

# Deprivation of citizenship for 'jihadists'

## Analysis of Belgian and French practice and policy in light of the principle of equal treatment

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### I Introduction

In the fight against terrorism States have resorted to a variety of weapons. Much attention has been devoted to criminal law as a possible answer to terrorism<sup>1</sup>. Many States have also resorted to nationality law, using deprivation as a means to punish those involved in terrorism<sup>2</sup>. In some countries, this has given rise to important rulings, such as those of the English Supreme Court in the *Al Jedda* and *Minh Quang Pham* cases.<sup>3</sup> In Australia a new provision expands the government's power to revoke Australian citizenship for those found to have engaged in terrorist conduct. In yet other countries, work is under way to sharpen the existing legislation and broaden the possibility to deprive citizens of their nationality<sup>4</sup>.

This paper will focus on Belgium and France. These two countries indeed present striking similarities. Both in France and Belgium the provisions on deprivation already made it possible to deprive a national of his citizenship in terrorist cases. Nevertheless, the legislation in these countries has been recently modified to offer yet a stronger answer to terrorism. The public debate in the two countries is modeled on similar lines. This is in particular true for the issue of equality arising in connection of deprivation of nationality. The paper will first offer an overview of the existing statutory provisions in the two countries (II), before critically reviewing the discussion on equality and non discrimination (III).

### II Deprivation of citizenship in Belgium and France

#### 2.1. Belgium

Deprivation of nationality has been a standard feature of the law on Belgian citizenship since the early 1900's. As early as 1919, Belgian law made it possible to deprive of its nationality persons who had become Belgian citizens during the first World War<sup>5</sup>. The deprivation mechanism was broadened shortly afterwards, to aim at persons found to have acted in serious violation of their

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1 See the contribution of Jogchum Vrielink in this book.

2 For an early account, see G.-R. DE GROOT, "Het ontnemen van het Nederlandschap wegens terroristische activiteiten", in: P. VAN DER GRINTEN & T. HEUKELS (red.), *Crossing borders, Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden*, Kluwer 2005, pp. 215-230.

3 Mr Al Jedda, a British citizen originally from Irak, was deprived of its British citizenship while he was in Turkey, after having been detained for a number of years in Irak by the British army. The Supreme Court found that since Mr Al Jedda had lost his Iraki citizenship when becoming British, he could not longer be deprived of his British citizenship (available at [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0129\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0129_Judgment.pdf)). In another, case, Mr Minh Quang Pham, who possessed both British and Vietnamese citizenship, was deprived of the former on account of his links with Al Qaeda. The Supreme Court rejected Mr Pham's challenge against this decision (available at <https://www.supremecourt.uk/cases/docs/uksc-2013-0150-judgment.pdf>). According to a survey, 27 persons have been deprived of their British citizenship since 2006 for reasons of nationality security (<https://www.thebureauinvestigates.com/category/projects/deprivation-citizenship/>). See in general, S. MANTU, "Citizenship Deprivation in the United Kingdom. Statelessness and Terrorism", *Tilburg law review* 19 (2014) pp. 163-170.

4 This is the case in the Netherlands, see G.-R. DE GROOT and O. VONK, "De ontneming van het Nederlandschap wegens jihadistische activiteiten", *Tijdschrift voor Religie, Recht en Beleid* 2015 (6), 34-53.

5 Article 1 of the Act of 25 October 1919, see further the comments by M. VERWILGHEN, *Le code de la nationalité belge*, Bruylant, 1985, at p. 27.

duties as Belgian nationals<sup>6</sup>.

If one leaves aside the short period after the second world war, this was, however, almost never applied. The provision was incorporated without much change in the Code of Belgian Nationality adopted in 1984 : Article 23 of the Code indeed made it possible to deprive of their nationality persons found to have seriously breached their duties as Belgian nationals. The exceptional nature of the deprivation was further underscored by the fact that the decision could only be taken by the Court of Appeal.

This provision was only rarely applied<sup>7</sup>. This made it difficult to have a clear view of its scope. It would not, however, have been unreasonable to apply it in case of terrorism<sup>8</sup>. This could be inferred from the attitude adopted by the executive in 1996 following the conviction of two persons for terrorist acts associated with the GIA, active in Algeria. Although these two persons had been found guilty of terrorist crimes, the Minister of Justice declined to seek deprivation of their nationality. The Minister argued that Article 23 should be strictly interpreted and that the two persons had merely provided logistic help to the members of GIA. As the latter was not directly threatening the security of Belgium, but rather that of foreign States, there was, according to the Minister, no reason to seek the deprivation<sup>9</sup>. One may infer from this reasoning that if terrorists seek to create panic in Belgium, deprivation would be in order.

This was further confirmed in 2004 : following another highly publicized case of terrorism, the Minister of Justice indicated that whether or not deprivation proceedings would be introduced following a criminal conviction would first depend on the question whether the individual possessed another nationality, as the minister was concerned to avoid statelessness. Further, the minister also indicated that deprivation would be balanced against the risk that the individual would no longer be registered as a citizen, which would make it more difficult to trace him. These answers confirmed in any case that convictions for terrorist acts could lead to deprivation<sup>10</sup>.

In 2009 the Court of Appeal of Brussels confirmed this view : it deprived a Tunisian-Belgian citizen of its Belgian citizenship following a series of conviction for various terrorist offenses<sup>11</sup>. It appeared that the individual had been instrumental in recruiting various persons and convince them to fight in Tunisia and Afghanistan. The same interpretation was adopted in later cases<sup>12</sup>.

Starting in 2012, the provision attracted renewed attention<sup>13</sup>. In a series of rapid changes, the legal

6 See Article 18bis of the Coordinated Acts on Belgian Citizenship, introduced by Act of 30 July 1934 and the comments of M. VERWILGHEN, *Le code de la nationalité belge*, Bruylant, 1985, at p. 31-34.

7 See, however, for applications of the earlier version : Supreme Court (Cour de cassation), 10 February 1949, *Pas.*, 1949, I, 119; Supreme Court, 12 March 1951, *Pas.*, 1951, I, 475; Supreme Court, 16 March 1953, *Pas.*, 1953, I, 544. In 1997, the Minister of Justice indicated that Article 23 CNB had never been applied (Parliamentary Question Alexandra Colen N° 065, 6 June 1997, Senate, *Bulletin Schriftelijke Vragen & Antwoorden*, B90, 1997, p. 12327).

8 According to Heyvaert, deprivation could be in order in case of “gedragingen tegen de binnenlandse of buitenlandse staatsveiligheid” (A. HEYVAERT, “Artikel 23 WBN”, *Commentaar personen- en familierecht*, Kluwer, 1996, n° 8).

9 Parliamentary Question Alexandra Colen N° 065, 6 June 1997, Senate, *Bulletin Schriftelijke Vragen & Antwoorden*, B90, 1997, p. 12327.

10 Parliamentary Question Michel Delacroix N° 3-929, 19 October 2004, Senate, *Bulletin Schriftelijke Vragen & Antwoorden*, 2004, p. 1593.

11 CA Brussels, 26 January 2009, *T. Vreemd.*, 2010, 31, comments C. AERTS; *Rev. dr. étr.*, 2009/152, p. 15, comments by B. RENAULD.

12 In another case, the same Court of Appeal was seized of a request by the public prosecutor to deprive a Moroccan Belgian national of its Belgian citizenship. The Court of Appeal referred a preliminary question to the Constitutional Court in relation to the fact that only certain Belgian citizens could be subject to deprivation : Constitutional Court, 14 May 2009, case N° 85/2009. Another case is pending against Ms Malika El Aroud, who has also been convicted for various terrorist crimes, and another case against Mr Loris Doukaev.

13 See e.g. the following bills introduced in Parliament : Bill Nr. 5 – 2140/1 (4 June 2013 – Ms Christine Defraigne); Bill Nr. 53-3571/1 (23 April 2014 – M. Theo Francken); Bill Nr. 54-796/1 (14 January 2015 – M. Georges

framework for deprivation was substantially altered. A first modification was brought with the Act of 4 December 2012. Although the primary aim of this Act was to make it more difficult to acquire Belgian citizenship<sup>14</sup>, the Act also strengthened the provision on deprivation : a new Article 23/1 was introduced, which made it possible to deprive a person of its Belgian citizenship in case this person is found guilty of a terrorist crime and sentenced to at least five years of jail<sup>15</sup>. Deprivation was linked to the specific terrorist offenses listed in the Criminal Code. Certain offenses were, however, excluded. Persons convicted for having recruited other in order to commit a terrorist crime (art. 140ter), or to have provided training instruction in relation to the use of weapons (art. 140quater) could not be deprived of their nationality. Likewise, a conviction for spreading publicly a message inviting to commit terrorist offenses (art. 140bis), would not lead to deprivation.

As was the case with the previous provision, the possibility to deprive somebody of its nationality was limited in time. It could only take place provided the person concerned had acquired its Belgian citizenship less than ten year before the terrorist acts were committed<sup>16</sup>. Contrary to the previous regime, deprivation was no longer the monopoly of the Court of Appeal : under Article 23, deprivation has to be request before the Court of Appeal. Under Article 23/1, deprivation may be requested before any court. The rationale is to allow the criminal court to rule on deprivation after having found somebody guilty.

Following the attack of *Charlie Hebdo* in Paris, the government announced its intention to sharpen the possibility of deprivation<sup>17</sup>. A bill was introduced in June 2015, which suggested to create a new provision entirely dedicated to the deprivation of nationality on ground of terrorism<sup>18</sup>. The bill was adopted in July 2015<sup>19</sup>. A new Article 23/2 was therefore introduced in the Code. This provision made it possible to deprive citizens of their nationality if convicted for any terrorist offense to more than five years of jail. The scope of the deprivation was therefore broadened to include new terrorist offenses<sup>20</sup>. Another novelty concerned the temporal scope : unlike the previous regime, the new deprivation mechanism could be applied no matter how long the person concerned has possessed the Belgian citizenship. In other words, no limitation applied in time. As with the regime introduced in 2012, the deprivation could be imposed by any court and not only by the Court of Appeal.

## ***Deprivation of Belgian citizenship – an overview***

Dallemagne).

- 14 See B. RENAULD, “Le Code de la nationalité, version 2013”, *Rev. dr. étr.*, 2012, pp. 565-566, D. DE JONGHE and M. D'OUTREPONT, “Le Code de la nationalité belge, version 2013 - De 'Sois Belge et intègre-toi' à 'Intègre-toi et sois Belge' (troisième partie) », *J.T.*, 2013, pp. 355-356.
- 15 At the same time, Article 23 was modified to make it possible to deprive people of their nationality if they had acquired through deception. This led to two parallel provisions : on lack of coherence, see P. WAUTELET, “La nationalité belge en 2014 - L'équilibre enfin trouvé ?”, in *Droit de l'immigration et droit de la nationalité : fondamentaux et actualités*, Larcier, 2014, pp. 337-341.
- 16 It is noteworthy that this limitation did not apply for convictions linked to crimes under international law such as genocide and other crimes against humanity.
- 17 This was already announced in the cabinet's program : regeerakkoord : “De mogelijkheid voor de rechter om de Belgische nationaliteit te ontnemen in geval van bestraffing van terroristische misdrijven of ernstige inbreuken op de voornoemde wet van 1 augustus 1979 wanneer betrokkene over de dubbele nationaliteit beschikt wordt uitgebreid. We zorgen in dit geval voor een versnelde rechtspleging.” (p. 99).
- 18 According to the government, “De verstrenging is verantwoord gezien het feit dat terrorisme op een zeer algemene en brede manier effecten resorteert op het volledige land en dus mag worden geïnterpreteerd als een vorm van verwerping van het land, zijn instellingen en zijn waarden. In dat opzicht is het dan ook gerechtvaardigd om de mogelijkheid uit te breiden van vervallenverklaring van de intrinsiek met het land verbonden nationaliteit voor dergelijke specifieke misdrijven.” (XXXXX).
- 19 Act of 20 July 2015 visant à renforcer la lutte contre le terrorisme (Official Gazette, XXX). See in general M.-A. BEERNAERT, “Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention”, *J.T.*, 2015, pp. 833-836.
- 20 I.e. all criminal offenses listed in the section on terrorist offenses of the Criminal Code.

	Art. 23 CBN		Art. 23/1 CBN	Art. 23/2 CBN
Ground for deprivation	Fraud during acquisition	Acting in serious violation of their duties as Belgian nationals	<ul style="list-style-type: none"> <li>- having been found guilty of certain grave crimes and punished by at least 5 y. of jail</li> <li>- having been found guilty of a crime the commission of which was facilitated by the possession of Belgian citizenship</li> <li>- after annulment of marriage of convenience, if Belgian citizenship acquired through marriage</li> </ul>	Having been found guilty of a terrorist offense and punished by at least 5 y. of jail
Time limit	No specific time limit		<ul style="list-style-type: none"> <li>- Grave crimes : deprivation at the latest 10 y. after acquisition of citizenship (except for international crimes : no time limit)</li> <li>- crime facilitated by the possession of Belgian citizenship : deprivation at the latest 5 y. after acquisition of citizenship (except</li> <li>- deprivation following annulment of marriage : no time limit</li> </ul>	No specific time limit
Who decides?	Court of Appeal		Ordinary (civil or criminal) judge	Ordinary (civil or criminal) judge
Can deprivation lead to statelessness?	No, except if nationality was acquired y fraud		No, except if nationality was acquired y fraud	No, except if nationality was acquired y fraud
Who is protected?	Persons having acquired their citizenship <ul style="list-style-type: none"> <li>- from a parent (art. 8/9)</li> <li>- on the basis of birth in Belgium (art. 11 §§ 1 and 2)</li> </ul>		Persons having acquired their citizenship <ul style="list-style-type: none"> <li>- from a parent (art. 8/9)</li> <li>- on the basis of birth in Belgium (art. 11 § 1)</li> </ul>	Persons having acquired their citizenship <ul style="list-style-type: none"> <li>- from a parent (art. 8/9)</li> <li>- on the basis of birth in Belgium (art. 11 § 1)</li> </ul>

## 2.2. France

France has already introduced the possibility to deprive a citizen of its nationality as a counter-terrorism tool in 1996. At that time, provision was added to the Civil Code, according to which a person may be deprived of its French citizenship if found guilty of a crime “characterized as an ordinary or serious offense that constitutes a violation of the fundamental interests of the Nation, or for a crime or offense that constitutes an act of terrorism”<sup>21</sup>. This followed a series of bloody attacks on the Paris metro in the summer of 1995, including an attack on the Saint Michel station. In the text adopted in 1996, deprivation could only take place provided the person concerned had been

<sup>21</sup> Act N° 96-647 of 22 July 1996 “tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire”, published in *J.O.*, 23 July 1996.

convicted no later than 10 years after having acquired French citizenship. Another time period of maximum ten years could lapse between the facts and the deprivation.

Under Article 25, deprivation is a decision taken by the government<sup>22</sup>. In practice, the Minister of interior will first inform the person concerned of its intention to seek deprivation. This will make it possible for the individual to react and present its arguments. The Council of Ministers will take a decision on the deprivation after reviewing the arguments presented by the individual. The Council of State is in any case requested to provide its advice on the matter.

This provision was adapted in 1998, in order to limit its application to individuals possessing another nationality than the French one<sup>23</sup>. Article 25 was again adapted in 2003 to make it possible to apply the deprivation for terrorist offenses committed *before* the individual acquired French citizenship<sup>24</sup>. In 2006, another modification took place : the maximum time lapse between the acquisition of French citizenship and the deprivation was brought to fifteen years instead of ten years<sup>25</sup>. The same time lapse applies between the moment the facts are committed and the actual deprivation<sup>26</sup>.

This provision was infrequently applied. Since 1996, only a handful of dual nationals were deprived of their French citizenship following convictions for terrorist acts<sup>27</sup>. In one of the cases, the deprivation was challenged before the *Conseil d'Etat*, the highest administrative court : the person concerned who was born in Algeria and had become French in 1998 thanks to his marriage to a French citizen, argued that the deprivation would make it possible to deport him, which would make it impossible for him to stay with his wife and children.<sup>28</sup> The *Conseil d'Etat* was not convinced : it found that there was no violation of Article 8 ECHR, as a decision to deprive somebody of its French citizenship had, according to the Conseil, no direct effect on the possibility for the latter to remain on the French territory<sup>29</sup>.

From time to time, there have been suggestions to amend Article 25. On such proposal sought to make it possible to deprive somebody of its French citizenship if the person “had been involved in spying or participated in terrorist activities”<sup>30</sup>. Another proposal sought to broaden the deprivation and make it possible to apply it even if the person concerned did not have any other nationality<sup>31</sup>. Recently, the French government has announced its intention to revise the deprivation mechanism and extend it to new categories of citizens. In an official intervention before both Chambers of Parliament, the French president has indicated that deprivation of citizenship should be allowed

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22 For more details, see P. LAGARDE, *La nationalité française*, 4<sup>th</sup> ed, pp. 236-241.

23 Act N° 98-170 of 16 March 1998 “relative à la nationalité”, published in *J.O.*, 17 March 1998.

24 Act N° 2003-1119 of 26 November 2003 “relative à la maîtrise de l’immigration, au séjour des étrangers en France et à la nationalité”, published in *J.O.*, 27 November 2003.

25 Act N° 2006-64 of 23 January 2006 “relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers”, published in *J.O.*, 24 January 2006.

26 The Conseil d’Etat has ruled that the new rule could be applied to individuals convicted by courts before the Act of 2006 entered into force. According to the Council of State, the new time limitation may be “applied immediately” (Conseil d’Etat, 20 November 2015, N° 394339).

27 See *e.g.* Décret of 12 September 2002 “portant déchéance de la nationalité française”, *Official Journal*, 13 Sept. 2002, p. 15154 (deprivation of Mr. Omar Saiki, who had been involved in various terrorist acts). See also the Décret of 19 July 2006 “portant déchéance de la nationalité française”, *Official Journal*, 20 July 2006 (deprivation of citizenship of Mr Adel Tebourksi). For earlier applications, see Décret of 11 June 1990 “portant déchéance de la nationalité française”, *Official Journal*, 15 June 1990, (deprivation of M. Bendehiba Diffallah).

28 Conseil d’Etat, 26 sept 2007, nr 301145.

29 More recently, the same *Conseil d’Etat* has rejected a petition by five individuals to stay the measure of deprivation inflicted upon them by the government : Conseil d’Etat, 20 November 2015, N° 394339.

30 Bill N° 1948 of 14 May 2014 “visant à élargir la déchéance de la nationalité française”, introduced by Mr Bompard.

31 Bill N° 2016 of 11 June 2014 “visant à permettre la déchéance de la nationalité pour tout combattant djihadiste français”, introduced by Mr Luca et al.

even for those who possessed French nationality at birth<sup>32</sup>. This would require that the French Constitution be modified. It is unclear at this stage whether this will become reality.

### 2.3. Preliminary findings

The preceding overview has shown that deprivation of citizenship linked to terrorist activities has been possible in France and Belgium for some time. In both countries, this mechanism is rarely applied : only in a handful of cases has somebody been deprived of his nationality due to terrorist activities. When it is used, deprivation takes the form of an additional penalty : it may only be inflicted once a criminal conviction has been handed out. In other words, deprivation cannot be a substitute for a criminal trial. Nor may it be inflicted if no criminal conviction has been handed out. This is a good starting point when compared to other countries where the executive may deprive individuals of their nationality based on loosely defined reason of being “conducive to the public good”<sup>33</sup>.

In France and Belgium, deprivation is only in order if the individual concerned also possesses another nationality. It is, however, not relevant how effective that nationality is. It could therefore be that after the deprivation, the person finds itself possessing the nationality of a country he or she has no links with. This nationality could also be of very little value. In other words, deprivation proceeds on the assumption that both nationalities are equally valid and effective. This may be a fiction.

A striking difference between the two countries is that the decision making power is vested in different bodies. In Belgium, deprivation may only be ordered by a court. Until recently, the decision was even within the exclusive province of the Court of Appeal. Under French law, it is up to the government to take a decision on deprivation. While recourse is possible before a court to challenge a deprivation decision, the initial decision.

Notwithstanding this clear difference, deprivation remains a discretionary decision in both countries. Deprivation does not operate *ex lege*, upon certain requirements being met. A decision is necessary. Under French and Belgian law, the authority in charge must decide whether deprivation is in order in light of the specific circumstances of the case<sup>34</sup>. It is therefore not excluded that no deprivation will be ordered in case of conviction for a 'lighter' offense – such as providing logistical assistance to other directly involved in terrorist activities.

Another difference between the two legal systems relates to the effectiveness of the deprivation : while in Belgium, deprivation only becomes effective after exhaustion of all remedies and once the decision has been duly recorded in the register, a “*décret*” adopted by the French government has

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32 According to Mr Hollande, “La déchéance de nationalité ne doit pas avoir pour résultat de rendre quelqu’un apatride, mais nous devons pouvoir déchoir de sa nationalité française un individu condamné pour une atteinte aux intérêts fondamentaux de ou un acte de terrorisme, même s’il est né français, je dis bien ‘même s’il est né français’ dès lors qu’il bénéficie d’une autre nationalité.” (Speech of 16 November 2015, available at [www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3/](http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3/)). See A. DIONISI-PEYRRUSE, “Déchéance de nationalité : proposition annoncée par François Hollande”, *D.*, 2015 2442.

33 Section 40 of the British Nationality Act 1981, as amended. Under this section, an order to deprive a person of their British citizenship can be made if the Home Secretary is satisfied that it would be conducive to the public good to deprive the person of their British citizenship status and to do so would not render them stateless.

34 This was again underlined following the recent modification in Belgium : Comme souligné tant dans l’exposé des motifs que dans l’avis du Conseil d’État, le juge pénal devra en effet avoir égard « aux conséquences possibles de cette déchéance dans le cas concret, en tenant compte des droits et libertés fondamentaux garantis notamment par la Convention européenne des droits de l’homme » (*Doc. parl.*, Chambre, sess. Ord. 2014-2015, Nr 54-1198/1, pp. 8 et 24).

effect from the day it is signed. It may hence produce its effects even before being published. There is a *caveat* to this : under Belgian law, deprivation may be ordered even if this would lead to statelessness, when it appears that Belgian nationality was acquired fraudulently. In that case, in order to be compliant with the *Rottmann* ruling, Article 23/2 provides that the court should offer the person concerned a reasonable time period in order to attempt to recover his original nationality. It is only after this period has lapsed that the deprivation may be ordered.

As already underlined, a question remains open : whether deprivation is an effective tool against terrorism. The jury is still out on this question. As Hailbronner has argued, “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”<sup>35</sup>. At the end of the day, it remains unclear what purpose is served by the banishment from the national community<sup>36</sup>. Certainly, if the purpose is to inflict a symbolic punishment, it may be questioned whether this makes any sense<sup>37</sup>. It is more likely that deprivation is seen as a means to prevent the terrorists from traveling and entering the country. As is well known, it is notoriously difficult to prevent a national from entering its own country. This is much easier to do when the person has been stripped of its nationality.

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35 K. HAILBRONNER, “Revocation of citizenship of terrorists: a matter of political expediency”, in *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* EUI Working Paper, RSCAS 2015/14, 2015, p. 25.

36 Doubts on the efficiency of deprivation of nationality are not new. See e.g. H. BONNEAU, “Le retrait de la nationalité en droit des gens”, *Revue générale de droit international public*, 1948, at p. 61, § 14. According to Bonneau, “il semble bien que la déchéance de nationalité soit d'une utilité contestable. Elle peut d'abord paraître comme une peine singulière pour un individu dont les sentiments nationaux sont déjà bien émoussés.”

37 V. PASKALEV, “It's not about their citizenship, it's about ours ”, in *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* EUI Working Paper, RSCAS 2015/14, 2015, p. 15. Spiro is even more critical : he writes that “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.” (P. SPIRO, “Terrorist expatriation: All show, no byte, no future ”, in *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* EUI Working Paper, RSCAS 2015/14, 2015, p. 7).

### III Deprivation and equality before the law

One striking feature of both French and Belgian law is that deprivation for terrorism only applies to certain categories of nationals. Under Belgian law, deprivation may not be requested for citizens who hold their Belgian citizenship from one of their parents<sup>38</sup> or who have become Belgian citizen at birth on the basis of the double *ius soli* principle<sup>39</sup>. In France, Article 25 of the Civil Code aims at those who have “acquired” French citizenship. This covers various categories : persons who acquired citizenship through naturalization (Article 21-15 Civil Code); persons who have acquired French citizenship through a declaration (Article 21-12 Civil Code); persons who have acquired French citizenship following their marriage with a French citizen (Article 21-2 Civil Code) and those who acquired French citizenship following birth in France and continued residence in France since the age of eleven (Article 21-7 Civil Code)<sup>40</sup>.

The limited scope of deprivation, aiming only at certain nationals, is not isolated. In other countries, deprivation can only target persons who became national through naturalisation or registration. In Cyprus, deprivation may only affect “a citizen pursuant to registration or a naturalized person”<sup>41</sup>. Under Irish law, revocation for those who have failed in their duty of fidelity to the nation and loyalty to the State only pertains to those who have obtained a certificate of naturalization<sup>42</sup>.

Certain categories of nationals are therefore protected against deprivation. This is particularly the case for citizens who have acquired the nationality from one of their parents. Acquisition *ius sanguinis* works as a protection against deprivation. So does acquisition predicated on birth on the territory of a State<sup>43</sup>.

In other countries, no distinction is made for purposes of deprivation between various categories of citizens. Deprivation on ground of terrorism is for example possible under Dutch law provided the person concerned possesses another nationality<sup>44</sup>. It is not relevant how the individual became a Dutch national. Likewise, Article 8B of the Danish Act on Citizenship does not make any distinction between categories of citizens when it comes to deprivation of citizenship for those who have committed terrorist acts.

As such deprivation for those involved in terrorist activities does not run afoul of international

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38 This applies to persons who have become Belgian citizen at birth on account of one of their parents being a Belgian national (Article 8 CBN) and to persons who have become Belgian citizen following adoption by a Belgian national (Article 9 CBN).

39 Article 11 § 1 CBN : acquisition of Belgian citizenship following birth in Belgium out of at least one parent born in Belgium.

40 This may change in the near future as the French Parliament has been requested to examine a draft bill amending the French Constitution. This Bill (*Projet de loi constitutionnelle de protection de la Nation*, Bill Nr 3381 of 23 December 2015) would amend Article 34 of the Constitution to make it possible to deprive a citizen of its French nationality even if that person obtained French nationality at birth. The new Article 34 of the Constitution would read as follows : “La loi fixe les règles concernant : [...] la nationalité, y compris les conditions dans lesquelles une personne née française qui détient une autre nationalité peut être déchu de la nationalité française lorsqu’elle est condamnée pour un crime constituant une atteinte grave à la vie de la Nation ».

41 Art. 113

42 Article 19 (1)(b) Irish Nationality Act, which provides that a certificate of naturalization may be revoked if “*the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State*”. The Constitution of Angola likewise provides that “No Angolan citizen by origin may be deprived of their original nationality” (art 9 § 4 Angolan Constitution).

43 This is also the case in Luxembourg : Article 15 of the Act of 23 October 2008 only applies to persons “qui a acquis la qualité de Luxembourgeois”.

44 Article 14 § 2 *Rijkswet Nederlanderschap*.



law<sup>45</sup>. Even though much will depend on the way deprivation is organized<sup>46</sup>, international law permits a State to withdraw its nationality in case a person is convicted of terrorist crimes<sup>47</sup>. However, questions may be raised by the limited scope of application of the deprivation.

In order to answer these questions, a brief overview of the principle of equality in nationality law will first be offered (3.1.). In a second stage, the French and Belgian rules will be critically examined (3.2).

### 3.1. The principle of equality in nationality law

The prohibition of discrimination is one of the most firmly entrenched principle of the international law of human rights. The relationship between this principle and nationality may be obscured by the fact that very often, the focus is on discrimination on the basis of nationality<sup>48</sup>. The equality principle may, however, resonate very differently when combined with nationality : one may first wonder whether a State may link access to and loss of its nationality to elements which generally fall under the prohibition, such as sex, race or ethnic origin. Further, one may also inquire whether a State may distinguish between different types of nationals.

The first dimension can be easily caught by general prohibitions of discrimination. Even though the right to obtain a nationality and to keep it, is not (yet?) firmly protected under international law<sup>49</sup>, one may refer to a number of treaty provisions<sup>50</sup> and customary principles, such as the one prohibiting arbitrary deprivation of nationality<sup>51</sup>, to protect individuals against discrimination in

45 Nor could it be criticized from the European angle. Although the ECJ has held that a Member State must ensure that a decision to withdraw its citizenship must observe the principle of proportionality (ECJ, 2 March 2010, *Janko Rottmann v Freistaat Bayern*, case C-135/08, ECR, I-1449), a deprivation linked to terrorist acts would certainly be regarded as legitimate by the court. In *Rottmann*, the Court referred, when examining the legitimacy of the decision withdrawing a naturalisation, to the 1961 Convention on the reduction of statelessness and the 1997 European Convention on nationality (§ 52-53). These two instruments make it possible for States to deprive a person of his nationality in case of terrorism.

46 See the critical commentary by de Groot and Vonk of the 2014 Dutch bill : G.-R. DE GROOT and O. VONK, “De ontneming van het Nederlanderschap wegens jihadistische activiteiten ”, *Tijdschrift voor Religie, Recht en Beleid* 2015, 34-53.

47 See the comments on Article 8(3) of the 1961 Convention in the Conclusions of the Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (UNHCR, November 2013). According to these 'Tunis Conclusions', the exception found in Article 8(3) which refers to a person who as behaved “in a manner seriously prejudicial to the vital interests of the State” may be applied to terrorist acts (at § 68).

48 e.g. Article 21(2) of the EU Charter.

49 See e.g. the overview by P. LAGARDE, “Le droit à une nationalité”, in *Libertés et droits fondamentaux*, R. CABRILLAC et al. (eds.), Dalloz, 2008, pp. 303-308 and H. FULCHIRON, “Droit à une nationalité, droit à la nationalité, droit à sa nationalité? (variations sur le thème de l'évolution contemporaine des rapports entre individu et nationalité)”, in *Mélanges Patrick Courbe*, Dalloz, 2012, pp. 205-225.

50 The most general provision may be found in Article 5 (1) of the European Convention on Nationality. According to this provision, “The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin ». This provision only lists a number of discrimination criteria, and does not make reference to other criteria which are commonly used in anti-discrimination provision, such as social origin (used in Article 26 ICCPR). On the reasons for the limited ambit of Article 5(1), see K. HAILBRONNER, “Nationality in public international law and european law”, in *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries*, R. BAUBÖCK et al. (eds.), Amsterdam University Press, 2006, Vol. 1, at p. 44. In relation to loss, see also Article 9 of the Convention on the reduction of statelessness (31 August 1961), according to which a Contracting State may not deprive a person of its nationality « on racial, ethnic, religious or political grounds ».

51 See Article 15 of the Universal Declaration of Human Rights and the Report by the Secretary General of the UN to the Human Rights Council (25<sup>th</sup> Session), 'Human rights and arbitrary deprivation of nationality', A/HRC/25/28, 2009. See also Article 5(d)(iii) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, Article 18 of the 2006 Convention on the Right of Persons with Disabilities and Article 29 of the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

relation to acquisition and loss of nationality<sup>52</sup>. The protection may even be very strong in respect of various categories such as women<sup>53</sup> and children<sup>54</sup>. Recently, the principle of equality was also extended to issues of nationality in relation to State successions<sup>55</sup>. The application of the prohibition of discrimination does not prevent a State from distinguishing between various categories, for example by granting speedier access to naturalisation to those who have been present for a long time on the territory of a State or selecting naturalisation criteria such as knowledge of the national language, deemed to reflect closer affinity with a State<sup>56</sup>. The difference of treatment is then objectively justified by reference to the aim pursued by the State.

Against this background it will not be surprising to read that courts have long ago started to take stock of the principle of equality in nationality matters. As early as 1974 the German Constitutional court held that it was inadmissible to distinguish between father and mother for the transmission of citizenship<sup>57</sup>. More recently the Dutch Supreme Court has held that the rules in relation to acquisition of citizenship following recognition of a child were in violation of the principle of equality<sup>58</sup>. In France, the *Conseil constitutionnel* has held that an old French provision making it possible for men who acquired another nationality to request the possibility to keep their French citizenship, while French women did not enjoy that possibility, should be stricken down as being in violation with the principle of equality before the law<sup>59</sup>. Even taking into account that the right to a nationality may not as such have acquired the status of a fundamental right, Courts have found ways to scrutinize national rules on acquisition of nationality. As the European Court of Human Rights made clear in the *Biao* case, Article 14 of the ECtHR applies “beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee”<sup>60</sup>. In the seminal case *Genovese v Malta*, the European Court of Human Rights forcefully underlined that no distinction can be tolerated between children on the basis of the status of their parents when it comes to the acquisition of citizenship<sup>61</sup>. The ambit requirement, according to which the non-

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52 For a thorough analysis of the main rules of acquisition from a French perspective, see A. DIONISI-PEYRUSSE, *Essai sur une nouvelle conception de la nationalité*, Defrénois, 2008, pp. 323-331.

53 See Article 9 of the 1979 Convention for the Elimination of All Forms of Discrimination Against Women. This provision does not, however, deal with difference of treatment between children born in and out of wedlock.

54 See Article 7 and 8 of the New York Convention on the rights of children (20 November 1989) and the comments by G.-R. DE GROOT, “Children, their right to a nationality and child statelessness” in A. EDWARDS and L. VAN WAAS (eds.), *Nationality and statelessness under international law*, 2014 Cambridge: Cambridge University Press, pp. 144-168.

55 See article 4 of the Council of Europe Convention on the avoidance of statelessness in relation to state succession (15 March 2006).

56 See K. HAILBRONNER, “Nationality in public international law and european law”, in *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries*, R. BAUBÖCK et al. (eds.), Amsterdam University Press, 2006, Vol. 1, at pp. 42-43.

57 BverfGE, 21 May 1974, 37, 217. The Court held that “*Es ist mit dem Grundsatz der Gleichberechtigung von Männern und Frauen (Art. 3 Abs. 2 GG) nicht vereinbar, daß nach § 4 Abs. 1 Reichs- und Staatsangehörigkeitsgesetz das eheliche Kind eines deutschen Vaters und einer ausländischen Mutter stets die deutsche Staatsangehörigkeit erwirbt, das eheliche Kind ein deutschen Mutter und eines ausländischen Vaters aber nur dann, wenn es sonst staatenlos sein würd*”. See in general on equality between men and women, G.-R. DE GROOT, “Equal treatment of women and men in nationality law”, in: I. WESTENDORP (ed.), *The Women's Convention turned 30: achievements, setbacks, and prospects*, Antwerp: Intersentia. 2012, pp. 185-200.

58 Hoge Raad (Netherlands 26 January 2007, *NJ*, 2007, 73 (in relation to acquisition of Dutch citizenship by a child recognized by a Dutch citizen).

59 Conseil constitutionnel, 9 January 2004, 2013-360 QPC, with comments by F. LAFAILLE, “Perte de la nationalité française et égalité ds sexes. A propos de la renaissance de l’alinéa 3 du Préambule de 1946”, *D.*, 2004, 459-463. This ruling is in sharp contrast with earlier cases decided by French courts, which took a much more hands off approach to nationality matters in relation with the equality principle. See the account by A. DIONISI-PEYRUSSE, *Essai sur une nouvelle conception de la nationalité*, Defrénois, 2008, pp. 247-248.

60 ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 77.

61 ECtHR, 4<sup>th</sup> section, 11 October 2011, *Genovese v. Malta*, Application N° 53124/09. According to the Court, “the applicant was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality. The only distinguishing factor, which rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock.” (at § 45). See G.-R. DE GROOT and O. VONK, “Nationality, Statelessness and

discrimination prohibition can only be invoked if a situation is within the ambit of a Convention right, is therefore not an obstacle to the application of the equality principle in nationality matters<sup>62</sup>.

There appears to be much less court activity in relation to loss and deprivation of nationality in the light of the prohibition of discrimination. However, one may safely state that it would be very difficult for a State to justify grounds of loss or deprivation exclusively predicated on the basis of the race, ethnicity or sex of the individuals concerned. It is enough in this respect to refer to Article 9 of the 1961 Convention on the Reduction of Statelessness which provides that a “Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds”.

Much less can, however, be said about the possibility for a State to make distinctions among its citizens. In a not so distant past, it was not unusual for a State to reserve a better treatment to some categories of citizens. In most cases, newly naturalized citizens were subject to certain restrictions, for example in relation to the benefit and exercise of political rights<sup>63</sup>. These distinctions have now for the most part disappeared. In certain contexts, States continue, however, to distinguish between various categories of citizens. This is mainly the case in relation to deprivation of citizenship.

In that respect, one may refer to Article 5(2) of the European Convention on Nationality which provides that « Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently »<sup>64</sup>.

The wording of this provision indicates that it does not have the same strength and force as other provisions of the Convention. This seems to be confirmed by the Explanatory Report, which indicated that Article 5(2) is « a declaration of intent and not a mandatory rule to be followed in all cases »<sup>65</sup>. If this paragraph is aimed at « eliminating the discriminatory application of rules in matters of nationality between nationals at birth and other nationals, including naturalised persons »<sup>66</sup>, it does so with less force<sup>67</sup>. It has been argued, however, that the wording of Article 5(2) is deceptive as it stems from a wrong understanding of the prohibition of discrimination. The drafters of this provision did not mean to downplay the importance of non-discrimination, but to make it possible for a State to retain a distinction between different categories of citizens provided such distinction had a reasonable and objective justification<sup>68</sup>. In any case, it is clear that Article 5(2) may be applied to differences of treatment among citizens in relation to deprivation of citizenship. In fact Article 5(2) was initially drafted with precisely this issue in mind<sup>69</sup>.

ECHR's Article 8 : Comments on *Genovese v. Malta*”, *Eur. J. of Migration and Law*, 2012, pp. 317-325.

62 Other international bodies have also tackled the issue of equality in relation to citizenship, see e.g. the IACtHR, 19 January 1984, *Re Amendments to the Naturalisation Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84.

63 See e.g. in Belgium the status of those who acquired citizenship through the old 'ordinary naturalization', M. VERWILGHEN, *Le code de la nationalité belge*, Bruylant, 1985, at p. 233-234. In France, a distinction is made between two categories of citizens in relation to persons who were born in the former colonies, see the comments by P. LAGARDE, *La nationalité française*, 4<sup>th</sup> ed, Dalloz, 2011, pp. 308-309, N° 63.02.

64 In *Biao*, the ECtHR indicated that “Article 5 §2 of the ECN ... has no importance for the interpretation of Article 14 of the Convention in the present case” (ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 95). In another case, the Court took more interest in the ECN, holding that it was part of a “common standard” which was relevant to interpret the provisions of the Convention (ECtHR, Grand Chamber, 27 April 2010, *Tanase v. Moldova*, Application N° 7/08, § 166).

65 Explanatory Report, § 45.

66 § 46 Explanatory Report.

67 According to Hailbronner, Article 5(2) does not exclude the possibility for a State to make distinctions in relation to the loss of nationality : K. HAILBRONNER, *op. Cit.*, at p. 44.

68 E. ERSBOLL, « The principle of non-discrimination in matters relating to nationality law - a need for clarification? » in Second European Conference on Nationality – Challenges to National and International Law on Nationality at the Beginning of the New Millenium ?, 2001, 199-200 and more recently E. ERSBOLL, « *Biao v. Denmark* – Discrimination among citizens ? », *EUI Working Paper*, RSCAS 2014/79, 2014, pp. 9-11.

69 As explained by E. ERSBOLL, *op. cit.*, *EUI Working Paper*, RSCAS 2014/79, 2014, pp. 10-11.

It is against this background that one should examine whether the French and Belgian provisions limiting deprivation to certain categories of nationals may be criticized.

### 3.2. The principle of equality and deprivation of citizenship

As has been indicated, the current regime in France and Belgium in relation to deprivation of nationality is only applicable to certain categories of citizens. This is not the only distinction made in relation to deprivation. The law of deprivation is in fact replete with distinctions<sup>70</sup>. One should indeed bear in mind that deprivation may only be used if the person concerned possesses more than one nationality. Individuals possessing only one nationality may in other words not be subject to deprivation on grounds of terrorism, as this would lead to statelessness. This distinction may be questionable. Subjecting a dual citizen to an additional sanction which may not be inflicted upon the sole national, who will only be subject to criminal sanctions, means that people engaged in the same, reprehensible conduct, will not suffer the same fate<sup>71</sup>.

The distinction is even more questionable since some dual nationals may not be able to give up one of their nationalities. It is well known that, while on paper it is possible to renounce Moroccan nationality<sup>72</sup>, in reality such renunciation stands very little chance of being accepted<sup>73</sup>. Hence, dual nationals may not be in the same position vis-a-vis deprivation: a dual national who may easily renounce one of his nationalities, may escape deprivation affecting his other nationality. This is important given that not every nationality entitles to the same rights, in particular from the perspective of migration and freedom to travel. This argument goes hand in hand with the idea that dual nationals may not have the same bond with each one of their nationalities. Take a person born in Belgium, whose father possessed the Moroccan nationality and mother the Belgian nationality. The child will grow up in Belgium, enjoying at least on paper both Belgian and Moroccan citizenship. By all accounts, however, the child's most effective nationality will be the Belgian one. The Moroccan nationality will remain in the background. Depriving this person of his Belgian nationality would mean taking away his most effective nationality, leaving him with the citizenship of a country with which he may not have any substantial link. It may be questioned whether this may not come very close to leave a person stateless<sup>74</sup>.

Going further, one may even wonder whether deprivation, as it is conceived in France and in Belgium, is not meant to affect more substantially, or even exclusively, citizens of a certain ethnic ascent. This would be only an *indirect* discrimination, as the relevant legal rules do not make any reference to the ethnic origin of the persons targeted by the deprivation. It is true that *de facto*, the vast majority of persons born French or Belgian citizens would usually be of French or Belgian ethnic origin, whatever that may mean, while persons who acquired French or Belgian citizenship at

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70 This is in particular the case for the law in Belgium, which distinguishes between three scenarios which may lead to deprivation, each one of them with different features.

71 Article 17 of the ECN provides that dual nationals should have as the "same rights and duties as other nationals" of the State of which they are citizens. In *Tanase*, the Court referred to this provision to conclude that excluding dual nationals from the possibility of being elected members of Parliament amounted to a discrimination (ECtHR, Grand Chamber, 27 April 2010, *Tanase v. Moldova*, Application N° 7/08, § 177). Arguably, subjecting dual nationals to a penalty which may not be inflicted to those possessing only one nationality comes very close to depriving dual national of a certain right.

72 Article 19-2° Dahir Nr 1-58-250 of 6 September 1958.

73 On this perpetual allegiance, see G. P. PAROLIN, *Citizenship in the Arab World . Kin, Religion and Nation-State* , AUP, 2009, at p. 108.

74 For this line of argument, see G.-R. DE GROOT, "Het ontnemen van het Nederlanderschap wegens terroristische activiteiten", in: P. VAN DER GRINTEN & T. HEUKELS (red.), *Crossing borders, Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden*, Kluwer 2005, pp. 217-218.

a later point in their life may predominantly be of foreign ethnic origin<sup>75</sup>.

While these questions may be highly relevant, the remainder of this paper will focus on the more straightforward distinction made under French and Belgian law between nationals by birth and nationals by conferral. A series of questions must be addressed in order to review the legitimacy the distinction between these two categories.

A *first question* pertains to the existence of comparable categories. If only certain categories of citizens are subject to deprivation nationality, it must be inquired whether these categories are comparable with those who are protected against such deprivation<sup>76</sup>. In that respect, it is striking to note that the French Constitutional Court (*Conseil constitutionnel*) has ruled twice that the various categories of citizens involved in deprivation, i.e. the citizens subject to and those protected against deprivation of citizenship, could be compared. In a first decision, the Court was asked to rule on various constitutional issues arising in connection with the 1996 Act which had made it possible to deprive citizens of their nationality if convicted for terrorist crimes<sup>77</sup>. According to the Court, “with respect to nationality law, persons who have acquired the French citizenship and those who have received it at birth are in the same situation”<sup>78</sup>. The Court, however, found that imposing a different treatment to the first category could be tolerated in view of the extreme nature of the crimes committed and taking into account the limited time during which such sanction could be inflicted. The Court repeated the very same reasoning in its 2015 ruling<sup>79</sup>.

By contrast, the Belgian Constitutional Court has found that there are objective differences between Belgian citizens subject to and those protected against deprivation of citizenship<sup>80</sup>. According to the Court, the difference lies in the fact that those protected against deprivation, have received their citizenship at birth, without any request on their part, while the citizens who could be subject to deprivation, only acquired their citizenship after coming of age, and on the basis of a specific request thereto which included a possible exclusion based on criminal activities<sup>81</sup>.

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75 For such an indirect discrimination to be challenged, one should demonstrate that the persons falling under the broad categories targeted by the deprivation under Article 23/2 CBN and Article 25 French Civil Code are predominantly of foreign ethnic origin, while persons protected against deprivation will in general be of local ethnic descent. This is not easy to demonstrate as the applicant found out in *Biao* (ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 90-91; see, however, the minority opinion in the same case, which stressed that a purportedly neutral requirement (such as length of citizenship) results in the categorisation of people into groups on the basis of origin, and one group is suffering a certain disadvantage, one may speak of indirect discrimination (at §§ 8 and 9).

76 The test of comparability features prominently in the case law of both the European Court of Human Rights and the European Court of Justice. UN human rights bodies such as the Human Rights Committee do not always make reference to the comparability test. It is *e.g.* not mentioned in the General Comment of the Human Rights Committee on Non-discrimination (Human Rights Committee, General Comment 18, Non-discrimination, 37<sup>th</sup> session, 1989). It is, however, inherent in the definition of direct discrimination applied by UN human rights bodies. In its General Comment on non-discrimination, the Committee on Economic, social and cultural rights defined direct discrimination as occurring “when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground” (Committee on Economic, Social and Cultural Rights, General comment No. 20 - Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 42<sup>nd</sup> session, May 2009). See in general on non-discrimination in the case law of UN human rights bodies, W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, 2005, 293 p.

77 *Conseil constitutionnel*, 16 July 1996, ruling N° 96-377 DC, ECLI:FR:CC:1996:96.377.DC.

78 Para. 23.

79 *Conseil constitutionnel*, 23 January 2015, ruling N° 2014-439 QPC, ECLI:FR:CC:2015:2014.439.QPC, at para. 13.

80 Constitutional Court, 14 May 2009, case N° 85/2009.

81 According to the Court, “*Aan de eerstgenoemden is de Belgische nationaliteit automatisch tijdens hun minderjarigheid toegekend, enkel door de omstandigheid van hun geboorte en door het gevolg dat daaraan bij de wet is verbonden, zonder dat een aanvraag moest worden ingediend met het oog op de toekenning van de nationaliteit, noch door hun ouders, noch door henzelf. De laatstgenoemden hebben de Belgische nationaliteit daarentegen pas na de leeftijd van achttien jaar verkregen, zij hebben daartoe een aanvraag moeten indienen, en de nationaliteit is hun pas toegekend aan het einde van een procedure die een onderzoek omvat naar het eventuele*

While one should admit that finding out whether situations are truly comparable is as such a normative statement<sup>82</sup>, it is submitted that both courts should have adopted a more nuanced reasoning. It is undeniable that a difference exists between those who have become citizens at birth, because of the parental link with citizens, and those who have acquired it at a later stage on the basis of an application. Those differences may be relevant from the point of view of deprivation. However, the differences may obscure the fact that citizens in the two categories may have a strong bond with the State concerned and hence be in an analogous, or relevantly similar situation.

Going beyond the distinction between nationality acquired at birth and by conferral, one should therefore look at the situation from the perspective of the ties or links between an individual and the country of its citizenship. On average, a person who has acquired the nationality at birth, will have very strong ties with the country of citizenship. This may, however, be different if that person was born and has always lived abroad. Let us take the situation of a French couple living in Argentina : their son, born in Argentina, will acquire French citizenship at birth<sup>83</sup>. If this child grows up in Argentina, it may when turning 18 not have a very strong link with France<sup>84</sup>. Conversely, if one imagine the situation of a child born in France who only acquired French nationality at the age of 18 y.<sup>85</sup> : if this person grew up and went to school in France, should it not be accepted that he presents very strong ties with France?<sup>86</sup>

Hence the distinction between nationality acquired at birth and nationality by conferral is by far too rigid and abstract<sup>87</sup>. Instead of focusing on the *method* of acquisition, one should rather examine the *nature of the link* between an individual and the State. It is true that the ECtHR has accepted that there are “in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it”<sup>88</sup>. In that case, however, the difference of treatment related to the question whether a person was born in a country and not so much to the question whether a person possessed a given nationality at birth. The Court in fact emphasized that the special treatment could be afforded to those born in a country and having built links with this country since then, without singling out those who have acquired a given citizenship at birth. This was central to

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*bestaan van gewichtige feiten, eigen aan de persoon, te hunnen laste, ingesteld door de procureur des Konings.”*  
(Constitutional Court, 14 May 2009, case N° 85/2009, para. B5)

82 See e.g. O. M. ARNARDOTTIR, *Equality and Non-Discrimination under the European Convention on Human Rights*, Kluwer, 2003, pp. 126-150.

83 Article 18 French Civil Code.

84 As the minority noted in *Biao* in relation to a Danish provision granting a privileged position to those born in Denmark, “To assume that birth to Danish nationals per se results in attachment is a fiction, or even two, as this approach is based on (i) the fictional assumption about the attachment of any foreign-born non-resident Danish citizen to Danish society, and (ii) on the generalised suspicion that any long-term-resident naturalised Danish citizen with proven attachment to Denmark does not provide guarantees of attachment when it comes to family reunion” (joint dissenting opinion of judges Sajo, Vucinic and Kuris, ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 16).

85 Article 21-7 French Civil Code.

86 The same question came up under EU law with respect to the mutual recognition of professional qualifications : in an older case concerning an Austrian citizen who had become French but had been refused the possibility to work as a veterinarian in France on the basis of the qualification obtained in Italy, the ECJ held that “there is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of [EU law], they possess the nationality of one of the Member State...” (ECJ, 7 February 1979, *Criminal proceedings against Vincent Auer*, case 136/78, ECR 1979, 437, § 28). Although this ruling focused on a question quite distant from that of citizenship, the Court's holding illustrates that making a distinction on the basis of the method or timing of acquisition of citizenship is questionable.

87 As Lagarde noted, “Faire dépendre la possibilité d'une déchéance du critère d'attribution ou d'acquisition de la nationalité française n'est plus justifiable aujourd'hui” (P. LAGARDE, comments, Constitutional Court 23 January 2015, *Revue critique de droit international privé*, 2015, at p. 125).

88 ECtHR (Plenary), 28 May 1985, *Abdulaziz, Cabalesand Balkandali v. the United Kingdom*, Application no. 9214/80 et al., § 88.

the reasoning, much more than the method of acquisition of a given citizenship<sup>89</sup>. In other words, the method of acquisition of citizenship is not relevant : what matters is the strength of the ties between an individual and the State. The Court has reaffirmed this in the recent *Biao* case : when considering the Danish rule which reserved a special treatment to those who had been resident in Denmark for more the 28 y., because this meant that they presented a strong link with DK, the Court rephrased its holding in the *Abdulaziz* ruling by noting that “there are in general persuasive social reasons for giving special treatment to those who have strong ties with a country, whether stemming from birth within it or from being a national or a long-term resident”<sup>90</sup>. This clearly indicates that the Court does not attach much weight to the question how one may be linked to a country, but is rather interested in the strength of those ties<sup>91</sup>.

If one focuses on Belgium, this calls into question the application of the deprivation to a number of categories. This is manifest when considering that deprivation based on terrorism may be applied to persons who became Belgian citizens by declaration based on Article 12bis, § 1-1° of the Code. This provision makes it possible for persons born in Belgium to register as citizen when becoming 18 provided they have lived all their life in Belgium. True, these persons only obtained citizenship at the age of 18 or later, while persons born Belgian citizen have always enjoyed this citizenship<sup>92</sup>. However, this cannot hide the fact that the former were born and must have resided all their life in Belgium. From the perspective of substantial link between a citizen and a State, the difference between the two categories is therefore not relevant<sup>93</sup>. Instead of focusing on the method and timing of acquisition, one should therefore take into account other factors which may result in the establishment of close and enduring connections between a person and a country<sup>94</sup>.

Applying this test, one may also call into question the application of deprivation to persons who have become citizens on the ground of Article 11 § 2 CBN. This category covers persons born in Belgium, whose parents have been residing for at least ten years in Belgium when applying for the child to obtain Belgian citizenship<sup>95</sup>. Again, the persons concerned obtained citizenship not *ius sanguinis*, but on the basis of the long term residence of the parents in Belgium. Acquisition may

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89 In addition, the Commission found in *Abdulaziz* that “a difference of treatment based on the mere accident of birth, without regard to the individual's personal circumstances or merits, constituted discrimination” (ECtHR (Plenary), 28 May 1985, *Abdulaziz, Cabalesand Balkandali v. the United Kingdom*, Application no. 9214/80 *et al.*, § 87).

90 ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 94. The last section of the sentence did not feature in the original version of the *Abdulaziz* ruling.

91 As noted by the minority in *Biao*, “*Abdulaziz* did not say that there were persuasive social reasons to grant special treatment to some forms of strong ties (such as citizenship by birth) but not to others (such as long residence or naturalisation)” - joint dissenting opinion of judges Sajo, Vucinic and Kuris, ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 17.

92 This argument was put forward by the government in the case decided by the Constitutional Court in 2009. According to the government, the distinction between those who acquire Belgian citizenship at the age of 18 y., on the basis of birth and continued residence in Belgium and those who acquire citizenship at birth on the basis of the double *ius soli* principle, is justified given that in the former case, there is no acquisition *ex lege*, but only following a request thereto by the individual and after a background check is performed (Constitutional Court, 14 May 2009, case N° 85/2009, § A.3 and A.4).

93 The same reasoning is sometimes applied when looking at Article 12, paragraph 4 of the ICCPR, which provides that “No one shall be arbitrarily deprived of the right to enter his own country”. According to the general comment on this provision by the Human Rights Committee (CCPR General Comment No. 27: Article 12 (Freedom of Movement) – 1999), the words “his own country” may be read as covering not only nationals, but also individuals who, because of their special ties to a given country, cannot be considered to be mere aliens. The Committee notes in that respect that “The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”.

94 The Constitutional Court recognized in its 2009 ruling the importance of the substantial links a person may have built with a country : it underlined that if deprivation could be applied to persons who acquired Belgian citizenship after turning 18 y. and not to persons who became citizens at birth, this was because of the fact that the latter had developed “very strong links” with Belgium while the former could not present a bond as old and strong with this country (Constitutional Court, 14 May 2009, case N° 85/2009, § B.8).

95 Between 2000 and 2014, this ground of acquisition benefited on average 243 persons a year.

occur at birth or at a later stage but at the latest when the child turns 12 y. However, such acquisition is only possible provided that the two parents have resided at least 10 y. in Belgium before filing the application requesting Belgian citizenship for their child<sup>96</sup>. Given that the deprivation may only occur once the person concerned reaches the age of 18 y., it will touch a person born and having lived all his life in Belgium. It is submitted that if one leaves the intricacies of Belgian citizenship law aside, the persons concerned are in a comparable situation, from a nationality perspective, with those having obtained citizenship at birth. This holds even more for those who have obtained Belgian citizenship based on Article 11 § 1 CNB. This provision gives effect to the double *ius soli* principle. It makes it possible for those children born in Belgium to obtain Belgian citizenship at birth when at least one of the parents was himself born in Belgium<sup>97</sup>. From the perspective of the genuine connection, these citizens enjoy a very strong link with Belgium<sup>98</sup>. If one accepts that formal categories and methods of acquisition of citizenship are not relevant, one should therefore conclude that this category can by all means be compared with that of persons having obtained Belgian citizenship at birth from a Belgian parent<sup>99</sup>.

In sum, the use of broad categories linked to the method and timing of acquisition is flawed. It does not allow to take into account the life stories of citizens and the nature of the bond which they may have build with their country of citizenship. This approach falls short of the commonly accepted standard of discrimination law, which requires that comparable situations should be treated in the same way. It would be more appropriate to build a new distinction based on the actual (and not presumed) strength of a person's ties with a country. This would allow to apply a different treatment to the category showing a rather weak bond with the state whose citizenship is at stake.

If different categories of citizens may be distinguished depending on the strength of the ties between an individual and a State, one should next inquire whether there is any *legitimate aim* to make such a distinction<sup>100</sup>. Indeed, a differentiation of treatment will not constitute discrimination “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a

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96 Such application must be filed before the child turns 12 y. old. At least one of the parents must be entitled to remain permanently in Belgium when making the declaration.

97 This provision further requires that the parent born in Belgium must have resided in Belgium during at least five of the ten years preceding the birth of the child. Between 2000 and 2014, this ground of acquisition benefited on average 766 persons a year.

98 This was in fact the argument put forward by the government in 1991 to justify adapting the provision which had existed until then : starting in 1984, children born in Belgium out of a parent born in Belgium could obtain Belgian citizenship upon a request thereto by the parents. The Act of 13 June 1991 modified Article 11 to provide that such acquisition would occur *ex lege*. According to the Bill presented by the government, such change was justified as for those children, born in Belgium out of a parent born in Belgium, “ is er in principe een meer dan voldoende band voor nationaliteitsverlenning aanwezig” en wel in die mate dat “om die reden kan of mag geen rekening worden gehouden met de wil van de betrokkenen op het ogenblik van de geboorte” (Memorie van toelichting, Doc. Parl. Chambre, 1314/1, 90-91, p. 3).

99 Compare with another distinction made in relation to deprivation of citizenship : in a bill introduced in 2003 and aimed at revamping the Code of Belgian Nationality, the Christian-democrats suggested to broaden the possibility deprivation to include the case of fraud, but to limit it to those who have acquired citizenship following a request thereto. According to the bill, this limitation was not contrary to the principle of equality, as there was a clear difference between the categories subjected to deprivation and the citizens not subjected as the latter obtained citizenship without requesting it (Bill “tot wijziging van het Wetboek van de Belgische nationaliteit, *Doc. Parl. Chambre*, 2 October 2003, Nr. 51-252/1, at p. 19). This suggests that all those who became Belgian citizens on the basis of Article 11 CNB should be treated equally.

100 One should not be confused by the accepted principle that distinctions on the basis of nationality are as a rule not tolerated except if “very weighty reasons” are put forward by the State (as the European Court of Human Rights noted in its decision in *Gaygusuz v. Austria* : ECtHR, 16 September 1996, *Gaygusuz v. Austria*, Application N° 17371/90, § 42). The UN Human Rights Committee has also accepted to review discriminations based on nationality, even though nationality does not feature in the list of prohibited grounds of discrimination in Articles 2 and 26 of the ICCPR (see *e.g. Ibrahim Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989), at § 9.4, finding that the differentiation by reference to the nationality falls “within the reference to 'other status' in the second sentence of Article 26”). The distinction discussed in this paper is not based on the nationality of the person concerned : it divides the group of nationals in two distinct categories.



purpose which is legitimate”<sup>101</sup>. Hence, proportionate measures which are designed to achieve a legitimate objective may not be criticized.

In that respect, the first step is to identify the objective pursued by the States concerned. Arguably, citizenship deprivation is used by States as a counter-terrorism tool. As the government explained in Belgium, the objective of the measure is to “*lutter plus efficacement contre le terrorisme*”<sup>102</sup>. There is little difficulty in accepting that a State may adopt specific measures to fight terrorism. Courts have made it clear that this is a legitimate aim, and one for which they will not easily second-guess the executive or the legislative branch<sup>103</sup>. The *Conseil constitutionnel* expressly referred to the particular nature of terrorist crimes to accept that the deprivation pursued a legitimate aim<sup>104</sup>.

It is striking, however, that the link between deprivation and counter-terrorism is seldom explained. In particular one may wonder how depriving some individuals of their citizenship will enhance the protection of the population at large against terrorist attacks. The most reasonable explanation for the insistence by various governments to resort to citizenship deprivation, is that it allows the executive to deport the individuals concerned more easily<sup>105</sup>. Stripped from their French or Belgian citizenship, the persons convicted of terrorist acts may indeed be prevented from returning to their home country and, if they succeed in doing so, expelled to third countries.

One may have some doubts about the effectiveness of this counter-terrorism tool. If terrorists indeed do intend to kill and maim in the name of an absolute faith, is there any reason to fear that they will be discouraged or prevented from doing so because they have lost their French and Belgian nationality? It is submitted that this legitimate question is not one for the courts to answer. Courts should indeed in this matter defer to the executive. If one takes stock of the fact that the measure examined touch upon two matters for which governments enjoy a large margin of discretion (i.e. terrorism<sup>106</sup> and citizenship), it is easy to accept that courts will apply a highly deferential test to the government's purported justification for the unequal treatment. The badge of differentiation<sup>107</sup> used by the French and Belgian legislators, i.e. the method of acquisition of citizenship, does not appear to command strict scrutiny<sup>108</sup>. Hence, only an arbitrary differential treatment of two groups of

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101 Human Rights Committee, General Comment 18, Non-discrimination, 37<sup>th</sup> session, 1989, § 13 (in relation to Article 26 ICCPR).

102 Bill Nr. 54-1198/001 'tot versterking van de strijd tegen het terrorisme', 2 June 2015.

103 See e.g. ECtHR, 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, Application N° 12244/86, § 28 : the court referred to the “special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose”. More recently, ECtHR, 22 February 2008, *Saadi v. Italy*, Application N° 37201/06, § 137 (the Court notes that “States face immense difficulties in modern times in protecting their communities from terrorist violence.... It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community.”).

104 *Conseil constitutionnel*, 16 July 1996, ruling N° 96-377 DC, § 23. The *Conseil* noted that “compte tenu de l’objectif tendant à renforcer la lutte contre le terrorisme... eu égard à la gravité toute particulière que revêtent par nature les actes de terrorisme”.

105 See e.g. for the situation in France, O. LE BOT, “La déchéance de nationalité pour les terroristes est conforme à la Constitution”, *Constitutions*, 2015, at p. 243.

106 In general, O. DE SCHUTTER, “La Convention européenne des droits de l’homme à l’épreuve de la lutte contre le terrorisme”, in E. BRIBOSIA et A. WEYEMBERGH (eds.), *Lutte contre le terrorisme et droits fondamentaux*, Bruylant, 2002, pp. 85-152; F. BERNARD, “The European Convention on Human Rights and the Fight Against Terrorism”, in *Balancing Liberty and Security: The Human Rights Pendulum* (L. HENNEBEL & H. TIGROUDJA, eds.), Oisterwijk 2011, pp. 171-196 and P. KLEIN, “Le droit international à l’épreuve du terrorisme”, *Collected Courses Hague Academy*, vol. 312, 2007, at pp. 417-422.

107 To use the phrase coined by O. M. ARNARDOTTIR, *op.cit.* pp. XXX.

108 Compare with the distinction sometimes made between EU citizens and non EU citizens, EuCtHR, 7 August 1996, *C. v. Belgium*, Application nr. 21794/93, where the Court held that the preferential treatment of EU nationals vis-à-vis non EU nationals was justified as it is based on an objective and reasonable justification, “given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship” (§ 38).

persons in analogous situations is likely to trigger a finding of violation of the general prohibition of discrimination. The Belgian constitutional court alluded to this in its 2009 ruling, when it noted that “Onder voorbehoud van een kennelijk onredelijke beoordeling, behoort het tot de beoordelingsbevoegdheid van de wetgever te beslissen welke categorieën van Belgen het voorwerp van een maatregel tot vervallenverklaring kunnen uitmaken en welke categorieën van die mogelijkheid moeten worden uitgesloten”<sup>109</sup>.

It remains necessary, however, to verify whether unequal treatment was proportionate, i.e. it is necessary to weigh the objective of the differentiated treatment with the gravity of the unequal situation that has been created. There is indeed a need to ensure that there is an “objective and reasonable justification” for the difference of treatment<sup>110</sup>. This requires examining whether there is a reasonable *relationship of proportionality* between the means employed and the aim sought to be realized<sup>111</sup>.

The French and Belgian experience are most interesting in that respect. In both countries, the constitutional courts paid close attention to the procedural limitations constraining deprivation of citizenship, to conclude that the measures were not unreasonable. The French Constitutional Council noted that deprivation was only possible within a certain time limit after the person concerned has obtained French citizenship. In 2009, this time limit was put at 10 years<sup>112</sup>. In its 2015 ruling, the same council noted that the French legislator had extended the time limit, making it possible to deprive somebody of its nationality up to 15 years after acquisition. The Council indicated that this time limit “could not further be extended without unreasonably breaching the equality between persons who are born French and persons who become French”<sup>113</sup>. For its part, the Belgian Constitutional Court noted that the deprivation was an exceptional measure, which may only be ordered by a court in case of serious violation of fundamental duties. This was enough, according to the Court, to demonstrate the reasonableness of the measure<sup>114</sup>. One may in that respect also refer to the ruling of the ECJ in the *Rottmann* case : looking at the possibility that Mr Rottmann could lose his German citizenship, the ECJ stressed the importance of the “lapse of time between the naturalisation decision and the withdrawal decision”<sup>115</sup>.

In view of these rulings, questions may be asked in relation to the current regime of deprivation for terrorism under Belgian law. As explained, according to Article 23/2, deprivation may be ordered without any regard to the time which has lapsed since the person concerned has acquired Belgian citizenship. This is highly questionable from the perspective of proportionality. The lack of reasonableness is even more visible for those who became Belgian citizens at birth and could nonetheless be subject to deprivation<sup>116</sup>. Even taking into account the specific nature of terrorist acts, it may be doubted whether there is a reasonable relation of proportionality between the possibility to deprive somebody of his citizenship without any consideration of the length of time since the person acquired citizenship and the objective pursued by the State. One may recall in this respect that a person who became Belgian (or French citizen) at birth on the basis of *ius sanguinis*,

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109 Constitutional Court, 14 May 2009, case N° 85/2009, § B.7.

110 ECtHR, 23 July 1968, *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, Application n° 1474/62, § 10.

111 The proportionality test was also at the heart of the *Rottmann* ruling (ECJ, 2 March 2010, *Janko Rottmann v Freistaat Bayern*, case C-135/08, ECR, I-1449).

112 Conseil constitutionnel, 16 July 1996, ruling N° 96-377 DC, § 20 and 23.

113 Conseil constitutionnel, 23 January 2015, ruling N° 2014-439 QPC, at para. 15.

114 Constitutional Court, 14 May 2009, case N° 85/2009, § B10 : “Ten slotte is de vervallenverklaring van de nationaliteit een uitzonderingsmaatregel waartoe enkel kan worden beslist door een rechtscollège bij een ernstige tekortkoming aan de verplichtingen die iedere burger heeft. Bijgevolg is de in het geding zijnde maatregel niet zonder redelijke verantwoording”.

115 ECJ, 2 March 2010, *Janko Rottmann v Freistaat Bayern*, case C-135/08, ECR, I-1449 § 56.

116 Under Article 11 § 2 CNB.

may never be subject to deprivation<sup>117</sup>. In practice, a person who has enjoyed Belgian citizenship for thirty years, having acquired it at the age of 18, is therefore susceptible to be deprived of it even though a person who acquired Belgian citizenship at birth *ius sanguinis* and has only enjoyed it for 18 years, may not be subject to deprivation.

In this respect one may recall that in *Biao*, the European Court of Human Rights held that it was not convinced “that in general it can be concluded that the strength of one’s ties continuously and significantly increases after, for example, 10, 15 or 20 years in a country”<sup>118</sup>. The Court made this remark in relation to a Danish provision whereby the benefit of a special family reunification regime was reserved for those who had held Danish citizenship for at least twenty eight years. However, the Court’s finding that “to conclude that in order to be presumed to have strong ties with a country, one has to have direct ties with that country for at least 28 years appears excessively strict” may resonate in other contexts. Indeed, the Court’s finding is relevant every time a State creates a distinction between different categories of its citizens. The current deprivation regime under Belgian law goes in fact much further than the Danish provision challenged in *Biao*, as it makes no allowance at all for those who have built strong ties with Belgium over the course of a long period. If a person has obtained its citizenship otherwise than *ius sanguinis* or by operation of the double *ius soli* principle, no protection may be found against deprivation no matter how long one has been a Belgian citizen. Clearly, the lack of any time limit preventing deprivation for those who have held Belgian citizenship for a long time is a matter for strong concern under the equality principle.

Another aspect which needs to be examined in light of the principle of proportionality is that of the gravity of the offense<sup>119</sup>. At present, deprivation is in order for all terrorist offenses under Belgian law<sup>120</sup>. Certainly, States enjoy a wide margin of appreciation in defining which acts qualify as terrorist offenses. The difficulty is that this list of offenses has grown substantially over recent years. Next to very grave crimes such as murder, kidnapping or highjacking of an airplane, one may also fall under the heading of terrorist act when one is found guilty of having provided information, logistical support or financial assistance to a terrorist group<sup>121</sup>. The same applies for persons who receive training, whether in Belgium or abroad, in order to build weapons which may be used to commit terrorist crimes. Finally, it has been made a criminal offense for a person to leave or enter Belgium for the purpose of participating in the activity of a terrorist group<sup>122</sup>.

Let there be no doubt that it may be perfectly justified from a counter-terrorism perspective to resort to criminal sanctions in all these cases. However, taking into account that such action may be criminally prosecuted, it may be questioned whether the additional penalty of deprivation, which may not be inflicted to those terrorists who only have one nationality or whose Belgian nationality was gained at birth *ius sanguinis*, still bears a reasonable relationship of proportionality with the aim pursued by the legislator. It is submitted that account should be taken of the exact nature of the crime committed by the person concerned when deciding upon the deprivation. It is difficult to accept that a person who received Belgian citizenship at birth<sup>123</sup>, and is later arrested when leaving Belgium because of suspicion that he is about to be involved in terrorist crimes, could be found guilty of a terrorist crime and hence be deprived of his citizenship while a person born abroad, but in possession of Belgian citizenship at birth *ius sanguinis*, could not be subject to the same penalty even if that person has been involved in actual killing and torturing other in name of some radical

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117 This may change in the near future XX for France.

118 ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 99.

119 This was also stressed by the ECJ in *Rottmann* (ECJ, 2 March 2010, *Janko Rottmann v Freistaat Bayern*, case C-135/08, ECR, I-1449 § 56).

120 This includes all offenses listed in Articles 137 tot 141<sup>ter</sup> of the Criminal Code.

121 Article 140 of the Criminal Code.

122 Article 140sexies Criminal Code.

123 On the basis of Article 11 § 2 CNB.

beliefs. In other words, the combination of the broad brush approach adopted in criminal law, whatever its merits and legitimacy, with the extension of the possibility to deprive somebody of his citizenship, may create a risk of unintended spillover which unduly restricts the right to equal treatment.

### *By way of conclusion*

When looking at French and Belgian policy and practice regarding deprivation for terrorist acts, one cannot but note the limited scope of deprivation. This measure, which is considered to be an additional penalty, is not uniformly applied to all nationals. It can only be inflicted upon certain categories of citizens. Persons who acquired French or Belgian nationality at birth following transmission by one parent are protected against such deprivation, even though they may possess another nationality. This distinction, which goes back to the early days of deprivation in those two countries, has been criticized for a long time. Niboyet wrote in 1947 that:

“Dès l'instant où elle [deprivation] frappe les individus nés en France et devenus français au cours de leur majorité, on ne comprend pas pourquoi seuls les Français d'origine lui échappent. Il n'est pas plus permis d'être un indésirable dans un cas que dans l'autre, et cela manque totalement d'élégance, après avoir accordé la nationalité, de la retirer pour des faits que peuvent impunément commettre les Français d'origine. Cette discrimination ne se défend pas”<sup>124</sup>.

Certainly, the distinction creates a “second-class citizenship”<sup>125</sup>, which is difficult to reconcile, in some respects, with the prohibition of discrimination. The distinction also smacks of an ethnic approach to nationality. While the regime put forward by both the French and the Belgian legislators is *prima facie* neutral as it focuses on the method of citizenship acquisition, it does have a stronger adverse impact on categories of people whose origin lies outside Europe. This may even reinforce existing patterns of social stereotyping related to one or other “natural feature”<sup>126</sup>. Treating a class of citizens with suspicion because of their alleged lack of strong ties due to the way they obtained citizenship, regardless of whether they are longstanding citizens, is unacceptable.

Two solutions may be contemplated : one could either extend deprivation to all nationals, no matter how one acquired or obtained citizenship<sup>127</sup>. In this context, the method of acquisition could still play a role, albeit limited. Acquisition of citizenship at birth *ius sanguinis* would no longer offer an absolute protection against deprivation. It could, however, be taken into account when deciding whether deprivation is proportionate in view of all circumstances of the case. This would mean that a person having obtained French or Belgian citizenship as an adult could be subject to deprivation more easily than a person who became a citizen as a child, although the method of acquisition would not be given as much weight as the length of time one has been a citizen. This case by case approach would do more justice to the very nature of citizenship as a bond between an individual and a State having at its basis a social fact of attachment.

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124 J.-P. NIBOYET, *Traité de droit international privé français, I : Sources, nationalité, domicile*, 2<sup>nd</sup> ed., Sirey, 1947, 476, § 384. Niboyet was not alone in his analysis : other authors joined him to condemn what was deemed to be a discrimination, see e.g. P. LOUIS-LUCAS, *La nationalité française - droit positif et conflits de lois*, Sirey, 1929, at p. 271.

125 As was noted by the minority in *Biao* in respect of the Danish provision on family reunification granting a privileged position to those who had held Danish citizenship for at least 28 years (joint dissenting opinion of judges Sajo, Vucinic and Kuris, ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 8).

126 As noted by the joint dissenting opinion of judges Sajo, Vucinic and Kuris, ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 8.

127 This solution was advocated by P. Lagarde (P. LAGARDE, comments, Constitutional Court 23 January 2015, *Revue critique de droit international privé*, 2015, at p. 125).

Failing such extension of deprivation, which would bring French and Belgian law in line with the practice of other States, there is a risk that the application of the current deprivation regimes to some citizens could breach the prohibition of discrimination<sup>128</sup>. Courts should therefore take into account the demands of the equality principle when ruling upon individual deprivation cases. This will not be easy, as this requires drawing comparisons between various categories of citizens and possibly also second-guessing the executive's motives for seeking deprivation. This is, however, the price to be paid if one intends to keep the practice of deprivation in line of contemporary standards of equality of treatment.

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128 On the difference between an abstract review of the State practice and a review of the same State practice applied to a given person, see joint dissenting opinion of judges Sajo, Vucinic and Kuris, ECtHR, 2<sup>nd</sup> section, 25 March 2014, *Biao v. Denmark*, Application N° 38590/10, § 19-24.