

DUAL CITIZENSHIP IN THE CONTEXT OF INTERNATIONAL, EUROPEAN AND CONSTITUTIONAL LAW

ANDRÁS PÜNKÖSTY

Pázmány Péter Catholic University, Faculty of Law and Political Science,
Department of European Law and Public International Law, Budapest

Abstract

This paper outlines the recent changes of the approach concerning dual or plural citizenship from the perspectives of international, European as well as constitutional law. The examination relies on rather diverse viewpoints dealing with variant subject matters. Recently, the concept of dual nationality has undergone significant changes. However, no common understanding thereof has been achieved so far. The present paper will first examine and draw up a brief overview of the development of the concept of dual nationality, in the context of international law with special regard to the human rights doctrine. As a second step an analysis and assessment is presented in relation to the potential influence of the European law regarding the legal feature of dual citizenship. Finally, an evaluation gives a brief overview of the law-making process that has occurred recently in certain states of Central- and Eastern Europe.

Key words

Dual citizenship; international law; European law; human rights.

It is necessary to clarify the terminologies used in the above context. In the literature, *nationality* is used as the international legal definition, which has to be clearly distinguished from the constitutional legal terminology of *citizenship*. The topic of *ethnicity* falls out of the scope of our discussions. Despite the direct link between the two above-mentioned concepts – since today the group of *nationals* and that of *citizens* are generally considered identical – they do not mean the same thing. The former one is a mechanism devised by the international community to assign individuals to a given state and it has little to do with rights accorded directly to individuals. Although at international level the scope of rights are limited like diplomatic and consular protection. Accordingly, collision of rights, which are designated to the states, may occur in this area at this level, when more than one state claims to exercise the protection over an individual. This happens especially when the individual holds the nationalities of the conflicting states. However, it is a clear principle of international law that consular protection of the sending state may be performed only with the consent of the receiving state. On the other hand, citizenship is determined by the scope and quality of the rights it entails within a given territory. This is basically a constitutional legal phrase. Thus, whilst nationality is used to define the

bond between an individual and a state at international level, citizenship determines the internal content of that bond.¹ In certain cases, the two concepts may be separated from each other, as for instance instate the international law recognises someone as a national, but it does not grant him the rights of a citizen, or on the contrary, when a state treats someone as a citizen but the international law does not recognises this relationship.² There are examples for both cases: for the first, the status of former British Commonwealth citizens could be mentioned, while for the second, the well-known Nottebohm case is a case in point.³ Conflicts may arise from plural citizenship, as it can confer conflicting rights and obligations in respect of different states (military service, social benefits, voting rights, etc.) The basic question to be answered in order to dissolve the possible conflict is whether rights and obligations are the subject of severance or not. Habitual residence is a plausible reference point for the separation (i.e. citizens are entitled to certain rights and obligations, without being effected by other citizenship relation, if habitual residence is located there.) However, the German Bundesverfassungsgerricht (Federal Constitutional Court) took the position that this status [nationality as a gateway to citizenship] cannot be parcelled out gradually, but [instead] always represents a decision about “all or nothing”.⁴

Dual nationality in international law: from the evil until recognition as a human right?

In the early 20th century, dual nationality was treated by international law as a phenomenon that is better to avoid and advised to fight against. Thus, when national status was the sole link, embodying loyalty and protection between the individual and the state at international level, it was appropriate for each individual to have only one nationality.⁵ At the Hague conference of the Codification of Conflict of Nationality Laws in 1930, there was made a reference to the desired ideal state of the “abolition of all cases of the statelessness and double nationality “. The framework of the legal context has become definitely more complex. The complexity of international relations stemming from the huge number of bi- and multilateral agreements and the practices to transfer of certain state powers on international organisations have resulted in the transformation of even such doctrines as state sovereignty, as well as the link between the individual and the state.

¹ Enikő Horváth, *Mandating identity*, 2008, Kluwer Law International, The Netherlands, p. 4.

² Jakab András (ed), *Az alkotmány kommentárja II.*, 2009, Budapest, pp. 2439.

³ Ibid.

⁴ Enikő Horváth and Ruth Rubio-Marín: “*Alles oder Nichts*”? *The outer boundaries of the German citizenship debate*, I●CON, International Journal of Constitutional Law, New York, Vol. 8. (2010) No.1. p. 73.

⁵ Ruth Donner, *Dual nationality in Internatinal Law*, 2006, Acta Juridica Hungarica, Vol. 47, No. 1. pp. 16.

In recent years, it become more common for the countries to acknowledge the status of dual nationality, while recognising that their nationals may also possess the nationality of an another state. Also, one does not lose one's nationality by operation of law when acquiring another one. Likewise, the expatriation mechanism connoted the practice applied earlier, when a woman acquired the nationality of her husband by marriage.⁶ There are examples of this acceptance-orientated law-making process in Europe. According to Enikő Horváth's study in 2007, there were 22 states in Europe that generally allowed plural nationality, 19 that allowed it in a restrictive way, and 6 countries that expressly prohibited it.⁷ New, more permissive laws have been adopted, among others, in Spain (2002), Finland (2003), Ireland (2002), Iceland (2003), Malta (2002), Armenia (2007), and Romania (1991, 2007).⁸ There are some examples also outside Europe, for instance, Mexicans naturalized in the United States have also been able to retain their Mexican nationality since 1998.

The recent acceptance of dual national status in national law has resulted in a renewed interest in dual nationality as a sociological factor, and as a research topic within political science. Also, an actual concern is as to how far modern developments in human rights law are relevant to the topic in question.⁹ Very recently, a symposium there has been organised by NYU Law School, where highly interesting distributions have been released regarding this topic. Peter J. Spiro analysed the arguments of a novel claim that dual (and plural) citizenship should be protected as a human right. He admits that "there is growing evidence from the state practice that dual citizenship is appropriately situated in a human rights framework".¹⁰ The basis of his argumentation reflects the concept of freedom of association and liberal autonomy values. In this respect, the right to maintain plural citizenship is derived from the concept of citizenship as an identity matter and as a form of association. Spiro observes that citizenship comprises both a form of association and a vehicle for individual identity. On the other hand, citizenship is necessary to pursue political rights of self-government. Basically, the individual interests are at the core of the rights, which should be unattached by the liberal state. The liberal state has nothing to do with obstructing alternate national ties in the absence of compelling interest. That interest existed to the extent that dual nationality destabilized interstate relations which were mainly understood in a historical framework. Spiro

⁶ Ruth Donner, *Dual nationality in Internatinal Law*, Acta Juridica Hungarica, 2006, Vol. 47, No. 1. pp. 16.

⁷ Enikő Horváth, *Mandating identity*, 2008, Kluwer Law International, The Netherlands, p. 240.

⁸ *ibid.*

⁹ Ruth Donner, *Dual nationality in Internatinal Law*, Acta Juridica Hungarica, 2006, Vol. 47, No. 1. pp. 16.

¹⁰ Peter J. Spiro: *Dual citizenship as human right* I•CON, International Journal of Constitutional Law Vol. 8. (2010) No.1. pp.111.

admits that if the incidence of the dual citizenship is constrained by legal instruments, it may pose unjustifiable burdens to the existence of political rights. According to him, there is no more such a risk (if any) today, which could justify the suppressing of the status of plural citizenship. However, in his contribution, Spiro makes reference to the “complex cases” articulated by Bauböck, who argues that extending citizenship of a kin state to trans-border minorities is a “different matter” to the extent that is affecting “clearly demarcated” territorial jurisdictions.¹¹ Two main objections may be addressed against the plural citizenship being positioned in the framework of the human rights doctrine. Firstly, as the consequence of the plural citizenship, the equality will injure within the political community, and on the other hand, it undermines state solidarity. Spiro refuses these concerns. The arguments are supported by institutional logic, and while no one can be resident in two states, his power is more formal similar to the others’. However, Spiro admits that acquiring double citizenship in an extraordinary volume may dilute solidarity.¹² It is interesting to note that Spiro does not use the term “nationality” while supporting the recognition of the concept of double citizenship, but he uses the term “citizenship” on purpose, which is used mainly referring to the constitutional legal framework in each state.

Plural citizenship as being a contender to European citizenship?

The basic inspiration of European Union citizenship, which was introduced in the Treaty on the European Union in Maastricht, arises from the repeatedly mentioned question: how to bring ‘citizens closer to the European design and European institutions?’¹³ The development of the concept cannot be understood without estimating the legal, political and psychological aspects. The provision of the Treaty in Maastricht stipulates that “this treaty marks a new stage in the process of an ever closer union among the *peoples* of Europe”. Professor Weiler ascribes a deep meaning to this plural case, hence “not the creation of one people, but the union of many”.¹⁴ In his understanding, this wording describes authentically the affective crisis of the European citizenship. The citizenship clause in the Maastricht Treaty was provided as follows: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” The Amsterdam Treaty, however, modified the clause by adding the phrase: “citizenship of the Union shall complement and not replace national citizenship”. The citizenship regulation was renewed at the time of drafting the Constitutional Treaty, but finally the Lisbon Treaty formulates that “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall

¹¹ *ibid.* pp.121.

¹² *ibid.* pp. 126.

¹³ Laeken declaration, Laeken 14 and 15, December 2001.

¹⁴ *The Constitution of Europe: J. H.H. Weiler* Cambridge University Press, Cambridge, 2005, p. 327

be additional to and not replace national citizenship". Nevertheless, the rights and duties attached to EU citizenship found in both TEU and TFEU, showing the signs of constitutional conceptualization of EU citizenship and a tendency to make a direct link between EU citizens and their political representation on EU level. In its jurisprudence, the ECJ is putting more emphasis to recognise fundamental rights attached to the European citizenship only if it is supported by economic reasons, derived mainly from worker, or work-seeker status (i.e. Baumbast, Collins). After all, there is no common understanding that the development of the European citizenship may ever replace the national citizenship. In addition, the regulation regarding the national citizenship status remained at a national level. The ECJ does not indicate any willingness to intervene, as long as national regulation is in conformity with the non-discrimination practice in connection with the worker status.

Recent changes of the citizenship acts in Central Europe

There are certain instruments of constitutional law that aim at supporting national identity. Firstly, there are the so called "status laws". In the framework of status laws, the state offers rights to the individuals, who are not the citizens of the state, and are not legible to acquire the citizenship. For example, from 2008 Poland issues a "Polish card" to the Polish nationals outside the country. The other feature of the constitutional law is the granting of citizenship under easier conditions. Article 18 of the Citizenship Act of the Serbian Republic stipulates: "An emigrant and his *descendant* can be admitted to citizenship of the Republic of Serbia if they are 18 and if they are not deprived of working capacity and if they submit a *written statement* that they consider the Republic of Serbia their own state." The Romanian legislation is even more liberal regarding double citizenship. The Article 11 (1) on Romanian Citizenship Act No. 21/1991 stipulates "Persons who have acquired Romanian citizenship by birth or adoption and have lost it for reasons that are *not imputable* to them or whose Romanian citizenship has been withdrawn against their will, as well as their *descendants to the third degree*, may apply for reacquisition of Romanian citizenship or it may be granted to them, and they may keep their foreign citizenship also, and either establish their domicile in Romania or *keep their domicile abroad (...)*". The recent amendment of the Hungarian citizenship act basically follows the line of the Romanian legislation.

Closing remarks

This article tried to outline the feature of double citizenship from three different points of view. Firstly, it discussed the concept from the international legal point of view. It is important to distinguish the definitions of nationality, citizenship, and ethnicity. The paper made a short summary regarding the development of the concept of dual nationality, and the very recent discussion that plural citizenship should be accepted as a human right. Also, the article examined implications of the European law. Finally,

there have been some examples of the legislature cited that support the concept of plural nationality as an instrument of maintaining national identity. It is necessary to add that any such intention is acceptable under mutual understanding and cooperation.

Literature:

- Enikő Horváth, Mandating identity, Kluwer Law International, The Netherlands, 2008, 9789041126627
- Rights and duties of dual nationals, Kluwer Law International, David A. Martin and Kay Hailbronner (eds.), The Netherlands, 2003, 90-411-1932-9
- J.H.H. Weiler, The constitution of Europe, Cambridge University Press, Cambridge, 2005, 0521 584736
- Dula Nationality, Social Rights and Federal Citizenship in the U.S. and Europe, Berghahn Books, Randall Hansen and Patric Weil (eds), 2002, 1-57-181-804-9
- Peter J. Spiro, Dual citizenship as human right, I●CON, International Journal of Constitutional Law, New York, Vol. 8. (2010) No.1.
- Liav Orgad, 'Cultural Defence' of Nations, Cultural Citizenship in France, Germany and the Netherlands, European Law Journal, Vol. 15, No.6, November 2009, pp. 719-737.
- Editorial comments, Two-speed European Citizenship? Can the Lisbon Treaty close the gap?, Common Market Law Review, Kluwer Law International, The Netherlands 2008 45: 1-11, 2008
- Annette Schrauwen, European Union Citizenship in the Treaty of Lisbon: any change at all?, Maastricht Journal of European Comparative Law, 2008, Vol. 15, No.1
- Enikő Horváth and Ruth Rubio-Marín: "Alles oder Nichts"? The outer boundaries of the German citizenship debate, I●CON, International Journal of Constitutional Law, New York, Vol. 8. (2010) No.1.

Dny práva – 2010 – Days of Law, 1. ed. Brno : Masaryk University, 2010
<http://www.law.muni.cz/content/cs/proceedings/>

- Az Alkotmány Kommentárja, Jakab András (ed), Századvég Kiadó, 2009, Budapest, 978 963 7340 16 1
- Ruth Donner, Dual Nationality in International Law, Acta Juridica Hungarica, Budapest, Akadémiai Kiadó, 2006, 47, No. 1, pp. 15-25.

Contact – email

punkosty@jak.ppke.hu