Fury and Surprise Anchored in Dogmas and Myths

Reflections on Commission v. Malta and its Discontents

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The Court of Justice's judgment in Commission v Malta has created quite some upheaval: The gasping and panting has been clearly discernible in the blogsphere in the wake of the ECJ's judgment against Malta's golden passport scheme. The immediate reactions to the judgment can be broadly divided into two groups: there are those who oppose the judgment and cry foul against the intrusion into the domaine réservé of Member States, and those who have defended the judgment on principled grounds. However, all seem to be surprised by the judgment.

That the judgment has caught so many legal commentators wrong-footed can be attributed to the fact that both sides overwhelmingly come from the premise that Member States are sovereign to decide who their nationals are and that there is no such thing as a genuine link requirement for nationality. The anchors for these certainties have been Declaration No 2, the Edinburgh Decision, *Micheletti* and the assertions that the ICJ's *Nottebohm* judgment is outdated, dead-letter, and most of all wrong in principle. The first group's hostility to a verdict that capitalizes on the idea that nationality is a bond that builds on a special relationship of solidarity and good faith between a State and its nationals and the reciprocity of rights and duties (para 96), i.e. a genuine link (paraphrasing *Nottebohm*, p 23), was therefore to some extent predictable.

For this reason, this blogpost will take a closer look at these alleged certainties, and set out why the judgment is not that surprising at all – lifting the veil of untenable dogmas and mystifications that have surrounded Declaration No 2 and the Court's *Micheletti* judgment for too long along the way.

Debunking the sovereigntists' dogma of Declaration No 2

A central argument levied against the judgment is that the Court established its understanding of nationality out of thin air without a proper legal basis and thereby abandoned the long-standing dogma that "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." The principal points of reference for this dogma are Declaration No 2 and the Edinburgh Decision. They are only briefly touched upon in the judgment (para 80). Nonetheless, they provide the foundation for the Court's recollection of its case law, that "it is for each Member State, having due regard to international law, to lay down the conditions for the grant and loss of the nationality of a Member State, those powers must be exercised having due regard to EU law" (para 81). This sets the scene for the seemingly unprecedented.

However, neither Declaration No 2 nor the Edinburgh Decision form part of the Treaties. They are merely interpretative instruments (*Rottmann*, para 40). Their normative substance can therefore only relate to an interpretative dogma read into the substantive provision of Article 20 TFEU. Moreover, the content of these instruments is in principle a statement of the obvious. In line with Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law and Article 3(1) European Convention on Nationality, the nationality of a State has always been determined by national law. Declaration No 2 and the Edinburgh Decision thus only underscore that the notion of nationality in EU law (in principle) reflects the understanding of nationality in international law. Relying on the word "solely," the sovereigntists – and

the furious ones in particular – have characterized Declaration No 2 as a normative reflection of Member States' fear that the Court could develop an autonomous interpretation of the notion of nationality.

But why, you might ask, has it not been enshrined in primary law given the Court has repeatedly demonstrated its willingness to interpret the fundamental status of EU law in an autonomous way? This seems all the more bewildering when considering that Decision No 2 is reflecting a common understanding by all Member States that – just like the second sentence of the Edinburgh Decision – could have easily been inserted into the text of Article 20 TFEU.

Declaration No 2 and the Edinburgh Decision are thus better understood as a reflection of the Member States' interest to assure themselves of their common understanding of the notion of nationality: an interpretative means between the drafters of the Treaties to establish that the scope of the Treaties *rationae personae* cannot be extended beyond the meaning of nationality as agreed between them. An interpretation, to be more precise, that points towards an inherently limited understanding of the notion of nationality primarily directed against excesses by other Member States, and not so much against an alleged competence creep by the EU through an autonomous interpretation.

Woven into this is the fact that Member States have always been acutely aware of the intricacies surrounding the nationality laws of their peers. In this regard, the second sentence in Declaration No 2 – allowing Member States to declare via the presiding Member State in the Council "for information, who are to be considered their nationals for Community purposes by way of a declaration" – highlights not only the interest in understanding the complexities of nationality regimes (see *Kaur*, para 23), but also underscores a practice under which Germany and the UK have embraced the limited understanding of nationality in EU law through respective declarations (see further here). Already on this basis it can be inferred that a passport of a Member State alone is not necessarily enough to be considered a national of a Member State from the point of EU law. Malta's golden passport nationals in this respect resemble the case of Ms Kaur. Nationals from the point of view of national law – maybe even international law – but nationals who by design have no stake in the society of their home Member State. As such, from the point of view of EU law, they lack "the bedrock of the bond of nationality of a Member State [...] formed by the special relationship of solidarity and good faith between that State and its nationals and the reciprocity of rights and duties established" (para 96 f) on which nationality as the basis of Union citizenship is premised. Malta has subverted this common conception of nationality and sought to commercialize the common status of Union citizenship.

Limited sovereignty

Rather than establishing a normative basis for Member States' unfettered sovereignty that protects them from interferences of EU law, Decision No 2 and the surrounding practice support a conception of nationality in EU law that goes against the dogma that nationality is what any Member State makes of it. This, as the Court has outlined (paras 85 ff), is underpinned by a constitutional logic whereby Member States have created a legal order in which they collectively assume rights and obligations in relation to the nationals of other Member States. To this end, they cannot easily disassociate themselves from the nationality rules and operations of other Member States. This "specific expression of [...] solidarity", as the Court put it (para 93), entails not only the reciprocal acceptance of nationality as the constitutive basis for Union citizenship, but that the power to lay down the conditions for the loss and conferral of nationality is not "unlimited" (para 95).

Furthermore, and in contrast to the dogmatic characterization that is attached to Declaration No 2, the Court has not changed the fact that the nationality of a person is and still can only be determined through the operations of national law. Although the Court's judgment has implications for Malta and beyond, the nationality of those golden passport holders will not, neither through the judgment nor through EU law in general, be rendered null and void. For Malta there is

"only" an obligation to follow-through on the judgment (and, by extension, a permission for other Member States – on a case-by-case basis – not to recognize these holders of golden passports as Maltese nationals and Union citizens). The assertion that EU law is taking over and is now itself determining who the nationals of its Member States are, is therefore simply wrong. The judgment simply highlights – once more – a limitation to the sovereignty of Member States they themselves agreed to when creating and joining the integrative constitutional enterprise that the European Union is.

In sum, the dogma that Declaration No 2 – and the Edinburgh Decision – establish an absolute boundary that the Court with this judgement has transgressed is just legal hocus-pocus.

The de-mystification of Micheletti

The other aspect both sides have focused on is the significance of the *Micheletti* judgment. *Micheletti*, established an – again ostensibly absolute – obligation for Member States to recognize the nationality of other Member States, prohibiting them from attaching any additional conditions (*Micheletti*, para 10). Though the judgement against Malta does not say anything about the recognition of the nationality of Maltese golden passport holders, this is, for obvious reasons, a major concern for Malta and the passport business industry lurking in the background.

The argument levied against the judgment is twofold: in *Micheletti*, the Court not only established an obligation to recognize nationality, but did so in a case where Mr Micheletti, an Argentine-Italian national, had acquired his Italian nationality on the basis of a *ius sanguinis* regime, but beyond his ancestral relations had no tenable connections with Italy. This – not least by AG Collins in his Opinion (see para 48) – has been equated with a rejection of the genuine link conception and an obligation to recognize all sorts of nationalities. The Court, in taking up and paraphrasing the ICJ's genuine link conception (*Nottebohm*, 23), seems to have undone this by the stroke of a pen. And it seems to have done so without any explanation.

Yet, this reading of *Micheletti* is the product of a mystification process, and overlooks that the obligation to recognize nationality has always been subject to two caveats. The first sentence of the central paragraph 10 in *Micheletti* is instructive: "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality." This posits an obligation of having due regard for EU law, which speaks to the limited conception of nationality within EU law. Moreover, the reference to international law suggests that for nationality to be recognized under EU law, it must be awarded in line with international law. A more explicit form of this latter obligation is not only part and parcel of the judgment against Malta, but can also be found in prior judgments, stating that "it is for each Member State, **having due regard to international law**, to lay down the conditions for acquisition and loss of nationality" (para 81, and *Tjebbes* para 30 [emphasis added]). Recognition of a nationality under EU law, hence, presupposes that the nationality conforms with international law and therefore must be recognized as a matter of international law (see Article 1 Convention on Certain Questions Relating to the Conflict of Nationality Law and Article 3 (2) European Convention on Nationality).

For the specific context of Mr Micheletti, this suggests that his nationality had to be recognized because it was uncontentious that nationalities conferred on the basis of a *ius sanguinis*-approach conform with generally recognized rules of international law. Moreover, from the approximative point of law establishing Mr Micheletti's nationality at the time of birth, he has had a genuine connection with Italy (see further on this point here and here). By contrast, the conferral of a nationality solely based on a financial transaction is not an accepted mode of conferral in international law and thus cannot be considered a testament of a genuine link.

A validation of Nottebohm

Although it is true that the Court did not explicitly reference *Nottebohm*, the judgment against Malta is a validation of *Nottebohm*. A validation, though given in

the context of the European Union, that delves into the very nature of nationality as a status under international law (see para 96) and thus has implications beyond the confines of EU law.

In EU law the effects of the judgment, however, go further than under international law. Rather than leaving the field with an auxiliary right not to recognize as in *Nottebohm*, the requirement to conform with a common obligation under EU law – i.e. the conception of nationality inherent in Article 20 TFEU – takes center stage. EU law, in short, has more bite. Indeed, because of its constitutional nature, it must have more bite to secure mutual trust, which translates into mutual recognition, reciprocal rights and a common political enterprise whereby the nationals of other Member States are engaged in a political process of determining the rules and laws that operate as an inherent part of the legal system in other Member States and vice versa (see para 85 ff).

The judgment, to be sure, is therefore neither overturning *Micheletti* nor, and this is the more important point, was *Micheletti* ever what those who mystified it in a certain way, claimed that it was.

Much of the criticism and surprise about the judgment against Malta thus seems to stem from narratives that have turned into dogmas and myths that are not in fact supported by the law.

Post scriptum: choose your fighter

And finally, for the furious few who have condemned the judgment as being illiberal and the Court for attacking the rule of law: I suggest simply comparing the consequences of the Court's case law on nationality with the 'liberalised' passport policy epitomised in Malta's selling scheme. On the one hand, the Court's policy that subjects Member States to external control in an area that was previously untouched, obliging them to justify their nationality policies in light of fundamental rights and common values. On the other hand, a neoliberal policy of passportisation abound with claims of corruption, money laundering, tax evasion, support for autocratic regimes and embezzlement, paving the way for a truly "liberated" instrumentalisation of nationality under the dogma of sovereignty.

Life is not just black and white. Nor are the judgments of the Court. But to argue that the latter policy must be preferred over the former on a principled point of liberal values and the rule of law does indeed require some Chutzpa.

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