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The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?

Edited by Audrey Macklin and Rainer Bauböck

European University Institute
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Abstract

In this EUDO CITIZENSHIP Forum Debate, several authors discuss the growing trend in Europe and North America of using denationalisation of citizens as a counter-terrorism strategy. The deprivation of citizenship status, alongside passport revocation, and denial of re-admission to citizens returning from abroad, manifest the securitisation of citizenship. Britain leads in citizenship deprivation, but in 2014, Canada passed new citizenship-stripping legislation and France's Conseil Constitutionnel recently upheld denaturalisation of dual citizens convicted of terrorism-related offences. In the wake of the ongoing crisis in Iraq and Syria, assorted legislators in Austria, Australia, the Netherlands, and the United States have expressed interest in enacting (or reviving) similar legislation. The contributors to the Forum Debate consider the normative justification for citizenship deprivation from a variety of disciplinary perspectives. There is relatively little disagreement among commentators about the limited instrumental value of citizenship revocation in enhancing national security, and more diversity in viewpoint about its significance for citizenship itself. The contributors discuss the characterisation of citizenship as right versus privilege, the relevance of statelessness and dual nationality, the relative merits of citizenship versus human rights as normative framework, and the expansiveness of banishment itself as a concept.

Kickoff contribution and rejoinder by Audrey Macklin. Comments by Peter Spiro, Peter H. Schuck, Christian Joppke, Vesco Paskalev, Bronwen Manby, Kay Hailbronner, Rainer Bauböck, Linda Bosniak, Daniel Kanstroom, Matthew J. Gibney, Ruvi Ziegler, Saskia Sassen and Jo Shaw.

Keywords

Denationalisation, citizenship, terrorism, banishment, exile, United Kingdom, Canada, USA

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Kick-Off contribution

Audrey Macklin*

After decades in exile, banishment is back. Britain resuscitated the practice as part of its counter-terrorism strategy in the wake of the 9/11 and 7/11 terrorist attacks in New York, Washington and London. Canada followed suit with the 2014 Strengthening Canadian Citizenship Act. As of late 2014, assorted legislators in Austria, Australia, Netherlands, and the United States expressed interest in enacting (or reviving) citizenship stripping laws.[1]

From antiquity to the late 20th century, denationalisation was a tool used by states to rid themselves of political dissidents, convicted criminals and ethnic, religious or racial minorities. The latest target of denationalisation is the convicted terrorist, or the suspected terrorist, or the potential terrorist, or maybe the associate of a terrorist. He is virtually always Muslim and male.

Citizenship-stripping is sometimes defended in the name of strengthening citizenship, but it does precisely the opposite. The defining feature of contemporary legal citizenship is that it is secure. Making legal citizenship contingent on performance demotes citizenship to another category of permanent residence. Citizenship revocation thus weakens citizenship itself. It is an illegitimate form of punishment and it serves no practical purpose.

Denationalisation refers to involuntary loss of citizenship.[2] Denaturalisation is a subset of denationalisation, and applies selectively to those not born into citizenship via ius soli or ius sanguinis. The most common basis for denaturalisation is fraud or misrepresentation in the acquisition of citizenship. The operative premise is that had the material facts been known at the relevant time, the state would not have conferred citizenship in the first place. Denaturalisation for fraud simply annuls the erroneously conferred citizenship and restores the *status quo ante*.[3]

My remarks focus exclusively on denationalisation for allegedly disloyal conduct by a citizen, while a citizen. In its present incarnation, citizenship revocation is best understood as a technique for extending the functionality of immigration law in counter-terrorism. Since 2001, states have turned to deportation to resolve threats to national security by displacing the embodied threat to the country of nationality. But deporting one's own citizens is exile, and exile extinguishes a singular right of citizenship, namely the right to enter and to remain. Citizenship revocation circumvents that problem by introducing the two-step exile: first, strip citizenship; second, deport the newly minted alien.

The British Nationality Act authorises the Secretary of State for Home Affairs (Home Secretary) to deprive a person of British citizenship where she "is satisfied that deprivation is conducive to the public good." That happens to be the same low and vague standard for depriving a person of permanent resident status (indefinite leave to remain), which provides one illustration of the

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1 For a more elaborate comparative analysis of recent legislative developments in the United Kingdom, Canada and the US, see Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien", (2014) 40 *Queens Law Journal* 1-54.

2 Before the widespread acceptance of dual citizenship, acquisition of a second citizenship or marriage to a foreign man commonly triggered denaturalisation. In a world where states tolerated only one legal bond between individual and state at a time, acquisition of a second nationality denoted a transfer of membership from one state to another.

3 The United States law combines renunciation of citizenship and denationalisation for birthright citizens into a category labelled expatriation. The US Constitution guarantees the citizenship of ius soli citizens as a constitutional right. The doctrine of expatriation operated on the legal fiction that certain acts by a citizen denoted an intention to renounce citizenship. In a series of judgments culminating in 1967 in Afroyim v. Rusk, the US Supreme Court progressively restricted the government's ability to deem conduct short of explicit renunciation as conclusive proof of an intention to expatriate, and the executive effectively abandoned attempts to pursue constructive expatriation in the 1980s.

downgrading of citizenship. In Canada, the executive power to revoke citizenship depends on a criminal conviction for a listed offence and a minimum sentence of either five years or life imprisonment. The offences include treason, spying, any terrorism offence defined under the Criminal Code and a variety of offences applicable to members of the military. In the case of terrorism offences, the conviction may be by a foreign court for an offence committed outside Canada, if it would also constitute a terrorism offence under Canadian law.[4] The UK law authorises citizenship stripping of naturalised citizens (but not birthright citizens) even if it renders them stateless. The Canadian law prohibits the creation of statelessness but puts the onus on the individual to satisfy the Minister that statelessness would ensue from revocation. The UK declines to publicly disclose the exact number, identities or circumstances of those deprived of UK citizenship, but investigatory journalists estimate that at least 53 Britons have lost citizenship since 2002, over half on national security grounds. In 2013, the Home Secretary deprived 20 UK nationals of citizenship, more than all other years since 2002 combined.[5] The Canadian legislation has yet to be declared in force.

Citizenship revocation raises an array of practical, legal and normative questions: Does it advance a valid objective? Does it comply with domestic, constitutional and/or transnational law? Is it normatively defensible? The answers turn, in part, on one's underlying conception of citizenship as legal status. Defenders of citizenship revocation liturgically intone that "citizenship is a privilege, not a right". The rhetoric of citizenship-as-privilege trades on a popular and laudable sentiment that is sometimes expressed as follows: 'I feel privileged to be a citizen of Canada, or the UK, or Italy, etc, and I consider it my duty to demonstrate my commitment through actively participating in civic life, or joining the armed forces, and standing up for my country as a good and loyal citizen should do.' But a privilege in law is something different: A privilege emanates from the patron (here a government minister) and can be rescinded from an undeserving beneficiary (here the citizen) at the former's discretion.

In two US Supreme Court cases in the 1950s, Chief Justice Warren rejected the classification of citizenship as privilege, proclaiming that "citizenship is not a licence that expires on misbehaviour". Instead, he invoked Hannah Arendt's famous depiction of citizenship as "no less than the right to have rights."[6] Framing citizenship as a right vests citizenship in the rights-bearer. Depicting it as a meta-right dramatically increases the justificatory burden for any curtailment, because it places all rights in the balance.

Yet the force of Arendt's 'right to have rights' aphorism may seem attenuated, at least with respect to liberal democratic states of the twenty first century. After all, permanent residents enjoy almost all the same rights as citizens, and even foreigners without status can, in principle, claim a long menu of basic human rights under international law and many domestic legal orders. But this rejoinder overlooks one crucial fact. The exercise of virtually all rights depends on territorial presence within the state,[7] and only citizens have an unqualified right to enter and remain on state territory. So once stripped of the right to enter and remain in the state, enforcement means that one is effectively deprived of all the other rights that depend (*de jure* or *de facto*) on territorial presence. This fact has

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4 The law also permits revocation of a citizen who 'served as a member of an armed force of a country or as a member of an organised armed group and that country or group was engaged in an armed conflict with Canada.' This is not a criminal offence, though it is almost identical to the existing offence of treason, except that it includes non-state armed groups, whereas the offence of treason only includes armed forces of a state.

5 Id.

6 The unattributed quote comes from Hannah Arendt, The Origins of Totalitarianism, (New York: Harcourt & Brace, 1951), at 294. It was picked up by US Supreme Court Justice Warren in Perez v. Brownell, 356 US 54 (1958) at 64 and again in Trop v. Dulles, 356 U.S. 86 (1958) at 102. See discussion in Patrick Weil, The Sovereign Citizen (Philadelphia: University of Pennsylvania Press, 2013).

7 Expatriate voting is one exception. Many people suppose that diplomatic or consular assistance is also a right available outside the territory of the state, except that states tend to deny that they owe a legal duty to extend assistance to their citizens abroad. See, e.g. R (Abbasi) v Foreign Secretary [2002] EWCA Civ 1598.

not been lost on the present UK government: With two exceptions, all her targets were abroad when the Home Secretary chose to exercise her discretion to strip them of citizenship. This meant they were absent and unable to respond when the notice of intention to deprive was delivered, and therefore barred from entry *qua* alien in order to appeal the decision.

Another strand of citizenship discourse describes citizenship as a contract in which the citizen pledges allegiance to the sovereign in exchange for the sovereign's protection. Acts of disloyalty amount to fundamental breach of contract, and so citizenship revocation simply actualises in law the citizen's voluntary severance of the relationship. This was, more or less, the logic of constructive expatriation under US law[8]. But neither the rhetoric of contract nor privilege can mask the flagrantly punitive rationale for the citizenship revocation regimes currently in play in the UK and Canada: baldly stated, some citizens are very bad citizens, and therefore do not deserve to be citizens. The move from 'bad citizen' to 'not citizen' is explicit in the Canadian law, where conviction for a criminal offence is a condition precedent to revocation and eventual deportation. Citizenship revocation in the UK arguably turns on prevention of future risk rather than punishment for past wrong, but statements by UK politicians like **'**We think that deprivation is a way of expressing extreme displeasure at the way in which someone has behaved**',** reveal that the difference is more apparent than real**.**[9]

Banishment as criminal penalty has a long pedigree, and dates to a time before the rise of penal systems that enabled states to segregate, punish, rehabilitate and reintegrate wrongdoers within the state. In other words, modern states have criminal justice systems and an infrastructure that obviates the utility of banishment. These systems can, and are, deployed in response to the range of conduct encompassed under the rubric of terrorism. Banishment is both superfluous and anachronistic.

One might counter that offences threatening national security are qualitatively distinct from other offences. For these putative 'crimes against citizenship', incarceration is insufficient and withdrawal of citizenship is uniquely appropriate as supplement or substitute. It bears noting, however, that none of the Canadian offences precipitating loss of citizenship on grounds of national security – including treason – apply exclusively to citizens. Moreover, the idea that 'national security' misconduct is an affront to the state and so warrants a distinctive punishment fails to take proper account of the fact that *all* crime is regarded as an affront to the state's maintenance of public order (the 'King's Peace' in common law systems) and its monopoly on the legitimate use of violence. It is this public dimension of criminal law that differentiates it from private law, and confers on the state the authority to investigate, prosecute and punish wrongdoers, in addition to and apart from any private remedy that an individual victim might seek in tort, contract or property.

The purported symmetry between 'crimes against citizenship' and denationalisation echoes the defence of the sovereign's other technique for permanent elimination of wrongdoers, namely the death penalty. Banishment fits the crime of disloyalty the way capital punishment fits the crime of murder. When tethered to expulsion, citizenship revocation effects a kind of 'political death'. A citizen stripped of nationality and banished from the territory is, for all intents and purposes, dead to the state. Once outside the territory, the state has neither legal claim nor legal duty in respect of the former citizen, and is relieved of any obligation to object if another state tortures, renders or kills one of its nationals.[10] Indeed, denationalisation is not only a political analogue to death, it may also be a prelude

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8 The US model of expatriation implicitly relied on this metaphor to characterise a series of acts, from desertion, to voting in a foreign election, as acts signifying an intention to renounce citizenship.

9 See See United Kingdom, Parliamentary Debates, HC Standing Committee E, 30 April 2002, col 54 (Angela Eagle), quoted in Rayner Thwaites, "The Security of Citizenship?: Finnis in the Context of the United Kingdom's Citizenship Stripping Provisions", in Fiona Jenkins, Mark Nolan and Kim Rubenstein, eds., *Allegiance and Identity in a Globalised World* (Cambridge, UK: Cambridge University Press, 2014), 243-66.- at note 94.

10 Since the United States' lethal drone strike on US citizen Anwar al Awlaki (and his son), the United States' position is that it may lawfully execute its own citizens without trial when they are abroad. This, of course, obviates the necessity to

to it.[11] At least two former UK citizens were executed by US drone strikes after the Home Secretary deprived them of citizenship, and another was rendered to the United States for trial on terrorism charges.

As with the death penalty, denationalisation extinguishes the prospect of rehabilitation or reintegration. The paradigmatic subject of citizenship revocation – the terrorist – is excluded from the ambit of human dignity that underwrites contemporary penal philosophy and affirms capacity for autonomy, rational self-reflection and reform. He is, in that sense, not fully human and thus incapable of rehabilitation. Banishment operates as pure and permanent retribution. There is no re-entry into the political community, no life after political death. Even creative and sophisticated attempts to classify and isolate those crimes that merit denationalisation from those that do not still founder on the instability of the distinction and the legitimacy of pure retribution.[12]

One might object that that this parallel neglects the statelessness constraint. To the extent that a prerequisite of denationalisation is actual or potential possession of another citizenship, the individual has another political life to live somewhere else. This is also an answer to the complaint that stripping citizenship from dual nationals but not mono-nationals violates the principle of equality of citizenship.[13] The dual national is not similarly situated to the mono-national precisely because the former has another citizenship and the latter does not, so differential treatment does not constitute invidious discrimination. (Of course, the counter-intuitive consequence of this reasoning is that dual citizenship becomes a liability. Multiple citizenship becomes less than the sum of its parts: the mono-citizen is secure from revocation, while the dual or multiple citizen is not).

The cogency of this argument depends on how one characterises the impact of citizenship revocation. From an external, statist perspective, the function of nationality is to catalogue the world's population and to file each person under at least one state. Nationality provides states with a return address they can stick on non-citizens for purposes of deportation, and is one reason why statelessness is an inconvenient anomaly for states. And just as all sovereign states are formally equal under international law, so too are all citizenships. Within this framework, citizenship becomes fungible. Statelessness is the problem, and nationality the solution. So, it may not actually matter what nationality a person possesses – Canadian or Somali, Brazilian or North Korean – as long as he or she possesses at least one. All nationalities are equal for purposes of averting statelessness.[14] This formal equality of nationality may partly explain international law's diffidence, or at least ambiguity, on whether citizenship deprivation that does not induce statelessness may nevertheless be arbitrary and contrary to international law.[15] In any event, as long as an individual retains a nationality somewhere, denationalisation poses no human rights problem.

From an internal, individual perspective, however, citizenship is not fungible.[16] The revocation of citizenship severs a unique relationship between the individual and a specific state. It is unique in two respects: First, the formal equality of nationality suppresses the substantive inequality of citizenship. The bundle of social, political, economic, cultural and legal opportunities and entitlements to which

(Contd.)

strip citizenship prior to execution. See "US cited controversial law in decision to kill American citizen by drone", The Guardian, 23 June 2014. See also Peter Spiro, "Expatriating Terrorists", (2014) 82 Fordham Law Review.

11 This was the case with the Nazi extermination of German Jewry, as Hannah Arendt recounted. First, the Nazi government stripped Jews of German nationality and then, when no country would take them in, proceeded to murder them.

12 For a recent example, see Shai Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach", (2011), 61 UTLJ 783-810, at 806.

13 It does not, of course, answer the charge of discrimination against naturalised mono-citizens under UK law. They are exposed to the risk of statelessness whereas birthright citizens are not.

14 One could even imagine how a creative government wedded to this view might venture that protecting mono-citizens from statelessness is really an affirmative action initiative under s. 15(2) of the Charter.

15 See Peter Spiro, "The New International Law of Citizenship", (2011), Am J. Int'l Law, 694-746, at 711-12.

16 Thwaites makes a similar argument, supra note 9, at 263.

citizenship provides access varies radically between countries. Canadian or Brazilian citizenship is dramatically and indisputably heftier than that of present-day North Korea or Somalia.

Secondly, the subjective experience of that legal bond, what the International Court of Justice in *Nottebohm v. Guatemala* calls 'the social fact of attachment'[17] is as infinitely diverse as the people who make up the citizenry. It may range from the 'nominal citizen' whose social attachment is highly attenuated, to the individual whose existence is, and has always been, wholly and exclusively embedded in the country of residence. Citizenships are not substantively equal in comparison to one another and the nature of the individual citizen-state relationship is not invariant. But my point is not to propose a metric capable of measuring the quantitative, qualitative, experiential, emotional, personal, familial, cultural, social, financial, linguistic and political impacts of exile on any individual, in order that some state official could determine precisely when citizenship revocation inflicts an appropriate versus excessive degree of punishment. Citizenship as legal status obviates both the need and the legitimacy of an ongoing or comparative evaluation by state authorities of how much or how well a citizen performs as a citizen.[18] The very act of subjecting a subsisting citizenship to this kind of normative scrutiny subverts the security that distinguishes legal citizenship from other statuses that define the relationship between state and individual.

The history of banishment generates only cautionary tales about the inevitably arbitrary and prejudicial abuse of a discretionary power to identify the 'bad' citizen for purposes of relegating him or her to the non-status of non-citizen. The violence of rupturing the link between citizens and state is not negated by possession of citizenship status in another polity, if one conceives of the relationship (whatever its intensity, depth, etc.) between a state and a citizen as singular and unique. On this view, citizenship revocation inflicts an intrinsically grave harm that is separate from (though exacerbated by) the harm of statelessness.[19]

I leave to one side an account of the myriad procedural and substantive deficiencies of the UK and Canadian denationalisation regimes that make them ripe for legal challenge. Nor do I dwell here on the dubious practical value of denationalisation in preventing terrorism or protecting national security. Suffice to say that if the aim of citizenship revocation is deterrence, there is no evidence that stripping citizenship will deter a potential terrorist any more or better than the prospect of a criminal conviction and lengthy imprisonment or, for that matter, the risk of blowing oneself up, getting killed or executed, or being detained indefinitely, rendered, or tortured. To the extent that exile supposedly makes a country more secure by removing dangerous people, the justification knows no limits: it is not obvious why Canadians or Britons would not also be made safer by exiling all citizens who commit violent offences. From the other side, expelling convicted or alleged terrorists is an oddly parochial response that transfers rather than reduces risk. Depending on the destination country, deportation may actually make it easier for the individual to engage in activities that pose a threat to global security.[20]

And, finally, the sheer absurdity of banishment as a response to the terrorist *qua* global outlaw is best illustrated by speculating on what would happen if all states behaved like the UK and Canada: Imagine a dual UK-Canada citizen who is convicted of a terrorism offence in the UK. Since terrorism is a global menace, Canada can treat a terrorism conviction in the UK as proof of being a bad Canadian citizen. Both Canada and the UK can lawfully denationalise him. But both states are also

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17 Nottebohm (Liechtenstein v. Guatemala), ICJ 4 (1955) at 23.

18 This does not preclude an argument that the depth and duration of a resident non-citizen's relationship to a state could and should generate an entitlement to remain and to be put on a path to citizenship. See, e.g. Joseph Carens, The Ethics of Immigration (Oxford: OUP 2013).

19 For a similar argument, see Rayner Thwaites, supra note 9.

20 Audrey Macklin, "Borderline Security", in R.Daniels et al. (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: U of T Press, 2001), 383-405; "Still Stuck at the Border", in Craig Forcese and François Crépeau, eds., *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012), 261-306.

somewhat constrained in law not to create statelessness, and both want and need to find another state to admit the expelled person. And the only country that has a legal obligation to do is a state of nationality. So, now it becomes a race between Canada and the UK to see which country can strip citizenship first. To the loser goes the citizen.

Modern exile, as imagined under UK and Canadian law, is erected upon unsustainable and incoherent propositions about the nature of legal citizenship. If citizenship is irrevocable only where withdrawal causes statelessness, then citizenship is a right for mono-citizens but a privilege for dual or multiple citizens. Legal citizenship can be contingent on normative criteria for one state if and only if it is not similarly contingent for another state. State A can deprive a national of citizenship and banish him because he is a bad citizen. But State A can do so lawfully if and only if State B is compelled to admit the individual simply because he is a citizen of State B, irrespective of whether he is a good or bad citizen of State B. One state's authority to deem the bad citizen a non-citizen presupposes another state lacking that same authority.

To contend that punitive denationalisation in the twenty-first century is an illegitimate and futile exercise of sovereign power does not refute or deny that social solidarity, belonging and allegiance have a place in conceptions of citizenship and deserve to be promoted. It is rather that these goals will not and cannot be advanced by citizenship revocation. Nor will citizenship revocation make any state, or the global community, more secure. Citizenship revocation only enhances the discretionary and arbitrary power of the executive, at the expense of all citizens, and of citizenship itself. Banishment deserves to be banished again. Permanently.

Terrorist expatriation: All show, no byte, no future

Peter Spiro*

I agree with the bottom line of Audrey Macklin's excellent kick-off for the forum. New expatriation measures adopted by the United Kingdom and Canada are ill-advised and possibly unlawful. The UK and Canada moves make for a kind of trendlet, and other states (even human rights-pure Norway) are considering similar measures as the "foreign fighter" phenomenon captures global attention. Denationalisation of terror suspects clearly merits the attention of scholars and activists; after decades of disuse, states are now stepping back into the practice of forced expatriation. Macklin sets the scene with a primer on recent developments and a powerful critique of the UK and Canadian measures.

But I would get to the destination along another path. I see denationalisation as anachronistic and toothless in the face of diminished conceptions of citizenship as an institution and the changed locations of allegiance. The expatriation measures are empty gestures, a kind of counter-terror bravado to make up for the deficiency of more important material responses. Government officials must be seen to be doing something, and so they may (for appearances sake) throw expatriation into the counter-terror toolbox. But expatriation won't advance the counter-terror agenda in any real way. Given the lack of policy advantage, I expect that the human rights critique will suffice to suppress the broad use of denationalisation in this context.

In theory, expatriation could help shore up the boundaries of membership and national solidarity. Terrorist expatriation might be consistent with the historical practice of terminating nationality upon formal transfer of allegiance. This was once the near-universal practice; original nationality was lost automatically upon naturalisation in another state. Military and government service in another country would also typically result in expatriation, even when the other state was a friendly one. This practice helped police the boundaries of community. One could be a member of one or another polity, but not both. States that continue to prohibit dual citizenship still operate on this principle. A Japanese citizen who naturalises as an American, for example, automatically forfeits her Japanese nationality.

One might situate security-related expatriation in this tradition. To the extent that fighting for the Islamic State represents a shift of loyalty incompatible with loyalty to the United Kingdom, expatriation merely reflects social conditions on the ground. Membership in the United Kingdom would be exclusive of membership in forces associated with the Islamic State. Expatriation clarifies the "us" and "them" in a way that clarifies social solidarities and the special obligations that come with co-nationality. (Ayelet Shachar makes a similar argument with respect to "hollow" citizens acquiring citizenship on the attenuated basis of descent.)

But this logic doesn't map out onto denationalisation in the current security context. There is no citizenship in the Islamic State (ISIL not being a state, the label notwithstanding). One cannot naturalise or be born into ISIL; there is no formal evidence of loyalty or membership. Expatriation doesn't work without the symmetry. To the extent that only dual nationals are subject to security-related expatriation, the criterion no longer makes any sense: the other citizenship is random, unrelated to the motivation for expatriation. (As Macklin points out, it could lead to a strange dynamic in which states allied against groups such as ISIL could race to expatriate foreign fighters in an effort to offshore putative threats.) The condition then arbitrarily discriminates against individuals on the basis of their dual-citizen status.

That takes care of the only normatively tenable rationale for the expatriation measures. The punitive basis is more easily dispatched. Punitive uses of expatriation have long been condemned. As early as 1958, the U.S. Supreme Court was able to observe that "[t]he civilized nations of the world

* Temple University.

are in virtual unanimity that statelessness is not to be imposed as punishment for crime." The Canadian measure marks a return to the practice of exile. As Macklin argues, non-application to cases in which statelessness would result does not save it from this rap. A person may well feel a deep social attachment to one country while holding alternative nationalities (which themselves may be nominal). The denationalisation of a Canadian citizen long-resident in Canada will feel like banishment even as he holds another nationality, especially to the extent the latter is attenuated.

Finally, the protective rationale for terrorist expatriation makes little sense as a practical matter. The "foreign fighter" problem is largely framed as a problem of return. Citizens radicalised by their experience in Iraq and Syria with brutal ISIL forces will return to their home countries in the West to undertake terror attacks. It's a potent narrative of weaponised citizens. Without citizenship, these individuals would have no right of re-entry, thus defusing their utility as ISIL operatives.

Or so our politicians would have it. In practice, denationalisation adds little counter-terror value. You can't take away someone's citizenship for being associated with ISIL before you know that he's associated with ISIL. But once the security apparatus is aware of the connection, it will have other, standard counter-terror tools to protect against the threat. There will be the possibility of criminal prosecution in many states on material support charges, with incarceration on conviction. (Canada's punitive scheme can hardly sustain even the pretence of a protective rationale.) Short of prosecution, watch lists and well-practiced surveillance techniques should prevent returning foreign fighters from undertaking terror attacks. Passport revocation and travel bans will help prevent citizens from becoming foreign fighters in the first place.

So terrorist expatriation advances counter-terror efforts not at all. It supplies yet another example of security-related theatre, a feel-good move that will be popular with some voters. (The features are shared with some Western responses to the vastly exaggerated Ebola threat, where politicians must be seen to respond dramatically even if dramatic moves make no sense in policy terms.) Terrorist expatriation is unlikely to have staying power against a powerful human rights critique. The UK and Canadian measures may well fall to legal challenges, domestic or international. Even if they are sustained in court, they are unlikely to be put to broad use. Few other states will follow suit (it is interesting that terrorist expatriation has almost no political traction in the United States, its aggressive counter-terror posturing notwithstanding). The failure will evidence an emerging norm against involuntary expatriation. If states can't make expatriation stick here, they won't be able to make it stick anywhere.

Should those who attack the nation have an absolute right to remain its citizens?

Peter H. Schuck*

Audrey Macklin's call for the banishment of banishment is eloquent and persuasive on many points. She is surely right that particular denationalisation regimes may suffer from a variety of fatal defects. The standards for revocation may be too vague to constrain official discretion or to provide adequate notice to the citizen concerning what conduct will risk revocation. Most important, the grounds for revocation must be limited to only the most extreme, unmitigated attacks on the nation's security, attacks that are consistent only with a desire to bring the nation to ruin. This conduct must be scrupulously-defined and highly specific conduct; mere malignant thoughts will not suffice. Revocation cannot be permitted to lead to statelessness and thus a loss of the "meta-right" (as Macklin puts it) to have rights, especially the right to the territorial presence that in turn confers a broad panoply of liberal rights. The procedures for revocation must be robust in all respects, including of course the right to be actually or virtually present rather than having to contest the government's action from exile. The government's burden and standard of proof must be exceedingly demanding, perhaps even the proof beyond a reasonable doubt required for criminal convictions.

But even these extraordinarily demanding and rare preconditions are irrelevant to Macklin; she is utterly categorical in her rejection of the very notion of denationalisation. She would preclude denationalisation even if these (and other) strict conditions were met; indeed, no protections for the individual citizen – or for the threatened nation – would suffice. Here is where we disagree. I see no reason in logic or justice why a state should be powerless to protect itself and its people from imminent, existential threats (suitably defined) from an individual who has launched a dangerous attack (suitably defined and rigorously proved) on itself and its people. And I see no reason in logic or justice why that state cannot defend itself and its people against such an attack by, among other things, severing the attacker's connection to a state with which he is manifestly at war, thereby making it much more difficult for him to succeed in that war. Should the individual's interest in maintaining that connection, which (by my definition, embedded in the preconditions listed above) can only be tactical and cynical, utterly and categorically outweigh the nation's interest in protecting those for whom it bears a sacred trust? This question, I submit, answers itself – and the answer is grounded not merely in a utilitarian balancing but in a deontological principle: the nation's fundamental duty to protect its people.

I also have some reservations about a few of Macklin's other, less fundamental arguments. First, she claims that denationalisation weakens citizenship by eliminating its security and thus rendering it a form of mere legal residence. I don't understand her logic. Am I less secure in my citizenship if I know that the state may execute me or imprison me for life if I murder a fellow citizen? I suppose that I am less secure, but that insecurity is warranted and I can easily avoid it. Moreover, there is a sense in which denationalising one who has demonstrably satisfied the exceedingly demanding conditions for revocation that I have specified does, contrary to Macklin's claim, strengthen citizenship by reaffirming the conditions on which it is based.

Second, she categorically condemns revocation in part because it categorically denies the individual the opportunity to rehabilitate himself. We should and ordinarily do protect a wrongdoer's opportunity to rehabilitate himself, but there are many situations in which we don't. An employer who catches an employee embezzling from the company may fire him without giving him an opportunity to rehabilitate himself there; if he wishes to rehabilitate himself, he will have to do so elsewhere, on his own time. When we sentence a murderer to life imprisonment without parole, we are denying him the right to regain his freedom through rehabilitation.

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Third, it is true that denationalising a dual citizen would still leave him with a state while denationalising a mono citizen would not. But so long as we do not allow revocations that would render one stateless, this particular inequality between categories of citizens is hardly one that should trouble us – any more than we should be troubled that a dual citizen has an additional passport and can vote in an additional polity.

Finally, Macklin states that there is no evidence that denationalisation will deter a would-be terrorist if other, more conventional counter-terrorism measures fail to do so. I agree, but so what? Deterrence may be an important reason to punish wrongdoers but it is by no means the only reason to do so. If we are justified in punishing them, that justification is not nullified by a claim that the punishment will not deter others. And if more conventional measures are indeed effective in eliminating threats, they should of course be our first and perhaps final resort. In such situations, denationalisation may well be a superfluous, unnecessary remedy. But this is a question of policy and prudence, not moral principle.

Macklin is certainly right to worry about the possible abuses of denationalisation. The history of political banishment is hardly reassuring on this point. But a liberal constitutional regime can control such abuses by scrupulously controlling the state's exercise of this power through a variety of familiar institutions and practices. These include a careful definition and exacting limitation of the grounds for revocation; demanding procedural and evidentiary requirements before such a power can be exercised; and an independent judiciary accustomed to challenging state power in the name of protecting individual rights. We have entrusted our precious liberties to the faithful working through of these institutions and practices. Some of these liberties are even more precious than our right to retain our citizenship when we have knowingly acted in horrendous ways that make it justifiable, under the safeguards I have described, for the state to declare that status forfeited.

Terrorists repudiate their own citizenship

Christian Joppke*

The recent trend to strip international terrorists of their citizenship raises general questions about the changing nature of terror and of citizenship. Let us start with "terror". In the era of Marxist-inspired violence against the state (or rather "capitalism", of which the state was suspected to be merely a servant), terror was a purely domestic affair, committed by the flower children of the elite, particularly its most educated and morally minded. No one would have fathomed stripping an Ulrike Meinhof or Andreas Baader, leaders of the 1970s' German Red Army Faction (RAF), of their German citizenship. The current "return of banishment" is a response to an altogether different type of terror, one that transcends borders and is committed by people who explicitly posit themselves outside the political community of the nation-state—allegiance to the community of believers (ummah) cancels out the secular community of citizens, it is even deliberately mobilised against the latter. Only notice the cynical ritual of the Islamic State`s henchmen to have a fellow-national do the mediatised head-chopping. By the same token, RAF limited its murderous acts to high-ranking representatives of the "system" (of which ordinary citizens were seen as merely victims who thus stood to be recruited as fellow-fighters). Al Qaeda and its Islamic State sequel seek death for ordinary citizens, whose humanity is denied through being demoted to "unbelievers". Paul Kahn took the ubiquitous threat of terror to be today`s ultimate moment of citizenship, the "moment of conscription".[1]

Indeed, Islamic terror is meant to be "war", while RAF aspired to "revolution" – two very different things, with obvious implications for citizenship in the former but not the latter. That terror against citizens should lead to reconsidering the citizen status of its culprits, who proved the ties to their state of citizenship to be at best "tactical and cynical", as Peter Schuck writes in his contribution, seems logical. One is therefore astounded about the measured response by Western states, which have mostly respected the international norm of avoiding statelessness (only lately, in response to the unspeakable atrocities committed by the fighters of the Islamic State, have there been cracks in this commitment, most notably in Britain). But academics cry out that "banishment weakens citizenship", as Audrey Macklin does. They draw an idyllic and reality-resistant picture of "singular and unique" ties between terrorists and the citizenship they despise; "intrinsically grave harm" is said to be inflicted here, separate even from "the harm of statelessness" (ibid.). Evidently, more sympathy is invested on the culprits than on their victims.

Make no mistake. One should hold no illusion about populist, spin-doctored politicians, from Britain to America, Norway to Italy, who hide their chronic incapacity to lead in our contemporary "audience democracies" behind the sable-rattling "security" and "War on Terror" rhetoric that the people wish to hear.[2] Macklin has a point when she finds that under the guise of "security" only "the discretionary and arbitrary power of the executive" is increased. Particularly the recent experience in Britain under Tory Home Minister Theresa May, with a rather capricious practice of citizenship stripping for the loosely defined reason of being "conducive to the public good", with sometimes lethal and conspiratorially concocted consequences for the targeted individuals, lends itself to this interpretation. And Peter Spiro is on target that conducting the fight against terrorism on the citizenship front is "empty gestures" and not likely to have much effect – though his proposal of "passport revocation and travel bans" in lieu of denationalisation reads eerily off the mark after the recent tragedy of a would-be jihadist, who had been grounded by the Canadian government exactly in these terms, turning his rage about the passport denial against an innocent guardsman in Ottawa.

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1 Kahn, Paul. 2011. Political Theology. Ithaca, N.Y.: Cornell University Press, p. 138.

2 Manin, Bernard. 1997. The Principles of Representative Government. New York: Cambridge University Press, Chapter 6.

The practical question of effectiveness is secondary to the principled question whether citizenship for proven (naturally not just suspected or potential) terrorists who conduct war (in the literal sense) against Western states and their citizens should be unassailable. At heart, the issue is one of "loyalty and allegiance", as the Canadian Immigration Minister, Chris Alexander, defended the 2014 Strengthening Canadian Citizenship Act in parliament. This act, representative of similar bills currently being considered in a number of European states, Australia, and the United States, allows the stripping of citizenship in the cases of treason, spying, taking up arms against the Canadian Forces, and terrorism, even if the latter is committed outside Canada and sentenced by foreign courts, should the action in question constitute a terrorism offence also under Canadian law. The expanded geographic scope for terrorism, which stirred controversy, was clearly dictated by heightened security concerns. But it also recognises the global nature of the new terror and its affront to the secular state and citizenship at large, wherever it may occur; one might read it as a comity of nations response to a global challenge. In any case, it is not just bizarre but self-destructive to measure the "strength" of citizenship in terrorists' unencumbered possibility to make tactical use of it in their war against the godless state and its unbelieving median citizen.

For calibrating banishment, next to taking into account the changing nature of terror, one also needs to recognise the changing nature of citizenship in a globalising world. Whoever has reflected for a second on the colossal injustice inflicted on the vast majority of mankind by being born into the "wrong" kind of state that cannot guarantee its "citizens" physical safety and the elementary means of survival[3], must be irritated to see citizenship depicted as something that an individual should never be able to lose, however randomly it had been assigned to her in the first place, and however much a particular individual has done to undermine or even destroy this very citizenship (and the state that guarantees it). Audrey Macklin sees the danger of banishment in "making legal citizenship contingent on performance". "Performance" strikes me as a rather vague and anodyne term for the behavior in question. It is one thing to make citizenship acquisition contingent on virtuous behaviour, which could never be exacted on born citizens (as Britain entertained for a while in its "probationary" or "earned" citizenship scheme that was never implemented); it is quite another to make a declared war against the secular state and its citizens a ground for renunciation. As much as one should eschew virtuous citizenship from a liberal perspective, one should welcome, even require the withdrawing of citizenship from someone to whom it is at best a tactical weapon.

It may warm the heart to elevate citizenship to a "right to have rights", enunciated by US Supreme Court Chief Justice Earl Warren in a different time and context (voting in foreign elections[4] and desertion during World II[5], in both cases without any third-party harm inflicted and at best a vague and constructed violation of allegiance). The gospel of citizenship stripping as "cruel punishment", pronounced in Trop v. Dulles (1958), needs reconsideration in the age of global terror. And the accompanying formula of citizenship as a "right to have rights" obscures that persons without states or citizenship are no longer the "scum of the earth" they may have been in the late 1940s, when Hannah Arendt wrote the Origins of Totalitarianism. But most importantly, the formula "rights to have rights" dodges the fact that, indeed, citizenship in a globalising world is increasingly "privilege" and "contract". It is a privilege if one considers the mentioned exclusion from a lucrative OECD-state citizenship of most of mankind (that has to make do with less than US$ 2 per day). And it is a contract by definition for the ever growing number of immigrants who are not born with it but seek it out for their own benefit. In the post-feudal world, most states allow the possibility to renounce one`s citizenship—this was the point of departure of "democratic" America from "monarchical" Britain. But then it is not outlandish (or illiberal) to concede the converse capacity to states to rid themselves even

3 See Shachar, Ayelet. 2009. The Birthright Lottery. Cambridge, Mass.: Harvard University Press.

4 Perez v. Brownell, 356 U.S. 54 (1958)

5 Trop v. Dulles, 356 U.S. 86 (1958)

of born citizens who have despised or patently abused their citizenship through their actions (and why stop at the threshold of statelessness?).

Macklin claims that banishment is "both superfluous and anachronistic" because states now have "criminal justice systems" at their disposal to "rehabilitate and reintegrate wrongdoers within the state". This claim is misleading and paternalistic. International terrorists are not criminals but warriors—they don`t want to be "reintegrated". The liberal state should acknowledge their claim, eye to eye, by taking away from them what they have factually renounced and even wish to destroy. Canadian minister Chris Alexander is right: "They (terrorists) will have, in effect, withdrawn their allegiance to Canada by their very actions." Peter Spiro lawyerly ups the ante by arguing that there could not be a "shift of loyalty" on the part of Islamic terrorists because "there is no citizenship in the Islamic State". Does he want to wait until they have acquired a seat in the United Nations?

It's not about their citizenship, it's about ours

Vesco Paskalev*

The very passion and fury pouring from Christian Joppke's contribution should prompt both the lawyer and the political philosopher that he is wrong. I too am outraged by what ISIS fighters are doing, but it is well known that the function of constitutional rights, and of the constitutions themselves, is precisely to assure that the legislator is not driven by the passion of the day. One decade after 9/11 we know that the actions taken both by the President and the Congress of the US, based on the rationale that it is a new world that we have woken up into, were not all reasonable, to put it mildly. So may be today's rush to strip terrorist suspects of their citizenship. When watching the daily news on TV, one is easily tempted to think that we are living in extraordinarily dangerous times, which warrant a return to what the US Supreme Court considered to be 'cruel punishment' half a century ago. Yet as a matter of statistics, and despite our contrary impressions, violence of all kinds in the world is actually declining.[1] On the other hand, the capacity of law enforcement agencies for surveillance and control, especially in the OECD countries, has increased dramatically, so the return to practices which have long been abandoned is difficult to justify. This is not to say that that citizenship is a sacred cow and any return to abandoned practices is excluded by some historic laws of human progress. Nothing can be further from the truth. But it does follow that the proponents of banishment must provide a more subtle justification than we have seen so far.

Joppke has a point when distinguishing the old school revolutionaries from the contemporary jihadists, who conceive of themselves as members of the global ummah, and not of any state. (Do we know that for sure? ISIS aims to create an Islamic state after all). He also has a point that waging war against a country is a good reason to strip the warrior of the citizenship of that country. I can accept even stretching this argument to apply to all those who take up arms against any allies of that country, or even to those who have taken arms against the international system of states. This would bring me already quite close to the position of the 'deprivationists'.

What I find difficult to accept is the unquestioned assumption that this gesture would serve any of the goals Joppke, and the politicians favouring banishment, may have. If the jihadists were as cosmopolitan as he takes them to be, deprivation would not have any meaning, neither for the actual fighters, nor for any like-minded followers. It might be the case that taking their passport will have the practical effect of preventing them from travelling to Syria or back, but as a person who is genuinely outraged by their deeds, I would rather see them locked up in prison rather than left at large in a legal limbo in the Middle East out of all places. For Joppke the practical side is only of secondary concern, but I am afraid his theoretical argument is self-defeating.

Now, if we accept that the jihadists just do not care if they are deprived of their western citizenships, let us consider whether this would still matter for anyone else. On the one hand, there are the 'normal' citizens of the same country who may wish to see the extremists publicly excommunicated. This is a legitimate concern. However, it is in no way different from the desire of many law-abiding citizens to see murderers and rapists sent to the electric chair. So the usual objections to the latter punishments apply here too. More importantly, while there is some commensurability between a murder and a death sentence, the very gravity of the offences of the jihadists make citizenship deprivation superfluous. Ironically, not the cruelty of citizenship deprivation, but its softness make it appear quite inappropriate for the case of terrorists. If we take into account also the practical difficulties arising in the prosecution of a foreigner, on balance it might be better to keep him as a citizen. On the other hand, the possibility or impossibility of revocation defines

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1 Pinker, S. (2011). The Better Angels of our Nature. New York: Viking.

and redefines the meaning of the concept of citizenship itself – of our citizenship, not of theirs. That is why many academics, whose professional duty is to care for precisely such nuance, are so uneasy about the recent trend. I would be glad if this concern remains confined to the ivory towers of the academia, but I suspect that the conditionality of citizenship is more than a theoretical concern for those citizens who are not white, Anglo-Saxon and Christian and have only recently arrived from the wrong side of the OECD border.

One may argue, as Peter Schuck does, for deprivation administered under narrowly circumscribed conditions. Indeed, due process can alleviate some of the anxieties the conditionality of citizenship would create, but he does not provide much of a justification for this conditionality in the first place. He also relies on the intuitive, yet questionable assumption that citizenship deprivation serves to protect the state and its people. But all grounds for deprivation he suggests already constitute a serious crime, and if the perpetrator must be convicted to be denationalised as he suggests, then again, what difference would it make if he is a citizen or not? If deprivation were administered properly – for grave crimes and with due process, it becomes redundant.

Beyond these conceptual concerns, and paying due consideration to the all too present terrorist threats, I want the Islamic State bombed out of existence, and I want all jihadists punished for what they do. But as a citizen I also want my tax money spent on police to put the bad apples in jail, not on border patrols to keep them out.

You can't lose what you haven't got: citizenship acquisition and loss in Africa

Bronwen Manby*

The heading for this discussion makes a person focused on sub-Saharan Africa scratch her head somewhat. Which 'new' denationalisation policies are we talking about? In Africa, we have continued to see the same old denationalisation policies that have been in place since the 1960s. The context of national security has changed in some countries, especially the threat of 21st century terrorism methods in places such as Kenya or Nigeria, but the methods used by the governments in response have not changed

The legal provisions

If we start from a survey of the laws, most African countries allow for deprivation of nationality acquired by naturalisation, some of them on quite vague and arbitrary grounds. The former British colonies borrow language from the British precedents and provide for deprivation on the grounds of "disloyalty" or the "public good"; while the francophone countries talk about behaviour "incompatible with the status of a national" or "prejudicial to the interests of the country". However, more than half of Africa's 54 states forbid deprivation of nationality from a national from birth (of origin, in the civil law terminology), whether or not the person would become stateless.[1] And although a large number of the remaining countries have a provision framed along the lines provided in the 1961 Convention on the Reduction of Statelessness for a person who works for a foreign state in defiance of an express prohibition to lose their nationality,[2] only a small handful provide for deprivation of a birthright citizen in case of a crime against the state — Egypt, Eritrea and Mali.[3]

None of the sub-Saharan countries come close to the extremes of Egypt, where citizenship can be deprived from anyone (citizen from birth or by naturalisation) if, among other things, "at any time he has been qualified as Zionist".[4]

On the positive side, the South African and Ethiopian constitutions provide blanket prohibitions on deprivation of nationality, whether from birth or naturalised (though South Africa then goes on to violate this prohibition in its legislation).[5] Several constitutions and laws create serious due process hurdles for governments seeking to revoke citizenship. In Kenya for example, the 2010 constitution requires a naturalised citizen (citizenship by birth cannot be revoked) to have been actually convicted of a serious crime, including treason;[6] less specifically, Burundi, Malawi, and Rwanda have

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1 Botswana, Burkina Faso, Burundi, Chad, Comoros, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Mauritius, Namibia, Nigeria, Rwanda, Seychelles, Somalia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. In the case of Botswana, Ethiopia, Libya, Tanzania and Zambia, dual nationality is not permitted, and voluntary acquisition of another nationality results in automatic loss. Lists from Bronwen Manby, *Citizenship Laws in Africa: A Comparative Study*, Open Society Foundations, 2nd edition 2010; updated information for a forthcoming 3rd edition. On the number of states in Africa: Morocco is not a member of the African Union, while the Sahrawi Arab Democratic Republic is: if both are counted, there are 55 states.

2 Angola, Cameroon, CAR, Congo Republic, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Guinea, Guinea Bissau, Liberia, Madagascar, Morocco, Mozambique, Sao Tomé & Príncipe, South Sudan, Sudan, Togo and Tunisia.

3 Egypt Law No. 26 of 1975 Concerning Egyptian Nationality, Article 16(7); Eritrea Nationality Proclamation 1992 Article 8; Mali Nationality Code 1962, Article 43 (amended 1995).

4 Law No. 26 of 1975 Concerning Egyptian Nationality, Article 16(7), translation from UNHCR website, http://www.refworld.org/docid/3ae6b4e218.html. Libya had similar rules until they were changed in 2010.

5 South Africa Constitution 1996, Article 20; Ethiopia Constitution 1993, Article 33.

6 Kenya Constitution, 2010, Section 17.

constitutional provisions forbidding arbitrary deprivation of nationality.[7] Meanwhile, Gambia, Ghana, Liberia and Rwanda all provide that deprivation can only be done by a court, on the government's application;[8] and a majority, though not all, others provide for judicial review of administrative decisions to deprive.[9] A few countries provide for protection against statelessness in deprivation cases: just Lesotho, Mauritius, and Zimbabwe (since 2013) provide in principle for protection from statelessness in all cases where nationality is revoked by act of the government; and Namibia, Rwanda, Senegal and South Africa provide partial protection, allowing statelessness to result in some circumstances.[10]

On the negative side, Botswana, Lesotho, Malawi, Mauritius, Seychelles, Tanzania, Zambia and Zimbabwe — notably, all with a British legal inheritance — explicitly state in their legislation that the decision of the minister on any matter under the nationality law cannot be reviewed in court.[11] These are all countries which do not allow for deprivation of birthright citizenship (though some provide for loss in case of acquisition of another nationality); but it's questionable what the protection against statelessness in deprivation cases provided by Mauritius means, if the decision of the minister cannot be challenged. In Swaziland, where a certificate of nationality "shall" be issued by the minister to a person who is qualified to be a citizen, it is also provided that the minister "may revoke" a certificate and no grounds are specified.[12] Namibia allows deprivation of nationality on the grounds that a person was already deprived in another country, increasing the likelihood of rendering them stateless.[13]

In 2013, the Seychelles inserted a new article to its citizenship law expanding the grounds for deprivation of citizenship if the minister "is satisfied" that the person has been involved in terrorism, piracy, drugs offences, treason, and other offences, or has acted with disloyalty.[14] In 2010, the South African Citizenship Act was amended, providing for automatic loss of citizenship by a naturalised citizen "if he or she engages, under the flag of another country, in a war that the Republic does not support", leaving lawyers wondering how you would know whether or not the Republic "supported" a particular war (and would it matter which side the person was on?).[15]

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7 Burundi Constitution 2005, Article 34; Malawi Constitution 1994 (as amended to 1998), Article 47 ; Rwanda Constitution 2003, Article 7.

8 Gambia Constitution 1996, article 13; Ghana Constitution 1992 Article 9, Citizenship Act 2000, Article 18; Liberia Aliens and Nationality Law 1973, Articles 21.53; Rwanda Nationality Law No.30 of 2008, Article 20.

9 Most of the civil law countries provide quite detailed procedures for nationality litigation through the courts; the Commonwealth countries tend to have weaker protections, and do not have the same tradition of providing procedures in the substantive law itself, but South Africa for example, provides for all decisions of the minister to be reviewable by the courts, as do Gambia and Kenya.

10 Lesotho Constitution 1993, as amended to 2001, Article 42 (however, this provision is not respected in the Citizenship Order 1971 Article 23); Mauritius Citizenship Act 1968, as amended to 1995, Article 11(3)(b); Namibia Constitution 1990, as amended to 2010, Article 9(4); Rwanda Nationality Law 2003, Article 19; Senegal Nationality Code 1961 as amended 2013, Article 21; South African Citizenship Act 1996, as amended 2013, Article 8; Zimbabwe Constitution 2013, Article 39(3) (but this is not respected in the Citizenship Act, 1984, as amended to 2003, Article 11(3), which provides in principle prohibition of rendering a person stateless, but allows the minister to override if it is in the "public good" to do so).

11 Botswana Citizenship Act 1998, Article 22; Lesotho Citizenship Order 1971, Article 26; Malawi Citizenship Act 1966, Article 29; Mauritius Citizenship Act 1968 Article 17; Seychelles Citizenship Act 1994, Article 14; Tanzania Citizenship Act 1995 23; Zambia Citizenship Act Article 9; Zimbabwe Citizenship Act 1984 Article 16.

12 Swaziland Citizenship and Immigration Act 1992, Article 20.

13 Namibia Citizenship Act 1990, Article 9(3)(e).

14 Section 11A of the Citizenship Act, No. 18 of 1994, inserted by Act 11 of 2013.

15 South African Citizenship Act 1996, as amended 2013, Article 6(3). This amendment came into force on 1 January 2013. The 1996 Constitution provides in Article 20 that "No citizen may be deprived of citizenship." It is possible that the phrasing of the revised Article 6(3) is designed to avoid this prohibition by providing for automatic loss. See further *Submission on the South African Citizenship Amendment Bill, B 17 – 2010*, Citizenship Rights in Africa Initiative, 6 August 2010.

The practice

But this review of deprivation provisions has a slightly unreal feel. These procedures are hardly used, so far as one can tell. Only South Africa publishes any statistics – or at least it used to do so – revealing that at least 17 people have been deprived of citizenship since 2001-02 (despite the constitutional ban on deprivation), though no details are given. Countries such as Kenya and Nigeria, both facing well-publicised and serious security threats from the Al-Qaeda-affiliated Al-Shabaab and Boko Haram are not known to have deprived any individual of citizenship through the formal procedures of the law on deprivation.[16]

The legal provisions on deprivation of citizenship are, in fact, more or less irrelevant in countries where (a) as described above, citizens from birth cannot be deprived of citizenship under law except in the rather rare circumstance of working for another state despite a formal request not to do so; (b) naturalisation is very difficult to obtain; and (c) the government has easily accessible other means of achieving the same result in relation to (people who believed they were) birthright citizens, obviating any need to amend the law on withdrawal of nationality.

As regards (b), statistics on naturalisation are hard to come by, but it seems that only a handful of people a year may be naturalised in most countries – even in Nigeria, with more than 150 million people, only around a hundred people acquire nationality by naturalisation or marriage annually – and those who are naturalised are mostly non-Africans operating in the formal economy, with all the panoply of lawyers and documents to support their claim.[17] So few people are involved, and the procedures for obtaining naturalisation are so highly discretionary, that it seems unlikely that anyone who has the slightest possibility of becoming a threat to the security of the state could pass that barrier — and therefore be at risk of subsequent deprivation. It's not impossible of course; but very unlikely. South Africa has had much more accessible naturalisation procedures, rendering it perhaps more vulnerable in this regard; but the numbers have dropped dramatically in recent years, without explanation.

Therefore, (c) comes into play. The methods traditionally used in Africa to "denationalise" a person are simply to deny that he or she ever had nationality to start off with; to argue that the nationality documentation previously held was issued in error, or to fail to issue or renew a document providing proof of nationality (not even requiring an allegation of fraud). The key amendments to nationality laws in Africa have not been to increase government powers to deprive, but to restrict access to nationality based on birth and residence and to exploit any ambiguity in the rules applied on succession of states at independence.[18] These are the methods used against some high profile individuals: Kenneth Kaunda of Zambia and Alassane Ouattara of Côte d'Ivoire most famously; but also John Modise of Botswana, who found himself no longer considered a national by birth when he set up a political party in order to run for president. These cases reached the African Commission on Human and Peoples' Rights, but there are many others litigated only at national level involving politicians, journalists or activists.

UNHCR's clear guidance is that a retrospective finding that a person was not a national and was issued nationality documents in error is just as subject to rules on arbitrariness as any procedure under formal provisions on deprivation.[19] However, under national law, why bother with deprivation

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[16] Email correspondence, November 2014, with Chidi Odinkalu of the Nigeria National Human Rights Commission and Adam Hussein Adam of the Open Society Initiative for East Africa, both following these issues closely.

[17] Bronwen Manby, Nationality, Migration and Statelessness in West Africa, UNHCR and IOM, forthcoming, 2015.

[18] Bronwen Manby, "Trends in citizenship law and politics in Africa since the colonial era", chapter in Engin F. Isin, and Peter Nyers (eds.), *Handbook of Global Citizenship Studies*, Routledge, 2014.

[19] Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), UNHCR, March 2014, especially paragraph 9.

proceedings if you can manage matters so much more easily by other methods? And this applies especially when whole categories of people are seen as problematic, or potentially so.

It is, in fact, not the individual difficult cases that raise the greatest concerns in the African context, but the tendency to attribute collective responsibility to whole groups of citizens when a country is faced with a (real or perceived) security threat – or simply an organised opposition with support from a particular ethnic group. Faced with the challenges of "nation-building" in states created by colonial fiat, the question of who belongs is not necessarily an obvious one to answer. African states have a history of mass expulsions based on ethnic grounds — there is even a style of bag known in Nigeria as a "Ghana Must Go" bag, dating to one such episode in the 1980s when (actual or alleged) Ghanaians had to pack up and leave — and it remains the case that the usual approach is to assert that someone is a non-national, and then expel them.[20] The prevalence of such practices led to the inclusion of a specific provision banning mass expulsions, not found among similar treaties, in the African Charter on Human and Peoples' Rights.[21] Even where those who have been expelled fail to find recognition in their alleged country of origin, they may be unable to reclaim their status in the former country of residence: among those persons of Eritrean origin who were expelled by Ethiopia to Eritrea during the 1998 war between the two countries, a number subsequently became refugees from the highly repressive Eritrean regime. Even in their case, when some applied for reacquisition of Ethiopian nationality, they were reportedly told that they were security risks, so could not get papers.[22]

In Kenya, discriminatory measures in relation to documentation and identity have been sharply stepped up against Kenyan Somalis and coastal Muslims, tarred with the brush of the Westgate Mall siege and other outrages. In addition to a general round up and detention of suspected youth, the issuance of national ID cards has been suspended in the three counties that are located in the former North Eastern Province bordering Somalia (Garissa, Wajir and Mandera Counties, created by the 2010 Constitution), meaning that those without IDs cannot travel out of that zone, and effectively lose the reality of citizenship rights — without the need for the government to undertake any bothersome legal proceedings.[23] In Nigeria, the peculiar features of the country's federal system have led to the possibility of "denationalisation" from a particular part of the country, even though such measures haven't been taken at national level. In the context of the threat from Boko Haram, governors of states in the south-east of the country in 2014 stepped up long-standing discrimination based on the idea of "indigeneity" to adopt controversial measures to register and possibly deport "non-indigenes", leading to an emergency meeting of the National Council of State in July 2014 to condemn these practices (but no action beyond establishing a committee to make recommendations).[24] Ghana's consul-general in Nigeria indeed recently blamed the Boko Haram insurgency on "stateless people" excluded from the benefits of citizenship, and urged efforts to strengthen documentation across the sub-region.[25]

There are the beginnings of recognition that stronger guarantees around the right to a nationality may be part of the solution to some of the security challenges in the continent. The African Commission on Human and Peoples' Rights is working with the AU Commission in Addis Ababa to

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20 See Manby, Struggles for Citizenship in Africa, Chapter 4.

21 Article 12(5) of the African Charter.

22 Amsale Getnet Aberra, "Ethiopians in Limbo: from statelessness to being a refugee in one's own country", ECADF Ethiopian News and Opinions, 14 February 2014.

23 Email communication, Adam Hussein Adam, OSIEA, November 2014.

24 "Council of State moves to stop citizens' registration, deportation" *The Citizen*, Abuja, 1 August 2014. On the history of discrimination in relation to nationality in Kenya, see Manby, *Struggles for Citizenship in Africa*, Chapter 6; on Nigeria and "indigeneity", see Chapter 5.

25 "Envoy Blames Insecurity in Nigeria, Others on Stateless People", *Premium Times*, 29 April 2014.

draft a protocol to the African Charter on the right to a nationality.[26] The African Committee of Experts on the Rights and Welfare of the Child recently adopted a General Comment on the rights of children to a name, birth registration and a nationality.[27] In parallel, there is a major push to improve documentation through the initiation or strengthening of requirements to hold a national identity card, for civil registration in general, and for the use of biometric data in these documents. But this push on information technology carries significant risks that governments will seek only to police the boundaries of their systems, excluding anyone of "doubtful" nationality, while failing to reform legal provisions and administrative practices that restrict access to nationality for those who constitute no security threat at all. To date, the international agencies responsible on these issues — especially UNHCR, UNICEF and IOM — are also failing to join up the dots with a coherent approach on nationality and documentation in their interventions with national governments. Given the very real security threats they face, it remains an open question whether governments such as Nigeria's and Kenya's will commit to more secure rights to citizenship, rather than only more secure documentation.

[26] See ACHPR Resolution 234 on the Right to Nationality, 53rd Ordinary Session, 9- 23 April 2013, Banjul, The Gambia; Resolution 277 on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, 55th Ordinary Session, 28 April to 12 May 2014, Luanda, Angola.

[27] Available at the Committee of Experts website: http://acerwc.org/the-committees-work/general-comments/.

Revocation of citizenship of terrorists: a matter of political expediency

Kay Hailbronner*

Let's be clear: We are not in a dispute about the use of denationalisation policies to get rid of unwanted citizens who do not comply with a code of conduct how to behave as a "good" or "loyal" citizen. Nor are we talking about deprivation or revocation of citizenship on account of race, political opinion, religion, descent etc. There are clear rules of public international law prohibiting discriminatory citizenship policies and none of the policies discussed here call these into question. What we are discussing is the different and by no means absolutely novel issue of revoking the citizenship of persons who have given up or are irrefutably considered as having renounced that basic attachment which distinguishes citizenship from a residence permit. A recent report of de Groot and Vink for the European Commission lists voluntary military service and non-military public service in nine, and eight EU countries respectively as a ground for revocation of citizenship, subject of course to some restrictions (prevention of statelessness) and exceptions.

In around half of the 28 countries included in the study, seriously prejudicial behaviour is considered as a ground for revocation of citizenship. The European Convention on Nationality of 6 November1997 provides for revocation of citizenship for conduct seriously prejudicial to the vital interests of the State party (Art.7 para 1 lit.d). Very similar provisions on revocation are laid down in Art. 8 para 3 of the Convention on the Reduction of Statelessness of 1961.

What is new is the inclusion of a specific type of seriously prejudicial behaviour which is considered as endangering the safety of the population of a state and its security into this catalogue. The actors are not totalitarian or authoritarian regimes but democratic states with well-established institutions to protect human rights and to ensure the rule of law. Not that the democratic character of the states in question would dispense us from closely watching the transfer and exercise of powers to the executive branch, particularly in such a rights-sensitive area as denationalisation policies. Safeguards against arbitrary actions and abuse of power, conditions and procedures must be predominant on the watch list, as Peter Schuck rightly emphasizes. But why should revocation of citizenship of terrorists result inevitably in arbitrary and abusive exercise of power, as Audrey Macklin assumes?

What makes international terrorism so distinctive is not only its criminal and administrative relevance, but also its relevance for discontinuance of that special relationship established by citizenship. In order to answer this question it is not sufficient to conjure up emphatically the uniqueness of the ties between a citizen and a state. It is true that citizenship establishes a special relationship based upon security and stability. Security and stability on the side of the individual citizen require that denationalisation remains a rare exception. Citizenship implies rights, whether it is designated as a privilege, as a right to have rights or as a contract. For that reason deprivation of citizenship requires an overriding public interest and is subject to proportionality.

Ordinary crimes, even of a serious nature, have not been considered as sufficient under Art. 7 of the European Convention to destroy the bond of citizenship. Yet, fundamental and persistent alienation from the nation as a political community has – in spite of divergent interpretations and applications – frequently been considered as a justification for revocation of citizenship. Democratic states in the defence of their constitutional order and protection of the safety of their population and the security of the state are not restricted to a regime of criminal and administrative sanctions if their own nationals turn against them.

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Legal comparison shows that there is no uniformity. States, according to their particular political conditions, and history that is sometimes reflected in constitutional provisions, have largely prohibited involuntary revocation of citizenship. Germany is one example, though it provides for loss of citizenship for voluntary service in foreign military services or in case of voluntary acquisition of a foreign citizenship. Other states, like Britain, have applied the concept to high treason, espionage, etc. International treaties, like the European Convention on Nationality of 1997 or the Convention on the Reduction of Statelessness provide further barriers. States may not provide for the loss of nationality if the person concerned would become stateless (except in case of fraud). One could discuss what this means if a state's national joins a group or organisation, such as the "Islamic State", which is dominating a state-like territory and exercises state-like authority.

Discussion of the international and constitutional law prerequisites of revocation of citizenship is not the concern of Audrey Macklin. She argues primarily with illegitimacy. As a lawyer I have some difficulty with this term. If it is not illegal, what are the criteria for illegitimacy or immorality? Her personal idea of how democratic states should behave? That of course may be an acceptable political reasoning, provided I learn more about its ideological premises which I may share or not. I do understand Peter Spiro's objection about the revocation of citizenship as a" security theatre" although I feel not confident on the basis of the facts to judge whether it is true that revocation of citizenship for international terrorists is impractical and irrelevant. The arguments of illegitimacy, in my view are hardly convincing. Assuming that revocation of citizenship is a (prohibited) form of punishment simply ignores the legal nature of revocation of citizenship. It is not destined to sanction acts of international terrorism, in addition to a potential criminal or administrative sanction. By untying the bond of citizenship, the former citizen can no longer rely upon his/her citizenship for unlimited entry and residence and free international travel. The further argument that there is no chance of rehabilitation is based on the same misunderstanding of revocation of citizenship as a special form of punishment. Citizenship of such persons is revoked because they have given up their attachment to a community by attacking the very fundament of that community, not by merely violating its internal rules of public order. To talk in this context of an inalienable right of rehabilitation, distorts the purpose of citizenship revocation.

The hard questions arise with the formulation of a precise and judicially reviewable provision authorising the executive to revoke citizenship. International terrorism as such is a term open to divergent interpretations. We do, however, have quite some experience, based upon the jurisprudence of national and international courts and Security Council Resolutions, in defining international terrorism. In order to be effective, a provision must include such actions as joining extremist organisations for training in order to use such training for participation in terrorist activities, as well as a membership in an organisation destined to fight against the state whose citizenship the person concerned possesses.

A further question is whether the introduction of a new provision on revocation of citizenship serves a useful purpose. Utility cannot be denied by reference to criminal law. It goes without saying that acts of international terrorism should be punished and that administrative action should, where possible, be taken to limit the use of passports for international travel for the purpose of preparing or assisting international terrorism – the technical and cynical use of citizenship rights, as Peter Schuck has phrased it. Criminal and administrative sanctions are always attached to specific activities. They do not cover the aspect of using citizenship in a general and in principle unforeseeable manner for acts destined to endanger the security of the state of which the perpetrators are citizens.

The cosmopolitan nature of this type of terrorism, as Christian Joppke has aptly described it, is misunderstood by Vesco Paskalev when he argues that the jihadists do not care about their citizenship. They might indeed not care about their attachment to the state whose citizenship they posses but they do care about the possibilities that a Canadian, US, British or German passport conveys with visa-free international travel, free entry and residence in their "home" country and diplomatic protection if something does not go quite as smoothly as expected.

Revocation of citizenship means a substantial interference with individual rights. It can only be justified if tightly defined material conditions in accordance with the constitutional law of each country and its international commitments are fulfilled. Risk assessment and proof of an affiliation, assistance or membership in an international terrorist organisation will be essential elements in this procedure. Whether there is a practical value in revocation of citizenship for citizens engaged in international terrorism in addition to criminal and administrative sanctions is within the framework of law a matter of political expediency which may well lead to different results in different countries.

Whose bad guys are terrorists?

Rainer Bauböck*

Peter Schuck, Christian Joppke and Kay Hailbronner have provided strong arguments why liberal democracies should have the power to strip terrorist suspects of their citizenship. As good lawyers, Schuck and Hailbronner add that such power must be exercised with restraint and hedged in by the rule of law.

Everybody in this debate agrees that terrorists ought to be punished. Most would also agree that liberal states need exceptional powers in order to prevent terrorism and that this justifies some constraints on freedom of speech and association, for example by making incitement to terrorist violence or joining a terrorist organisation punishable crimes.

Terrorists commit particularly evil crimes. Yet denationalisation does not look like punishment for these crimes. First, it is normally based on executive order rather than court judgment. Second, it does not meet the standard purposes for criminal punishment. It cannot be justified as retribution, since it is not proportionate to the monstrosity of the crime. It does not promote rehabilitation, since the effect is to remove the criminal from the jurisdiction. And it is not effective in deterring or preventing terrorist crimes, since – as Vesco Paskalev has argued global jihadists hardly care about losing citizenship status in a Western democracy that they detest.

Hailbronner points out that terrorists care about losing their right to travel, but restricting their freedom to move can also be achieved by other means, e.g. by invalidating their passports without denationalising them. Banishing jihadists to exactly those states where they want to go anyway to commit their atrocities can hardly count as an effective strategy against global terrorism. As a political scientist I suspect that governments have other motives apart from policy effectiveness when they seek denationalisation powers. They do not only want to do something against terrorism, they also want to be seen by voters as doing something. Stripping terrorist suspects of their citizenship is a strongly visible policy and for that reason possibly also a strongly symbolic one, as suggested by Peter Spiro.

This is not yet a conclusive refutation, since on some views it is exactly the symbolic nature of the sanction that justifies the denationalisation of terrorists. This argument starts from the assertion that liberal democracies are value-based political communities. Their basic values include freedom of conscience and religious practice, of speech and association and democratic self-government. Since these states are liberal, they cannot force their citizens to share their basic values. These are instead enshrined in their constitutions and their political institutions are designed to protect these values. Terrorists do not merely reject liberal values, they act to destroy the very institutions that protect these values. So why should liberal states not take away citizenship from those who attack the very foundations of liberal citizenship? Wouldn't this serve to defend these states' core values?

The answer is that the norms guiding the acquisition and loss of citizenship status have little to do with either the promotion or the defence of liberal values. In all states, including liberal ones, citizenship is acquired automatically at birth and normally retained over a whole life. Native citizens are never asked to show their commitment to liberal values as a condition for retaining their citizenship, nor are they stripped of their status when they commit crimes. Serious criminals are locked up in prison and thereby stripped of many citizenship rights, most importantly that of free movement. In some countries they also lose – and in my view much more questionably – voting rights. But they do not lose their citizenship status. Citizenship in our world has an extremely sticky quality. It does not have an expiry date, it can be passed on to subsequent generations and it can be carried abroad and increasingly also exercised from outside the state territory.

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Yet many liberal states have introduced citizenship tests or naturalisation oaths in which immigrants are asked to affirm their commitment to the polity and its constitution.[1] Doesn't this show that acquisition of citizenship status and therefore also its loss may depend on a commitment to liberal values? No, it doesn't. Leaving aside the tricky question whether such commitments can be tested by filling in a questionnaire or taking an oath, naturalisation integrates newcomers into a political community that is based on birthright membership and equal citizenship. No matter how they have been selected and how they have acquired their citizenship, all citizens have equal membership status and those who have got it through naturalisation can retain it in the same way as if they had got it by birth.

This statement needs two minor qualifications. First, if citizenship has been acquired unlawfully, for example through concealing a criminal record, then it may be withdrawn. This reasoning cannot be applied to citizens who assert their commitment to a liberal constitution in a citizenship test or loyalty oath that they subsequently violate. Because liberal states cannot force ordinary citizens to support their core values, they also cannot claim that citizenship status has been acquired unlawfully if a naturalisation applicant was not sincere when swearing loyalty or was sincere and subsequently changed his views.

Second, the norm of equal treatment of native and naturalised citizens is not accepted by all liberal states – as we all know, the American President must be a native citizen. It is, however, enshrined in Art. 5 of the 1997 European Convention on Nationality and it is not difficult to see why unequal treatment of citizens based on their circumstances of birth is discriminatory and undermines the core value of equality. Faced with terrorism that is now no longer just imported but also home-grown, Western governments may anyhow be reluctant to limit the application of their denationalisation powers to naturalised immigrants.

There are two closely connected reasons why citizenship status is sticky and why it should not be taken away even for acts that attack the foundations of the polity. The first reason has to do with the function of nationality in the international state system. Citizenship is a mechanism for assigning responsibility for individuals to states. In its 1955 Nottebohm judgment the International Court of Justice asserted that citizenship should be based on a genuine connection in order to prevent states from abusively bestowing their citizenship on individuals residing abroad who want to escape a legal duty towards their host country. The same genuine link argument has been invoked by the European Parliament and Commission against Malta in January this year as an objection against the sale of EU citizenship to wealthy foreigners without a residence requirement.[2] If states can abuse their powers to confer citizenship by naturalising foreigners who lack a genuine connection, they can also do so by denationalising their citizens in order to shift responsibility for them to another state. This is exactly what happens when Western countries deprive terrorist suspects of their citizenship. As Audrey Macklin has already explained, the effects can be particularly perverse for dual citizens. Since deprivation does not make them stateless, each of the two states involved has an incentive to act first so that the other state becomes responsible.

International law can thus not provide a full answer to our question. We must also consider what depriving terrorist suspects does to the citizenship bond as an internal relation between an individual and a state. Joppke points out that Germany did not expatriate the left wing terrorists of the Red Army Faction. They wanted to transform the German state whereas the global jihadists de facto renounce their membership by affiliating themselves with an Islamic pseudo-state. But the RAF was certainly as effective in shaking the foundations of a liberal Rechtsstaat by triggering illiberal responses as was Al

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1 See EUDO CITIZENSHIP Forum Debate 'How Liberal are Citizenship Tests?'

2 See the press release of EU Justice Commissioner Vivian Reding (15 January 2014), the European Parliament resolution of 16 January 2014 on EU Citizenship for Sale, and the EUDO CITIZENSHIP Forum Debate 'Should citizenship be for sale?'

Qaeda when it fell the twin towers in New York – and much more so than IS, which primarily wants to scare Western powers out of Iraq and Syria. In any case, the question here is not whether Ulrike Meinhof and Andreas Baader had a moral claim to German citizenship that jihadist terrorist suspects do not have. The question is whether Western democracies can shed responsibility for their home-grown citizen terrorists and shoulder it upon other states. This is what the new denationalisation policies are about.

Imagine for a moment that after 1945 Germany or Austria had posthumously denationalised Adolf Hitler. Would this symbolic act have strengthened their post-war liberal orders by demonstrating their abhorrence of Hitler's destruction of their liberal constitutions and his genocidal elimination of Jews and Roma from the political community? The answer is clearly no, because Hitler's denationalisation would have entailed a denial of responsibility for his crimes and their consequences and would thus have achieved the very opposite of the intended defence of liberal values. Moreover, if either Germany or Austria had taken such a decision, it would have signalled that they merely wanted to pass on the buck to the other state. Recognising that Hitler was "our bad guy" was therefore crucial for building a liberal democratic consensus in both countries and good relations with other states that were the victims of Nazi aggression.

Why should this be different today with the jihadist terrorists? Joppke's answer involves an attempt to distinguish domestic from global terrorists. This may be often difficult, since Hitler turned out to be a global terrorist too. But the crucial point is that citizenship is by its very nature a domestic relation between an individual and a state. By cutting the bond, states deny their responsibility, including that towards the rest of the world upon whom they inflict the terrorist threat.

If denationalisation were a necessary and effective tool to prevent terrorism, it might be justifiable on such utilitarian grounds. But as a symbolic defence of the liberal values that terrorists attack it is entirely unconvincing.

Human rights for all is better than citizenship rights for some

Daniel Kanstroom*

This is an exceptionally rich and challenging discussion in which I am honored to participate, though time and space limitations will inspire brevity. Audrey Macklin's essay reaches two major conclusions with which I heartily agree:

1. Citizenship-stripping weakens the concept of citizenship;
2. It is of highly-questionable efficacy and legitimacy as punishment;[1]

Despite my deep agreement with Macklin about the dangers of denationalisation trends in the UK, Canada, and elsewhere, I am not convinced that she has chosen the best way to counter them. In brief, I fear that Macklin may have missed some of the forest for the trees.

My view of the forest is this: Denationalisation should be situated against a broader backdrop in which pervasive rights deprivations against noncitizens – and even such extraterritorial rights deprivations against citizens as drone strikes – are central components. Macklin points us in this direction when she distinguishes the aspirational safe harbor of citizenship from a functional methodology:

> "But my point is not to propose a metric capable of measuring the quantitative, qualitative, experiential, emotional, personal, familial, cultural, social, financial, linguistic and political impacts of exile on any individual, in order that some state official could determine precisely when citizenship revocation inflicts an appropriate versus excessive degree of punishment."

I fully support Macklin's desire to enhance "the security that distinguishes legal citizenship." I worry, though, about what certain approaches to such security might mean for "other statuses that define the relationship between state and individual." The challenge is to protect citizenship rights without relegating those "other statuses" unduly tenuous and marginal.

Put simply, I suggest that the best way to do this is less (formally) citizenship–centered and more (functionally) rights-centered. By "rights-centered," I mean, essentially, a critical examination of state practices (including the government's intentions and justifications, and the practices' mechanisms, and effects) measured against the norms of a fully-developed human rights protection system.[2] More specifically, the important legal and policy questions raised by Macklin may be best answered by viewing denationalisation along a continuum of state practices that use citizenship status and territorial formalism to achieve policy goals with weakened (and in some cases no) rule of law encumbrances. This is one of the great human rights legal challenges of our times. It must be engaged fully – in all of its manifestations – in order to be properly understood and effectively engaged.

Macklin rightly notes that, "…citizenship revocation is best understood as a technique for extending the functionality of immigration law in counter-terrorism." Moreover, "[s]ince 2001, states have turned to deportation to resolve threats to national security by displacing the embodied threat to the country of nationality." However, the deep significance of these insights may be lost by too formalistic and narrow an examination of the particular practice of denationalisation. A basic reason for this is the powerful attraction—symbolic and practical--of citizenship as a safe harbor. That, in and of itself, is unobjectionable. But it risks denigration of the rights claims of noncitizens. Let me emphasize that I do not think that Macklin intends this at all. Still, her method may take us there.

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1 Though I agree with Kay Hailbronner that legitimacy is an elusive concept in need of further definition. I believe that one can do this relatively easily in this context.

2 *See e.g.*, A and others v Secretary of State for the Home Department [2004] UKHL 56

Here is an example. Macklin writes, "Banishment fits the crime of disloyalty the way capital punishment fits the crime of murder." This works for me passably well as analogy (though, of course, the "crime" of disloyalty is a much more complex proposition than murder). But the analogy prompts a question: How does banishment (of citizens) differ from what I have termed "post-entry social control deportation," which in the U.S. has resulted in lifetime exclusion of many thousands of long-term legal residents from their families and communities due to minor criminal offenses?[3] Does their lack of citizenship status render the death penalty analogy less apt? In another passage, Macklin correctly worries about "arbitrary and prejudicial abuse of a discretionary power." What do we make of the fact that such abuses are rare against citizens and troublingly common against noncitizens? Macklin is thus right, but perhaps insufficiently expansive when she asserts that the *particular* practice of denationalisation "*is* exile." Is denationalisation categorically different from expulsion and removal of long-term legal residents because, as Macklin argues, it "extinguishes a singular right of citizenship, namely the right to enter and to remain"? This seems formalistic and perhaps a bit circular. A fuller exploration might consider the actual effects of deportation and denationalisation on people of various statuses, various levels of assimilation, and various fears of harm. This would help explain *why* the "right" to enter and remain is so crucial to protect against disproportionate or arbitrary state action against all people.

My main concern is about the potential implications of Macklin's methodology. The formalistic reification of citizenship may justify the relegation of noncitizens to a nether world of inferior balancing tests.[4] This is especially the case if that reification is connected to an implicitly exclusive set of rights claims to enter and remain. Noncitizens have such rights, too, at least under certain circumstances. Insufficient attention to such rights – though they are concededly still works–in-progress – is especially dangerous where the rights claims at issue include the right to life, to proportional punishment, to family unity, against arbitrary detention, and to procedural fairness.

Let us also consider the etiology and evolution of denationalisation. Harsh expulsion and exclusion practices against noncitizens can provide a conceptual matrix that facilitates similar practices against citizens. As Thomas Jefferson – writing to oppose the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act – warned in 1798: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow..."[5] The best response to this concern, however, is *not* a regime of exclusive protections only for citizens. Rather, we should strengthen reasonable (procedural and substantive) human rights protections for all people, regardless of status or location. I expect that Macklin would not strongly disagree with this. Still, insufficient attention to such experiments against noncitizens have had metastatic tendencies in the past.

Denationalisation should not be viewed as an anomalous practice that requires a unique normative critique grounded on a strong, formalistic conception of citizenship as the (supposed) Arendtian "right to have rights." Rather, it should be viewed as the *apotheosis* of an evolving array of exclusion and removal practices, as well as the episodic search by governments for what some termed Guantánamo Bay: "a legal black hole." [6] A more capacious analysis would thus not only critique the British,

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3 *See e.g*., Daniel Kanstroom, Daniel. 2007. Deportation Nation: Outsiders in American History. Cambridge: Harvard University Press; Kanstroom, Daniel. 2012. Aftermath: Deportation Law and New American Diaspora. New York: Oxford University Press.

4 I suppose that the opposite might also be true in certain circumstances. Rights gains won by citizens could form models that protect long term residents, albeit in depreciated form. But this pathway works best if citizenship is viewed on a continuum.

5 The Kentucky Resolution, Documents of American History 181(Henry Steele Commager ed., 6th ed. 1958).

6 *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (concluding: "We have assumed … that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. … But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.") *See also*, Johan Steyn, *Guantanamo Bay: A Legal Black Hole*, 1 International and Comparative Law Quarterly 53 (2004).

"conducive to the public good" standard as relegating citizens to the status of permanent residents. It would equally question the standard's legitimacy and propriety for the latter group.[7] (Indeed, its attempted application to citizens might be ironically salutary, as political opposition will be more readily mobilised if it is practiced widely.

Easy denationalisation deserves normative and practical critique, to be sure. As Rainer Bauböck properly highlights, citizenship is (and should be) "sticky" and thus denationalisation must be justified as punishment. This practice is ill advised, problematic, and especially difficult to justify in liberal democracies for the reasons he highlights. However, critique should be primarily grounded in a broader set of human rights norms that apply *whenever* a state seeks to use its power disproportionately or arbitrarily against *anyone anywhere*. This is especially important for those who are strongly assimilated, who would be rendered juridically or functionally stateless or who would face severe harm, persecution, or torture.

In a similar vein, I would not recapitulate the rather formalistic and ultimately sterile debate between a "right" and a "privilege," nor rely too readily on Justice Earl Warren's channeling of Hannah Arendt. When Warren asserted that citizenship is "the right to have rights," he was tactically using this phrase to justify a particular position in a dissent in a 1958 case.[8] The case involved a U.S. citizen (by birth) who had lived most of his life in Texas and had voted there in 1946.[9] The court narrowly upheld the denationalisation (also called "expatriation"). Justice Warren wrote a somewhat rambling dissent built around the (unattributed) reference to Arendt.[10] He concluded with two apparently contradictory propositions. The first was seemingly absolute, if a bit puzzling: "The Government is without power to take citizenship away from a native-born or lawfully naturalized American."[11] The second conclusion focused on the intention of the citizen: "The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country." Thus, even Justice Warren accepted that certain conduct could justify expatriation, so long as the conduct was voluntary.[12] But this fits poorly with the absolutist reading of the "right to have rights." Who would voluntarily relinquish the right to have all rights?

Later U.S. cases elaborated on the criterion of voluntariness, ultimately elevating it to the dominant principle.[13] However, as Justice Harlan once noted, the historical evidence limiting government power

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7 By which I mean conformity to the best understanding of the "rule of law" in all its aspects, including procedural and substantive protections of basic rights.

8 *Perez v. Brownell*, 356 U.S. 44 (1958).

9 The 1940 law at issue had been passed largely in response (ironically for our purposes) to voting by American citizens in a 1935 plebiscite relating to Hitler's annexation of the Saar region. As one member of congress put it. The legislation "would "relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purposes." Id. at 55 (in opinion of Justice Frankfurter).

10 (joined by Justices Douglas and Black)

11 Puzzling because the latter practice (denaturalisation) was well accepted in a wide variety of situations, such as where naturalisation had been illegally procured. The term, "lawfully," thus meant that one could not be denaturalised absent a finding that the naturalisation (viewed retrospectively, had been in some way unlawful).

12 *Cf. Trop v. Dulles*, 356 U.S. 86 (1958)(in which Justice Warren, writing for a plurality, found denationalisation of a military deserter to be invalid for similar reasons, and also invalid as cruel and unusual punishment, because it resulted in "the total destruction of an individual's status in organized society.")

13 *See e.g., Aforyim v. Rusk*, 387 U.S. 253 (1967)("First we reject the idea…that…Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent."); Vance v. Terrazas, 444 U.S. 252 (1980)("[T]rier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." Proof may be by a "preponderance of the evidence" standard.) See also, Pub.L.99-653 (1986) (adopting this approach).

to voluntary expatriation was questionable, to say the least.[14] Harlan highlighted a more functional, less formalistic defense of citizenship: "Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution…." This model seems to dovetail with Peter Schuck's proposal in this debate.[15] It has the powerful virtue of situating denationalisation within the rubric of well-accepted protections of the rule of law.

Finally, one should also note something obvious but worth highlighting: Hannah Arendt's position was *not* that citizenship *should be* the "right to have rights." Rather, as she expressly put it: "The Rights of Man, supposedly inalienable, proved to be unenforceable…whenever people appeared who were no longer citizens of any sovereign state."[16] (Arendt 1966: 293) Her concerns were practical: Such people lacked any real protection. When she explored the subject substantively her argument was much more nuanced: "…recent attempts to frame a new bill of human rights, which seem to have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizen, really are." (Ibid.)[17] But Arendt published The Origins of Totalitarianism in 1951. It hardly needs to be said that—despite its evident challenges and deficiencies--the corpus of human rights protections is today more specific, more robust, and more widely enforced than was the case during the times she considered.

Arendt also poignantly described the "calamity of the rightless" as "that they no longer belong to any community whatsoever." The main reason this was a calamity was that "no law exists for them." (Ibid: 295) The best way to avoid such calamities is not only to strengthen citizenship protections. That may well have the perverse consequences of, on the one hand, rendering citizenship ever harder to achieve, and on the other, relegating noncitizens to an increasingly rightless realm. We must do the harder, more basic work of defining and instantiating meaningful human rights protections for all people, regardless of status, or location. Focusing too specifically on the problem of deprivation of citizenship must not blind us "to the numerous small and not so small evils with which the road to hell is paved."[18]

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[14] Senator Howard, who had sponsored the Citizenship Clause of the Fourteenth Amendment, had conceded that citizenship could be "forfeited" due to "the commission of some crime."

[15] It should also be noted that US law has long provide for such denationalisation for a wide variety of actions, including: "committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, United States Code, or willfully performing any act in violation of section 2385 of title 18, United States Code, or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction." Immigration and Nationality Act Sec. 349. [8 U.S.C. 1481].

The operative standard, as noted, is the following:

"A person who is a national of the United States whether by birth or naturalisation, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality- …" Kay Hailbronner correctly highlights the prevalence of such standards elsewhere though I am less optimistic than he about the ability of states to define terrorism with sufficient precision to justify denationalisation.

[16] Arendt, Hannah. 1966. The Origins of Totalitarianism. New York: Harcourt, Brace & World, Inc.

[17] Indeed, Arendt herself defined the "right to have rights" not as formal citizenship status as such, but as the right "to live in a framework where one is judged by one's actions and opinions…" She distinguished this from the related "right to belong to some kind of organized community." (Ibid: 296-7)

[18] Arendt, Hannah. 1994:271 Essays in Understanding 1930-1954, Formation, Exile, and Totalitarianism. (New York: Schocken Books).

Denationalisation, assassination, territory: Some (U.S.-prompted) reflections

Linda Bosniak*

Unlike the several liberal states Macklin cites which have already, or will soon, deploy citizenship revocation as an anti-terrorism mechanism, the United States is unlikely to implement similar policies. The U.S. Constitution has been interpreted to prohibit unilateral citizenship-stripping as a tool of governance. Instead, denationalisation via expatriation in the U.S. requires the individual to specifically consent to relinquish the status, and such consent cannot be inferred from acts alone – even from acts which some (including some commentators in this symposium) would like to characterise as intrinsically antithetical to citizenship identity. The vigorous safeguarding of individual citizenship in US law is borne of the nation's history of race-based slavery and its aftermath. Today, courts quite stringently interpret the Fourteenth Amendment's guarantee of citizenship status for "all persons born or naturalised in the U.S." I realise the matter of slavery will seem remote from the concerns of contemporary transnational debates over citizenship-stripping in Europe and Canada (although it might be worth wondering, another day, if "slavery" could ever serve – along with "political death" – as a fruitful analytic metaphor here. Think, for example, of the recent mass denationalisation of Dominican-born Haitians in the Dominican Republic). Nevertheless, we know that national citizenship law and policy look inward as well as outward. In the U.S., the legacy of slavery forms a part of a deep conversational grammar about citizenship in a way that will almost certainly stay the hand of congressional advocates of the "Enemy Expatriation Act" and similar proposed measures.

That the US is not about to join Britain and Canada and other states in a politics of forcible expatriation, however, by no means implies that the US does not wish to "permanently eliminate" suspected or confirmed terrorists, nor that it is unable to do so. Indeed, we have recently seen deployment by the U.S. of what Macklin calls "the sovereign's other technique for permanent elimination" of such persons: namely: state-inflicted death. The 2013 assassination of U.S. citizen Anwar al-Awlaki in Yemen was a widely noted recent example of this policy (with the apparently accidental assassination Anwar's 16-year-old U.S. citizen son, Abdulrahman, a notorious follow-up.) For some commentators, state acts of this kind may appear more "proportional" to the claimed offenses than expatriation is. Personally, I would not endorse any policy of assassination, much less when visited upon its target without application of due process. But my comments don't concern the policy's defensibility. Instead, I raise the al-Awlaki case to frame a few brief observations about the relationship between citizenship-stripping, targeted assassination and territoriality in the United States and beyond.

First, as Macklin points out, states strip citizenship not merely in order to territorially banish the affected going forward but sometimes perhaps, as a "prelude to assassination," whether by themselves or others. In particular, Macklin cites the cases of Britons who were denationalised and subsequently killed by US drone strike in Somalia.[1] Denationalisation here can be understood to have strategically relieved Britain of the imperative of protecting its own nationals from harm, including assassination, by another state party. In this scenario, denationalisation is not merely a form of political death; as Macklin argues, it may facilitate bodily death as well.

Nevertheless, we have also seen that since United States law makes it "easier to kill than expatriate," in Peter Spiro's succinct phrasing,[2] the U.S. government does not await denationalisation

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1 See "British terror suspects quietly stripped of citizenship… then killed by drones," The Independent, 28 February 2013 and "Britain Increasingly Invokes Power to Disown Its Citizens", New York Times, April 9, 2014

2 Spiro, Expatriating Terrorists, 82 Fordham L. Rev. 2169, 2177 (2014).

to assassinate its own citizens. We could, indeed, view assassination of al Awlaki senior as the nation's only route to denationalise him, with assassination serving as the actual mechanism for stripping his citizenship.

On the other hand, al Awlaki's assassination precipitated a fascinating debate in the United States about territoriality and citizenship which perhaps bears on our transnational conversation here. In the wake of the killing, a segment of the US political class erupted in concerted anxiety about whether the government actually claimed authority not only to assassinate US citizens abroad but to do the same "on US soil." Senator Rand Paul led a filibuster against the confirmation of proposed CIA Director John Brennan, promising to "speak as long as it takes until the alarm is sounded from coast to coast that our Constitution is important, that your rights to trial by jury are precious, [and] that no American should be killed by a drone on American soil without first being charged with a crime, [and] found…guilty by a court." Much media fan-flaming followed, and eventually, Attorney General Eric Holder conceded that targeting any U.S. citizen for assassination within national territory—in the absence of imminent threat – is unacceptable. [3]

What was striking in this episode was the normative distinction taken up in popular discourse between in-country and out-of-country citizen assassination. The implied claim was that death of a citizen by its own government was somehow uniquely intolerable when accomplished *inside* national territorial bounds. For that moment, at least, the American political imaginary seemed to coalesce more around fear of tyrannical government than of the foreign terrorist within.

Of course, if government were in fact bound by this normative logic – i.e., that territorially present citizens are uniquely out of bounds for targeted killing – then the target would need to be denationalised and/or territorially expelled first and only executed thereafter. Yet since the US state is constrained in denationalising citizens, and since, like all states, it is precluded from expelling citizens, it would seem to have to await such person's travel outside the country in order to strike. This seems odd, yet it notably parallels the form denationalisation practices take in many countries – where, according to Macklin, governments tend to strip citizenship from those citizens who are already located abroad. In both settings, we see not only that territorially-present citizens are regarded as possessing more fundamental protections against government power than those territorially absent, but that governments make opportunistic use of citizen absence to act against them. Among other things, this amounts to a kind of penalty on citizen mobility, and seems to rest on an arbitrary locational distinction. This, at least, is what the US Supreme Court itself concluded in 1957 in a related context when it wrote that a citizen's constitutional rights may not "be stripped away just because he happens to be in another land."[4]

Of course, territoriality's relationship with citizenship sometimes reaches back well beyond any possible denationalisation and assassination to the moment of the citizen's birth. For some, the Awlaki affair itself evoked longstanding debates about assignment of citizenship based on territorial presence at birth, with Awlaki an exemplar of the "nominal citizen" whose extraterritoriality for most of his post-natal life rendered his social attachment to the nation "highly attenuated" (to use Macklin's phrase). Yet in this setting as well, the United States will remain robustly-citizenship protective. The country's inclusive birthright citizenship rules are another stanchion of its post-slavery, post-Civil War, constitutionalism. Consequently, and much as some "anti-birthers" wish it were otherwise, citizenship cannot be easily eliminated on the front end here, except by way more stringent immigration and border control policies to prevent, ex ante, potential parents' territorial presence.

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[3] For more extensive discussion and citations, see Bosniak, Soil and Citizenship, 82 Fordham L. Rev. 2069 (2013).

[4] Reid v. Covert, 354 U.S. 1 (1957).

Broadly drawn and often selectively-applied grounds of inadmissibility and deportability based on "terrorist activity" arguably go some of the distance in accomplishing that end.[5]

In short, citizenship status, especially for those in national territory, still remains more secure in the U.S. than it is in some other national settings. Our government works to counter the alleged "bad guys" (Baubock's shorthand) by different means.

[5] E.g., Stephen H. Legomsky, The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights, 25 Boston College Third World Law Journal 161 (2005)

Beware states piercing holes into citizenship

Matthew J. Gibney*

I find a great deal to agree with in Audrey Macklin's trenchant and wide-ranging argument against denationalisation power's recent revival in Western countries. Yet I also understand where her critics are, somewhat abrasively, coming from. It is of course possible to imagine carefully fashioned cases where denationalisation seems a morally appropriate response as long as a range of guarantees are met (for example, when an individual represents a clear threat to the state, where there are no doubts about his guilt or intentions, and where he could be stripped of citizenship without being made stateless.) However, while this realisation might help us identify the terms on which the denationalisation of a particular individual is permissible, it tells us little about the broader consequences of piercing the norm of unconditional citizenship for punitive reasons.[1] I think that once we are realistic about the political dangers of conceding to the state powers to withdraw citizenship, we're brought back to a position compatible with Audrey Macklin's ban on denationalisation.

Before explaining why I think an absolute bar might be justified let make a couple of comments on the previous discussion. The first of these is on what one might call the statelessness constraint. All of the critics of Audrey Macklin's position start (with the possible exception of Christian Joppke) by accepting that individuals, even those who commit terrorist acts, should not be made stateless. This constraint against statelessness is not simply a matter of international or domestic law; it is also a normative constraint that stems from basic liberal commitments. The problem with statelessness is that it leaves individuals subject to state power without citizenship's basic protections against that power, including security of residence, political rights, and potentially a host of other entitlements. If we accept this normative rationale for guarding against statelessness, as I think we should, we will also want to ensure that those denationalised are not made de facto stateless, that is, forced to rely on a state that is unable and unwilling to protect them or otherwise to deliver the fundamental rights citizenship (or nationality) is supposed to guarantee.[2]

Yet taking this additional constraint seriously is going to be very consequential. The secondary citizenships of the individuals Western states most want to strip of citizenship tend to be those of countries with dubious human rights records and histories of civil war and conflict (Somalia, Iraq, Eritrea, Sudan, to name a few).[3] If de facto statelessness is a bar, most of the prime targets are going to be out of denationalisation's reach. Of course, de facto statelessness does not establish a case for an absolute rejection of the state's power to denationalise. But it does show why the power's scope may be very narrow indeed, at least for liberals.

Second, I find myself attracted to the position of Rainer Bauböck that one reason denationalisation is unacceptable is because it involves states "passing the buck" of their own responsibilities on to other states, a point that adds a different dimension to Audrey Macklin's claim that citizenship is, in important respects, not fungible. This view that banishment is unfair to other states is a very old one.

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1 My focus in this short piece is exclusively on the punitive withdrawal of citizenship. There are, of course, other reasons why states have sought to "pierce" citizenship, for example, to address fraudulent acquisition of citizenship or to prevent dual nationality.

2 Cf. C. Barry and L. Ferracioli, "Withdrawing Citizenship", paper delivered at Australian National University, Canberra, 16 July 2013. I accept that specifying exactly what is included in the concept of "de facto statelessness" is not necessarily clear, as is the relationship between de facto statelessness and simple human rights abuses. A good starting point for further consideration of this issue is C. Sawyer and B. K. Blitz, eds. Statelessness in the European Union: displaced, undocumented, unwanted. Cambridge University Press, 2011.

3 Note, for example, the second nationalities of the denationalised individuals that the Bureau of Investigation Journalism has been able to track.

None other than Voltaire argued against the practice of banishment on the grounds that it involves throwing into our neighbour's field the stones that incommode us in our own.

Powerful as it is, however, the consideration that there's something wrong with denationalising "home grown" terrorists, wouldn't mean that denationalisation was always inappropriate. States might still claim the moral right to denationalise individuals who had held citizenship only for a short period of time or had spent most of their lives living in the other country in which they held citizenship. Germany certainly should not have posthumously denationalised Hitler. But Hitler was the leader of the German state and celebrated in this role by a significant proportion of the German people during the 1930s and 1940s. Putting aside the question of what should be done posthumously, some citizens have a much more tenuous, even a merely nominal, relationship to the state. Not all are even grown at home.

These considerations help to clarify some of the constraints necessary for a liberal denationalisation power. Even from the short discussion here, we can identify plenty of others. Peter Schuck suggests that an individual's threat to the state needs to be "rigorously proven" and Kay Hailbronner argues that citizenship deprivation must be "subject to proportionality". It's clear that satisfying all of these different requirements will make the construction of denationalisation law consistent with liberal principles a Herculean task. However, where I part company with the denationalisers is not so much over whether it's possible to identify a liberal starting point for the practice.[4] Rather, my concern is over the illiberal direction denationalisation seems likely to take once it returns to the political repertoire. Here my position has been greatly influenced by the recent experience of the UK.[5]

When denationalisation was first revived after over thirty years of desuetude by the Blair government in 2002, the power was tightly constrained: the definition incorporated was taken from the European Convention on Nationality, only dual nationals were targeted, and an automatic judicial appeal was to follow any decision by the Home Secretary. The government promised to use the power rarely. This modest beginning for denationalisation did not last. After the London bombings in July 2005, a new act passed by the Blair government in 2006 lowered the standard required for denationalisation. While previously the Home Secretary had to be satisfied that an individual had engaged in actions that threatened the "vital interests of the UK" state, now he or she had only to be satisfied that taking away someone's citizenship was "conducive to the public good". The standard for continuing to hold British citizenship had now become the same as the one used to judge whether a non-citizen should be deported. Even after this radical change, it was possible to convince oneself that the government would use the power sparingly. Only a handful of people lost their citizenship under the Labour government's watch.

But with the coming of the Conservative/Liberal Democrat coalition government things have gone seriously awry. In the Cameron government's first year of office in 2010–11, no fewer than six people were stripped of their citizenship. This was more people than the Blair and Brown governments had denaturalised in the previous nine years (in the immediate aftermath of the terrorist events of September 11, 2001 and July 7, 2005). The enthusiastic use of deprivation power has continued apace in the years since, though almost always in secret. By May 2014, it was evident that Cameron's government had some 23 people stripped of citizenship on 'not conducive' grounds in the last three years. Almost all of these individuals were stripped of citizenship while outside the UK, undermining real access to appeal procedures. In January this year the government presented a bill to parliament requesting the power to strip citizenship from naturalised citizens even if they would be made stateless. The amendment passed, albeit, in a modified form. Under current law in the UK a

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4 I discuss the normative complexities of denationalisation in M. J. Gibney (2013), "Should citizenship be conditional? The ethics of denationalization". The Journal of Politics, 75(03), 646-658.

5 I give a fuller account of the history of UK denaturalisation power in M. J. Gibney (2013) "'A Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom". Political Studies, 61(3), 637-655.

naturalised citizen can be made stateless if the Home Secretary deems there are reasonable grounds for believing they have access to another citizenship.

Now it might be said – and Christian Joppke would probably be the one to say it – that the UK is an outlier. The unravelling of constraints on denationalisation evident in Britain is unlikely to be repeated elsewhere because other Western countries are less insouciant about protecting rights. But note that the circumstances that have geed along transformation in UK law are generally applicable: terrorist events (the 2005 Tube bombing) and a change of government (the coming of the Conservatives to power). Moreover, I'm not confident that other countries are as legally protected against creep of denationalisation power as they might seem. Australia has fewer rights based protections even than the UK; Canada has some alarming inclusions in its recent denationalisation legislation, including the state's ability to rely on a conviction for terrorist offences in another country; and, as I write, a large number of prominent US politicians (buoyed by public opinion polls) have effectively endorsed torture as a practice for dealing with terrorists past and future.

I thus find myself agreeing with Audrey Macklin's embrace of unconditional citizenship, albeit because I fear where we will end up if we try to pierce even a small – liberal size – hole into citizenship to punish terrorists. Liberalism is not simply a set of principles, it's also a political stance – one that encourages a healthy scepticism of state attempts to encroach upon established rights and protections. In these fraught times, it is wise to adopt the stance as well as to protect the principles.

Disowning citizens

Reuven (Ruvi) Ziegler*

Macklin's kick-off focused 'exclusively on denationalisation for allegedly disloyal conduct by a citizen, while a citizen'. Most contributions to this debate weighed the predicament of the former citizen against state interests. In my contribution, I offer a typology of cases in which revocation could be sought according to some of the contributors. I contend that disowning of citizens by their states is incoherent, tenuous, or disingenuous.

The first type of case involves acts which, according to Hailbronner, undermine the constitutional order by seriously threatening public safety and state security. Hailbronner contends that individuals performing such acts 'have given up their attachment to a community by attacking the very fundament of that community, not by merely violating its internal rules of public order'. However, this line-drawing exercise seems to be quite difficult: every crime may cause insecurity, threaten public order, and prevent democratic societies from functioning properly; citizens (and decision-makers, including those entrusted with citizenship revocation) will diverge, based on their ideological biases, as to whether particular crimes cross Hailbronner's threshold. For instance, did the perpetrators of the Brighton hotel bombing cross the threshold in light of the potential ramifications of Thatcher's assassination for the stability of the United Kingdom? If so, would a person financing such an attack qualify, too?

Nevertheless, perhaps a 'core' case can be identified, such as a criminal conviction for treason. One of the constituent elements of such acts is often that they are committed by citizens qua citizens. For instance, Lord Haw Haw (William Joyce) could be convicted of espionage for Germany in the Second World War because he possessed British nationality; he unsuccessfully argued that he did not owe loyalty to the Crown. If the basis for Joyce's conviction was that his crimes against the state were committed as a British national, then disowning Joyce ex post facto seems incoherent: the state must reject the claim that treasonous acts amount to renunciation of citizenship, because that would disable the state from prosecuting the perpetrator for treason (for an analogous argument concerning the legitimacy of disenfranchisement of convicted adult citizens, see my article).

The second type of case involves crimes (including crimes defined as 'terrorism' under international treaties or domestic law) committed by a citizen of state A against individuals or institutions in state B. The fact that the person who has committed such crimes holds the citizenship of state A seems incidental. Consider the attack on the Jewish museum of Belgium in Brussels on 24 May 2014, which is likely to have been carried out by a French national affiliated with ISIL. ISIL has been designated as a terrorist organisation by the EU, of which France is a member, as well as by the UN. Were France to revoke the citizenship of this member of an internationally designated terrorist organisation, it would be severing legal relations with a citizen even though the citizen's actions were not directed specifically towards the French state, its institutions, or its population. This seems rather tenuous.

Joppke argued that 'international terrorists are not criminals but warriors'. But the state exercises its sovereign powers vis-à-vis 'international terrorists' qua citizens. The fact that such persons commit acts that are of an international character does not make it more plausible for their state of nationality to legally disown them as a result. Hailbronner argues that '[w]hat makes international terrorism so distinctive is … also its relevance for discontinuance of that special relationship established by citizenship.' I am not quite sure why engagement in international terrorism (such as the ISIL-sponsored attack on the Jewish museum) necessarily or even plausibly indicate that a citizenship bond

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has been severed by the terrorist. This seems to conflate the fact that their state of nationality perceives (and rightly so) the terrorist's act as heinous with a direct effect on that state.

The third type of case concerns acts which are committed by a citizen in the name of the Ancien Régime. Following political transformation, the state wishes to disassociate itself from such past acts by dissociating itself from the perpetrators. As Bauböck rightly notes, Hitler's posthumous denationalisation by either Germany or Austria would have been considered 'a denial of responsibility for his crimes and their consequences'. In addition to the revocation's outward-looking dimension (towards the international community), it has an inward-looking dimension too. When Augusto Pinochet stood trial in in 2004, he was charged with crimes committed by him as head of the military junta which ruled Chile after the 1973 coup. He died in 2006 before the conclusion of his trial. Let's imagine that Pinochet had another (nominal) citizenship, and that his conviction would have resulted in his denationalisation. This would have seemed, rightly, as an attempt to undermine the fact that these acts were committed in the name of the Chilean state.

Paskalev asserted that, ironically, the 'softness of citizenship revocation makes it appear quite inappropriate for the case of terrorists'. However, even if (some) terrorists may be blasé about losing their citizenship, we ought to be concerned about states' eagerness to wash their hands of them.

Our epoch's little banishments

Saskia Sassen[*]

I arrive late to this discussion, to these excellent pieces that cover much ground... not much left to cover. For the sake of debate and commentary, rather than scholarly analysis, let me throw into the discussion what is no more than a little wrench.

Denationalisation is an ambiguous concept. This discussion has given it one sharp meaning: being stripped of one's nationality and thrown out of one's country. In my own work I have used it to capture more ambiguous meanings, thereby giving it the status of a variable that can be applied to a range of domains, not only citizenship.[1]

Thus, I see denationalisation at work when, beginning in the 1980s, global firms pushed for and got most national governments to institute deregulations and privatisations so as to maximise their access into any national economy. It meant that states had to denationalise key elements of the legal framing (i.e. protections) they had long offered their own firms, markets, investors. One might say that in doing so, these states instituted a partial 'banishment' of their own national firms from a legal framing that granted these national firms exclusive privileges/rights. This is a form of banishment that does not entail a physical departure from a country's territory. It only entails a loss of particular exclusive rights and protections. We can conceive of it as a kind of micro-banishment.

Similarly, I would argue that such internal micro-banishments are also present in the decisions of many national states, beginning in the 1980s and onwards, to eliminate a few rights here and there that their citizens may long have had. Examples for the U.S. are, among several others, Clinton's 1996 Illegal Immigration Reform and Immigrant Responsibility Act which took away the rights of citizens to bring legal action against the INS in lower courts; or when credit card companies obtained the right to pursue payment even if a household had declared bankruptcy – a right so abusive it eventually got cancelled. We might argue that in these cases, citizens experienced a partial banishment from specific rights (even as some new rights were also attained, notably gay marriage). The better language to describe these losses may be what Audrey Macklin refers to elsewhere as civil death.[2]

Current examples for the gains of rights for global firms and the loss of protections for national firms and workers can be found in some of the clauses of both the Transpacific and the Transatlantic Trade Partnerships.

Long before we get to the dramatic figure of the terrorist, where the debate about banishment turns clearly pro or contra, I see a range of micro-banishments that take place deep inside national territory. If I wanted to give this image an extreme character, I would say that in today's interaction prone world (see, for instance, the earlier behind closed-doors negotiations between Iran and the U.S., or, for a period, between the U.S. and the Taliban) there is no more terra nullius for banishment.

If I were to use the term "banishment," I would want to use its conceptual power to get at the multiple little banishments that happen inside our countries and that often entail a move into systemic invisibility – the loss of rights as an event that produces its own partial, or specialised, erasure. I refer to these micro-banishments as expulsions, a term I intend as radically different from the more common

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[1] See chapters 4,5, and 6 in Saskia Sassen. Territory, Authority, Rights: From Medieval to Global Assemblages, Princeton University Press 2006; 2nd ed. 2008.

[2] Audrey Macklin, Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien, (2014) 40 Queen's LJ 1-54 at 8.

term "exclusion," which refers to a condition internal to a system, such as discrimination.[3] I conceive of such expulsions as a systemic capability, clearly a use of the term capability that diverges from the common use which marks it as a positive. Thus micro-banishments can be seen as a profoundly negative systemic capability that is far more widespread than our current categories of analysis allow us to see.[4]

To conclude I would like to return to Audrey Macklin's argument.

I agree with Audrey Macklin's proposition that citizens should not be banished even when they engage in terrorist attacks on their own country. I share her concern with the importance of protecting a robust form of citizenship. But I do so partly also from a transversal and dystopian perspective that may have little to do with the rationale put forth by Macklin. Let me clarify. It is not only terrorists that are destructive and attack the innocent; it is also predatory actors of all sorts –corporate firms that exploit workers worldwide, financial speculators, abusive prison systems. Further I agree with Macklin that a country should develop the needed internal instruments to deal with terrorists rather than banish them. But again, I would take this beyond terrorists who are citizens, and include the types of predatory actors I refer to above.

Beyond all of this, I am above all concerned with the larger history in the making that I refer to earlier in this short text. This larger history is shaping an epochal condition that takes me away from prioritising banishment as loss of citizenship and of the right to live in one's country as discussed in this forum.

Briefly put, I would argue that the conceptual locus of the category banishment in today's world is not banishment in the historical sense of the term, but a new kind of banishment. It is one predicated on the formation of geographies of privilege and disadvantage that cut across the divides of our modernity – East-West, North-South. The formation of such geographies includes a partial disassembling of the modern national territorial project, one aspiring (and dependent on) national unity, whether actual or idealised. This then also means that there is a weakening of the explanatory power of the nation-based encasements of membership (for citizens, for firms, for political systems) that have marked our modernity. The micro-banishments I refer to are part of emergent (and proliferating!) geographies of disadvantage (for citizens, firms, districts) internal to a country.

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[3] Saskia Sassen. Expulsions. Brutality and Complexity in the Global Economy, Harvard University Press, Cambridge, Mass. 2014.

[4] This also raises the possibility of an obverse condition: that the tissue constructed via the recurrence of micro-banishments inside a nation-state could, with time, become the tissue for a claim to transnational citizenship. Could it be that as citizens experience the limits of national citizenship, transversal notions of membership become more plausible? I am thinking here of substantive conditions for transnational citizenship, not just ideational one.

Deprivation of citizenship: is there an issue of EU law?

Jo Shaw*

The purpose of this short intervention in the debate on *The Return of Banishment* initiated by Audrey Macklin, where the pros and cons of various forms of deprivation policies pursued by, or sought by, liberal states have been fully debated, is to add an element of EU law. Specifically, in the light of the judgments of the European Court of Justice in Rottmann and Ruiz Zambrano, how – if at all – are Member States' law and procedures on involuntary loss of citizenship affected by EU law, given that the primary competence to determine the rules on the acquisition and loss of citizenship remains with Member States? We have yet to hear conclusively, but well informed observers who followed the UK Supreme Court hearing in the case of B2 (Pham) v SSHD concerned with the UK's rather extensive deprivation powers and the issue of statelessness have indicated that they think it likely that the Supreme Court will now make a reference to the Court of Justice. It seems that the judges will ask the CJEU if it really meant what it said when it decided the case of *Rottmann*. *B2 (Pham)*, like the earlier cases of *G1* (discussed below) and as well as the case of Al Jedda, a former Iraqi citizen who has twice been stripped of his UK citizenship as well as spending time in military detention in Iraq, all concern naturalised citizens who are suspected of some form of terrorist involvement, but against none of whom criminal proceedings have been brought in the UK.

We are likely, therefore, to be in a phase of further legal development – initially in iteration between the UK courts and the Court of Justice, but with implications for all of the Member States as quite a number of states have started to look closely at using expatriation measures in order to combat radicalisation and terrorist threats, even if many judge this approach to be ill-advised and inappropriate.

I will explain briefly what the issues are. The *Rottmann* case was the subject of an earlier forum debate on the EUDO Citizenship website. *Rottmann* was a case of loss of citizenship conferred by naturalisation, after it came to light that the naturalisation had been obtained by fraud. In this case, Rottmann, an Austrian citizen, had failed to reveal that he had been the subject of unconcluded criminal proceedings in Austria when seeking naturalisation in Germany. Rottmann raised issues of EU law in his appeal against the deprivation decision before the German administrative courts, which led to a reference to the Court of Justice. He pointed out that having obtained German citizenship he lost Austrian citizenship, by operation of law. Thus, if he were deprived of German citizenship he would be stateless, and – furthermore – he would have lost his EU citizenship. One issue that had been raised – and which caught the attention of Advocate General Maduro in his Opinion – was whether this was a 'wholly internal situation' – i.e. a German court reviewing a decision of a German public authority regarding a German citizen. In that sense, it could be said, EU citizenship was not engaged at all. In response, the Court repeated its standard formulation when dealing with matters which fall outside the competence of the EU and its legislature. It reminded us that EU cannot adopt measures with regard to national citizenship, but none the less while national competence remains intact, it must be exercised 'with due regard' to the requirements of EU law in situations covered by EU law. Specifically, in this case, said the Court:

> 'It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law' (para. 42 of the judgment).

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The Court went on to recognise that states may have legitimate reasons to withdraw citizenship, but it is worth noting that the Court of Justice does not, in this paragraph, focus on statelessness, but rather on the loss of the rights specific to EU law. In other words, this can be seen as an EU-specific reason for requiring the testing of any decision to withdraw citizenship against – as the Court went on to hold – a standard of proportionality. Factors to be borne in mind in assessing the proportionality of the withdrawal decision included the gravity of the original offence or deception, lapse of time, the impact on the subject of the decision and their family, the possibility of recovering the original citizenship lost at the time of naturalisation, and the availability of other less severe measures than withdrawal.

While some have suggested that the essence of *Rottmann* lay in the way that the claimant is strung across between the national citizenship laws of two EU Member States, one at least of which claims exclusivity and thus operates an automatic rule of withdrawal in the event that a citizen acquires the citizenship of another state, the point about loss of the benefits of EU citizenship as a freestanding principle of EU law without regard to prior movement from one Member State to another was given a further boost in the case of *Ruiz Zambrano*. In that case, the EU citizens threatened with losing their rights of citizenship were the children of the claimant, who were born in Belgium and who had acquired Belgian, and thus EU, citizenship at birth. Meanwhile, through a combination of circumstances their Colombian citizen father had not regularised his situation in Belgium (or had perhaps been prevented from doing so by a series of delays perpetrated by the Belgian authorities in relation to his case). Because the refusal of a residence permit for Ruiz Zambrano and his wife would, in effect, have meant that the EU citizen children would have been obliged to leave, with their parents, the territory of the EU and thus would not have been able to avail themselves of their rights as EU citizens (notably the right of free movement which they had not yet exercised, but which they might exercise in the future), the Court concluded that a Member State could not refuse to grant either a residence permit or indeed a work permit. The test that the Court articulated was whether the measure taken in relation to a third country national upon whom the EU citizen children were dependent was whether it would make them unable to exercise 'the substance of their rights' as citizens of the EU.

Neither *Rottmann* nor – in particular – *Ruiz Zambrano* have been met with unalloyed enthusiasm at the national level. It goes beyond the scope of this short comment to discuss how and why Member States and indeed their courts might react to challenging judgments of the Court of Justice that appear to extend the scope of EU law and, in particular, the scope of EU citizenship.[1] That said, there is no evidence to suggest that, thus far, *Rottmann* has had a significant or disruptive effect on national citizenship laws.[2]

The UK is one of the few states where *Rottmann* has thus far been discussed in national cases, but – until the case of *B2 (Pham)* which is before the Supreme Court – the limit of consideration had been a rather dismissive swipe at the Court of Justice taken by Lord Justice Laws in the Court of Appeal in the case of G1 v SSHD[3]. Laws LJ sceptically asked '[u]pon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to "have due regard" to the law of the European Union?' (para. 38), given that the grant and withdrawal of citizenship remains a matter of Member State competence.

The Supreme Court refused to give leave to appeal to the applicant in *G1*, but perhaps it was only a matter of time, given the salience of deprivation of citizenship in the UK at the present time, before it

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1 M. Blauberger, 'With Luxembourg in mind ... the remaking of national policies in the face of ECJ jurisprudence', (2012) 19 *Journal of European Public Policy* 109-126, M. Blauberger, 'National Responses to European Court Jurisprudence', (2014) 37 *West European Politics* 457-474, S. Schmidt, 'Judicial Europeanisation: The Case of *Zambrano* in Ireland', (2014) 37 West European Politics 769-785.

2 See N. Nic Shuibhne and J. Shaw, 'General Report', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges*, The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 2, DJØF Publishing, Copenhagen) at p154-155.

3 G1 v Secretary of State [2012] EWCA Civ 867.

had to grasp the nettle of considering not only the meaning of statelessness in the context of the then applicable UK law (this having moved on somewhat since that time, as Gibney's contribution to the forum highlights) but also the possible applicability of EU law as a restraint upon executive freedom, and as a standard which UK courts, in exercising their review function, would need to uphold. Hence the appellant in *B2* has been given leave to appeal, with perhaps a reference to the Court of Justice still to come.

As the discussion by Simon Cox, a lawyer working with the Open Society Institute which intervened in this case, has made clear, it seems quite likely that if the applicability of EU law as a frame of reference against which UK deprivation legislation needs to be judged is duly established by the Court of Justice and accepted by the Supreme Court, then the proportionality standards which need to be applied by UK courts exercising their review function may differ from those otherwise applicable within UK public law. The key issue seems likely to surround the putative autonomy of EU citizenship: is there a freestanding EU law related concern with citizenship stripping, namely the loss of EU citizenship rights, which goes beyond the issue of statelessness? *Rottmann* seemed to suggest there was, but this is the issue on which the Supreme Court may probe the CJEU further. It should be noted that there may also be higher standards of disclosure of otherwise secret evidence, following the judgment of the Court of Justice in the ZZ case, if the applicability of EU law is accepted.

Finally, it should be pointed out that the OSI interest in the case is not directly with the *Rottmann* point, but concerns the definition of statelessness, which, they argue also has an EU element and should have a common EU level definition to which Member States are obliged to adhere. This call stems from the fear that in its earlier judgment in *B2 (Pham)* the Court of Appeal created significant difficulties when it resolved that B2 was not to be judged as *de jure* stateless, once deprived of UK citizenship, because although the Vietnamese government indicated they did not recognise him as a citizen, it was clear that this was unlawful under Vietnamese law.

The UK courts, said the Court of Appeal, were bound by the rule of law. Therefore, they could not recognise an unlawful act of the Vietnamese government. This seems to be peculiarly Kafka-esque reasoning and the OSI, given its investment in the campaign against statelessness ongoing under the leadership of the UNHCR, would be concerned if this reasoning were to take hold in the UK, which is bound to have further cases coming before the courts, given the remarkable rate at which the state is now expatriating its citizens on grounds that this is conducive to the public good.

On producing the alien within: A reply

Audrey Macklin*

Shortly after the last contributor posted a comment on this forum, reports of the Charlie Hebdo attacks erupted in the media. The assailants were two French brothers (Cherif and Siad Kouachi) who claimed affiliation to Al Qaeda in Yemen. Hours later, an associate (Amiday Coulibaly) killed a police officer, then rampaged through a kosher Hyper Cacher supermarket and murdered four hostages. All three men were slain two days later in confrontations with French police and security. That same day, the notorious 'Finsbury Mosque cleric', British national Abu Hamza, was sentenced to life in prison by a US court for terrorism related crimes. Most recently, the French Conseil Constitutionnel upheld a law permitting denaturalisation of dual-national French citizens convicted of terrorist offences.[1] One cannot but wonder whether the Charlie Hebdo and Hyper Cacher attacks cast a long shadow over the Conseil Constitutionnel's deliberations, even though all three men were French by birth and therefore outside the purview of the denaturalisation law.

The horrific deeds of the French perpetrators struck at the heart of liberal democratic values: freedom of expression and religious tolerance. States understandably seek new and better tools to prevent future atrocities; the impulse toward retribution at such moments seems hard to resist. Do these attacks make the case for citizenship revocation? I remain skeptical that citizenship revocation advances the objective of protecting liberal democracies, or that pursuit of unalloyed retribution is an objective worthy of liberal democracies.

Defenders of citizenship stripping offer a mix of instrumental and non-instrumental justifications, but Kay Hailbronner, Christian Joppke and Peter Schuck lean toward the latter more than the former. Despite its rejection by the US Supreme Court over fifty years ago, both Hailbronner and Joppke revert to the legal fiction of constructive renunciation and insist that certain conduct communicates an irrefutable intention of terrorists to renounce their own citizenship. Schuck revises the fiction by acknowledging that perpetrators may not actually wish to renounce citizenship, but then discounts an intention to maintain citizenship for 'tactical and cynical' purposes. But however attractive the fiction of constructive renunciation, it does not become truer with repetition, or with the passage of time, or by writing new characters into the narrative. Citizenship revocation for misconduct while a citizen is not chosen by the citizen; it is inflicted by the state.

Joppke explains that Germany would have been wrong to regard members of the RAF as menacing enough to warrant denationalisation, and I suspect he would also condemn the United States denaturalisation of Communist citizens in the twentieth century as hysterical overreaction. But he remains confident that one can transcend historic patterns of panic-induced political myopia and he thus arrives at the conclusion that Islamic terrorists are uniquely suitable for citizenship revocation. Peter Schuck contends that citizenship revocation, when employed judiciously against terrorists, strengthens the value of citizenship itself. Kay Hailbronner adds that my arguments do not address the illegality of citizenship revocation under international or constitutional law, but rather proceed from unarticulated notions of legitimacy and morality. Space does not permit a proper reply to the last criticism. Readers are invited to read my published article on citizenship revocation in the Queen's Law Journal, which addresses citizenship revocation for misconduct under international and constitutional law.[2]

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1 The law permits denaturalisation of dual nationals who commit terrorism offences within fifteen years of naturalisation.

2 Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien", (2014) 40 Queen's Law Journal: 1-54

Consider citizenship revocation in relation to the goal of bringing perpetrators to justice. As I mentioned in my kickoff text, fear of citizenship revocation is unlikely to deter those bent on martyrdom, and the deaths of the Kaouchi brothers and Coulibaly seem to demonstrate that. As for Abu Hamza, it is worth noting that the UK did attempt to strip him of citizenship. It was thwarted because deprivation would have rendered the Egyptian-born cleric stateless. But the fact that Abu Hamza remained in the UK as a UK citizen made him available for extradition to face charges in the United States, where he was tried, convicted and sentenced to life imprisonment for terrorism offences after an open and fair trial. Had he been stripped of UK citizenship and expelled to Egypt, he would never have faced justice in a US court, or anywhere for that matter.[3] I take the view that prosecution, trial and conviction are preferable responses to past acts. As for pre-empting incipient risks, various states have begun revoking passports of citizens allegedly bound for IS camps in Syria and Iraq. Restricting exit in this manner is only available in relation to citizens. Stripping citizenship permits states to shed their duty and responsibility toward nationals; it also deprives them of the authority to subject them to criminal prosecution and to thereby make a tangible contribution to bringing terrorists to justice under the rule of law.

Schuck, along with Hailbronner and Joppke, concede that existing practices of citizenship revocation breach basic norms of fairness. They regard these flaws as contingent defects that are severable from the abstract question of whether citizenship revocation for misconduct can be justified. I find the attempt to segregate theory from practice unconvincing in this context, and Matthew Gibney's intervention highlights the way in which attempts by the judiciary to hold the state to requirements of legality simply breed more tactics of state evasion. A chronic failure of a state practice to comply with fundamental norms of legality across time and space invites the inference that there is something about what the state is endeavouring to do that ineluctably and incorrigibly perverts the process of how it does it.[4] A fair process leading to banishment, like a fair process culminating in the death penalty, can only ever operate as a mirage that legitimates ongoing practices that will – inevitably and necessarily – fail to meet basic norms associated with the rule of law.

This leaves a defence of citizenship revocation that does not depend on practicality or utility, but instead rests on the insistence that revocation is just and fitting punishment of those who abuse the privilege of citizenship. I argue that when citizenship becomes revocable for misconduct, citizenship as legal status is demoted from right to privilege. This is a specifically legal argument about the juridical fragility of a privilege compared to a right. Joppke's comment that citizenship in western states is a privilege because citizenship delivers so little to citizens of most states is a non-sequitur. I may feel privileged to be a Canadian citizen and to benefit from the rights, entitlements and security of Canadian citizenship, but that does not make citizenship as such a privilege. And it would be peculiar indeed if only liberal democratic states that guarantee robust citizenship were entitled to revoke citizenship *qua* privilege, while poor and dysfunctional states that deliver only a meagre citizenship, were not so entitled. Schuck maintains that citizenship revocation, properly wielded, does not weaken citizenship, but can actually "strengthen citizenship by reaffirming the conditions on which it is based." I am not sure exactly what this means but his subsequent invocation of capital punishment does alert one to the rhetorical symmetry of his claim with similar assertions by death-penalty advocates: If one is convinced that the value of life is strengthened when the state executes a murderer, perhaps one will also be persuaded that citizenship is strengthened when the state denationalises a

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3 Egypt does not extradite its nationals, and the Egyptian criminal justice system does not inspire confidence in its capacity to administer justice.

4 This point draws on the insight of legal theorist Lon Fuller. He admitted that his principles of legality were formal in the sense that they did not stipulate any substantive moral content to law. But he also maintained that legal systems that were intent enacting morally repugnant laws would be hard pressed to reconcile achievement of those objectives with compliance with principles of legality. I extend Fuller's intuition to suggest that a chronic pattern of non-compliance with principles of legality in relation to a particular law supports an intuition that the law is normatively defective in substance.

terrorist. The corollary also applies: If one is not attracted by the first proposition, perhaps one should resist being seduced by the second.

Jo Shaw's insightful intervention about the implications of denationalisation for EU citizenship brings to the discussion the important issue of proportionality, a matter Hailbronner also addresses briefly. Stepping back from the specificities of EU citizenship, a proportionality inquiry into citizenship deprivation directs us to the question of whether the state can achieve its objectives through less rights-infringing means than the impugned law. If one takes seriously the injunction against statelessness, the answer must surely be yes. However one frames the goals and purposes of citizenship deprivation, it remains true that states can and do deploy other means to address, contain and denounce threats to national security from mono-nationals.[5] They must do so because denationalisation is not a legal option, yet no state will be heard to say that it is disabled from protecting the nation adequately because it cannot denationalise mono-citizens.

Schuck proclaims that a state is "powerless to protect itself and its people from imminent, existential threats", if denied access to denationalisation as a weapon. Not only does this ignore the resources currently available to states, it dramatically overestimates what citizenship revocation would add to the arsenal. Unless a state could mount evidence showing that dual citizens pose a qualitatively different and graver threat to national security than mono-nationals, I doubt that citizenship revocation for some citizens (but not others) could survive a rigorous proportionality analysis. And is it really a good idea to dump an "imminent, existential threat" on another state and its people anyway?

Rainer Bauböck correctly and helpfully reminds us that what is at issue is citizenship as legal status. Legal citizenship, as an institution that regulates membership within and between states, performs certain specific functions that have formal implications. Among liberal states, equality of status and security of that status are two defining features of legal citizenship. The former speaks to citizenship's internal dimension by ensuring that all citizens within a state are recognised and treated as equal to one another. The latter speaks to citizenship's external dimension. In functional terms, nationality not only protects individuals from what Michael Walzer calls the 'infinite precarity' of statelessness, it also serves an international system of sovereign states in ensuring that at least one mailing address is affixed to every individual for purposes of state responsibility and deportation.

Apart from Joppke, all contributors accept statelessness as a constraint on citizenship stripping. In the world as we know it, where all habitable space is already assigned to some state, the claim that a citizen, by virtue of his or her conduct, does not belong to *this* state must, therefore, entail the claim that the person does belong to *that* state.[6] This exposes two related problems for conduct-based revocation. The first is that the people whom Joppke depicts as appropriate targets of denationalisation are not merely enemies of a particular state or government. On his view, they 'explicitly posit themselves outside the political community of the nation-state'. In other words, they repudiate citizenship as such or, if one prefers, pose as 'citizens' of a non-state entity that every other state in the world rightly regards as deeply threatening and inimical to their security. One expects that they will be as 'tactical and cynical' in their connection to one citizenship as to another. The Canadian citizenship revocation law validates this model of the global terrorist by making conviction for a terrorist-related offence in another country grounds for revoking Canadian citizenship. If another state regards a

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5 States can and do use the criminal law to prosecute people for terrorist related offences committed at home and abroad. Expanded police powers of investigation and surveillance enable detection. Passport confiscation that prevents travel to conflict zones restrains a right of citizenship (exit), and some states prosecute citizens who participation in combat abroad when the return. Some states also restrict the right of citizens abroad to re-enter in the name of national security. I consider this less defensible as a matter of law, both in relation to the excluded citizen and other affected states but cannot develop that argument here.

6 One could, I suppose, imagine a world where states re-appropriate statelessness in order to resurrect the figure of the global legal outcast (hostis humani, or perhaps homo sacer). Stripped of law's protection, this global outlaw could be killed or punished with impunity. I will set this aside this possibility, and I am unsure if this is what Joppke has in mind.

Canadian citizen as a terrorist, that is reason enough for Canada to conclude that his citizenship connection to Canada is inauthentic and warrants amputation.

Joppke's own characterization of the terrorist's relationship to citizenship makes his argument about denationalisation self-defeating. If terrorists disavow citizenship as such, and are indeed hostis humani generi (enemies of all humanity), the same facts that would allow Joppke to pronounce that the Kouachis (for example) did not really belong to France must also yield the conclusion that they did not belong to any other state either. As a practical matter, if one state declares that formal possession of legal status is normatively insufficient to attach the terrorist to that state, it can hardly press the claim that legal status is sufficient to attach him to another state.

Joppke mocks Peter Spiro for making the sensible observation that neither al Qaeda nor Islamic State are states, which means that they are not deportation destinations. Hailbronner abets Joppke by musing about whether IS' military control over patches of land in the midst of violent conflict could be ratcheted up into something approximating statehood. If this is meant to hint at a viable legal option for where to dispose of otherwise stateless citizens, one might as well explore the equally plausible (from a legal perspective) option of launching them into space to orbit the globe aboard some inter-galactic Flying Dutchmen.[7] Alternatively, perhaps we are meant to shrug off as a convenient fact that powerful states can opportunistically denationalise their citizens while they are abroad in conflict zones. Even if they are rendered stateless, they become some other [failing] state's problem.

Bauböck's contribution directs one to another dimension of belonging, which reveals the second problem with Joppke's approach. Citizenship stripping's revival traces back to the anxiety about so-called 'home-grown' terrorists who, unlike the iconic foreign menace, actually possess citizenship by birth. Revoking citizenship enables the state to recast them as the alien within, in order to then cast them out. Denationalisation serves the narrative of terrorism as always and essentially foreign to the body politic by literally transforming the citizen-terrorist into the foreign outcast. But the very term 'home-grown' refutes the premise. The Kaouchi brothers were French citizens. They were orphaned as children and raised as wards of the French state. It is difficult to see them other than as products of French society. The ideology that seized them originated elsewhere, but their receptivity to it also directs one's attention inward. Indeed, any viable anti-terrorism strategy must attend carefully and critically to the local conditions that produce a descent into disaffection, hatred and violence – whether of the Islamist, neo-Nazi or any other variety. The French assailants may have been alienated from France, but there is no state to which they belonged more.[8]

Ultimately, arguments about citizenship revocation turn on underlying conceptions of what citizenship is for, and expectations about what citizenship as legal status can achieve. Citizenship signifies membership, but beyond that general descriptor, citizenship inhabits multiple registers across many disciplines which are not reducible to or fully commensurate with one another. Citizenship as legal status is powerful because it carries the force of law, but also limited in what it can achieve for precisely the same reason. It is enabled and constrained because it is *citizenship* law and because it is citizenship *law*.

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[7] It seems more likely that the UK will simply continue the practice of depriving citizens of their UK citizenship while abroad, now accompanied with a statement that the Home Secretary believes that target can obtain citizenship elsewhere. Even if the person does not, in fact, have access to another citizenship, the individual's physical location outside the UK and inside another state (to which they may have no legal relationship) will impose insuperable hurdles on challenging the decision or compelling the UK to repatriate him.

[8] One might object that the sample set is too limited: After all, there are dual citizens (especially those who naturalised as adults) who might reasonably be understood as more connected to their country of origin. A short answer is that even if true, it would be a clear conflict of interest to let one state of citizenship make that determination. A fuller answer, which lies beyond the scope of this intervention, would explain why this type of calculus is inimical to the security that distinguishes citizenship from other statuses.

States can and do use law to promote and endorse commitment, patriotism and active citizenship. They do it through public education, programmes for social inclusion, support and assistance, sponsorship of the arts and recreation, and other policies that build solidarity and encourage 'good citizenship'. These various spheres of public activity are enabled through legal frameworks, and so law plays an important role here. Citizenship law's chief constructive contribution lies in imposing (reasonable) requirements for naturalisation, such as residence and language acquisition, that genuinely facilitate integration and commitment to the national community.

The state must also be concerned about 'bad citizenship' and it falls to the criminal justice and national security regimes to address the most egregious conduct that endangers or harms the national community. To conclude that contemporary citizenship law is ill-suited to advancing punitive goals does not deny that some people are very bad citizens, or that law plays a crucial role in addressing that fact. It simply opposes the recruitment of citizenship law to punish bad citizens by demoting them to non-citizens.[9] A man who attacks his mother may be a terrible son who deserves to be prosecuted for his crime, but it is not the job of family law to disclaim him as the son of his mother. Citizenship law is not criminal law. Nor is it national security law. Nor should it be rigged to operate as a trap door that shunts citizens to immigration law.

Accounting for citizenship status' specific legal character also guides us toward what law can (and cannot) achieve. A number of plausible accounts of citizenship's normative foundation circulate in political theory. They typically involve some idea of commitment or allegiance, whether to the state, the constitution, or democratic self-government. I do not here express a preference among them, but rather observe that they tend to focus on the internal relationship between state and citizen, and the grounds upon which the relationship may be properly said to have ruptured. They do not attend to the external dimension of legal citizenship, namely the role of nationality in stabilising the international filing system for humanity, and they do not furnish a satisfactory normative explanation for why the 'bad citizen' should be assigned to another state.

Citizenship law cannot subject to legal regulation the myriad values, practices and aspirations ascribed to citizenship-as-belonging. This is unsurprising: Citizenship status enfranchises citizens above the age of majority, but there is no legal compulsion to vote (except in Australia. Belgium, Brazil and a few other states) and citizenship law does not purport to penalise those who never exercise their right or duty of active citizenship. Nor does citizenship law purport to regulate access to most types of civil and social citizenship (in Marshallian terms), and I suspect most commentators agree that that is a good thing.

Nevertheless, defenders of revocation insist that citizenship law can and should regulate 'loyalty and allegiance' of citizens. The criminal law can punish people for intentionally committing wrongful acts, including treason, murder, and all other forms of horrific violence that concern us here. Some assailants may openly express contempt for their country of citizenship, while others (like the Ottawa shooter Joppke cites) display a messy history of mental illness, drug addiction and petty criminality preceding recent conversion to Islam. The putative value added by citizenship revocation is precisely that it makes lack of allegiance and loyalty the central element in defining crimes against citizenship. But to paraphrase Aldous Huxley, loyalty and allegiance are like happiness. They are byproducts of other activities. Fostering love of country is a valid aspiration of states and worth cultivating. But it cannot be manufactured by the carrot of a citizenship oath (as Joppke has elsewhere acknowledged), nor will it be conjured by the stick of revocation. Law is not adept at producing sentiment on command.

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[9] The various legal strategies currently in use to detect, deter, prevent and respond to terrorism can and do fail, sometimes tragically and spectacularly. Is this because states have not arrogated to themselves sufficient coercive powers, or do inadequate human, technical and financial resources explain more about operational failure?

Space constraints have led me to focus on those submissions that directly challenge my own position, and I have not responded to the cogent, provocative and creative insights offered by so many contributors. My own thinking has been deepened and provoked by them, for which I express gratitude and appreciation. I admit that I took as my remit citizenship revocation only in the literal, legal sense. I also acknowledge the criticism that confining my focus to citizenship revocation does not pay due regard to the claim, for example, that deportation of non-citizens may also constitute banishment in some circumstances, with attendant human rights implications. I hope that nothing I have said here gives the appearance of foreclosing or prejudging broader or different conceptions of banishment. There is always more to be said, and much to be done.

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