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Epilogue: International norms for nationality – an elusive goal?

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Efforts to develop international legal norms on matters of nationality have always been vexed by an inherent contradiction. On the one hand, the status of nationality is by its very nature an international one that depends on recognition by other states.¹ On the other hand, the *Grundnorm* of international law on nationality is national self-determination, spelled out in Art. 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law: “It is for each State to determine under its own law who are its nationals”. To grasp fully the tension between these two principles, imagine for a moment that they would apply not only to states’ populations, but also to their territory. Would it be possible to uphold simultaneously a principle of mutual recognition of international borders and a principle that it is for each state to determine its territorial borders under its own law?

In the 20th century, the human rights revolution in international law has piled another contradiction upon this basic one between national self-determination and the requirement for international recognition. Bringing in the individual as a bearer of universal rights against states that must be upheld by the international community of states, raises the question of which state is responsible for protecting the rights of which individual. Hannah Arendt called this the “paradox of human rights”, which had been revealed by the fate of stateless people in the interwar period. “The Rights of Man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state.”² There seems to be an obvious solution to the paradox and Arendt spells it out in her famous description of citizenship as “the right to have rights”.³ In an international system grounded on equal sovereignty of states, universal human rights cannot be realized without a right to citizenship. Such a right has, in fact, been proclaimed in Art. 15 (1) of the Universal Declaration of Human Rights, but it leaves open which states are the addressees of the corresponding duties. The subsequent legally binding conventions (the 1954 and 1961 Conventions on Statelessness and Art. 24 of the 1966 Covenant on Civil and Political Rights) have not answered this question adequately either.⁴

As this epilogue will suggest, the contradictions could in the future be ratcheted up to a third level when individuals are no longer just seen as bearers of universal rights in need for a state that recognizes them as nationals, but as autonomous agents with a right to choose the state whose nationals they want to be. Could such a shift eventually transform the spatialities of citizenship traced in Kristin Henrard’s

¹ Where international recognition is lacking, as it is in disputed “liminal territories” (Krasniqi 2018), such as Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, North Cyprus and Crimea, inhabitants are subjects of governments and may even enjoy citizenship rights of political participation, but their de facto citizenship no longer matches their legal nationality.

² Arendt 1967, p. 293.

³ See the contribution by Owen in this special issue.

⁴ See the contributions by van Waas and Jaghai in this special issue.

introduction⁵ to this special issue into deterritorialized political communities determined by mobile citizens' choices?

Four Goals of International Law

International law has attempted to grapple with these contradictions by setting itself four goals. The first of these is to avoid or resolve conflicts between states. Conflicts of law arise inevitably where national rules for determining the personal status of individuals differ and states claim individuals as nationals over whom other states also claim jurisdiction because they reside in their territory. Private international law has specialized in the task of resolving conflicts between nationally diverging norms in family law through weighing the criteria of habitual residence and nationality against each other and by creating a space for legal pluralism inside national jurisdiction within which foreign legal norms can be applied by domestic courts.⁶ The right to diplomatic protection is similarly shaped by a goal to regulate conflicts between states involving their nationals, except that in this case the matter to be addressed are harms to nationals (or legal persons such as nationally registered companies) of one state inflicted by another state in the latter's territory.⁷

As I have described them, the goals of private international law and diplomatic protection respond to the first tension between international recognition and national self-determination. However, the human rights revolution complicates these tasks by introducing further questions. Do courts discriminate and risk violating human rights standards when they apply foreign legal norms, e.g. on divorce or child custody that conflict with domestic ones? Is the right to diplomatic protection merely exercised by governments against each other, or is there also an individual right of nationals to receive diplomatic protection by their government even if this government is unwilling to act on their behalf?

The second goal is to avoid statelessness. The existence of individuals without any legal affiliation to a state creates problems for relations between states, e.g. when a state wants to deport a non-national who is not recognized by any other state as its national. Yet it is the human rights revolution that has made the goal of eliminating statelessness a major concern for the international community. Owen argues that a normatively coherent human rights perspective requires fleshing out the right to a nationality and the right not to be arbitrarily deprived of one's nationality through establishing substantive criteria for determining which person should be a citizen of which state. Doing so would, however, be incompatible with a Westphalian view of state sovereignty.⁸

A third goal that was considered equally important in the period between the mid-19th and mid-20th centuries was to avoid multiple nationality. This goal seems an obvious one when focusing on the tension between international recognition and national self-determination. If states are expected to recognize each other's nationals although they determine under their own law who these nationals are, then they must at least agree on rules that prevent that several states claim the same individual as their national. The problem is that such rules would have had to harmonize and constrain nationality laws to an extent that would have completely eradicated historically different citizenship traditions and national self-determination. Consider which set of rules could hypothetically prevent the emergence of multiple

⁵ See the introduction to this special issue by Henrard.

⁶ See the contribution by Struycken in this special issue.

⁷ See the contribution by Denza in this special issue.

⁸ Ibid.

nationality at birth. There are only two: either universal *ius sanguinis* with a strict rule that only one of the parents can transmit nationality to the child or universal *ius soli* with no complementary *ius sanguinis* for the first generation born abroad. In any other global birthright regime, states would have to intervene to deprive children of a nationality that they would normally acquire at birth under the rules of the regime.

The goal was eventually abandoned not because of the impossibility to prevent multiple citizenship at birth but because of shifting state interests – mostly those of source countries of migration that did not want to lose their diasporas when these acquired host country citizenship. However, making human rights a cornerstone of international law contributed to this outcome in important ways. From the perspective of individuals' claims to be recognized as nationals a general prohibition of multiple nationality cannot be defended. In a world where migrants do not merely move across borders but generally stay connected with their countries of origin, first generation migrants who have settled in a host country have claims to retain their nationality of origin that are equally strong as their claims not to be excluded from becoming citizens of their host country. Slightly different reasons apply to second generations born abroad or to the children of parents with different nationality. One may argue that their links to a parental country of origin are more tenuous, but rules that would deprive them of a citizenship acquired at birth subject to a genuine link test conflict with the expectation that nationality is a secure and by default life-long status,⁹ which is also crucial for its role in international relations.

A fourth goal that was entirely absent in early efforts to develop an international law of nationality and that has been introduced only by the human rights revolution is the definition of minimum standards of non-domination (e.g. the ban on arbitrary deprivation of nationality) and non-discrimination (on gender, ethnic, racial, religious and other grounds). Gender-neutral *ius sanguinis* and independent nationality for both spouses have become major causes for the proliferation of multiple citizenship by birth.¹⁰ What has not yet been fully achieved is applying non-discrimination norms to the status of nationality itself by mandating that states do not distinguish between citizens by birth and by naturalisation, or between those who do or do not possess another nationality. The former type of nationality-based discrimination is still widespread in the Americas when it comes to access to political office and also with regard to protection against deprivation.¹¹ By contrast, Art. 5(2) of the European Convention on Nationality requires, rather cautiously, that “each State party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.” A stronger principle of non-discrimination might constrain the power of states to deprive multiple citizens of their nationality in cases where mono-nationals would be protected in order to avoid turning them stateless.¹²

Wautelet's contribution highlights a deeper puzzle: In order to resolve the problem of mutual recognition in a world of equally sovereign countries and in order to prevent discrimination, international law has to treat all nationalities as equal. However, nationalities have de facto unequal value in three ways. First, they have unequal value in terms of the rights and opportunities enjoyed by citizens of different countries; second, the same nationality changes its value for the individual

⁹ Bauböck and Paskalev 2015.

¹⁰ See the contributions by Wautelet, De Groot and Vonk, Honohan and Rougier in this special issue.

¹¹ Acosta 2018.

¹² See the contribution by Van Waas and Jaghai in this special issue.

depending on whether and how long she resides in the territory or outside; third, the external value of a nationality may also depend on special relations between a state of residence and of origin (as it does for EU citizens residing in another EU Member State). Which of these differences should be taken into account by prescriptive international legal norms for states' nationality laws? Which should be accepted through permissive norms that allow states to differentiate if they see a need to do so? And which should be ruled out because they conflict with norms of equal recognition among states or non-discrimination among individuals?

Three principles for determining nationality

Faced with such difficult normative questions and conflicting principles, international lawyers may be tempted to take a different route and examine state practice in the hope of finding some trends from which customary norms of international law might eventually emerge. This short epilogue obviously does not provide enough space for even a cursory comparative analysis of global trends in nationality law. Instead, I will merely propose some conceptual distinctions that would be necessary for such an exercise and that suggest that there is little hope for bottom-up convergence that could resolve the three tensions mentioned above.

Rules for determining which individual is a national of which state use three basic criteria: circumstances of birth, residence in a territory, and choice. The three criteria are hierarchically ordered in such a way that birth dominates residence and residence dominates choice. This hierarchy creates a strong family resemblance between nationality laws that makes them comparable and provides leverage for international legal norms. Imagine that this would be otherwise and some states would turn all residents automatically into their citizens, while others would auction their citizenship off to both residents and non-residents who are interested and can afford the price. In such a world, there would be either endless and irresolvable conflicts over recognition of nationality between states or nationality would become entirely meaningless and inconsequential as an international status.

The general hierarchy of birth, residence, and choice that we find in the nationality laws of all states is, however, not sufficient for creating a dynamic of convergence for two reasons. First, there are additional criteria (mostly for naturalisation, renunciation and withdrawal) that create more variation. For example, family ties, loyalty and criminal record, cultural similarity or assimilation, merit and contribution play a strong role in nearly all nationality laws both for rules of acquisition and loss, but the way they are taken into account differs enormously across states. The Global Citizenship Observatory¹³ uses a scheme of 27 modes of acquisition and 15 modes of loss of citizenship in order to capture such variety and compare nationality laws across the globe. The second reason is that the common core criteria of birth, residence and choice, too, are highly ambivalent in their implications for the attribution of nationality or enjoyment of citizenship. I will discuss each of these briefly in turn.

Birthright citizenship

As Honohan and Rougier demonstrate on the basis of a GLOBALCIT dataset, nearly all countries mix *ius sanguinis* and *ius soli* to a certain extent, with *ius soli* regimes granting citizenship *iure sanguinis* to second generations born abroad and most, but not all, *ius sanguinis* regimes granting citizenship *iure soli*

¹³ www.globalcit.eu

to foundlings and otherwise stateless children. However, there are strong regional patterns in the variation of birthright regimes, with unconditional *ius soli* being now present nearly exclusively in the Americas, while pure *ius sanguinis* regimes are more prevalent in Asia. De Groot and Vonk add to this a longitudinal dimension that shows how *ius sanguinis* regimes have been transformed through the impact of norms against gender discrimination while *ius soli* regimes outside the Americas have become more conditional – sometimes in response to public anxieties about “birthright tourism” and family reunification claims.

This lack of uniformity and convergence means that the category of non-citizens who potentially qualify for naturalisation on the basis of residence is inflated in some countries by including second and even third generations born in the country to non-citizen parents of immigrant origin. Remarkably, international law does not even include a right to naturalisation by declaration or entitlement for children who have never lived outside their country of birth and there is no sufficient evidence that state practice will ever generate a customary norm of this kind.

Residence, presence and domicile

Residence, coming second in the hierarchy of criteria, is never sufficient for automatic attribution, but it matters strongly for change of nationality (through naturalisation or renunciation) and also for its effect in terms of citizenship rights and obligations. In these respects, there are rather clear patterns but again strange deviations from what one might expect in terms of rules conducive to preventing conflicts between states. Most naturalisation laws require a period of residence in the country, but quite a number of countries offer their citizenship also to populations living permanently outside their territory if these are descendants of emigrants who had lost their original nationality or ethnic kin populations in neighbouring territories. The picture is much more mixed when it comes to the converse of naturalisation, i.e. voluntary renunciation. States generally require that the person possesses, or has access to, another nationality, but many do not demand that those who give up their citizenship must have previously left the country.

Residence makes of course a huge difference with regard to the enjoyment of citizenship rights. Most civil and social rights can only be guaranteed by states for citizens residing in the country. By contrast, the rights to return and diplomatic protection can only be enjoyed by non-residents. Multiple nationality has a dramatic impact on the enjoyment of these rights of “external citizenship”. It transforms the right to return into a right of free movement between several states, while it diminishes the protection that states can offer to their nationals abroad when these reside in their other country of citizenship.¹⁴ A recent global trend is the granting of voting rights in national elections to non-resident citizens,¹⁵ which entails for dual citizens that they can often vote in two national elections. No such clear trend can be seen when it comes to non-residents’ citizenship duties. The U.S. is an outlier in claiming global tax jurisdiction over their citizens’ income earned abroad, but many states with military conscription draft also non-resident citizens into their army or deprive them of their nationality if they refuse to serve.

Finally, we have to be aware that “residence” is an ambiguous legal construct that for this very reason creates a lot of variation in nationality attribution and its effects. Human beings cannot be simultaneously present in different territories. Presence or absence have an impact on nationality-based

¹⁴ See Denza, *ibid.*

¹⁵ Arrighi and Bauböck 2017; Collyer 2014.

rights quite independently from where a person resides, but they generally do not impact on the attribution of nationality status. In the context of the fight against terrorism, the UK and other states have, however, resorted to stripping terrorist suspects of their nationality when they are even temporarily outside the territory in order to deprive them of the right to return.¹⁶ The concept of domicile is a more complex one than physical presence, but it is also meant to exclude simultaneity across different territories. By contrast, it is neither physically nor legally impossible for individuals to have multiple residences. Attempts to further develop international legal norms that regulate state practices with regard to how they use residence conditions for nationality attribution and enjoyment of citizenship would thus have to introduce additional differentiations not just between mono- and multiple nationals, but also mono- and multiple residents.

Individual and state choice

The third main criterion for attributing nationality is choice or an expression of will. Since nationality is a link between two autonomous agents, an individual and a state, choice can be potentially exercised by both sides. Membership in many human associations is primarily a matter of choice. People sort themselves into marriages, circles of friends, clubs and other types of civil society organisations by reciprocity of choice. Where associations are large, this reciprocity takes on a more asymmetric form with the individual choosing the association through applying for membership and the association setting the conditions for admission and sometimes letting governing bodies or general assemblies decide on individual admissions. In voluntary associations, individuals are unilaterally free to leave but not to join. Without individual choice, membership becomes involuntary, without choice by the association, it becomes invasive.

States are not voluntary associations of this kind and the fact that all states attribute citizenship automatically at birth illustrates this well. However, choice is very important in rules for changing nationality by naturalisation or renunciation. States can no longer turn long-term residents into nationals against their will,¹⁷ although a significant number (among them nearly all Arab states and Iran) do not permit renunciation of nationality under any circumstances.

The notion that nationality could or should be determined on the basis of mutual choice exercised by individuals and states in a way that sets aside circumstances of birth and conditions of residence is, however, no longer completely outlandish. Some small island states offer their nationality to investors without requiring them to take up residence. These investor citizenship schemes have recently become a subject of media attention and academic dispute.¹⁸ The best-known (but not the only case) in Europe is the 2013 Maltese scheme that originally offered EU passports to foreigners willing to invest € 650.000 and to pay an additional fee of € 500.000.¹⁹ The scheme was modified after protests by the European Commission and European Parliament and includes now a condition of 12 months residence, although

¹⁶ Macklin 2014, Van Waas and Jaghai, *ibid*.

¹⁷ However, automatic naturalisation of long-term residents was occasionally practiced in the 19th century, including the Austrian monarchy until 1833. See Bauböck and Çınar 2001. Some political theorists have recently advocated mandatory naturalisation of immigrants on grounds of democratic inclusion and equality of rights and duties for all residents. See Rubio-Marín 2000; De Schutter and Ypi 2015.

¹⁸ Shachar and Bauböck 2014; Dzankic 2015; Parker 2017.

¹⁹ See the contribution by Oosterom-Staples in this special issue.

this merely requires renting an apartment rather than living in the country, which illustrates the ambiguity of residence criteria discussed above.

As Wollmann's contribution highlights, "citizenship for sale" is not the only way in which citizenship can become commodified. If states improve their chances for Olympic medals by offering naturalisation to athletes without connection to the country and if athletes improve their income and chances of winning through becoming nationals of state that offers them better conditions, then the Olympic ideal of peaceful competition between national teams on a level playing field seems compromised.

Rules for automatic acquisition at birth generally set aside choice both by the beneficiary and the state. This is the condition for sorting individuals into relatively stable sets of nationals linked to a specific state. Nationality could not serve its function of providing individuals with a status that is recognized by all other states if choice were the dominant sorting mechanism. However, individual choice does play a role also in birthright acquisition and creates problematic irregularities where it does. "Birthright tourism" in countries with unconditional *ius soli* is an obvious example of individuals strategically choosing a nationality for their children. Unlimited extraterritorial *ius sanguinis* in many European states creates similar incentives for parents to register a child's ancestral nationality in order to provide him or her with future mobility opportunities derived from EU citizenship.²⁰ On the other side, states also exercise choice negatively when failing to register births among ethnic and religious minorities whom they do not consider as belonging to the nation and depriving children in this way of their birthright citizenship.

Conclusions

The general picture that emerges from these glimpses at existing norms and state practice is that the hierarchy of birth over residence over choice as basic criteria for attributing nationality seems to be rather stable until now. This means that the task of international law to further develop common norms for nationality law is not an entirely impossible one. The goals of avoiding conflicts of law and improving the enforcement of human rights make the task also a normatively imperative one. As the slow but cumulative emergence of international legal norms on nationality demonstrates, this is not the task of Sisyphus that always starts from scratch without ever achieving its goal. But it is certainly a Herculean task given the inherent contradictions with which it is fraught, the huge variety of citizenship regimes and the lack of convergence on most dimensions. It is also an endeavour with an uncertain future if global inequalities of wealth combined with growing geographic mobility turn citizenship ever more into an object of strategic choice rather than a stable marker of membership in polities sharing a common destiny.

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²⁰ See Harpaz 2018.

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