic of free movement differs from the one on migration⁴². Consequently, the

³⁹ Gounin (n 35), 21, n 28.

⁴⁰ In a similar vein, see M. Medina Ortega, *El derecho de secesión en la Unión Europea* (Marcial Pons, 2014), 108.

⁴¹ Art. 217 and 218.8 §2 TFEU. In addition national ratification of the agreement may be called for in case of 'mixity', as it is usually the case with association agreements. However, see, for a controversial exception, the negotiations of a Stabilization and Association agreement with Kosovo, COM (2012) 602 and European Commission, MEMO/13/938, 28 October 2013.

⁴² For a discussion on this question, see Paula García Andrade, 'Privileged Third-Country Nationals and Their Right of Free Movement and Residence to and in the EU:

legal basis of the association – art. 217 TFEU – constitutes the only external competence susceptible of extending freedom of movement to third-country nationals, as it allows the EU to include in this kind of agreement commitments ‘in all the fields covered by the Treaty’⁴³.

Concluding remarks

The effects that a hypothetical secession of a part of the territory of a Member State may have on the status of EU citizenship, now enjoyed by its nationals, and also the most controversial question of what impact this concept may have for the so-called "internal enlargement" of the EU merit particular attention in the debate around the independence of territories such as Scotland and Catalonia. Put it simply, individuals who lose the nationality of a Member State would lose EU citizenship and the rights associated to it, while that loss of EU citizenship, still not autonomous from Member State nationality, would not allow the new States to circumvent the accession procedure to the EU. For these reasons, there is a need, in my view, of a sincere and honest debate, whereby the specific consequences of independence on the status of individuals should be correctly explained, avoiding misleading arguments not always based on the current legal context. Nevertheless, we might also concentrate on the positive side of things. In times of existential crisis, this debate shows that the EU project and its benefits matter and are seen by its citizens as a valuable and cherished conquest.

Questions of Status and Competence’ in Elspeth Guild, Christina. J. Gortázar Rotaeché, Dora Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Brill-Nijhoff 2013), 121ff.

⁴³ Case 12/86 *Demirel* [1987] ECR 3719, para. 9.

