Iberian Nationality Legislation and Sephardic Jews

'With due regard to European law'?

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Proposal to grant Spanish nationality to Sephardic Jews – History of Sephardic Jews in Iberia – Sephardim and the Portuguese nationality code – The EU and the nationality laws of the member states – Impact of Union law on the acquisition of Iberian nationalities by Sephardic Jews – European Convention on Nationality – Sephardim from third countries – *Micheletti* – *Nottebohm*

Some history

At the end of the fifteenth century, right at the start of that fateful year 1492, now more than half a millennium ago, Granada fell after a long siege and Emir Boabdil (Abu Abdallah Muhammed XII [1460-1533], 'El Chico') had to surrender the city. Three months later, being non-Christian, the Moors and Jews were expelled. Ferdinand and Isabella, *Los Reyes Católicos*, as they were called by Pope Alexander VI – himself of Aragonese origin, born in the small village of Borjas, hence Borgia – issued a decree banishing them from what we now call Spanish territories. The Jews had already been subjected to a number of 'pogroms', to forced conversion, to harassment by the *Santa Hermandad*, the religious police instituted in 1474, and by the Inquisition, under the formidable Dominican Tomas de Torquemada, since 1482.[1]

Between 100,000 and 150,000 Jews were involved, out of a total population in the Spanish countries of 11.5 million. Around 50,000 Jews settled in North Africa (Alexandria), in Italy, Greece (Thessaloniki), Palestine, Syria and Turkey

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[1] *See* N. Davies, *Vanished Kingdoms, The History of Half-Forgotten Europe* (Penguin Books 2012) p. 205 ff., especially p. 218.

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(Constantinople , Smyrna (now Istanbul, Izmir)). Portugal took in 70,000 Jews. Under pressure from the Spanish kings, the Jews in Portugal were subjected to increasingly harsh regimes. In 1536, the Pope installed the Holy Office, the Inquisition, in Portugal. Religious terrorism with its autos-da-fé spread around the country. A second diaspora ensued, which had as destinations the Balkans, Italy, Flanders, especially Antwerp. Many Jews emigrated to South America and the Caribbean islands, among them the island of Curaçao.[2]

There is no space to pursue the complex migration history of these Jews through the ages. Some of them arrived in the Low Countries, first in Antwerp, and later, as the war for independence (and lower taxes) against the Spanish kings broke out in 1568, they took refuge in the northern part, mostly in Amsterdam and The Hague. Amsterdam became the most important settlement of the so-called Portuguese Jews. 'So-called', because they considered it to be a safer designation than to identify themselves as Spanish Jews, as The United Provinces, the northern part of the Low Countries, were at war with Spain until 1648, and the Spanish Inquisition had its spies in these regions as well. For this reason, the exiled merchants used pseudonyms in their dealings with Spain and Portugal.[3] In 1675, the large Portuguese synagogue was inaugurated in Amsterdam, a monumental building which is still there. Of the Sephardic community of 4,500 persons before the Second World War, only 800 survived; nowadays, the Portuguese Israelite church counts some 500 members and there is a number of non-affiliates who consider themselves in various degrees as Sephardics. (Sephardim is derived from the Hebrew word for Spain: *Sepharad*).

As you may surmise from my family name, I myself am of Portuguese Jewish descent, whereas my given names suggest German origins. So I am more than ordinarily interested in the developments concerning the Sephardim in the Iberian peninsula. In this essay, I will focus upon recent nationality issues concerning the Sephardim in both Iberian countries, seen in their inter-relationship with the Code of Nationality of the Netherlands, international law on nationality and European law. Especially the case-law of the Court of Justice (ECJ) will be scrutinised as to its foundations and its implications for the Iberian attribution of nationality to descendants of the Jews who were expelled more than five centuries ago. I finish with a chapter of the German persecution of Sephardic Jews in the Netherlands during the occupation in the Second World War and its relevance for the new Iberian legislation.

[2] *See* e.g. H. Pietschmann, 'Spain and Portugal', in K.J. Baade et al. (eds.), *The Encyclopedia of Migration and Minorities in Europe: From the Seventeenth Century to the Present* (Cambridge University Press 2011) p. 120 ff.

[3] R.G. Fuks-Mansfeld, *De Sefardim in Amsterdam tot 1795* (Historische Vereniging Holland and Uitgeverij Verloren 1989) p. 43.

Sephardim and Spanish nationality legislation

On 7 February 2014, the Spanish Minister of Justice proposed a draft Bill to the Council of Ministers with a view to enabling descendants of Sephardic Jews able to demonstrate special ties to Spain to acquire, upon their request, Spanish nationality. This draft Bill was already announced in 2012. 'With this Bill', said Minister of Justice Ruiz-Gallardon, 'Spanish society brings to completion the redress of what must be considered without doubt to be one of the most important historic mistakes.' He alluded of course to the Edict of Expulsion (also known as The Alhambra Decree) with which the Jews were confronted in 1492.

The Bill, considered by the minister his most important achievement, forms the final piece of attempts at reparation, *Wiedergutmachung*, which were initiated in 1982, in the clamorous and turbulent post-Franco period. At the time, the Government was determined to do something about the 'historical debt' towards the Sephardim. They put at their disposal two ways of voluntarily acquiring Spanish nationality. First, they were given a place among those groups that could acquire, by right, Spanish nationality through naturalisation after a shorter period of time than the general period of ten years. Article 22 Codigo Civil required a period of five years of legal residence in Spain for refugees; a two-year term was reserved for citizens of Latin American countries, the Philippines, Andorra, Equatorial Guinea and Portugal; now the Sephardim were included among these last groups as well.[4] Still, their position is somewhat different from the other categories which profited from the shorter residence requirement, in that the Sephardim are not allowed to retain their previous nationality (Article 23(1) Codigo Civil). In the second place they can, at the discretion of the Government, acquire Spanish nationality by *carta de naturaleza*, if they are able to show 'special circumstances' (Article 21 Codigo Civil).

Generally speaking, Spain is a country that considered itself until recently primarily a country of emigration (from poverty or out of colonial aspirations). It has as a political objective the protection of its nationals abroad (a) by allowing them to retain or re-acquire their nationality while acquiring the nationality of their countries of emigration; and (b) by the *ius sanguinis* principle, according to which Spanish-born children acquire *ex lege* the Spanish nationality of their parents. This principle is not only the basis for the *ex lege* acquisition of Spanish nationality at birth, but works through the rules on naturalisation and option as well. Expatriate Spaniards and their descendants in Spain's former colonies enjoy

[4] R. Rubio-Marin et al., *Country Report on Citizenship Law: Spain*, (EUDO Citizenship Observatory RSCAS/EUDO-CIT-CR 2015/4, revised and updated January 2015), <cadmus.eui.eu/bitstream/handle/1814/34480/EUDO_CIT_2015_04-Spain.pdf>, visited 26 March 2015, p. 14: 'In recognition of its historical debt to Sephardic Jews (expelled from the Spanish Kingdoms in 1492) the legislator included the descendants of this community in the group which needed an abbreviated period of residence to be able to apply for Spanish nationality.'

the special consideration of the Spanish state and have little problem in acquiring or re-acquiring Spanish nationality; a great number of bilateral treaties have been concluded to his effect with the former colonies.[5]

The Government approved the draft Bill, with some changes, on 6 June 2014, which will now proceed through Congress and Senate.[6] The most important amendment removes the condition that the descendants of the Sephardim, wherever they are settled, give up their original nationality; this concession applies even if they possess the nationality of countries with which no bilateral treaty has been concluded.[7] It specifies, furthermore, in its Article 1, the 'special circumstances' mentioned in Article 21(1) Codigo Civil which must be present as a condition for acquiring the *carta de naturaleza*. The draft Bill makes clear that these exist if the applicant proves to be of Spanish Sephardic descent possessing special ties with Spain, even if resident abroad. These 'special ties', according to Article 1(4), take the form of passing an examination in Spanish language and culture at the Cervantes institute, unless the applicant lives in a Spanish-speaking country. For the rest, the conditions for acquiring Spanish nationality remain as they were enacted in 1982: to take an oath of allegiance to the King[8] and of obedience to the Constitution and the legal order, and entry of the acquisition in the Civil Register.

In practice, not very much may be changed by the proposed striking out of the condition of giving up one's previous nationality. This obligation was something of a mere formality: the *naturalisandus* had to declare before the judge of the Civil Register that he had lost his original nationality, but he did not need to prove with documents issued by the authorities in the country of origin that this was indeed the case. As a matter of fact, then, even those who were not exempted from the obligation to relinquish their original nationality were able to retain this status. That is, as long as the authorities of the state of origin were not informed about the naturalisation. If their nationality legislation attaches the loss of nationality to the voluntary acquisition of another nationality, this effect cannot occur as long as the authorities stay ignorant.[9] Detection, however, may take place years later, and may cause interesting surprises.

[5] Cuba, Puerto Rico and the Philippines, lost after the Spanish-American war of 1898, are absent from this list.

[6] 'Proyecto de ley en materia de concesión de la nacionalidad española a los sefardíes […]', Boletín oficial de las Cortes Generales, BOCG-10-A-99-1.

[7] The draft Bill proposes to amend Art. 23 Codigo Civil, which lists the common requirements for acquiring Spanish nationality, by option, by naturalisation as of right and through receiving a *carta de naturaleza*, by including a sub-clause b.: 'los sefardíes originarios de España' among the groups that are not required to give up their previous nationality.

[8] Republicans abroad are loath to take an oath of allegiance to the King and therefore refuse the easy route to (re-)naturalisation.

[9] *Cf.* Art. 24 European Convention on Nationality (1998) on exchange of information.

The most difficult part of acquiring Spanish nationality lies in the demonstration of descent from Sephardic expellees. According to an earlier memorandum of the Ministry of Justice, the lineage can, for example, be shown by figuring on a list of Sephardic families, and their direct descendants protected by Spain, drawn up on the basis of a Decree of 29 December 1948.[10] Furthermore, the names they bear, the language spoken at home (for certain groups this is Ladino or Haketia (Oriental Ladino, still present in Morocco or Gibraltar)) or other indications may demonstrate that they traditionally belong to the cultural Sephardic community; and, finally, it can be shown by a declaration of the Spanish Israelitic Society that the person involved adheres to the Sephardic-Jewish religion. There exists a list of some 5,000 names considered to be Sephardic. Most of these indications are now mentioned in the draft Bill.[11] These pieces of evidence have to be shown to the Civil Registrar in Spain, or, as the case may be, to the Spanish Consulate abroad.

There is a time limit: the applicants for a *carta de naturaleza* have to complete their application within three years after the coming into force of the Bill, a term that may be prolonged by a year by the Council of Ministers. Applicants have to pay a fee of 75 euros as well.

Experience since 1982 teaches that it is by no means easy to show the lineage with the required degree of probability. The cumbersome task of collecting letters, papers, church documents and especially building a pedigree is sometimes unrewarding, as the decision, based upon the evidence as a whole, may turn out to be negative.

Not only Sephardic Jews were driven out of the country after the year 1492. The *Reconquista* was fought against North-African Arabs and Berbers. 'Religious cleansing' concerned Islam as much as Judaism in the endeavour to create a Catholic nation. Attempts by left-wing parties in the late nineties of the twentieth century to ensure equal treatment for the descendants of the banished Moors came to nothing. Although the 'Moors' are back in Spain, their position differs from that of the Sephardic Jews. They have to be naturalised according to the general conditions. The grounds adduced for rejecting equal treatment are quite dubious. The North African community is still striving for equal treatment.

[10] On the basis of a Royal Legislative Decree of 20 December 1924. It concerns Sephardim in Greece and Egypt. According to the Explanatory Memorandum to the draft Bill, some 3,000 Sephardim acquired Spanish citizenship up to 1930. During WW II, according to the Explanatory Memorandum, many Sephardim profited from the Royal Decree of 1924 and received consular protection, even if they had not re-acquired Spanish nationality.

[11] Art. 1(2) draft Bill. Interestingly enough, the proposed Art. 1 of the draft Bill states that it applies whatever the ideology, the religion or belief of the Sephardim may be. This has been deleted in the version put before Parliament.

Sephardim and the Portuguese nationality code

After the Portuguese Revolution of 1974, which put an end to the dictatorship of Salazar d'Oliveira (no relation), a new Constitution (1976) and a new Organic Law on Nationality (1981) derived from it, were laid down. A reshaping of the law on nationality was necessitated by the winds of change in Portugal, especially the process of decolonisation. The legislators' intention was to reinforce the links with Portuguese elsewhere in the world, and to establish equal treatment between men and women. Dual nationality was considered less important an issue than were demographic reasons to increase the population of a country that considered itself all of a sudden to be a small state. An estimated four million (ex-)Portuguese were living as expatriates, partly driven by poverty or for political reasons. They had sometimes taken on the nationality of the host country, and formed an attractive reservoir from which to fill the Portuguese population. Portugal had, furthermore, the wish to follow the way to modernity after a period of dictatorial stagnation. In 2006, a new general revision of the Organic Law on Nationality took place under the socialist Government. It had become urgent to take account of the fact that Portugal had become a country of immigration as well as of emigration, and the Government wanted to conform to the European Convention on Nationality of 1998 that Portugal, unlike Spain, had ratified in the meantime. One of the novelties of the 2006 version of the Code was the introduction of a subjective right to naturalisation for persons who fulfilled a certain number of conditions. Naturalisation as a discretionary decision of the Government continued as a separate form, open to certain groups, such as outstanding sportsmen/women and others who could be of importance for Portugal, and to descendants of Portuguese abroad. For our topic, members of communities of Portuguese origin abroad are interesting, as they can be considered as forerunners of what is laid down in an amendment of 2013. According to Article 6(1) under 7, introduced by Act 43/2013 of 25 June 2013, the Government may grant, under certain conditions, Portuguese nationality by naturalisation to

> the descendants of Portuguese Sephardic Jews if they are able to demonstrate that they belong traditionally to a Sephardic community of Portuguese origin, based upon objective data concerning their link with Portugal, more specifically through their names, language spoken at home, direct or collateral descent.[12]

[12] 'O Governo pode conceder a nacionalidade por naturalização, com dispensa dos requisitos previstos nas alineas b) e c) do no.1, aos descendentes de judeus sefarditas portuguesas, attravés da demonstração da tradição de pertenca a uma comunidade sefardita de origem portuguesa, com base em requisitos objetivos comprovados de ligacão a Portugal, designadamente apelidos, idioma familiar, descendência direta ou colateral.'

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This amendment has been accepted unanimously in Parliament and finds its grounds, as in Spain, in the mending of a dark period in the history of Portugal. Those who may rely on this rule do not have to show, like other *naturalisandi*, a certain period of residence in Portugal; they are allowed to stay in their home countries. As Portugal generally allows the existence of plural nationalities in the case of voluntary acquisition of Portugese nationality, Sephardic Jews as well are exempted from the condition of giving up their original nationality. In this way Portugal, compared to Spain, leads the way as to the issue of dual nationality and in striking out the condition of residence; and it follows the example of Spain, that, as we have seen, paved the way in 1982 for the naturalisation of Sephardic Jews. The regulation still has to be implemented, but the Government has already hinted that requests[13] would be handled benevolently.

Hundreds of thousands of Jews lived in Portugal in the fifteenth century; the community now numbers only around a thousand. One may question whether this number will be increased considerably by this measure. Although the new developments in Spain and Portugal were reported prominently in the Dutch press, the Portuguese-Jewish Society in the Netherlands did not register any interest at all among Dutch Sephardic Jews in acquiring one of the Iberian nationalities.

It will not be easy to find out whether one qualifies for Spanish or for Portuguese nationality. A significant number of the Spanish Jews migrated through Portugal to other countries and may well qualify for both nationalities. Others, however, started out from Portugal on their diaspora, and have no choice. All may lose, notwithstanding the liberal Iberian legislation on this topic, their nationality of origin. That depends of course on the legislation in the home country: it takes two to tango.

In the Netherlands, for example, the voluntary acquisition of another nationality entails the loss of Dutch nationality.[14] Dutch Sephardim may thus acquire Spanish or Portuguese nationality only by losing automatically their Dutch nationality. There is a snag here. While foreigners who voluntarily acquire Dutch citizenship by naturalisation have to shed their original nationality, 'unless this cannot reasonably be required from them',[15] this saving clause does not apply to Dutch nationals who acquire a foreign nationality. This asymmetry between Dutchmen/women becoming foreigners and foreigners becoming Dutch may be contrary to the European Convention on Nationality. While this Convention

[13] There were earlier manifestations of guilt or regret about the treatment of the Sephardic Jews in Portugal. In the late 1980s, President Mario Soares made this regret clear in several speeches, as he told me shortly afterwards, on the occasion of his visit to the European University Institute.

[14] Art. 15(1) Rijkswet op het Nederlanderschap [*Dutch Nationality Code*].

[15] Art. 9 Rijkswet op het Nederlanderschap.

allows states to attach the loss of one nationality to the acquisition of another (Article 7(1)(a)), it states as one of its principles, which permeate all the rules contained in it, that 'no one shall be arbitrarily deprived of his or her nationality' (Article 4(c)). The lack of an exception of reasonableness in the Dutch regulation for Dutch citizens acquiring voluntarily another nationality opens the doors to arbitrariness. I submit that this is systematically the case for Dutch Sephardim becoming Spaniards or Portuguese. The Dutch Code erects too high a barrier against the gesture of the Iberian states to repair the harm done five centuries ago.[16] It stands in the way of a generous gesture of *Wiedergutmachung*. The lack of interest in the Netherlands may partly be caused by the automatic loss of the Dutch nationality involved in responding to this offer.

The EU and the nationality laws of the member states

Before discussing the potential impact of EU law on the acquisition by Sephardic Jews of Spanish and/or Portuguese nationality, I have to state my doubts on the position of the ECJ concerning the nexus between nationality of a member state and Union citizenship. In my opinion, the ECJ has overstretched its competence in its case-law on the subject. Its reasoning in putting the nationality laws of the member states under the supervision of Union law is not sound. Take *Micheletti*,[17] where it all started. This dual Argentinian/Italian dentist wanted to practise in Spain and invoked to that end the freedom of establishment and the freedom to render services. Spain denied him these rights because, according to Spanish law, his effective nationality was Argentinian. The Court ruled that the Spanish effectiveness test conflicted with the law of the Communities and that the nominal Italian nationality was sufficient to allow him to exercise the European freedoms. So far so good. But *in cauda venenum*. In an *obiter dictum* the Court propounded:

> 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.[18]

This consideration was in fact superfluous, and certainly beside the point, because it was *not* about the attribution or loss of the nationality of a member state, but rather about the question of whether Spain should or should not *recognise* the

[16] This lacuna is not only an element of incoherence in the Dutch nationality legislation, but is also in itself unjustified.

[17] ECJ 7 July 1992, Case C-369/90, *Mario Vicente Micheletti and others* v *Delegación del Gobierno in Cantabria*. *See* on this landmark-case notes by, among many others, G. R. de Groot in *Migrantenrecht* (1992) p. 105 and H. U. Jessurun d'Oliveira in 30 *CMLReview* (1993) p. 623.

[18] *Micheletti*, *supra* n. 17, para. 10.

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European legal consequences of the (in and of itself) uncontested possession of Italian nationality. So *Micheletti* did not concern acquisition or loss of a nationality at all; it was about recognition by member states of the European consequences of the undisputed and recognised possession of a member state nationality.

Here a legerdemain took place by which the ECJ started to usurp a power to supervise the arrangements in the codes of nationality of the member states in the light of European law, instead of defining the European legal consequences of the possession of a member state nationality, for which it has, without any doubt, the power.[19] In other words, the Court has to take the nationality of persons as it finds it, just as do the member states, according to the principle of international law as laid down in the European Convention on Nationality, not by qualifying Article 3(1) ('Each state shall determine under its own law who are its nationals.'), but under Article 3(2):

> This law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.

The EU Treaties are not to be counted as applicable international conventions which condition the acceptation of the results of the nationality laws of other member states. There is, until the present day, no explicit transfer of powers concerning the definition of nationality in the Treaties. Such an important subject, vital to the existence of the member states, cannot be considered to be the competence of the EU without a solid basis in the Treaties. According to Article 4(1) jo. Article 5 TEU the EU does not have any competences if they are not transferred; and, for that transfer, the principles of proportionality and subsidiarity apply. All relevant institutions of the EU – the Council, the Commission and the Parliament – concur (until recently?) in the view that the nationality law of member states is not a matter for the EU, but exclusively for the member states. See, for example, the declaration by the heads of state and government of December 1992, i.e. after *Micheletti*:

> The provisions of Part Two of the Treaty establishing the European Community relating to the citizenship of the Union give nationals of the Member States additional rights and protection as specified in that part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.[20]

[19] *See* in this vein my note on ECJ 2 March 2010, Case C-135/08, *Janko Rottmann* v *Freistaat Bayern*, 7 *EuConst* (2011) p. 138.

[20] Conclusions of the Presidency (Edinburgh 12 December 1992), SN 456/92 part B annex 1.

The Court made short shrift of this position, although the statement is not only in accordance with international law, but also with the views expressed by the European Commission, the European Parliament, and, last but not least, the member states. The subsidiarity principle alone, in this sensitive area which concerns the existence itself of the member states, would lead to the conclusion that the European Court of Justice has no say in the matter until the Treaties themselves allow it clearly and explicitly to do so. The fact that Union citizenship is dependent on the possession of the nationality of a member state is not sufficient to give the Union any competence on the nationality legislation of the member states. The Court is reversing this order of things by stating that 'citizenship of the Union is intended to be the fundamental status of nationals of member-states' and that therefore 'national rules concerned must have due regard to […] European law'. I submit that the European Court of Justice should leave national laws on nationality alone, and concern itself only with the consequences these have in the sphere of Union law, more specifically eventual modulations of Union citizenship. It is free to deny these consequences, notwithstanding possession of the nationality of a member state, or to consider someone as being a Union citizen, although not in possession of a nationality of a member state. Herein lies the delimitation between the powers of the Union and its member states.

The stances, taken earlier in 2014, by the European Parliament and the vice-president of the Commission, Viviane Reding, concerning Maltese legislation by which Maltese citizenship and hence Union citizenship can be bought[21] by foreign investors does not change my position. Commissioner Reding appealed to the principle of sincere cooperation and referred to the 'genuine link' principle in awarding citizenship of a member state.[22] She furthermore announced that the Commission would follow any developments concerning the Maltese arrangement; the Commission even threatened to start infringement proceedings, but ended up with some nudging of the Maltese Government into amending its legislation. The EP adopted a resolution, condemning member states' legislation with citizenship for sale programmes generally, as Malta is certainly not the only member state to do so.[23] The Greek Presidency kept aloof

[21] Read the illuminating and detailed essay by S. Carrera, 'How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the Union?' CEPS Paper in Liberty and Security in Europe, No. 64 (April 2014), <www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf>, visited 26 March 2015.

[22] This reference to ICJ 6 April 1955, *ICJ Reports* (1955) p. 4, *Nottebohm* (*Liechtenstein* v *Guatemala*) is erroneous. That Nottebohm possessed the nationality of Liechtenstein was not in dispute, even if it had been bought; the question was which consequences had to be drawn from that fact under international law as to the diplomatic protection Liechtenstein was prepared to exercise vis-à-vis Guatemala.

[23] EP Resolution on European citizenship for sale, 2013/2995 (RSP), 16 January 2014.

and took the position that 'Member States must have mutual trust to recognise different national provisions governing naturalisation.'

There is here clearly a shift towards interference by various European institutions with the nationality legislation of member states, but on what basis in the Treaties is not at all evident. Sincere cooperation seems to me too vague an underlying principle for these interferences. One of the traditional grounds for the acquisition of nationality has always been the interest and the profit a state draws from counting a person as its citizen.[24] Happiness and prosperity, not only in the member states, but in the EU at large, are the result of these naturalisations. Again, remedies are to be found, if remedies are sought, not in nudging states to adapt their codes on nationality, but in differentiation of the entailed effects in terms of Union citizenship.

Impact of Union law on the acquisition of Iberian nationalities by Sephardic jews?

This being said, it remains to answer the question of whether Union law has some impact on the arrangements in the Iberian Codes affording Sephardic Jews and their descendants the opportunity to acquire the nationality of Spain and/or Portugal, and the repercussions of this acquisition on the laws of their countries of origin in the Union. Given my remarks in the last section, it will be no surprise if I answer this question in the negative. If I, nevertheless, seek to stay within the limits of the line of misdirected case-law which starts with *Micheletti* and ends, until further notice, with *Rottmann*,[25] the following remarks may be made.

One may distinguish between the situation in which a Sephardic citizen of the Union acquires Spanish (or Portuguese) nationality and the situation of a third country national acquiring such nationality. Concerning the first group, nothing much changes in terms of Union law. Before and after the persons involved remain Union citizens, although the possibility of being subjected to reverse discrimination shifts from one member state to the next. As is reasonably clear from *Rottmann,* the principles of Union law which have to be taken into account in *withdrawing* the nationality of a member state, such as the Union principle of proportionality, apply to the attribution of nationality in the same way.[26] Thus, although 'the situation of a citizen of the Union' who acquires the nationality of

[24] *See* e.g the Act of 4 September 1802 (26 Vendémiaire Année XI), which grants French nationality to foreigners who 'apporteront […] des talents, des inventions, ou des industries utiles, ou qui formeront de grands établissements.' It is obvious that outstanding sportsmen, scholars etc. are naturalised and bought by states to show off in the international arenas.

[25] *See* my note on *Rottmann*, *supra* n. 19; *cf. also* note G. R. de Groot and Anja Seeling, 7 *EuConst* (2011) p. 150.

[26] *Rottmann*, *supra* n. 19, para. 62.

another member state 'falls, by reason of its nature and its consequences, within the ambit of European Union law',[27] I foresee no spectacular impact of Union law on the situation of Sephardic Jews changing from one member state nationality to another, because it does not affect the rights and duties conferred and protected by the Union.

One may wonder, however, whether the concomitant loss of their original nationality, as provided in the Dutch Code, will hold water. Is it not unreasonable, in other words arbitrary, to withdraw automatically the nationality of citizens who accept the invitation of the Iberian member states to redress the misery wreaked upon the heads of their ancestors? To withhold, in general terms,[28] the possibility of making an exception in cases in which the loss of nationality appears to be unreasonable, may hurt the European principle of proportionality, even if this changes nothing much in the status of being a Union citizen of the persons involved. Would the Court be outgoing enough to strike out such dispositions in order to facilitate plural nationality within the EU? I do not expect such brazenness, but it would be in line with its case law, which systematically undermines the identity of member states by intruding into their exclusive right to define their citizens.

It could rely, however, on the case law of the European Court of Human Rights, in particular on the arguments put forward in *Genovese* v *Malta*. Although the decision is couched in cautious terms, its chain of reasoning is clear. The ECtHR expounds, in general terms, but to be applied to the case in hand, that the concept of 'private life' in Article 8 of the European Convention on Human Rights

> is not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity […] [I]t cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual […].[29]

Arbitrary denial of citizenship, then, may amount to a violation of private life (and, as the case may be, family life) as protected by Article 8 ECHR. Multi-faceted

[27] *Rottmann*, *supra* n. 19, para. 42.

[28] There are a few exceptions in the Dutch code which allow some groups to retain their Dutch nationality while acquiring another nationality: according to Art. 9(2) Rijkswet op het Nederlanderschap, these concern persons born abroad who have their residence there at the time of the acquisition of the nationality of that country; persons before the age of majority who have lived at least for a period five years in the country of the other nationality; nationals who are married to a person of that other nationality.

[29] ECtHR 11 October 2011, No. 53124/09, *Genovese* v *Maltam*, para. 30; *see* also para. 33.

social identity encompasses citizenship. Citizenship as such is not protected by the Convention, but it may fall within the ambit of the rights safeguarded by Article 8. In recent cases the ECtHR has shed all caution. In *Labassée* v *France* it stated without much ado:

> Par ailleurs, même si l'article 8 de la Convention ne garantit pas un droit d'acquérir une nationalité particulière, il n'en reste pas moins que la nationalité est un élément de l'identité des personnes (*Genovese c. Malte*, no 53124/09, § 33, 11 octobre 2011). Or […] la troisième requérante est confrontée à une troublante incertitude quant à la possibilité de se voir reconnaître la nationalité française en application de l`article 18 du code civil […]. Pareille indétermination est de nature à affecter négativement la définition de sa propre identité.[30]

'Might' has become a firm 'is'.

If it is the case that arbitrary denial of citizenship falls within the ambit and scope of Article 8 ECHR, other nationality issues may also present themselves as amenable to be treated as aspects of the social identity of persons. The social identity of a person may involve the possession of more than one nationality. The social identity of a person depends as much on his own self-definition as on those created by the social environment, including governments. The preamble to the European Convention on Nationality reflects this by stating that the signatories to this Convention recognise 'that, in matters concerning nationality, account should be taken both of the legitimate interests of states and those of individuals', and several principles and rules in the Convention on Nationality bear witness to this consciousness of the relevance of the individual's interests. One of these principles, previously mentioned, is the self-inflicted order that 'no one shall be arbitrarily deprived of its nationality' (Article 4, sub. c). This principle forms an obligatory guideline in shaping the laws of the signatory states. Although these are allowed to provide for loss of their nationality in certain specific cases (Article 7 European Convention on Nationality), they are not obliged to do so, and must avoid arbitrariness, both substantively and in terms of procedure. I submit that it may be arbitrary, in certain circumstances, to withdraw *ex lege* the nationality of persons who acquire voluntarily another nationality. This is especially the case where there is no test of reasonableness available to be applied by the administration and the courts in the country involved. The lack of such a remedy alone suffices to raise the issue of arbitrariness.

Case law of the European Court of Human Rights such as *Genovese* v *Malta* has its impact in the sphere of Union law, especially through the parallel EU Charter of Fundamental Rights, which protects family life and private life within this ambit (Article 7 Charter).

[30] ECtHR 26 June 2014, No. 65941/11, *Labassée* v *France*, para. 76; the same considerations in its decision of the same date: ECtHR 26 June 2014, No. 65192/11, *Menesson* v *France*, para. 97.

In the case of Sephardic Jews, who are allowed to retain their nationality of origin according to the laws of Spain and Portugal, but lose their citizenship according to the law of their home country, such as the Netherlands, the question must be answered whether such loss is reasonable. The question is linked to the more general problem of the view that governments hold on the desirability of multiple nationalities, and this general view may dictate or influence the considerations on the specific issue of the Iberian legislation. That is inspired both by the wish to make amends for the banishment decrees in the fifteenth and sixteenth centuries and by the endeavour to integrate the descendants of the former population again in the socio-cultural community of their ancestors. The loss of the nationality of the state of origin functions undoubtedly as a barrier to the fulfilment of these motives and hampers the self-definition of the members of the group concerned. Are the interests of the states of origin intense and weighty enough to underpin this denial of double nationality desired both by individuals and the naturalising states?

Sephardim from third countries

There seems to exist a lot of interest in the Iberian legislation in third countries such as Israel, Venezuela and Turkey; in Israel, a rush to the Spanish consulates took place although the legislation was (and is) not yet adopted.[31] In the case of third country Sephardim, acquisition of Spanish or Portuguese nationality is especially attractive because of its corollary of the much coveted Union citizenship. Sephardim in Israel, who may already possess more than one nationality, often consider themselves second rate citizens of Israel, dominated as it is by the Ashkenazim population, and thus are inclined to avail themselves of an exit option. In the case of Portugal and Spain, a nationality change *sur place* can take place. Nothing in the case-law of the ECJ indicates that this acquisition of an Iberian nationality, and by that token Union citizenship, will not 'stick'. *Micheletti* is a case in point. European law takes the nationality of a member state basically as it finds it, and consequently attaches the status of Union citizenship to the status of being a national of a member state. Is it permissible to interpret *Rottmann* broadly and infer that not only the loss of the nationality of a member state but the acquisition of the nationality of a member state as well, because of its effects on the status of Union citizen, 'falls, by reason of its nature and consequences, within the ambit of European law'?[32] I am inclined to answer the question in the affirmative, given the boldness of the ECJ in this area; and this would entail the

[31] D. Williams, 'Israel's Sephardim abuzz at expanded Spanish citizenship offer', *Reuters*, 10 February 2014, <reut.rs/1jpHSLw>, visited 26 March 2015.

[32] *Rottmann*, *supra* n. 19, para. 42.

possibility that Union law tests such as those of proportionality, equality and the protection of legitimate expectations can be carried out on the grounds for acquisition of the nationality of member states.

Ultimately, in this line of thought, rejected by the author, *Nottebohm*[33] appears on the horizon, as the test of proportionality is intimately interrelated with the 'genuine-link' criterion. As in *Nottebohm*, the question to be answered is not whether the nationality involved holds good (in Nottebohm's case, Liechtenstein nationality was bought by him in anticipation of the vicissitudes of the imminent Second World War; it was only later that he became a 'genuine' Liechtenstein national by living there for the rest of his life) but what the possession of this nationality entailed, in his case in terms of the right to exercise diplomatic protection. One may imagine that the same question arises in terms of Union law: although third country Sephardim acquire without doubt the nationality of Spain or Portugal, whether Union citizenship is attached to that status is a matter of recognition by this international organisation *sui generis*, through its own rules and principles. Basically, both second- and third-country citizens, in acquiring Spanish nationality, pass the threshold of the 'genuine link' test: they have to show, according to the draft Bill, *una especial vinculación* with Spain. This is less clear in the Portuguese legislation, but in both cases cultural ties are required.[34]

There may come a moment in which not all nationals of member states enjoy the fundamental status of Union citizen, and not all non-nationals of member states may be excluded from this status. The one-to-one nexus between the nationality of a member state and Union citizenship will ultimately, I presume, be loosened up in both directions. In this construction, there is no need for the ECJ to pursue the highly sensitive task of scrutinising the laws on citizenship of the member states in relation to their acceptability by the Union. The Court may restrict itself to defining the effects under Union law of the existence of a member state's citizenship, and, as the case may be, allow some effects to subsist although such citizenship is lost or not acquired.[35]

[33] *Nottebohm*, *supra* n. 22.

[34] Compare the situation in the Federal Republic of Germany , where ethnic ties are required. Art. 116 Grundgesetz recognizes ethnic German displaced persons ('Vertriebene deutscher Volkszugehörigkeit') as qualifying for German citizenship, with the effect that, since 1950, 3 million persons who had lived sometimes for many generations in the Soviet Union and other Eastern European states, displaced or not, availed themselves of the right to return to Germany and (re-)acquire German citizenship. *Cf.* R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) p. 171.

[35] Some developments in this area: the European Economic and Social Committee made a proposal to amend Art. 20 TFEU 'so that third- country nationals who have stable, long term residence status can also become EU citizens.', and called for inclusion of third country citizens in the Union citizenship, EESC opinion, 'A more inclusive citizenship open to immigrants, SOC/479 (16 October 2013), *OJ* C (6 March 2014) p. 16, paras. 1.11 and 1.8. *Cf.* in the same vein the

Coda – A personal recollection

Sephardim and genealogical exercises… How to prove that forbears had their origin in Spain or Portugal? That was a vital issue for Sephardim in the Netherlands during the Second World War. Individually and collectively, they sought to escape deportation and death in the concentration camps. One of these collective endeavours was to mount a case claiming that Sephardim were in reality not Jews at all, but that they belonged to Mediterranean or Alpine 'races'. The German race theory, with its store of race characteristics of Jews, was in fact used to show that the Sephardim did not fit into that 'race'. In the Netherlands there existed the opportunity – and in this it differed from Nazi Germany – to attack in the German administration the listing as Jew, with all its consequences. This arrangement, to allow the submission of evidence against being Jewish, was the work of a German lawyer, Dr. Hans Calmeyer, who ran a small office of the German occupational apparatus, the *innere Verwaltung*, in The Hague. The Dutch population had been required in 1941 to report the number of Jewish parents and grandparents on the basis of which they were considered to be Jewish themselves according to classifications along the line of the Nuremberg Laws (*Nürnberger Gesetze*). Some prominent members of the Sephardic community commissioned anthropological research to show that the Sephardim were, in reality, not Jews, but belonged to races prevalent in the Iberian peninsula. They asked Dr. Arie de Froe, a young medical scholar who had worked already in this field and had issued a large number of individual affidavits, mostly with fraudulent data, stating that the person involved was not Jewish (e.g., because the issue of an extramarital liaison of a Jewish mother with a non-Jewish man).[36] He accepted and eventually produced an impressive report on the basis of measurement of a large number of physical characteristics (e.g. craniometry) of a considerable number of 'pure' Sephardic Jews. His conclusion was that the Sephardim showed clear differences from the Ashkenazim and from the Dutch population generally.[37] A similar research exercise had already been conducted before the War by an internationally distinguished scholar,

Tampere Presidency Conclusions (15 and 16 October 1999) Nos. 18 and 21. *See* also my case note on *Rottmann*, *supra* n. 19, at p. 149 with further literature.

[36] *See* about De Froe (who, after WW II became Rector Magnificus of the University of Amsterdam): J. Cohen, 'Arie de Froe, Wetenschapper in dienst van de goede zaak', *De Gids* (2013) issue 4, p. 3; H.U. Jessurun d'Oliveira, 'Het wetenschappelijk geweten', *De Gids* (2013) issue 4, p. 7. Furthermore a collection of essays: H.U. Jessurun d'Oliveira (ed.), *Ontjoodst door de wetenschap. De wetenschappelijke en menselijke integriteit van Arie de Froe onder de bezetting* (Amsterdam University Press 2015).

[37] To enforce its arguments the report was accompanied by an album of pictures of Sephardic Jews, produced by my father who was a professional photographer. It tended to show the aristocratic 'unJewishness' of the persons portrayed.

Prof. Ariëns Kappers,[38] who had come to the same conclusions and who approved with his authority De Froe's report. The Sephardim, according to the report, had merged with the Iberian population before their banishment and had assumed the characteristics of these peoples. Dr. Calmeyer, who had already nurtured similar opinions, was inclined to accept the report and to exclude the Sephardim from deportation. He was, however, surrounded by other, and stronger, forces in the German administration, both in the Netherlands and in Berlin, and by Dutch collaborators, specialised in genealogy, and this led in the end to disaster. On 1 February 1944, a raid took place for the few hundred Sephardim on Calmeyer's list, categorised by SS officials in the transit camp (*Durchgangslager*) of Westerbork as 'racially inferior' (*rassisches Untermenschentum*) and almost all, after a stay in Theresienstadt, were murdered in extermination camps, mostly Auschwitz.

It is a strange irony of fate that the efforts made during the Second World War to show Iberian lineage in order to escape the Nazi scourge, are now, seventy years later, available for those Sephardim who desire to acquire Spanish or Portuguese nationality and, by that token, to accept the *Wiedergutmachung* for the atrocities of half a millennium ago perpetrated by state and Church in those countries. Research to the effect that the Dutch Sephardim were, according to the prevalent views at the time, not Jews at all, may now be used to demonstrate that they are indeed Jews, and Sephardic at that.

[38] C.U. Ariëns Kappers, *An introduction to the Anthropology of the Near East in recent and ancient times* (Noord-Hollandsche Uitgeversmaatischappij 1937). My aunt, Elsa d'Oliveira, assisted him in his measurements of Portuguese Jews in Amsterdam.

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