

voting, e-voting) are not always reliable, and are, therefore, unavailable. Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the European Commission for Democracy through Law suggests that states, in view of citizens' European mobility, and in accordance with the particular situation of certain states, adopt a positive approach to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship.

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Marcel Szabó

International Law and European Law Aspects of External Voting with Special Regard to Dual Citizenship

In the following the author shall analyze the international and European law aspects of participation in elections by citizens residing abroad and persons possessing dual citizenship. As a first step the legal concept of citizenship will be examined. Although the author is rather inclined to define citizenship as Hanna Arendt quite accurately described it: the right of the individual to have rights. A scholar of international law should also make reference to the most widely accepted definition of citizenship as elaborated by the Hague International Court of Justice in the *Nottebohm* judgement¹ of 1955. In the *Nottebohm* case, the facts of which were also related to a situation of multiple citizenship, the Hague International Court of Justice declared: „nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than with that of any other state.” Thus, the Court of Justice described citizenship as a complex relationship comprising elements of emotional attachment as well as existential aspects, while the whole concept is based on the social reality of the bond connecting the citizen with the state.

The legal content of citizenship was subject to significant changes throughout the centuries. However, it may safely be argued that only citizens of the state enjoy the totality of political rights, while full social and economic rights are also reserved exclusively for the citizens of the state. Citizens have the right of return to their country of origin and the right to establish themselves in the same at all times. Furthermore, in third countries they are entitled to consular and diplomatic protection afforded by their own state. Citizenship

¹ See judgment of 6 April 1955 in the *Nottebohm case* (Liechtenstein v Guatemala) (I.C.J. Reports [1955]), p. 4.

not only entails rights, but also duties, in particular tax liability and in countries where it still exists: military service as well as citizens' participation in the administration of justice in countries employing the jury system.

It is not up to the citizens, but up to of the state to determine the scope of the persons rights it recognizes as its citizens. Certain states follow the principle of *ius sanguinis* in establishing the relationship towards their citizens, that is, the offspring of their citizens also acquire the respective citizenship, while other states grant citizenship to those born on their territory based on the principle known as *ius soli*. The cohabitation of these two principles in different parts of the world led to the result that many acquired the citizenship of more than one state, giving rise to various problems under international law. In the last few decades even states that had up until now operated on the basis of territorial sovereignty now consider affording voting rights in their national elections to their citizens living abroad. Initially such efforts were limited to diplomats and soldiers, later, the voting rights of citizens residing and working abroad also came into consideration, as well as the possibility of reestablishing the relationship between the native country and those persons who had left as a result of persecution. Finally, around the millenium citizens were afforded voting rights in their country of origin as a kind of historical compensation for their disadvantaged situation resulting from the breaking up of certain European states. With this, the process of granting voting rights to citizens living abroad was completed and widely confirmed. In the following the complicated interplay between the development of external voting and multiple citizenship will be analyzed.

The conceptual expansion of the sociological notion of dual citizenship

In Europe the notion of citizenship has radically changed.² From a sociopolitical and sociological point of view the concept of citizenship acquired a significantly broader meaning. As Bosniak points out, citizenship refers to a formal or nominal membership in an organized political community.³ In this sense, the notion of political community is not merely, or not necessarily restricted to the state. The concept of post-national citizenship marks the diminishing signifi-

² Linda Bosniak: Citizenship Denationalized, *Indiana Journal of Global Legal Studies*, 7 (2000) 2:447-508., p. 449.

³ *Ibid.* p. 447.

cance of identity pertaining to citizenship on the one hand, at the same time it also enables us to discuss the quasi-membership rights of non-citizens in the framework of post-national citizenship. Moreover, the idea of post-national citizenship also entails that the affinity of a person to a feminist, ecological or other political community is stronger than his or her bond with the state.⁴ Trans-national citizenship refers to the situation where a great number of persons belong to several political communities and states at the same time. According to some scholars, those international human rights documents that guarantee a list of rights to the individual also give rise to a feeling of belonging to a certain political community, a community which may be described along the lines of post-national citizenship. Beyond the categories of post-national and trans-national citizenship, Richard Falk also identified the category of global citizenship.⁵ Some accord greater weight to their membership in Amnesty International or Greenpeace or another political community than to their connection with a national community.

The European Union has created a special community of law, establishing a link between the 500 million citizens of the Union Member States through the institution of union citizenship. Based on the institution of union citizenship, all union citizens must be afforded the same treatment in the territory of all Member States of the European Union as received by their own nationals with respect to economic and social rights. Citizens are entitled to return to their country at any time, however, within territory of the European Union, union citizenship and relevant provisions of European law also guarantee the right of free entry into other Member States as well. As a result of the rights endowed by European law, union citizens may not only seek diplomatic and consular protection from their home state but – pending certain conditions – also from any other EU Member State. In many cases citizenship offers refuge from prosecution in foreign states for persons returning to their own country. Based on the law of the European Union and with the adoption of the European Arrest Warrant the Member States may no longer afford such a safe haven for their citizens against other European states. In consequence, the institution of national citizenship is becoming more and more an empty shell in Europe. As already mentioned above, the primordial duties of citizens – in countries foreseeing such

⁴ Linda Bosniak: Multiple Nationality and the Postnational Transformation of Citizenship, *Virginia Journal of International Law*, 42 (2002): 979-1004., pp. 1002-1003.

⁵ Richard Falk: The Making of Global Citizenship, in: Jeremy Brecher et al. (eds.): *Global Visions: Beyond the New World Order*. Boston: South End Press, 1993.

duties – are the participation in the administration of justice, military service and tax liability. Employing the jury system was never typical of Europe, military service is in an obvious decline on the continent and from the point of view of the conditions of tax liability, all union citizens are endowed with the same rights and duties.

As a result, those union citizens who have established themselves in other Member States are subject to a special legal status described by Bauböck with the notion of *denizenship*.⁶ According to this status the person residing in another state is endowed with almost identical rights as the citizens of the host state, while still possessing the entirety of political and civil rights pertaining to his or her citizenship in the country of origin. Furthermore, union citizens residing in another Member State may participate both in the municipal and European Parliamentary elections in their country of residence.⁷

In the following the author shall shed light on the problematic aspects of this important legal and political issue through the shift in the perception of dual citizenship under international law and European law as well as the voting rights of citizens living abroad.

The development of international law with respect to dual citizenship

While the institution of dual citizenship had existed for centuries, the voting rights of citizens living abroad was only introduced in the different legal systems following the 2nd World War. We must commence our assessment with the analysis of the development of the institution of dual citizenship, and demonstrate its strong relationship to voting rights.

⁶ Rainer Bauböck: Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting, *Fordham Law Review*, 75 (2007) 5: 2393-2447., p. 2396.; Rainer Bauböck: Expansive Citizenship: Voting beyond Territory and Membership, *Political Science and Politics*, 38 (2005) 4: 683-687., p. 683.

⁷ Exploiting administrative laxity, around one and a half million European citizens vote in the European parliamentary elections both in the country of their residence as well as in their country of origin, and similarly, vote in municipal elections in the country of residence and the country of origin, where they presumably maintain – at least on paper – a place of residence. See: The practice of double citizenship in the EU Member States), June 2010, p. 16. Available at www.kmkf.hu/tartalom/dokumentumok/kettos_allampolgarsag.doc (Last visited: 12 September 2012).

The long arm of perpetual allegiance

In the first half of the 19th century dual citizenship was tied to the legal concept of *nemo potest exuere patriam*. This British legal doctrine describes citizenship – or, at that time the status of tributary subjects – as *the long arm of perpetual allegiance*. According to this doctrine citizens couldn't disavow their country, not even by emigrating and establishing themselves in another, foreign state, thus, the bond of citizenship was deemed unbreakable. In the first half of the 19th century, citizens of the United States of America visiting Spain, Prussia or Great Britain were systematically arrested and forcibly enrolled in the armies of their respective states, due to the fact that these countries still viewed such persons as their own citizens.

One state, one citizenship

In the late 19th century the United States of America launched a diplomatic campaign in Europe and liberated its citizens from the „long arm of perpetual allegiance” with the conclusion of the Bancroft Treaties. In accordance with the Treaties the signatory European states accepted that following an uninterrupted five years of residence in the USA their emigrated citizens assumed American citizenship. In turn, the United States of America also accepted that should such persons return to their country of origin, they shall regain their original citizenship and will be the sole citizens of such states. Thus, the Bancroft Treaties may be seen as international conventions drafted on the basis of the principle of exclusive citizenship.⁸

The next step in the history of the development of citizenship under international law was the 1923 advisory opinion of the Permanent Court of International Justice rendered in the case of citizenship decisions issued by Tunisia and Morocco.⁹ The Court determined that the issue of who can be deemed a citizen of a country forms part of the exclusive competence of the given state (*domaine réservé*). This legal doctrine is still valid under international law. The Hague International Court of Justice reaffirmed the decision of the Permanent Court of International Justice in the *Nottebohm* case, stating that:

⁸ So true, that Bancroft himself compared dual citizenship to bigamy in his letter to the British prime minister, Lord Palmerston, dated 26 January 1849, with the distinction that dual citizenship is even worse than bigamy, so horrible that humanity has not even come up with a word for it. See Dimitry Kochenov: Double Nationality in the EU: An Argument for Tolerance, *European Law Journal*, 17 (2011): 323-343., 17. footnote.

⁹ See: Advisory Opinion of the Permanent Court of International Justice of 7 February 1923 on Nationality Decrees issued in Tunis and Morocco (France c. Great Britain), PCIJ Series B No 4.).

„It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation”.

According to the preamble of the Hague Convention on certain questions relating to the conflicts of nationality law of 1930, „the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases of statelessness and dual nationality”. The goal of the Convention is therefore to decrease or abolish cases of dual citizenship, however, it realistically counts with such situations and the possibility of legal problems arising therefrom. One of the key aims of the Convention is to find a solution to the multiple military obligation of persons holding several citizenships, which led to the adoption of the additional protocol to the Convention on 30 April 1930.¹⁰ It is worth noting that the Convention is still in force between twenty State Parties,¹¹ thus, the rules laid down therein continue to form part of the living corpus of international law.

In 1954 Secretary General of the United Nations directed a question to the International Law Commission of the United Nations with regard to multiple citizenship. In response, the International Law Commission elaborated a report on multiple citizenship for consideration by the General Assembly, the main conclusion of which was that „all persons are entitled to possess one nationality but one nationality only”.

Based on Article 15 of the Universal Declaration on Human Rights, everyone is entitled to the right to citizenship. However, the entitlement contained in the Declaration cannot be invoked against the states, the right of persons to citizenship does not guarantee – whatever legitimate factors underlying their claim notwithstanding – that they may lawfully claim that a state accept them as its citizen.

Towards the acceptance of dual citizenship

We may encounter the implicit acceptance of dual citizenship in the *Convention on the Elimination of All Forms of Discrimination against Women* adopted by the General Assembly on 18 December 1979 which entered into force on 3 September 1981. According to Article 9 of the Convention the State Parties ensure „that neither marriage to an alien nor change of nationality by the husband during

¹⁰ Protocol relating to military obligations of certain states of double nationality (Hague, 12 April 1930).

¹¹ The majority of the Parties to the Convention are members of the British Commonwealth.

marriage shall automatically change the nationality of the wife”, in order to avoid a situation that would „force upon her the nationality of the husband”. Thus, the Convention seeks to prevent states from stripping women of their original nationality due to their marriage with an alien. However, facts show that almost all countries’ citizenship laws enable women to acquire the citizenship of their husband. Although states may adopt national rules according to which only women who actually acquire the citizenship of their husband may be deprived of their original citizenship, this is much more difficult for the states to control than the mere act of marriage. Therefore we may conclude that such a rule opens up the possibility of acquiring dual citizenship for a significant portion of the society.

The development of dual citizenship resembles a subterranean brook: for a long period of time only few states accepted it, however, resistance was rare and sluggish, as a result, the institution which was previously merely tolerated became so rooted that in practice even the mightiest states gradually gave up their resistance and multiple citizenship thus evolved into an accepted institution of customary international law. A vivid example would be the study carried out in 2005 by the United States House of Representatives’ Committee of the Judiciary on dual citizenship. During the inquiry not only did the esteemed professors state that dual citizenship is incompatible with the moral and psychological foundations of constitutional democracy in America, but that potential terrorists may give birth to children in the United States for the sole reason of building a fifth column. Further, dual citizenship was investigated from the perspective of political bigamy. There is no greater proof of how deeply the institution of dual citizenship became embedded in the international community than the fact that notwithstanding the serious doubts and objections of American decision-makers and opinion leaders the United States of America has totally shed its resistance towards dual citizenship and today, one may only lose American citizenship, if one personally renounces it at an American embassy.

Thus, the international community exhibits more and more acceptance of the notion of dual citizenship and takes the view that „dual citizenship has to be seen as a gesture of welcome and recognition for those who want to integrate in one political community without giving up links to another community.”¹² As Kochenov quite correctly

¹² Joachim Blatter: Dual Citizenship for Ethnic Minorities with Neighbouring Kin States, in: Rainer Bauböck (ed.): *Dual Citizenship for Transborder Minorities? How to respond to the Hungarian-Slovak tit-for-tat*, European University Institute Working Paper, Robert Schuman Centre for Advanced Studies, RSCAS 2010/75, p.

points out, the development of international law stripped states of the legal possibility to strive towards the creation of a homogenous, ethnically monocultural society using citizenship policy as an instrument.¹³ It is worth reiterating Jonathan Bach's position, according to which: „*dual citizenship and extending voting rights does not challenge the principle of national territorial jurisdiction and the nation-state system*”.¹⁴

*Dual citizenship – Legal activism of the Council of Europe
and the OSCE*

In Europe, we are witnessing a novel and significant development regarding multiple citizenship with the adoption of the 1997 *European Convention on Nationality* under the auspices of the Council of Europe.¹⁵ Article 3 of the Convention declares that each state shall determine under its own law who are its nationals, however, such laws must be consistent with international conventions, customary international law and the general principles of law. The Convention marks a shift from the previous rejecting or reserved stance of European states towards dual citizenship by assuming a neutral position regarding the same. The Explanatory Report attached to the European Convention on Nationality makes it clear that the signatories of the Convention remain free to determine whether or not to allow their citizens to possess multiple citizenship. However, should the state permit its citizens to possess dual citizenship, it may not discriminate between such citizens holding just one citizenship and those who actually possess various citizenships.¹⁶ Based on items 69 and 70 of the Explanatory Report, persons living abroad may lose their privileges of retaining their citizenship or regarding favourable renaturalization in case they have resided abroad for several generations.¹⁷

The most important rules of the European Convention on Nationality guarantee fair treatment for the members of two disadvantaged groups in the realm of multiple citizenship. In Article 14 the Convention explicitly foresees the conservation of the citizenship of those multiple citizens who acquired the citizenship of various countries at birth as a consequence of the interplay between different principles of citizenship. Further, Article 16 of the Convention obliges signatory states to conserve the citizenship of such nationals, who, due to the restrictive laws of a third state cannot renounce their previous citizenship.

The judgment of the Strasbourg Court of Human Rights in the *Tănase v Moldova* case¹⁸ further substantiates the wide acceptance of the institution of dual citizenship on the European continent. In said case, the European Court of Human Rights determined that an attempt to prevent the acquisition of mandates by Moldovan dual citizens in the parliament of Moldova constituted an infringement of Article 3 of Protocol No. 1 to the European Convention on Human Rights. The judgment of the European Court of Human Rights reflects the changing stance of the European states towards dual citizenship and the spreading of a more permissive attitude. At the same time, this development may only be described as an emerging regional international law, more precisely, a form of European soft law.

Dual citizenship based on membership in a national community. The Convention prohibits discrimination between citizens based on national or ethnic origin, religion, race, colour or sex and with this, the Convention greatly contributed to the de-ethnicization of citizenship law.¹⁹ However, the prohibition of discrimination based on national or ethnic origin does not exclude the adoption of provisions which afford more favourable conditions for the acquisition of citizenship for persons who share the same culture, language or ethnicity as the majority population of a given state but do not possess its citizenship, as it was laid down in Article 5 of the Explanatory Report

13. Available at http://eudo-citizenship.eu/docs/RSCAS%202010_75.rev.pdf (Last visited: 15 September 2012).

¹³ Kochenov 2011, p. 323.

¹⁴ Jonathan Bach: *Extending Rights to Citizens Abroad: Implications for the Nation-state*, *International Affairs Working Paper*, 2011-02, April 2011, p. 2. Available at http://www.gpia.info/files/u706/Bach_2011-02.pdf (Last visited: 15 September 2012).

¹⁵ European Convention on Nationality adopted under auspices of the Council of Europe and signed on 6 November 1997. Promulgated by Act No. III. of 2002.

¹⁶ This rule is in conformity with Article 17 of the European Convention on Nationality.

¹⁷ „One of the main aims of this provision is to allow a State, which so wishes, to prevent its nationals habitually living abroad to retain its nationality generation after generation. Such loss, however, is only possible for persons possessing

another nationality... this provision applies in particular when the genuine and effective link between a person and a State does not exist, owing to the fact that this person or his or her family have resided habitually abroad for generations. It is presumed that the State concerned will have taken all reasonable measures to ensure that this information is communicated to the persons concerned.”

¹⁸ ECHR: *Tănase and Chirtoacă v Moldova* (Application no. 7/08). Judgement. Strasbourg, 27 April 2010.

¹⁹ As it is widely known, the Greek law on citizenship has until quite recently made a distinction between citizens with ancestors of Greek nationality and Greek citizens who are not of Greek ethnicity. Naturally, such a distinction would amount to a serious breach of the provisions of the 1997 Convention on Nationality, but it would also be a grave infringement of the general principles of European law.

to the European Convention on Nationality. Based on the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations issued by the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe states are entitled to take into account historical, cultural and family ties as well as language skills when granting citizenship to persons living abroad.²⁰ We may discern a very significant development of European law in the Bolzano Recommendations. In essence, the Bolzano Recommendations reflect the acceptance of a form of dual citizenship where citizenship is granted to persons who, albeit living abroad, share the same cultural ties.

Following the dissolution of the Yugoslav states and the break up of the Soviet Union certain successor states adopted new citizenship rules aiming at restoring the citizenship of those persons who had previously possessed the nationality of the state and lost such citizenship through no fault of their own. The Baltic states and other Soviet successor states did not afford citizenship rights to Soviet settlers arriving in the wake of Soviet territorial expansion nor to their descendants, for this reason, Russia offered and granted citizenship to persons affected by such laws. Today there are more than one million Russian citizens residing in the Soviet successor states. Rumania offered citizenship to persons of Rumanian nationality residing in Moldova.²¹ For a long period of time, Yugoslavia was the homeland of Southern Slavonic peoples, however, following its dissolution and the drawing of the state borders on the basis of the principle *uti possidetis juris* which in many cases failed to reflect the ethnic realities, successor states guaranteed the possibility of re-establishing the legal bond between nationals residing beyond the state borders and the kin-state. Of all such cases, the issue of the Croats living in Bosnia was the most pressing: today, around 800 000 Bosnian Croats possess Croatian citizenship, but many nationals applied for Serbian citizenship²² from the Bosnian Republika Srpska.²³

Such Central-European developments laid the foundations of the legal possibility for Hungary to grant citizenship to those persons, who, through no fault of their own and primarily as a result of the peace treaties signed following the first and the second world war, lost their Hungarian citizenship. In this case we are also witnessing a legal process which is designed to afford a sort of personal justice to

²⁰ OSCE HCNM (2008), p. 19.

²¹ Moldova formed part of Rumania until 1943 when, as a result of the Molotov-Ribbentrop pact it was annexed to the Soviet Union.

²² Bauböck 2010, p. 5.

²³ The Bosnian Serb Republic.

the individuals involved. It seems that the international community is very understanding and accepting towards such developments that may prevent numerous conflicts and guarantee the peaceful co-existence of peoples in East-Central Europe.

Dual citizenship in the European Union

The concept of dual citizenship is of very different significance in the European Union, than anywhere else in the world. There is a clear breach of European law if citizens living abroad cannot participate in the political life of their own Member State, and with this, the determination of the composition of Union institutions dependant on Member State representation. As a result of the introduction of union citizenship national citizenship has lost some of its meaning: its relevance has been watered down to voting rights in national elections. In consequence, 17 Member States of the European Union no longer prescribe the renouncement of citizenship in case of the acquisition of another citizenship, thereby accepting that their citizens may become dual citizens. However, 10 Member States still insist on this legal condition, notwithstanding the fact that legal scholarship and in particular Dimitry Kochenov find that such rules amount to a serious breach of the fundamental principles of European law.²⁴

To sum up we may agree with Ruth Donner, who pointed out that under the classic theory of international law each individual only had a right to possess one citizenship.²⁵ And although an international law rule of universal scope regarding dual citizenship still doesn't exist, in Judit Tóth's view, states have freely adapted their respective rules to the pressures of changing social circumstances.²⁶ As a result, 45 percent of the states allow for the institution of dual citizenship. Thus, instead of the previous rejection of the institution we may now say that the states take divergent positions as to the acceptability of dual citizenship. In comparison, due to particular historical and social circumstances, the institution of dual citizenship is much more widely accepted in Europe. In particular, one must have regard to the legal developments brought about by the Council of Europe and

²⁴ See: Dimitry Kochenov: Double Nationality in the EU: An Argument for Tolerance, *European Law Journal*, 17 (2011): 323-343.

²⁵ Ruth Donner: *The Regulation of Nationality in International Law*. 2nd ed. New York, Transnational Publishers, Inc., 1994, pp. 18-19., 25.

²⁶ Dr. Judit Tóth: Miért nem lehet, ha szabad? A többes állampolgárság a nemzetközi és az európai közösségi jog felől [in English: Why isn't it possible if it is allowed? Multiple citizenship in the light of international law and European law], *Romániai Magyar Jogtudományi Közlöny*, (2004) 2: 5-14. Available at <http://rmjk.adatbank.transindex.ro/pdf/01KozjogToth.pdf> (Last visited: 15 September 2012).

the European Union, the special relationship between the Member States of the Union and their citizens, as well as the institution of union citizenship. If not in the case of universal public international law, but at the very least on the level of European regional international law we may conclude that dual citizenship has become acceptable in the following cases:

- a. women acquiring multiple citizenships by virtue of marriage;
- b. individuals acquiring the citizenship of more than one state *ex lege* at birth;
- c. persons unable to renounce their previous citizenship due to restrictions imposed by third states;
- d. the renaturalization of persons residing permanently abroad, but sharing ties with the national community, who, due to historical reasons lost their citizenship through no fault of their own.

In the following the development of the concept of external voting rights of citizens living abroad will be discussed, finally, the relationship between dual citizenship and external voting shall be examined against the backdrop of Union law.

Voting rights of citizens living abroad based on international law (external voting)

Article 25 of the International Covenant on Civil and Political Rights²⁷ declares that: „*every citizen shall have the right and opportunity ... without unreasonable restriction ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be by secret ballott, guaranteeing the free will of the electors*”. Article 2 of the Convention makes clear that each State Party undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Convention. Article 21 paragraph 1 of the Universal Declaration of Human Rights ensures that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.²⁸ As Rubio-Marin points out, the wording of the Declaration draws a clear relationship between political rights and citizenship.²⁹

²⁷ Promulgated in Hungary by Statutory decree No. 8 of 1976.

²⁸ Article 3 of the Additional Protocol 1 to the European Convention on Human Rights also foresees the active and passive voting rights of citizens in equal and secret elections.

²⁹ Ruth Rubio-Marin: *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emig-*

Soldiers, diplomats

Until world war II states did not find it necessary to afford voting rights to their citizens residing abroad. In many countries however the unthinkable sacrifice rendered by the armed services had the effect that national parliaments decided, soldiers based abroad and diplomats serving in foreign countries must be granted voting rights. This was the case for example in Great Britain, Canada and Australia.³⁰

Voting rights of migrant workers

The first milestone of the recognition of the voting rights of migrant workers was the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted under the auspices of the United Nations, which, in its Article 41 declares: „*migrant workers and members of their families shall have the right to participate in the public affairs of their State of origin and to vote and to be elected at elections of that State.*” Hitherto the Convention has only been ratified by 34 states, however, it is a clear sign of the positive attitude of the international community towards the conservation of the political rights in the country of origin of persons working in third states.

As regards the external voting rights of citizens living abroad, the real breakthrough was when the majority of the countries accepted that the state must afford voting rights to those citizens who left the country to take up work somewhere else. The social foundations of this legal development lies in the history of European integration and are based on the fact that today, 12 million citizens of the European Union's population of 500 million persons reside in another Member State, the majority of them are workers and their families. There are good reasons for such persons to retain their political rights in their country of origin. Similar developments took place in other regions of the world as well, in these cases we may discern an attempt to

rants, *New York University Law Review*, 81 (2006): 117-147., p. 119.

³⁰ A British citizen living abroad of his own accord contested the British law which granted voting rights to soldiers and diplomats on foreign duty. He was of the opinion that in comparison to soldiers and diplomats, as a British citizen living abroad he was put at a disadvantage, which constitutes a breach of his rights under the European Convention on Human Rights. The European Human Rights Commission however found, that there is no breach of the prohibition of non-discrimination when a state only grants external voting rights to its soldiers and persons working under its direct control, such as diplomats, since these persons constitute a separate – albeit very restricted – group of citizens. Due to the fact that these persons belong in a non-comparable group, the Court found that no discrimination had taken place.

link economically successful emigrants to their poor, disadvantaged country of origin. Mexico could be named as a typical example of this effort: today, over 20 million Mexican emigrants reside in the territory of the United States enjoying a standard of living way in excess of the Mexican average. People emigrating from Mexico often made use of their economic success by reviving the economy and living circumstances of their birthplace as true patriots, thereby linking their economic rights to political rights. First, Mexico offered special Mexican certificates to its nationals living abroad which merely encompassed economic rights, and entitlements regarding inheritance, acquisition of property and free entry. However, this did not satisfy the majority of the Mexican nationals living in America, therefore, the Mexican state later also endowed them with active rights of suffrage, at the same time, these nationals still do not possess passive voting rights.

Voting rights of refugees

Where international law allows for citizens moving voluntarily to a third state to retain their political rights in their country of origin, this is all the more justified in the case of persons who have been forcibly expelled from their homeland. Some scholars extrapolated the obligation of the states to ensure voting rights to refugees in their country of origin from Article 2 of the International Covenant on Civil and Political Rights.³¹ In practice, various countries such as Eritrea, East Timor, Namibia, Iraq and Bosnia guaranteed the participation in national elections of refugees resident in third states.³² In compliance with the Dayton Agreement, this right was expressly guaranteed as a contractual right to persons who fled Bosnia Herzegovina because of the war.³³

In some of the national elections cited above, in countries where, following a major socio-political cataclysm political life had to be rebuilt from scratch, non-resident nationals were guaranteed voting rights. Nationals who, based on ethnic or cultural traits had a strong connection with the given state and, for reasons of their personal circumstances, had a good chance of acquiring the citizenship of the new state. This was the case in Eritrea and Iraq, where non-citizens,

³¹ Jeremy Grace: Challenging the Norms and Standards of Election Administration External and Absentee Voting, Challenging the Norms and Standards of Election Administration (IFES, 2007): 35-58., p. 39. Available at <http://www.ifes.org/publication/3dd9c7573d5b38d597a995a5533d456e/3%20IFES%20Challenging%20Election%20Norms%20and%20Standards%20WP%20EXTVOT.pdf> (Last visited: 14 September 2012).

³² Bauböck 2007, p. 2436.

³³ Grace 2007, p. 39.

who shared strong cultural ties with the home country, were afforded voting rights.

According to the OSCE's 1999 Istanbul Summit Declaration the State Parties „facilitate the rights of refugees to participate in elections in their country of origin”.³⁴ Thus, as far as *soft law* is concerned, we are witnessing a proactive attitude of the receiving states, based on which such states must facilitate the external voting of refugees in their country of origin. Since 2000 the acceptance of external voting rights of citizens living abroad has gained particular impetus. The Parliamentary Assembly of the Council of Europe endorsed the enforcement of such rights with its Resolution 1459 of 2005.³⁵ Currently, only Greece, Ireland, Malta and Cyprus restrict the external voting of citizens living abroad. In its judgment on Greek elections³⁶ the European Court of Human Rights declared, that the fact that the Greek constitution foresees the external voting rights of citizens living abroad and yet the Greek legislature has failed to enact appropriate legislation to this end, amounts to a breach of the European Convention on Human Rights. Although such a judgment could not have been rendered without the provision of the Greek constitution prescribing the voting rights of non-resident citizens, the judgment nonetheless reflects the positive stance of the European Court of Human Rights towards the external voting rights of citizens living abroad.

Voting rights of national minorities

Besides the above cases, Grace claims that the external voting rights of citizens living abroad may also be substantiated on the basis of belonging to a national community. According to Grace, there are three possible justifications for external voting: first, the voting rights of expelled persons, second, the voting rights of emigrants and migrant workers, and third, the fact of belonging to a national community, a right which may be invoked by minority groups towards their state of nationality.³⁷ An example would be the process described in relation to dual citizenship, where, in the wake of the dissolution of Yugoslavia and the Soviet Union and the succession of states, ethnic groups in East-Central Europe lost the bond of citizenship tying them to their national community, however, due to the re-established constitutional

³⁴ The OSCE's 1999 Istanbul Summit Declaration, Istanbul, November 1999, para 26.

³⁵ Besides the Resolution, the Council of Europe Recommendation 1714. (2005) also invites State Parties to recognize the voting rights of out-of-country voters.

³⁶ ECHR: Sitaropoulos and Giakoumopoulos v. Greece (application no. 42202/07). Judgement. Strasbourg, 08-07-2010.

³⁷ Grace 2007, p. 38.

rules of their kin-state they regained their previous citizenship which went hand in hand with the acquisition of external voting rights. The same process took place more peacefully in Central-Eastern Europe and with less repercussions, whereas the individuals concerned viewed these new rights as a form of personal justice. With this, a new, hitherto disenfranchised group acquired external voting rights, contributing also to the development of European law.

The general legal expectation of external voting rights in Europe

In 2011 the Venice Commission issued a recommendation on the out-of-country voting of citizens living abroad.³⁸ In its report the Venice Commission determined that restrictions on the voting rights of citizens living abroad constitute a restriction of the universal right to vote. Although European electoral traditions do not necessarily dictate that all citizens living abroad should be afforded external voting rights, however, a supportive, more positive trend may be identified in the European states regarding the issue of out-of-country voting of citizens living abroad. Today, a total of 150 million citizens reside abroad around the world, with about 100 million migrant workers and 10 million refugees. The changing international law context makes it ever more possible for these non-resident citizens to actively participate in the political life of their country of origin.

Legal considerations of European law

According to Declaration No. 2 attached to the Final Act of the Treaty on the European Union³⁹ it is up to the law of the affected state to determine who are the citizens of the state. Obviously, this also has a great impact on union citizenship, as there is no possibility to directly acquire the citizenship of the Union, it may solely be acquired indirectly, through the acquisition of the citizenship of a Member State. At the same time, as Stephen Hall points out, citizenship laws of the Member States must comply with Union law.⁴⁰ In particular, the judgment of the European Court of Justice rendered in the *Micheletti* case⁴¹ may be mentioned, where the Court underlined the obligation of the Member States to regulate citizenship rela-

³⁸ The Venice Commission: Report on out-of country voting, Study No. 580/2010, CDL-AD(2011)022. (17-18 June 2011).

³⁹ HL 1992. C 191., p. 98.

⁴⁰ Stephen Hall: *Nationality, Migration Rights and Citizenship of the Union*. Dordrecht, Martinus Nijhoff, 1995, p. 43.

⁴¹ Case C-369/90. Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria [1992] ECR I-04239.

tions with „*due regard to community law*”.⁴² In the *Micheletti* case an Argentinian-Italian dual citizen was not recognized as an Italian citizen, and therefore, as a person benefitting from the rights enjoyed under union citizenship. However, the Court declared that in case an individual possesses union citizenship as well as the citizenship of a third state, the Member States of the European Union must recognize him as a union citizen and ensure him the entirety of the rights flowing therefrom.

In the territory of the European Union, where rights derived from national citizenship essentially boil down to the active and passive right of suffrage in national elections, the development of citizenship rights may take two possible directions. In Balibar's words, one direction would be a process, where aliens perceived as enemies are transformed into aliens as citizens, which, according to Balibar is an unsurmountable necessity.⁴³ In Dahl's view, the demos must encompass each and every adult member of the community, who will thus become the subjects of the common binding norms adopted, except for people in transit and those suffering from mental diseases.⁴⁴ These ideas also found their way into European law. The 1992 Convention on the Participation of Foreigners in Public Life at Local Level adopted under the auspices of the Council of Europe also reflects the trend that European states are willing to ensure certain political rights to aliens.

Through the instrument of the so-called *alien suffrage*, Day and Shaw, the propagators of the voting rights of foreigners in the territory of third states, would oblige states to integrate all immigrant communities into their social, economic and political life. The authors contend that this has already been partly implemented on the territory of the European Union and shall help Member States to accept the idea of granting voting rights to foreigners living on their territory.⁴⁵

⁴² Ibid. para10.

⁴³ Etienne Balibar: Strangers as Enemies: Further Reflections on the Apories of Transnational Citizenship, *Globalization Working Papers* 06/4, p. 13. Available at http://www.socialsciences.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS_06-4_Balibar.pdf (Last visited: 12 September 2012).

⁴⁴ Robert A. Dahl: *Democracy and Its Critics*. New Haven, CT, Yale University Press, 1989, p. 129.

⁴⁵ Stephen Day – Jo Shaw: Implementing Union Citizenship: The Case of Alien Suffrage and the European Union, undated conference paper, p. 7. Available at http://www.reading.ac.uk/AcaDepts/ce/GSEIS-Dreamweaver/Content/research/tser/papers/vienna_paper.pdf (Last visited: 13 September 2012).

Many authors claim that there is only a thin red line separating the European Union from becoming a fully fledged federal state,⁴⁶ therefore, it is worth examining the practice employed by the United States of America regarding state and federal citizenship. According to Article 1 of the 14th Amendment of the American Constitution „*all persons born on or naturalized within the United States and subject of the jurisdiction thereof, are citizens of the United States and of the State within which they reside.*” This means that there is a form of state citizenship in the United States as well, however, this automatically changes once an American citizen moves from one state to the other. Therefore, there is a possible direction of the development of European Law, where citizenship coincides with the place of permanent residence of the citizen, and any changes to the place of residence of the citizen would automatically trigger a corresponding change in the citizenship of the given individual. Owen for example also argues for the establishment of citizenship based on the place of permanent residence.⁴⁷ At the same time, what we see in the European Union is that Member States continue to be close-fisted about the acquisition of their respective citizenships, therefore it seems that such a direction of development is less likely. However – as Bauböck points out – we must keep in mind that host countries generally do not afford voting rights to their foreign residents. This segment of the population is stripped of its rights of democratic participation. In Bauböck’s view, this amounts to a breach of human rights.⁴⁸ Bauböck develops this line of thinking with two very important premises. He claims that „*determining the external boundaries of the demos is a matter of democratic self determination*”,⁴⁹ and further, „*a strictly territorial conception of political community is not plausible in a world where large numbers of people move across international borders and settle abroad*”.⁵⁰ In consequence, the most plausible direction of development is a setting where the significance of the state as a territorially

⁴⁶ Christian Tomuschat: The International Responsibility of the European Union, in: Cannizzaro, E. (ed.): *The European Union as an Actor in International Relations*. Hague, Kluwer Law International, 2002, p. 183.

⁴⁷ David Owen: Transnational Citizenship and Rights of Political Participation, *Normative Orders Working Paper*, 06/2011, pp. 2., 7. Available at <http://publikationen.uni-frankfurt.de/frontdoor/index/index/docId/22387> (Last visited: 15 September 2012).

⁴⁸ Rainer Bauböck: How Migration Transforms Citizenship: International, Multi-national and Transnational perspectives, *IWE Working Paper Series*, 2002/24, p. 23. Available at <http://www.eif.oeaw.ac.at/downloads/workingpapers/IWE-Papers/WP24.pdf> (Last visited: 12 September 2012).

⁴⁹ Bauböck 2007, p. 2411.

⁵⁰ Ibid. p. 2419.

defined concept is reduced and one of the main elements of the state, the population shall be the community of citizens who, albeit living scattered in the entire territory of the Union, share a bond with the state. Dimitry Kochenov describes this phenomenon as the deterritorialization of citizenship and contends that in the context of the development of the law of the European Union, this is the most likely scenario.⁵¹

Others also take the view that persons moving freely within the territory of the European Union are stripped of a fundamental right, since most likely those Member States where such persons take up work, will not afford them political rights. According to Spiro, if identity is lost, the normative basis of citizenship itself is lost.⁵² Rubio-Marin makes a very significant point in this respect by stressing that citizenship serves as an expression of political membership. In this sense, citizenship may be a source of self-respect, pride and psychological comfort. According to Rubio-Marin, the sense of membership conveys experiences to individuals which may in itself be regarded as valuable, and goes on to explain: „*a sense of effortless belonging and rootedness allows for a sense of intergenerational connectedness and thus historical transcendence and continuity*”.⁵³ Thus, in Europe we may speak of a clear embeddedness of citizenship in national culture, and Brun quite correctly describes this phenomenon by citing the citizen’s dilemma: „*But why should I ask for its nationality, if I still feel French, German or Polish?*”⁵⁴

In the European Union, guaranteeing the rights of citizens living abroad is more and more turning into a clear obligation under European law. The 2010 EU Citizenship Report of the European Commission⁵⁵ stresses that EU citizens living in other Member States and unable to vote anywhere cannot participate in the political life of the

⁵¹ Dimitry Kochenov: Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship, *EUI Working Paper*, Robert Schuman Centre for Advanced Studies, 2010/23, p. 32. Available at http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3 (Last visited: 13 September 2012).

⁵² Peter J. Spiro: Dual Nationality and The Meaning of Citizenship, *Emory L. J.*, 46 (1997): 1411-1485., p. 1411.

⁵³ Rubio-Marin 2006, p. 136.

⁵⁴ Alain Brun: A European or a national solution to the democratic deficit?, in: Rainer Bauböck – Philippe Cayla – Catriona Seth (eds.): *Should EU Citizens Living in other Member States Vote there in National Elections?*, Robert Schuman Centre for Advanced Studies, *EUI Working Paper RSCAS 2012/32*, p. 5. Available at http://eu-do-citizenship.eu/docs/RSCAS_2012_32.pdf (Last visited: 15 September 2012).

⁵⁵ Commission Communication: EU Citizenship Report 2010. Dismantling the obstacles to EU citizens’ rights. Brussels, 2010.10.27. COM (2010) 603.

European Union which amounts to an infringement of their rights under European law. According to Bauböck we may be witnessing the emergence of a rule of customary law which obliges Member States to afford voting rights to their citizens residing abroad.⁵⁶ This development notwithstanding, as Bauböck correctly points out, for the time being ensuring voting rights to citizens living abroad is merely a legal possibility, but not an obligation.⁵⁷

Naturally, as all legal constructions, this direction of development may also be contested. Some assume that citizens living abroad who more readily leave the jurisdiction of the state of their citizenship and who are less affected and directly not bound by the legislation and government policy of the place of residence chosen by them, will perhaps make less of an effort to select the right candidates in the course of elections. Another point is that citizens residing abroad may be less informed about the political situation in their country of origin, although this argument seems less realistic what with the possibilities provided by the internet and other forms of telecommunications or travel. However, political arguments are by far outweighed by the legal argument according to which national measures stripping the citizens of their political rights for reasons of their residence abroad may be deemed a restriction on the free movement within the European Union.

In the European Union citizenship has gradually shed its strictly national and ethnical characteristics. At the same time, Member State citizenship has lost its discriminatory function and its nature of a membership affording certain prerogatives, and has essentially evolved to become a legal bond reflecting the self-understanding of a political community. According to Spiro it is less than absurd to envisage Swedish citizens as a club of persons of Swedish ethnicity, since in this case we are dealing with a political community and not a set of prerogatives operating as exclusive rights against third persons.⁵⁸ Again, it is worth citing Bauböck, who finds that: „*citizenship in a narrow sense is a legal relation between states and individuals, but in its comprehensive sense it signifies membership in a self-governing community*”.⁵⁹

⁵⁶ Bauböck 2007, p. 2402.

⁵⁷ Ibid. at 2422.

⁵⁸ Spiro 1997, p. 1467, para 244.

⁵⁹ Bauböck 2002, p. 5.

Conclusion

The history of international law evidences an intrinsic relationship between the development of international law and the development of human rights. Although in many areas international law faces difficulties of enforcement, human rights seems to be the field where international law yielded the greatest results. This is all the more true for the development of European regional international law, which was supported by the adoption of the European Convention of Human Rights and the extensive jurisprudence of the European Court of Human Rights as well as the recommendations issued by the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe.

The author would like to revisit the formulation of Hannah Arendt, who defined citizenship as a right to rights.⁶⁰ In this context we must keep in mind that in the course of the development of European integration national citizenship gradually lost its legal content, since Member States are obliged to afford the entirety of social and economic rights to all union citizens and even political rights, such as the citizen's right to return to his country at any time or to seek diplomatic or consular protection are not exclusive anymore, better still, in certain cases all union citizens enjoy these rights. Not to mention the fact that in compliance with the European Arrest Warrant the country of origin no longer counts as a „safe haven” towards the rest of the Member States. Exclusive rights related to national citizenship have slimmed down to the core of voting rights in national parliamentary elections. And who would fear more for the future of the Polish, the French or the Spanish nation or state, than members of the French, Spanish or Polish national community, wherever they may reside in the world.

The European Union has just yet embarked upon its pursuit of an own identity, while national citizenship was based on the foundation of a solid national identity for many centuries. Although this has historically led to numerous cases of exclusion and disenfranchisement which would be unacceptable today, the universal system of human rights documents endowed individuals with a very restricted right of „global citizenship” and the processes of European integration afforded union citizens with socio-economic rights of more or less identical content. Citizenship understood as a social and emotional bond between the individual and a state no longer presupposes the element of exclusion and may therefore also be upheld in the future.

⁶⁰ Hannah Arendt: *The Origins of Totalitarianism*. Cleveland/New York, The World Publishing Company: Meridian Books, 1951, p. 294.

There is no citizenship without identity, and without identity there is no state and – at the present stage of integration – no European Union either.

Based on the approach outlined above, dual citizenship should be understood as an entitlement which – due to the special personal circumstances of the individual – affords him or her the right to belong to two political communities and to enjoy the rights stemming from this situation as well as to undertake the obligations and responsibilities flowing from the same. Although dual citizenship may arise under different circumstances, European regional international law recognizes four groups: women acquiring multiple citizenships by virtue of marriage, individuals acquiring the citizenship of more than one state *ex lege* at birth, persons unable to renounce their previous citizenship due to restrictions imposed by third states and persons residing permanently abroad, but sharing ties with the national community, who, due to historical reasons lost their citizenship through no fault of their own.

As a result of the legal development facilitated by the Council of Europe and the Strasbourg Court, the voting rights of citizens residing abroad have not only become acceptable, but are even desirable. Such a practice takes a tolerant stance towards the question of external voting of dual citizens residing abroad as well as the legal institution itself. Considering the history of these institutions it becomes apparent that both the voting rights afforded to persons residing abroad as well as the institution of dual citizenship served as a primary instrument to compensate for past injustices. The legislation adopted and the legal development that took place in Europe in this field may be deemed exemplary.

Hajnalka Juhász

External Voting in the International Practice: A Comparative Analysis and Overview

The present study attempts to offer a review of several important statements and conclusions of the International IDEA Handbook 2007¹, which monitors external voting practices of 115 countries worldwide. It also examines other relevant materials and presents its own conclusions. Undoubtedly, our world is constantly changing, and we need to formulate our own answers to these challenges. Broadly speaking, globalization, migration, professional and personal life – as challenges of the 21st century – have all contributed to the increasing interest in external voting rights in recent years. At the same time, external voting is quite a new phenomenon, and it also appears on the political agenda in many countries of the world. According to the IDEA Handbook's definition, external voting is none else but "*provisions and procedures which enable some or all electors of a country who are temporarily or permanently outside the country to exercise their voting rights from outside the territory of the country*".²

First of all, it is important to emphasize that there is no uniform legislation for external voting either in the European Union or elsewhere in the world. Essentially, the European Union leaves the regulation of external voting in the competence of the member states. Considering the different electoral systems and electoral practices in the world, external voting has never been easy to implement. Currently, external voting is allowed in 115 countries and territories worldwide.³ These 115 countries represent more than 50 per cent of the world's democracies, which seems to indicate a tendency in favour of external voting. According to the IDEA Handbook's latest data, a fairly high number (41) of European countries allow external voting in the world⁴. Secondly, international migration has also had an impact on the electoral system of those countries whose citizens are increasingly leaving

¹ International Institute For Democracy and Electoral Assistance

² *The International IDEA Handbook, Voting from Abroad*, 2007, p. 67, hereinafter IDEA, <http://www.idea.int/publications/esd/index.cfm>

³ Ibid p 3.

⁴ IDEA, p. 3.