

Citizenship deprivation, (non) discrimination and statelessness.

A case study of the Netherlands

By Sangita Jaghai

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Citizenship deprivation as an obstruction for states to respect the international law principles of non-discrimination and the prohibition of statelessness: a case study of The Netherlands*

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Abstract

This is a reflection on how deprivation of citizenship can create different classes of citizenship and can (symbolically) destabilise social cohesion. The Netherlands is used as a case study to exemplify this. This paper critically analyses three aspects that can contribute to the erosion of equal and unconditional citizenship. First, tensions at state level in the implementation of international law principles of non-discrimination and the prohibition of statelessness when regulating deprivation of citizenship. Both principles can be violated by national legislation on deprivation of nationality. Withdrawal of nationality can (un)intentionally result in statelessness under specific circumstances, leaving people without any nationality and subject to human rights violations. Other states limit deprivation of nationality to specific groups of citizens, resulting in differential treatment of citizens, which could be discriminatory. Second, challenges inherent to citizenship deprivation measures in the Netherlands in respect of ensuring equal and unconditional citizenship. Third, reflections on how political rhetoric on citizenship revocation, particularly in the case of terrorism, breeds fear in society, disrupts social cohesion and makes people believe that it is acceptable to make a distinction between groups of citizens.

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1. Introduction

For the first time, the former Dutch Minister of Security and Justice (Stef Blok) stripped four alleged foreign terrorist fighters of their Dutch nationality² in September 2017.³ All four are of Moroccan descent, and were dual nationals. The Minister stated that their behaviour goes against all Dutch values and that they are, therefore, no longer worthy of being Dutch nationals.⁴ In March 2017, a controversial bill was adopted by the Dutch Senate that gives the Minister discretionary power to deprive a person's citizenship prior to criminal conviction, if it does not render a person stateless.⁵ Citizens who are abroad, at least 16 years of age and—on the basis of their behaviour—appear to be part of an organisation 'blacklisted' as partaking in national and international armed conflict (which includes ISIS and Al-Qaida) can be denationalised.⁶ This administrative measure currently exists alongside Article 134a of the Dutch Criminal Act (*Wetboek van Strafrecht*) which regulates deprivation of nationality for people convicted of terrorism.

One of the concerns raised by academics and policy makers—and the focus of this reflection—is that both the criminal and administrative measure on deprivation of citizenship in the Netherlands only allow revocation of citizenship for dual citizens (or people with multiple citizenship). Such revocation is—according to the Netherlands—in line with international law. The Netherlands is party to the 1961 Convention on the Reduction of Statelessness (1961 Convention), which generally prohibits deprivation of nationality if it results in statelessness.⁷ A stateless person is a person who is not considered a national of any country under the operation of its law.⁸ Revoking Dutch citizenship of people who have more than one nationality can prevent statelessness in some cases. Yet, several questions remain unanswered: would distinguishing between nationality statuses, i.e. people with one nationality v. dual nationals or birthright nationals v. naturalised nationals, be discriminatory and therefore prohibited under international law? Does such an approach create hierarchy in different sorts of citizenship? And is the prevention of statelessness guaranteed?

In practice, people affected by this measure are often naturalised citizens or people who acquired dual nationality at birth, in both cases people of foreign descent. People with one nationality (often birthright nationals) cannot be denationalised—even if they commit a terrorist act—and will be subject to other administrative measures, such as freezing assets, withholding social aid, revoking passport, jail sentence. However, dual nationals who (allegedly) commit a terrorist offence are denationalised because they are not deemed to be loyal towards the State. While naturalised citizenship is made conditional upon good behaviour, this is not the case for birthright citizens.

The Netherlands is just one of the many states that expanded their Minister's powers to denationalise people with more than one nationality. This seems to create two classes of citizenship. For instance, Australia, Russia, and the United Kingdom have similar provisions on denationalization in their national

² The terms nationality and citizenship in this reflection are used interchangeably.

³ Rijksoverheid, Minister Blok trekt Nederlanderschap in van 4 personen, 13 September 2017, <https://www.rijksoverheid.nl/actueel/nieuws/2017/09/13/minister-blok-trekt-nederlanderschap-in-van-vier-persoonen>

⁴ NOS, Nederlanderschap van vier Jihadisten ingetrokken, 13 September 2017, <https://nos.nl/artikel/2192744-nederlanderschap-van-vier-jihadisten-ingetrokken.html>.

⁵ This administrative measure currently exists next to Article 134a of the Dutch Criminal Act (*Wetboek van Strafrecht*) which regulates deprivation of nationality for people convicted of terrorism.

⁶ Stb. 2017, 67.

⁷ UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, Article 8(1).

⁸ Ibid. Article 1(1)

legislation.⁹ These measures leave persons with more than one nationality in a more precarious situation. ‘Bad’ or undesired behaviour can lead to denationalisation. While a second nationality remains in place in theory, in practice denationalisation can have far-reaching consequences. It can result in forced expulsion, as denationalised people would be unlawfully residing in the territory, and the inability to enjoy private and family life since they are unable to lawfully return to the country of previous residence and therefore separated from their family.¹⁰ Some states even apply derivative denationalisation, stripping nationality from children and/or spouse which puts them at risk of statelessness. Also, a person’s other nationality may not be effective, for instance, in ensuring diplomatic protection while being abroad.¹¹

Further, some states have nationality deprivation measures without a safeguard against statelessness (e.g. Indonesia, Turkey, and Bahrain).¹² Risks of statelessness also exists if one of the two states has a safeguard against statelessness. For instance, a person is a Dutch national at birth and a naturalised citizen of South-Africa for three years. The person is stripped of Dutch nationality due to involvement in terrorism. The South African Citizenship Act states that: “The Minister may by order deprive any South African citizen, by registration or naturalisation, of his South African citizenship if he is satisfied that such citizen (...) within five years of the date of the grant of the certificate of registration or naturalisation, has been sentenced in any country to a period of imprisonment of not less than twelve months or to a fine of not less than one hundred pounds or the equivalent thereof”.¹³ Statelessness can arise if the competent Minister of South Africa also decides to denaturalise the person.

Besides provisions on withdrawal of citizenship to protect national security—which could entail terrorism, attacking the royal family, and other crimes that come with a jail sentence of a certain number of years—many states globally regulate revocation of nationality if said nationality has been acquired in a fraudulent manner.¹⁴ Deprivation is also used as a tool to exclude large groups of people, such as the Rohingya and persons of Haitian descent in the Dominican Republic.¹⁵ In both situations, statelessness is a consequence. Being left without any nationality means lacking legal identity. Not having a nationality hinders the enjoyment of fundamental human rights such as health care and education, despite the goal of human rights being accessible for all. Being stateless means being invisible and can result in increased risks of various human rights violations, including human trafficking and torture. Forced expatriation, arbitrary detention, and discrimination are not uncommon among the estimated 10 million stateless people worldwide.¹⁶

While many countries implemented grounds for denationalisation, others heavily criticise deprivation policies targeting specific citizens or deprivation of nationality as a whole. Canada repealed Bill C-24 that regulated deprivation of citizenship for dual nationals if convicted of terrorism, espionage or treason in

⁹ Australian Citizenship Act 1948, Article 21(b); Federal Law NO. 62-FZ of May 31, 2002 on Russian Federation Citizenship, Article 4; British Nationality Act 1981, Article 40.

¹⁰ This could be the country of which the person previously had a nationality or a third country if a person migrated.

¹¹ UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 19 December 2013, A/HRC/25/28.

¹² Bahraini Citizenship Act 1963, Article 10 and Royal Decree No 8; [Indonesia] Law No. 15/2003 on the Eradication of Terrorism. Article 12B.

¹³ South African Citizenship Act, 2 September 1949, Article 19(d).

¹⁴ See for instance: the EUDO CITIZENSHIP Global Database on Modes of Loss of Citizenship: <http://eudo-citizenship.eu/databases/modes-of-loss>.

¹⁵ Stories of the stateless in Myanmar and the Dominican Republic can also be found in: G. Constantine, *Nowhere People*, 2015, *Nowhere People Book Series*.

¹⁶ A. Edwards & L. van Waas, Introduction, *Nationality and Statelessness under International Law*, 2014 (eds. A. Edwards & L. van Waas), Cambridge University Press, p. 1.

June of this year.¹⁷ President Trudeau's infamous quote stresses the importance of unconditional citizenship:

'As soon as you make citizenship for some Canadians conditional on good behaviour, you devalue citizenship for everyone. A Canadian is a Canadian. Is a Canadian (...) And by the way, there are penalties for anyone convicted of (...) terrorism or an act of war or an offence against Canada. They end up locked up in jail for the rest of their lives.'¹⁸

After the Bataclan attack in Paris, President Hollande proposed depriving dual nationals of their French nationality after they commit offences that constitute a serious threat to the Nation.¹⁹ The proposed measure was subject to heavy criticism and the French Minister of Justice decided to resign as she objected to the proposed measure.²⁰ While there is an exponential rise in the adoption of administrative measures to revoke nationality as a tool to counter terrorism, not all states turn to the adoption or use of deprivation measures. In the US, for instance, no one can be deprived of their nationality. The U.S. Supreme Court considers deprivation of citizenship "a form of punishment more primitive than torture."²¹ States that have adopted deprivation measures largely ignore the negative impact of such measures on the concept of equal citizenship and society.

This reflection addresses how the use of deprivation of citizenship results in the erosion of equal and unconditional citizenship. Section 2 briefly explains how citizenship deprivation, unequal citizenship, discrimination, and statelessness are interconnected. Section 3 looks at how deprivation of nationality is regulated at international and regional level. It specifically focuses on the tensions in relevant international law that either feed into or prevent the creation of hierarchy in sorts of citizenship. Where relevant, it also pays attention to regional jurisprudence that further interprets equal citizenship. Section 4 elaborates on challenges with regards to citizenship revocation measures in the Netherlands. It assesses different layers of discrimination hidden in current deprivation measures. Section 5 reflects on manners in which political rhetoric on deprivation of nationality can (symbolically) affect society and the relationship between citizens.

2. The interconnectedness between citizenship deprivation, inequality, statelessness and discrimination

Before reflecting on whether citizenship deprivation can be discriminatory and how this relates to international law on nationality matters, it is important to elaborate on links between citizenship deprivation, unequal citizenship, discrimination and statelessness.

¹⁷ Parliament of Canada, LEGISinfo, C-6 An Act to amend the Citizenship Act and to make consequential amendments to another Act, June 2017, <http://www.parl.ca/LEGISInfo/BillDetails.aspx?Language=E&billId=8117654>.

¹⁸ Soundcloud, Justin Trudeau's explosive audio: "Terrorists should get to keep their Canadian citizenship, 2016, <https://soundcloud.com/tarek-fatah/justin-trudeaus-explosive-audio-terrorists-should-get-to-keep-their-canadian-citizenship>.

¹⁹ France Diplomatie, Speech by the President of the Republic before a joint session of Parliament, Versailles November 16, 2015, <http://www.diplomatie.gouv.fr/en/french-foreign-policy/defence-security/parisattacks-paris-terror-attacks-november-2015/article/speech-by-the-president-of-the-republic-before-a-joint-session-of-parliament>.

²⁰ The Guardian, French minister Christiane Taubira resigns after fallout over terror policy, 27 January, 2016, <https://www.theguardian.com/world/2016/jan/27/french-justice-minister-christiane-taubira-resigns>.

²¹ United States Supreme Court 1958, No. 70, 1958 (*Trop v. Dulles*).

Citizenship is not only a legal status which result into rights and duties for both citizens and the state. It is just as much a social status as a form of membership that gives people a sense of national identity and belonging to a group that shares the same norms and values.²² Historically, citizenship was determined by ethnicity, religion, and other sociocultural factors that people within a community have in common. States had complete sovereignty to determine who can acquire citizenship and under which conditions.²³ Determining conditions for citizenship inevitably results in the inclusion of some and exclusion of others.

State sovereignty at the time also meant no restrictions in determining conditions for loss of nationality. Particularly, naturalised citizens were subject to revocation practices and differential treatment. Singling out naturalised citizens in regulating deprivation of citizenship is historically linked to fears of disloyalty among people who were born abroad and obtained citizenship at a later stage. It was believed that country of birth and allegiance are intrinsically related with one another. They were not given the same privileges that come along with birthright citizenship. Naturalised citizenship was a conditional status that is given based on allegiance and good behaviour.²⁴ Differential treatment and creating categories of citizenship is, thus, nothing new.

The difference between then and now is the way the international community feeds into the concept of citizenship. Over time, several developments—including the rise of international law—reframed the concept of citizenship, as well as the traditional approach to state sovereignty in regulating nationality matters. In the early twentieth century, international law on citizenship mainly focused on regulating international relations and solving conflicts of nationality laws.²⁵ With the rise of international human rights law, states agreed to abide by universal norms such as the principle of non-discrimination on the basis of gender, race or ethnicity, and the prohibition of arbitrary deprivation of nationality. Restrictions were imposed on rendering a person stateless in order to prevent mass denationalisation and mass migration, as witnessed during the Second World War. Spiro explains that new international laws on citizenship have reframed the concept of citizenship as an individual right, also increasingly limiting state sovereignty in regulating nationality matters.²⁶ States now have the sovereignty to determine who is a national and who is not by regulating modes of acquisition and loss of nationality, as long as this happens ‘within the limits set by international law’.²⁷

The next section focuses on the extent to which international law limits state sovereignty in determining who can acquire or lose nationality, and to what extent tension exists between international law principles when applying this in the context of nationality deprivation.

²² S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens*, Cambridge University Press 2006, p. 3.

²³ P. Spiro, A New International Law of Citizenship, *American Journal of International Law*, 105, 2011, p. 1.

²⁴ M.J. Gibney, *Should citizenship be conditional? The ethics of denationalization*, Cambridge University Press 2013, p. 646 – 658.

²⁵ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April, Treaty Series, vol. 179, p. 89. No. 4137.

²⁶ *Ibid.* N23.

²⁷ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, Preamble.

3. Tension between non-discrimination and prohibition of statelessness under international law

International human rights law explicitly prohibits arbitrary deprivation of nationality.²⁸ Article 15 of the Universal Declaration of Human Rights (UDHR) reads:

- 1) Everyone has the right to a nationality.
- 2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

The prohibition in Article 15 (2) is also found in: Article 18(1) (a) of the Convention on the Rights of Persons with Disabilities, Article 4(c) of the European Convention on Nationality, Article 20(3) of the 1969 American Convention on Human Rights, Article 24 of the 1995 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Article 29(1) of the 2004 Arab Charter on Human Rights, and Article 18 of the 2012 ASEAN Declaration of Human Rights.²⁹

The Office of the High Commissioner and the United Nations Secretary-General published a report on human rights and arbitrary deprivation of nationality in 2009, which explains the legal framework applicable to the prohibition of arbitrary deprivation of nationality and important principles as well as components that need to be met in order for deprivation of nationality not to be arbitrary.³⁰ In order for deprivation not to be arbitrary, it needs to:

- Be non-discriminatory (on any ground)
- Have a firm legal basis in national legislation (no interpretation by analogy, law cannot have retroactive effect)
- Meet due process guarantees (i.e. right to appeal, right to a fair trial)
- Have a legitimate purpose (in line with international law)
- Be the least intrusive means to reach that purpose
- Be proportionate (i.e. weigh the impact deprivation of nationality has on the individual against the interest of the state to use this measure³¹)

²⁸ Deprivation of nationality in this reflection covers all forms of involuntary loss of nationality, as well as arbitrarily precluding a person from acquiring or retaining a nationality. This is in line with UN Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34, para. 23.

²⁹ The right to a nationality and the prohibition of arbitrary deprivation of nationality is not enshrined in the European Convention on Human Rights. Nevertheless, the European Court deals with cases on deprivation of nationality as will be elaborated on later in this paper.

³⁰ UN Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34. Other guidelines on deprivation of nationality are: UN High Commissioner for Refugees (UNHCR), Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, (*"Tunis Conclusions"*), March 2014 and ILEC (Involuntary Loss of European Citizenship), Guidelines on Involuntary Loss of European Citizenship (*ILEC Guidelines*), 2015.

³¹ The Court of Justice of the European stated in *Rottmann v. Freistaat Bayern* (Case C-135/08) gives interpretative guidance on what the principle of proportionality entails when it comes to withdrawal of nationality. It explains that the national court should ascertain whether the decision concerned observes the principle of proportionality. It states the following: "when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality."

It goes beyond the scope of this paper to discuss the numerous issues raised by scholars, policy makers and civil society for each of the above components in understanding when deprivation of nationality is arbitrary. However, the importance of the principle of non-discrimination is evidenced by several international norms and is useful for understanding how deprivation of nationality relates to the concept of equal and unconditional citizenship in the context of deprivation.

The principle of non-discrimination is enshrined in the objectives and aims of many human rights law instruments, also in respect to nationality matters.³² In addition, the Human Rights Council (HRC) stresses that arbitrary deprivation of nationality, especially on discriminatory grounds such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, including disability” is a violation of human rights and fundamental freedoms.³³ This is a non-exhaustive list of discriminatory grounds. Further, the prohibition of arbitrary deprivation of nationality is also implicitly enshrined in provisions of human rights treaties that focus on specific forms of discrimination.³⁴ The HRC calls upon States to refrain from taking discriminatory measures and from enacting or maintaining legislation that would arbitrarily deprive persons of their nationality on those grounds, especially if it leads to statelessness.

The Human Rights Committee clearly states that not every form of differential treatment constitutes discrimination.³⁵ In order for a difference in treatment not to be discriminatory it must have a legitimate aim and it must be proportionate. Legitimate aims for denationalisation could, for instance, entail protecting national security or no longer having ties to the state. Assessing proportionality is more complex. In each case, the interests of society should be weighed against the impact such differential treatment has for the individual concerned. Other factors that need to be taken into consideration are the suitability of differential treatment to achieve the intended goal, whether alternative means exist to achieve that goal, and whether the disadvantage faced by the individual is excessive in relation to the aim pursued.³⁶ Therefore, international law applies the proportionality requirement twice in the context of nationality revocation. First, the act of citizenship stripping is subject to a proportionality test. Second, whether differential treatment in nationality withdrawal practices at domestic level is proportionate under international law and therefore not discriminatory.

The 1961 Convention on the Reduction of Statelessness (1961 Convention) contains an absolute prohibition on deprivation of nationality of a person or group of persons on the basis of racial, ethnic, religious or political grounds.³⁷ The provision was designed to give effect to Article 15 of the UDHR and is

³² Among others in: the International Covenant on Civil and Political Rights, Article 2; The International Covenant on Economic, Social and Cultural Rights, Article 2; The Convention on the Elimination of Racial Discrimination, Article 5; the Convention on the Rights of Persons with Disabilities, Article 3; The Convention on the Rights of the Child, Article 2; Convention on the Elimination of Discrimination against Women, Articles 2 and 3.

³³ UN Human Rights Council, Human rights and arbitrary deprivation of nationality: resolution, 15 July 2016, A/HRC/RES/32/5, para. 4.

³⁴ For example, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that women have the same right as men to change or retain their nationality, also when the husband loses or changes his nationality. Article 9(1); The Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination in respect of the right to a nationality. Article 5 (d) (iii) ; The Convention on the Rights of the Child, Article 8; The International Convention for the protection of All Persons from Enforced Disappearances entail the right to an identity, Article 25(4).

³⁵ Human Rights Council, General Comment 18, HRI/GEN/1/Rev.9 (Vol I) 195, para. 13.

³⁶ Moeckli, Equality and Non-Discrimination, *International Human Rights Law* (eds. Moeckli, Shah, Sivakumaran), 2014, Oxford University Press, p. 167-168.

³⁷ UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, Article 9.

complemented by provisions in the CERD, CEDAW and CRPD which give a longer list of discriminatory grounds under which deprivation of nationality is prohibited. Whereas the 1961 Convention looks at deprivation of nationality from a perspective to prevent and reduce statelessness,³⁸ the human rights realm looks at deprivation of nationality from a perspective that having and retaining a nationality is a fundamental right, and that deprivation of nationality cannot be discriminatory. In the realisation of the different objectives, tension may arise in the approach to deprivation of nationality.

The example of the Netherlands will illustrate the issue and tensions between the two aforementioned principles of international law. The Netherlands is party to all the above mentioned international treaties and conventions.³⁹ National legislation regulates deprivation of nationality for dual nationals. People of Moroccan descent often have dual citizenship, and is the largest ethnic group in the Netherlands that could be subject to deprivation of nationality.⁴⁰ If a measure indirectly targets an ethnic group, does this fall under the prohibition of ethnic or racial discrimination? Also, it is worth noting that Article 9 of the 1961 Convention “was designed to give effect to Article 15 of the UDHR and is complemented by provisions in, among others, CERD, CEDAW and CRPD.”⁴¹ These other human rights treaties explicitly prohibit discrimination on the basis of status, unlike the 1961 Convention.

In general, deprivation of nationality is prohibited if it leads to statelessness under Article 8(1) of the 1961 Convention. However, there seems to be tension in international law between the above described widely recognised principle of non-discrimination and the prohibition against statelessness when reading Articles 7 and 8 of the 1961 Convention, as some provisions only apply to certain groups of citizens to prevent statelessness. In the following provisions, withdrawal of nationality only applies to naturalised citizens, contributing to unequal terms of possessing citizenship, compared to birthright citizens:

- If a naturalised person resides abroad for a period longer than seven consecutive years, and if the person fails to declare to the appropriate authority his intention to retain his nationality (7(4) and 8(2)(a))
- When a nationality has been obtained by misinterpretation or fraud (Article 8(2)(b)).

Next to differentiating between naturalised and birth right citizens, Article 8(3) specifies deprivation of nationality for national security related reasons, even if it leads to statelessness.⁴² A person’s nationality can be revoked if he or she:

- Disregards an express prohibition of the State and rendered, renders or continues to render services to another State, or received or continues to receive emoluments from another State ((8(3)(a)(i) 1961 Convention)

³⁸ UN High Commissioner for Refugees, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04.

³⁹ Government of the Netherlands, Human Rights in the Netherlands, 29 November 2017, <https://www.government.nl/topics/human-rights/human-rights-in-the-netherlands>; United Nations Treaty collections, Convention on the Reduction of Statelessness, New York, 29 November 1961, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&lang=en.

⁴⁰ As seen in statistics set out in section 3 of this reflection.

⁴¹ UN High Commissioner for Refugees (UNHCR), Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), March 2014, p. 15.

⁴² if a state party already that provision on deprivation of nationality in its national law prior to ratifying, acceding to or signing the 1961 Convention and if it specified their retention of their right to deprive people of their nationality at the time.

- Conducted himself in a manner seriously prejudicial to the vital interests of the State (8(3)(a)(ii) 1961 Convention)
- Has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State (8(3)(b) 1961 Convention)
- Is involved in voluntary service in a foreign military force (8(3) 1961 Convention)

Regional law can differ from the 1961 Convention on this matter. The European Convention on Nationality (ECN) includes similar grounds under which nationality can be revoked. Unlike the 1961 Convention, only deprivation of nationality acquired by “fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant” can lead to statelessness under the ECN.⁴³ It is also generally accepted under international law that a person’s nationality can be revoked if it has been acquired through fraud, even if it leads to statelessness.⁴⁴ So, international law gives limited guidance on making a distinction between groups of citizens in the context of whether denationalisation is legitimate or discriminatory.

Jurisprudence on differential treatment between groups of citizens may give further guidance on the interpretation of this issue. The European Court of Human Rights (ECtHR) is yet to elaborate on the principle of non-discrimination in a deprivation of nationality context. While the case of *K2 v. United Kingdom* concerned deprivation of nationality,⁴⁵ it did not elaborate on the issue of differential treatment between naturalised and birthright citizens. K2 is a dual citizen (Sudanese since birth and naturalised British). He was deprived of his British nationality and barred from re-entering the United Kingdom on account of his terrorism-related activities pursuant to Article 40(2) of the British Nationality Act 1981. K2 complained that the decision to deprive him of his British citizenship resulted into being treated different from birthright British citizens pursuant to Article 8 in conjunction with Article 14 ECHR (prohibition of discrimination). Interestingly, the ECHR does not entail a separate right to a nationality but interprets aspects of this right under Article 8 of the Convention. However, The ECtHR did not deal with this question of differential treatment as K2 did not raise this issue at domestic courts and had, therefore, not exhausted all domestic sources.

The case of *Biao v. Denmark* does provides guidance from the European Court of Human Rights (ECtHR) in understanding to what extent it is lawful to treat naturalised citizens differently from birthright citizens.⁴⁶ In this case, a complaint was made by a naturalised Danish citizen of Togolese origin and his Ghanaian wife, Mr. and Ms. Biao. To be eligible for family reunification, they had to meet the ‘attachment requirement’. According to the Danish Aliens Act 2003, this entails that family reunification for people who became Danish nationals at a later stage is possible, only if they have held Danish citizenship for at least 28 years to ensure that people have strong ties with Denmark. Biao complained that this ‘28-year rule’ resulted in a difference in treatment between those born as Danish nationals and those who had acquired Danish citizenship later in life. He claims that this is a violation of Article 8 of the European

⁴³ Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166, Article 7(1)(b).

⁴⁴ The European Court of Human Rights concludes that revocation of citizenship might in some circumstances raise an issue under Article 8 ECHR, because of its impact on the private life of the individual. Two things must be assessed when depriving a person’s nationality 1) is the revocation arbitrary? 2) What were the consequences for the applicant? For more information, see: ECtHR, No. 42387/13, 9 March 2017 (*K2 v. United Kingdom*); ECtHR, No. 76136/12, 21 June 2016 (*Ramadan v. Malta*).

⁴⁵ ECtHR, *K2 v. United Kingdom*, Judgment of 9 March 2017, Application No. 42387/13.

⁴⁶ ECtHR, No. 38590/10, 25 March 2014, (*Biao v. Denmark*).

Convention on Human Rights (ECHR)⁴⁷ and Article 8 in conjunction with Article 14 ECHR⁴⁸. The Court recalled that:

'A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group' and that indirect discrimination does not necessarily require a discriminatory intent.⁴⁹

When interpreting this by case in the context of deprivation of nationality, it seems that difference in treatment of dual citizens and singular citizens can be deemed discriminatory, even if the measure is worded in a neutral manner and has no discriminatory intent. In the Netherlands, deprivation of nationality is limited to dual nationals as it is bound by the prohibition of statelessness. This, in practice affects dual nationals, which are mainly citizens of Moroccan descent.⁵⁰ Section 4 will take a closer look at the groups that are actually affected by denationalisation measures in The Netherlands. It seems that if a deprivation measure directly or indirectly affects a specific group, be it naturalised citizens or an ethnic minority, it can be discriminatory even if the measure was not intended to be discriminatory.

Furthermore, the African Commission on Human and Peoples' Rights (ACHPR) adds another perspective to differential treatment between naturalised citizenship and citizenship by descent in *John K. Modise v. Botswana*. In this case, the Commission recognises a distinction is made between citizenship by descent and naturalised citizenship in the context of arbitrary denial of acquisition of nationality, which is also a form of deprivation of nationality under international law.⁵¹ The Commission's ruling concerned which sort of citizenship Mr. Modise should acquire.⁵²

Modise claimed citizenship of Botswana by descent, on the basis of his parentage and the nationality provisions adopted following Botswana's independence, but he was refused recognition as a birthright citizen by Botswana. Eventually, Modise was granted citizenship by naturalisation in 1995. However, this type of citizenship status did not entitle him to full political rights in Botswana and so he proceeded with his case before the Commission. The Commission was not satisfied that the conferral of citizenship by naturalisation to Modise was sufficient to address the violation of rights. Naturalised citizenship allowed for fewer political rights and considering that Modise was an active politician, found this to be "a legal disability of grave consequence".⁵³ The Commission thereby recognised Modise's entitlement to citizenship by descent through the application of a particular nationality rule. This, though under different circumstances, also raises the question whether one should distinguish between naturalised and birthright citizens.

There seems to be tension in the application of international law at the domestic level regarding the principle of non-discrimination and the prohibition that deprivation of nationality cannot lead to statelessness. States who opt to deprive dual nationals from one of their nationalities are complying with the international norm to prevent statelessness, but risk violating the principle of non-discrimination. This is an interesting matter to take upon in further research in understanding when deprivation of nationality

⁴⁷ This entails the right to respect for private and family life.

⁴⁸ This entails the prohibition of discrimination.

⁴⁹ Ibid. at 103.

⁵⁰ As will be seen in the next section that also elaborates on statistics.

⁵¹ Ibid., N.12.

⁵² African Commission on Human and Peoples' Rights, Comm. No. 97/93, 6 November 2000 (*John K. Modise v. Botswana*).

⁵³ Ibid, para. 97.

is arbitrary, especially because the principle of non-discrimination and general prohibition on statelessness seem to be co-existent safeguards in international law.

4. Challenges in the Netherlands

Highly charged debates exist in the Netherlands since deprivation of nationality became possible without criminal conviction. The Commissioner of Human Rights of the Council of Europe (the Commissioner) sent a letter to the Minister of Security and Justice and the Minister of Interior and Kingdom Relations, asking for clarifications on the Bill as it was at odds with Articles 6, 7, 12 and 13 of the European Convention on Human Rights.⁵⁴ The Commissioner stated in his letter that:

‘Revocation should occur in a manner that prevents statelessness and is non-discriminatory on, inter alia, religious or ethnic origin grounds. The principle of non-discrimination also applies to distinctions between nationals, such as those who have acquired nationality by birth and those who have acquired it later.’

He asked for clarification about how this Bill could be implemented in a non-discriminatory manner, as the 2014 Statistics from the Central Bureau of Statistics in the Netherlands showed that half of all dual nationals are of Turkish or Moroccan descent. So, the measure would primarily affect them but excludes alleged terrorists who only have Dutch citizenship. The government ignored the issue and responded that the ECN allows them to revoke citizenship of people if it would not lead to statelessness. Further, the Netherlands promised to examine the following recommendation received during the third cycle of the Universal Periodic Review on its counter terrorism measures:

Target individuals and groups based on race, ethnicity and religion, including Muslims and Muslim communities and ensure that such measures do not associate, or contribute towards associating terrorism with any religion, race, culture, ethnic group or nationality.⁵⁵

In 2017, the question whether deprivation measures in the Netherlands are discriminatory is still unanswered and new issues have arisen in the meantime. For instance, a new law on registration of persons (*Wet Basisregistratie Personen*) was implemented, whereby a Dutch person’s second (and other) nationality is no longer registered anywhere since January 2015. Also, in cases where a person’s foreign nationality was registered prior to adoption of this law, it was decided to reverse such registration.⁵⁶ As a result, it is not clear how the existing nationality deprivation measures are implemented, while providing a safeguard against statelessness.⁵⁷ The Netherlands does not have a statelessness determination

⁵⁴ Commissioner for Human Rights, CommHR/NM/sf 045-2016, 2 November 2016, https://www.eerstekamer.nl/overig/20161129/brief_council_of_europe_van_2/document.

⁵⁵ Kamerstukken II 2016-2017, 26150, nr. 161, p. 17.

⁵⁶ Kamerstukken II 2012-2013, 33219, nr. 9, p. 4.

⁵⁷ This new law was adopted as a result of a highly charged debate among citizens who solely feel Dutch but are also registered as dual nationals, and therefore feel foreign. Considerations of the legislative powers in relation to deprivation of nationality in national security circumstances was at the time deprivation of nationality was never used before. If used in the future, it can be expected that criminal investigations will point out whether a person has another nationality or not. However, now deprivation of nationality as criminal law measure is used and exists next to a newly adopted administrative law measure that allows the Minister of Security and Justice to strip of a person’s citizenship, without interference of a criminal law judge nor criminal investigations. So it is unclear how exactly research into a person’s second nationality is carried out in the event the Minister revokes a person’s Dutch citizenship. For more information see: Kamerstukken II 2012-2013, 33219, nr. 9, p. 2.

procedure in place.⁵⁸ Further, to determine whether a person is stateless, or has another nationality, an analysis of the nationality law alone does not suffice. To determine whether a person is stateless, it is also important to evaluate the application of the national legislation in practice.⁵⁹ Not having a registration system in place to gather data on whether a person has more than one nationality can increase risks of statelessness when a person's Dutch nationality is revoked. Statistics resulting from registrations would also point out who is actually targeted with this measure.⁶⁰

While discriminatory aspects in deprivation measures mainly focus on discrimination between groups of citizens, the Dutch deprivation measure also distinguishes between sorts of organisations. Organisations such as ISIS and Al-Qaida are found of the list of terrorist organisations but other organisations such as FARC, Tamil Tigers, and PKK are not.⁶¹ The distinction made here can be deemed proportionate as some organisations pose an increased threat to national security. Still, this is another example of differential treatment.

On a side note, the government states that the best approach to counter terrorism is yet to be analysed. The government aims to exchange best practices with other European countries in the near future.⁶² Meanwhile, the government has already denationalised suspected terrorists.

5. Political rhetoric on deprivation of citizenship and social cohesion

This section will provide further reflections on deprivation of citizenship and how differential treatment between groups of citizens can lead to disruption of social cohesion. Below are a number of examples which illustrate the consequences of nationality deprivation on society, particularly social cohesion.

Former President of France, Nicholas Sarkozy stated in the aftermath of riots around Grenoble in 2010 that "nationality should be stripped from anyone of foreign origin who deliberately endangers the life of a police officer, a soldier or a gendarme or anyone else holding public authority."⁶³ He pleaded for deprivation of naturalised citizens in the context of national security. This can cause divide in society, as citizens would not be treated equally when being punished for any wrongdoings. It also strengthens the suspicion towards citizens who are perceived as 'different', who are portrayed as untrustworthy and to cause riots.

⁵⁸ In 2016, the Netherland's State Secretary of Justice introduced a legislative proposal to determine statelessness. At the time of writing, no statelessness determination procedure is established. For a critical reflection on the Dutch Statelessness Determination Procedure, see: <https://www.statelessness.eu/blog/proposal-legislation-statelessness-netherlands-bittersweet-victory>.

⁵⁹ UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02.

⁶⁰ *Bevolking; kerncijfers*, Centraal Bureau voor de Statistiek (February 22, 2017). Retrieved from: [http://statline.cbs.nl/Statweb/publication/?VW=T&DM=SLNL&PA=37296ned&D1=a&D2=0,10,20,30,40,50,60,\(l-1\),l&HD=150716-2035&HDR=G1&STB=T](http://statline.cbs.nl/Statweb/publication/?VW=T&DM=SLNL&PA=37296ned&D1=a&D2=0,10,20,30,40,50,60,(l-1),l&HD=150716-2035&HDR=G1&STB=T).

⁶¹ G.R. de Groot & O. Vonk, De ontneming van het Nederlanderschap wegens jihadistische activiteiten, *Tijdschrift voor Religie, Recht en Beleid*, TvRRB 2015-1, p. 42.

⁶² Kabinetsformatie, Regeerakkoord Vertrouwen in de toekomst, 10 oktober 2017, <https://www.kabinetsformatie2017.nl/documenten/publicaties/2017/10/10/regeerakkoord-vertrouwen-in-de-toekomst>.

⁶³ *Sarkozy looks to strip citizenship from those who threaten police*, France 24 (July 31, 2010). Retrieved from: <http://www.france24.com/en/20100730-sarkozy-looks-strip-citizenship-threaten-security-forces-french-immigration>

The Netherlands Minister-President (Mark Rutte) wrote the following in a letter to citizens in the wake of national elections in 2017:

We feel increasingly uncomfortable when people abuse our freedom to cause disruption, while they came to our country to enjoy that freedom. People who do not want to adjust, revile to our customs and repudiate our moral values...I very well understand if people think: If you are fundamentally rejecting our country, I would rather see you leave. It is also what I feel. Behave normally or leave.⁶⁴

In the case of France, Sarkozy makes a clear distinction between groups of citizens in a situation to protect national security, which could serve a legitimate purpose when looking at the proportionality test for both non-discrimination and arbitrary deprivation of nationality. The Minister-President of the Netherlands takes it a step further and justifies denationalisation for people who do not share the same norms and values—which would not serve a legitimate purpose—and feeds into a fear that those of foreign descent cannot be trusted, stressing that they need to leave if they do not adapt to our customs. In other words, this is an example of how politicians deploy people's increasing fears of terrorism to manipulate support for denationalisation measures or by openly supporting such policy measures to gain popularity when campaigning for elections.

Consequences of such measures should not be underestimated. It leads to division in society among citizens and it creates suspicion towards those who are 'different'. It can even indirectly result in racial discrimination when specific groups are affected with such a measure (e.g. discrimination against Moroccans in The Netherlands). As Choudhury explains "It constructs a hierarchy in which the formal equality of legal citizenship is hollowed out by the creation of the hierarchy that draws a distinction between the 'good', tolerated' and 'failed' citizen."⁶⁵ Naturalised and dual citizens are tolerated citizens, and their citizenship is conditional upon good behaviour. Those who do not share common values are 'failed' citizens, justifying denationalisation. However, one should realise that this destabilizes social cohesion and contributes to fears among birthright citizens of accepting people that are 'different'.⁶⁶ These are all important factors to take into consideration when assessing whether a measure meets the proportionality standards.

To take a step back, should we give the government the power to revoke a person's citizenship? More specific, should we give a Minister (of Justice or Interior) discretionary power to revoke citizenship as they see fit in order to protect national security? Nationality deprivation in The Netherlands has occurred only recently, showing that measures on deprivation of nationality no longer only symbolically strengthen anti-equality and destabilisation of social cohesion. When looking at other countries where denationalisation to protect national security occurs at a large scale, it becomes evident that such measures threaten the citizenship of all.

For instance, 103 Bahraini nationals have been deprived of their nationality in 2017 because the government uses a broad definition of "terrorist acts and incitements to such acts"⁶⁷ which also includes

⁶⁴ "We voelen een groeiend ongemak wanneer mensen onze vrijheid misbruiken om hier de boel te verstieren, terwijl ze juist naar ons land zijn gekomen voor die vrijheid. Mensen die zich niet willen aanpassen, afgeven op onze gewoontes en onze waarden afwijzen. (...) Ik begrijp heel goed dat mensen denken: als je ons land zo fundamenteel afwijst, heb ik liever dat je weggaat. Dat gevoel heb ik namelijk ook. Doe normaal of ga weg." <https://www.vvd.nl/nieuws/lees-hier-de-brief-van-mark/>

⁶⁵ Choudhury, T., 'The radicalization of citizenship deprivation', *Critical Social Policy* 37(2), p. 229.

⁶⁶ Ibid.

⁶⁷ Chick, K., Bahrain is stripping dissidents of their citizenship, and the U.S. is silent, *The Washington Post*, 8 July 2017, https://www.washingtonpost.com/world/middle_east/bahrain-is-stripping-dissidents-of-their-citizenship-and-the-us-is-silent/2017/07/08/3ad347d0-5154-11e7-91eb-9611861a988f_story.html?utm_term=.ce8c65548db2.

freedoms of expression, assembly, and association. In Turkey, emergency laws have been adopted after an attempted military coup in July 2016. One of the measures was to deprive persons of their nationality if they have been summoned but will not return to Turkey to be subject to investigations.⁶⁸ These examples show that measures on deprivation of nationality can be subject to abuse, or that innocent citizens fall victim of this measure affecting the citizenship of all.

6. Conclusion

This reflection expressed concerns about the discriminatory character of nationality deprivation measures. States, including the Netherlands, are convinced that deprivation measures are within the boundaries of international law as long as it does not lead to statelessness. The inevitable result is that these measures distinguish between citizens, making the naturalised become second class citizens. It makes citizenship a conditional status for dual nationals and naturalised citizens.

Unequal citizenship contributes to destabilising social cohesion. It leads to a divide in society among citizens and it creates suspicion towards those who are 'different'. As this paper has shown, deprivation measures can be discriminatory on the basis of race or ethnicity if such a measure directly or indirectly targets a specific group of citizens. Making naturalised citizens and citizens with more than one nationality subject to deprivation of nationality can also result into groups of citizens being deemed untrustworthy. Political rhetoric also contributes to deepening the social divide, as it portrays threats of terrorism as something brought from outside, from people who do not share 'our norms', justifying denationalisation. It gives a pretence that distinguishing between groups of citizens is normal. Meanwhile, denationalisation as a tool to protect national security has yet to be proven effective.

⁶⁸ Institute on Statelessness and Inclusion, Arbitrary deprivation of nationality and denial of consular services, policy brief, July 2017, http://www.institutesi.org/policy-brief-Turkey-arbitrary-deprivation-of-nationality_2017.pdf.