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ACT ON POLISH CITIZENSHIP OF 2 APRIL 2009 (JOURNAL OF LAWS 2009) – FROM THE PERSPECTIVE OF INTERNATIONAL LAW

INTRODUCTION

Lawyers specialising in international law consider the issue of citizenship on the one hand as an obligatory part of an international law lecture or textbook, and on the other as an issue still at the intersection of international, national and EU laws, but falling into the other, i.e. the constitutionalists' part, thus determining a far-reaching prudence in considering the subject and the readiness to give it up for constitutional law consideration, especially for comparative analysis. At the same time, the issue of citizenship was one of the first human rights issues[17] codified by the Hague Codification Conference as an issue of international law (Acts of the Conference), back in the 1930s. However, if the issue is considered in terms of human rights international law, it is considered in terms of the rights and freedoms of citizens, rather than an individual right: a claim to acquire and possess citizenship. It is determined by the conviction that international law – following the prevailing opinion of the doctrine – protects individuals against the status of a stateless person (Michalska, 1982: p. 148), however, is not the source of substantial law – the right to citizenship (Galicki, 1996: p. 11–12). Still, in this case the boundary between statelessness and the substantial law is not as evident as in other cases where the right to change citizenship belongs to anyone. It predominantly involves protection from arbitrary deprivation of citizenship by the state, as well as obligations of member states of the international community confronted with illegal situations, and finally (relatively new) obligations related to the state in the capacity of a sovereign meeting its responsibility – R2P (Report of the International Commission and World Summit Outcome) its citizens and people staying in its territory. These problems, when considered as research challenges, particularly given certain controversies regarding Polish law regulations, justify the issue of the right to citizenship creating new research perspectives.

According to the basic definitions of a citizen and citizenship, a citizen is considered to be "*A person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges. A* ***natural-born citizen*** *is a person born within the jurisdiction of a national government. A* ***naturalized citizen*** *is a foreign-born person who attains citizen by law*"; while the notion of citizenship de-

[17] The significance of the issue for the states is proven by their challenge to international legislation on citizenship, already after implementing bans on slavery and slaves trafficking and on humanitarian norms of the law at a time of war.

picts "*1. The status of being a citizen. 2. The quality of a person's conduct as a member of a community*" (Garner, 1999: p. 237).

Still, the comparison at that level of utterance shows a fundamental difference between defining citizenship in the world and in Poland. Polish textbooks define the citizenship as "*a particular type of legal relation of an individual with the state. It depicts an obligation of faithfulness and loyalty towards the state and institutional jurisdiction of a state of its citizens…*" (Góralczyk, Sawicki, 2009: p. 252), "*it is a permanent legal relation connecting an individual with a state*" (Bierzanek, Symonides, 2002: p. 256). The difference comes from not noticing in Polish textbooks the transition from a feudal social structure with its specific relations to a civil society, as evidenced by the reluctance of textbooks authors to define citizenship (Czapliński, Wyrozumska, 2004).

The definitions embrace all the components considered to be elements of a citizen legal status and ties. Those constituting elements of a legal status include the following:

- status attributed to an individual – a person as a member of a state/civic community. The legal title for the status may come by virtue of birth – the legal title of an individual may be the place of birth (under state jurisdiction) or naturalisation (a person born outside the state jurisdiction may gain the status on the base of a legal act, in the majority of cases it is an individual administration decision). Ehrlich (Ehrlich, 1958: p. 598) points to the appropriateness/regularity of linear alteration of setting a "man's legal status" from gaining citizenship by virtue of birth to the virtue of decision (from a status to a contract);
- membership in a political community based on a correlation of the duty of political loyalty[18] to the community and rights making use of the plenitude of citizens' rights and protection by the institutions of the community – the state. The ties of citizenship are equivalent to the legal regime of citizenship.

At the same time, the substantial aspects of law also require attention – definitions and regulations do not refer to the nature of citizenship ties (common for many domestic law systems, and even international law). Neither the law itself nor legal consideration perceive differences derived from the presence of *de facto* citizenship and classical citizenship *de iure*[19] (Swirski, Hasson, 2006)

Common acceptance and formulations reflecting this pattern of both the law and legal definition is confirmed by national and international legal texts such as encyclopaedias (Symonides, 1976: p. 220–222) and fundamental textbooks (Sørensen, 1968: p. 472; Buergenthal, Murphy, 2002: p. 207).

In the modern understanding of both citizenship and state (Dahl, 1971: p. 1–3) relations between citizenship/the citizen and the state are of constant feedback, as citizenship is the source of existence of a state considered as an institutionalised form of a community of citizens.[20] Citizenship is relative to the existence of the state and to the state–citizen relationship: "*citizenship' means legal binds between an individual and a state and does not depict ethnic origin*" (European Convention: Article 2, point A). The Polish Constitutional Tribunal has expressed the partially similar opinion that "*citizenship means permanent legal ties between the individual and the state, expressed by all their mutual rights and obligations enforced by law, and the value of citizenship is not mani-*

[18] The institution roots derive from feudal society – relations between lord and vassals.

[19] In this aspect, the legal status of the Bedouins of Negev should be perceived.

[20] In Polish there are different words meaning nationality and citizenship.

fested solely by legal consequences, as it is also membership in political, historic, cultural and axiological community,"[21] embracing the historical community may stress citizenship by virtue of *quasi ethnic* community, though by analogy to the perception of cultural and axiological values in the Constitution of the Republic of Poland, a reference to historic "community" may not always be the same as to the ethnic one.

Having recognized the issue of nationality – in the past almost entirely within the scope of the domestic law- as a state internal domain is the subject of competence transfer to the sphere governed by the international law. Numerous arguments, embracing both the norms of binding and non-binding, but still of normative power, international texts, as well as the international and domestic practice) support the opinion on the competence transfer. By the second half of the twentieth century, the traditionally exclusive competence of a state in the area of citizenship was evolving towards allowing other subjects, when, due, to the development of human rights in international law a division between "*the issues belonging by their nature to the competences of a state*" (the UN Charter Article 2) and those shared capacity of a state/states and international community shifted towards narrowing the state exclusive domain.[22]

Undoubtedly, the internationalisation of human rights law has resulted in international law obligations of a state regarding the scope of citizenship, though this is still relatively new. However, an analysis of texts and international practice shows a certain inconsistency in considering the issue as the exclusive competence of a state. On one hand, in its advisory opinion from 7 February 1923 on "decrees on Tunisia and Morocco citizenship", the Permanent Court of International Justice confirmed that the issues of citizenship are the exclusive competences of the state.[23] On the other hand, however, Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws regarding certain cases of statelessness stipulates that: "*It is for each State to*

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[21] This is analysed below.

[22] Schlesinger Jr. pointed that "*great liberating ideas of individual dignity, political democracy, equality before the law, religious toleration, cultural pluralism, [and] artistic freedom*" evolved from the Western tradition, but "*empower people of every continent, colour, and creed*" and are ideas "*to which most of the world today aspires*." (Schlesinger, 1992: p. 27); on the internationalisation of human rights law see Forsythe (Forsythe, 1991, p. 119–142) and Coatsworth (Coatsworth, 2003).

[23] As the French Government concluded in "*…en ce qui concerne les décrets de nationalité en Tunisie et au Maroc est ou n'est pas, d'après le droit international une affaire exclusivement d'ordre intérieur*" and the advisory opinion referring to the issue remains is still valid, the Court stated: "*Les mots «compétence exclusive» semblent plutôt envisager certaines matières qui, bien que pouvant toucher de très près aux intérêts de plus d'un Etat, ne sont pas,en principe, réglées par le droit international. En ce qui concerne ces matières, chaqile Etat est seul maître de ses décisions. La question de savoir si une certaine matière rentre ou ne rentre pas dan le domaine exclusif d'un Etat est une question essentiellement relative: elle dépend du développement des rapports internationaux. C'est ainsi que, dans l'état actuel du droit international, les questions de nationalité sont, en principe, de l'avis de la Cour; comprises dans ce domaine réservé. Aux fins du présent avis, il suffit de remarquer qu'il se peut très bien que, dans une matière qui, comme celle de la nationalité, n'est pas, en principe, réglée par le droit international, la liberté de 1'Etat de disposer à son gré soit néanmoins restreinte par des engagements qu'il aurait envers d'autres Etats. En ce cas, la compétence de l'Etat, exclusive en principe, se trouve limitée par des règles de droit international. L'article 15, paragraphe 8, cesse alors d'être applicable au regard des Etats qui sont en droit de se prévaloir desdites règles ; et le différend sur la question de savoir si l'Etat a ou n'a pas le droit de prendre certaines mesures, devient dans ces circonstances un différend d'ordre international qui reste en dehors de la réserve formulée dans ce paragraphe. Ecarter la compétence exclusive d'un Etat ne préjuge d'ailleurs aucunement la décision finale sur le droit que cet Etat aurait de prendre les mesures en question.*" (French Government).

determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality." (Convention 1930) The discrepancy in those legal statements is *prima facie* visible. Both the PCIJ and states-parties to the Convention consider citizenship issues to be the exclusive competence of a state, though obviously having the right to subdue to treaty stipulations obliging it to restrict its regulatory capacity (following the PCIJ legal standing and the Convention stipulation, their adoption may influence law regulations within treaties). However, the Convention also provides norms "*of the international custom, and principles of law generally recognised,*" limiting a state's capacities in discretionary citizenship issues. It requires the legislator to list applicable norms, traditionally forming the catalogue of norms. It is possible to resort solely to the requirement of "effective nationality", quoted in the case of "*Nottebohm (Liechtenstein v. Guatemala)*" and Article 3 of the PCIJ Statute, as well as the right to diplomatic and consular protection (*LaGrand*). The restriction is advocated in some way by the dissenting opinion of Judge Read in the "*Nottebohm*" case,[24] though international practice determined by multinational treaties regulating issues of citizenship proves to the contrary. This is the case because the international agreements concluded since the inter-war period, including the Minority Treaties of the League of Nations (such as the stipulations of Articles 1–6, Chapter 1 of the Allies and the Republic of Poland Treaty – i.e. the Little treaty of Versailles) or the Hague Convention on some issues regarding a conflict of laws on citizenship and the Protocol on Cases of Statelessness (of 12 April 1930) were the tools of states-parties to protect an individual from the status of a stateless. The desire of states to protect an individual is expressed *expressis verbis* in the Preamble to the New York Convention on the Nationality of Married Women (from 20 February 1957) *"… recognizing that conflicts in law and in practice with reference to nationality arise as a result of provisions concerning the loss or acquisition of nationality by women as a result of marriage of it dissolution or of the change of nationality by the husband Turing marriage, recognizing that in the Article 15 of the Universal Declaration of Human Rights the General Assembly of the United Nations has proclaimed that "everyone has the right to nationality" and that "no one shall be arbitrary deprived of his nationality or deprived the right to change his na-*

[24] „*… Applying this rule to the case, it would result that Liechtenstein had the right to determine under its own law that Mr. Nottebohm was its own national, and that Guatemala must recognize the Liechtenstein law in this regard in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality. I shall refer to this quality, the binding character of naturalization, as opposability.*

No 'international conventions' are involved and no 'international custom' has been proved. There remain 'the principles of law generally recognized with regard to nationality.' Yet Guatemala concedes that there are no firm principles of law generally recognized with regard to nationality, but that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard–opposability–are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud. (…)

In the first place, I do not think that international law, apart from abuse of right and fraud, permits the consideration of the motives which led to naturalization as determining its effects. (…)I have difficulty in accepting the position taken with regard to the nature of the State and the incorporation of an individual in the State by naturalization. To my mind the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance. Most States regard non-resident citizens as a part of the body politic." p. 4.

tionality", desiring to co-operate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to sex." The regulations met numerous individual cases as well as situations on the scale of humanitarian catastrophe regarding statelessness. It is hard to remain indifferent to the price that the human rights protagonists of the UN Bill of Rights paid for *quasi consensus* on not obstructing at the UN forum the Human Rights Pact by its antagonists defending the *ancien régime* of state omnipotence . The price paid included abandoning the right to citizenship, comforted by the stipulation of Article 24 (3) of the Covenant on Civil and Political Rights, whereby "Every child has the right to acquire a nationality." This concession on the universal forum was accompanied by sustaining the right to citizenship on the regional co-operation forum – the American Convention of Human Rights (from 1969) confirmed that "Every person has the right to a nationality." (Article 20 (1)) The resignation from Pact repeating the stipulation of declaration of Article 15(1), was never intended by the states and international institutions (deriving from the foundation of meeting the obligation to respect fundamental rights and freedoms) to be giving up the system of values stipulated by Article 15 of the Universal Declaration. The UN works were taking place in two directions: towards resigning from promotion of the right to citizenship (thus the claim to citizenship) resignation from its confirmation in the Pact on the one hand, while confirming the obligation to respect individual rights to citizenship and creating a regime for its implementation on the other, through the Convention on the Reduction of Statelessness of 1961 (Jennings, Watts, 2011: p. 868, 889).

States desired to protect individuals against an unwanted status, and communities against an unwanted phenomenon, with both desired balanced between the interests of the individuals and the communities (Goodwin-Gill, McAdam, 2007). Reality proves that a stateless person tends to be of relatively lower economic and social status in comparison to the one privileged with citizenship (Cooter, Ulen, 2012: Chapter 4. Appendix),[25] as the desired protection of fundamental rights and freedoms of an individual is fully performable in respect to such a person (Freeman, 2007: p. 22–31, 70–89). Lack of citizenship may result from a number of factors, including those in connection with the negative coincidence of the right to citizenship of a newborn, hereditary succession of an underprivileged status, regulations on married women citizenship, as well as factors resulting in refugee status. Among them, the underprivileged status of a refugee raised objection, as the case of a refugee most often poses a threat or infringement of one of the "*Four Freedoms*" (Roosevelt, 1941), i.e. freedom of speech, freedom of worship, freedom from want or freedom from fear.[26] In most cases, not respecting fundamental rights enforces the migration of an individual, i.e. exile. This raises the question of the legal consequences of not securing individual rights in the situation of existing international law of human rights, for other states and other members of the international community. Despite agreement over the home state's obligation to protect individual rights and freedoms, this is hard to acknowledge, as for many years (Symonides,

[25] Opinion to the contrary see: Judge Zbigniew Cieślak (Dissenting Opinion).

[26] See Geneva Convention Relating to the Status of Refugees (from 28 July 1951); Preamble "The high Contracting parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,".

1991) it appears that the only obliged is the state blemed for infringing human rights It is acknowledged that in the situation of a state infringement of fundamental rights and freedoms, other members of the international community are empowered, if not obliged, to counteract in spite of a lack of clarity as to the scope of rights, and in particular of obligations. Thus, states rather avoid taking responsibilities, being aware of the consequences of coming between an infringing state's execution of its sovereignty[27] and its own citizens' interests.[28] States, nations are also reluctant, or at least reserved, in specifying their obligations towards the victims of infringers, in particular regarding the implementation of "R2P".

I. IMPULSES FOR ACTION – CITIZENSHIP STAKEHOLDERS

Due to its duality, the right to citizenship should be considered from two perspectives: the obvious perspective of a state – civil society, as well as from the perspective of an individual lacking citizenship, whether in the situation of wanting to obtain it or wanting to change it. Both perspectives obviously reflect not only different points of view, but also competitive interests. The international perspective should not reject the state one, as such an exaggerated demand (relative the adopted perspective), even if justified, by moral standards would result in gaining nothing. However, the fact that the individuals interested in gaining citizenship with all the rights and privileges are the people in need, i.e. the already mentioned refugees, should not be neglected.

An analysis of the issue based on the legal criterion allows the following categories of refugees to be differentiated:

– exiles resulting from the complexity of events preceding and following the First World War. Among them holders of a "Nansen passport" (Jaeger, 2001: pp. 727–736): Russians (not protected by the USRR) and Armenians (former subjects of the Ottoman Empire, not protected by Turkey)[29] as well as Assyrians, Assyrian and Chaldean, Syrians or Kurds, (not protected by any state), and Turks (not protected by Turkey);[30]

[27] As refers to the responsibility for protection ("R2P") "*Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*" the UN General Assembly in the referred to Resolution (A/60/L.1).

[28] I am aware of positioning the issue on the intersection of two institutions, i.e. refugees and exiles; the institutions are distinct For sake of clarity: "asylum" is giving shelter on the state's own territory to those prosecuted or threatened with prosecution, and it is manifestation of internal competence of the state. Pursuant to Article 14 of the Universal Declaration of Human Rights (1) *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*") is the right of an individual, not having, however, equivalent of obligation of another State. The power of the Convention regulates the status of a person who "*because of a reasonable fear of persecution because of race, religion, nationality, membership of a particular social group or political conviction due to living outside of the State of which he is a citizen, and can or may not want to because of these concerns, benefit from the protection of that country, or has any citizenship and, as a result of similar events, being outside the country of his former permanent residence cannot or does not want, return to his State.*" This status provides international protection.

[29] The Agreement of 12 May 1926 regulated the status of refugees The international instruments texts see Collection…

[30] Agreement of 30 June 1928.

– exiles enforced by the authoritarian and totalitarian regimes activities before the Second World War: Spanish,[31] German[32] and Austrian[33] victims of Nazism;
– exiles of the years 1946–1951 resulting directly and indirectly from the Second World War, during which the mass scale expulsion of civilians took place in occupied territories of the "Axis powers", and those attacked by the USSR caused German civilians to escape the attacking army, as well as the forced displacement of German minorities, and finally political changes in states under Soviet dominance caused the population to escape (their climaxes leading to in repressions of liberation movements such as the Berlin and Hungarian uprisings or the Prague Spring);
– exiles of the recent period resulting from instability in the 1990s caused by conflicts across Europe (including the former USSR and the former Yugoslavia).

Regardless of this periodisation, exiles may be identified on the basis of geopolitical criteria covering the following:

– The Middle East initiated by the Arab rejection of the legal and actual consequences of the United Nations General Assembly Resolution No 181 of 29 November 1947 (British mandate of Palestinian territory decolonisation formulas[34]) and the war against the newly emerged state of Israel. Exile has been powered by successive waves after wars against Israel, the Kingdom of Jordan and an unsuccessful attempt by Arab immigrants to appropriate power in Lebanon;
– Africa and Asia, caused by conflicts in states set up after decolonisation (escaping from the new State power, e.g. the Moluccas or "boat people" as well as the consequences of civil wars, separatism, ethnic and national feuds, etc.)

And the scale of this exile has not been reduced.

The exile may also be analysed by its reason. Due to that differentiate the exile resulting from the infringement or the threat of infringement of individual rights and freedoms immediately under the Geneva Convention from migration for purely economic reasons. Italians seeking employment migrating to neighboring countries after WWII – make a good example of a broader phenomenon of "migrant workers". On the other hand, it is important to be aware of the correlation between poverty and the violation of human rights and the lack of the rule of law (as a result, exile is *de facto* caused by a joint violation of "four freedoms", namely religious and ethnic discrimination results in economic discrimination and impairment (Staszewski, 2003)). The principle of the indivisibility of individual rights and freedoms forbidding to treat violations of economic, social and cultural rights separately from violations of first-generation rights and freedoms should not be forgotten.

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[31] Convention of 28 October 1933.

[32] Convention of 10 February 1938.

[33] Protocol of 14 September 1939.

[34] Its essence is presented in the following decision: "*The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948. (…) The mandatory Power shall advise the Commission, as far in advance as possible, of its intention to terminate the mandate and to evacuate each area. The mandatory Power shall use its best endeavours to ensure that an area situated in the territory of the Jewish State, including a seaport and hinterland adequate to provide facilities for as substantial immigration, shall be evacuated at the earliest possible date and in any event not later than 1 February 1948. (…)*

The period between the adoption by the General Assembly of its recommendation on the question of Palestine and the establishment of the independence of the Arab and Jewish States shall be a transitional period."

II. THE LAW

The international community has taken the challenge to defend human rights of (the underprivileged status of) stateless people by implementing laws confirming the right to citizenship, allowing for the alteration of citizenship and forbidding the arbitrary deprivation of citizenship. These fundamental civil rights and freedoms have already been confirmed by Article 15 of the Universal Declaration of Human Rights[35] and their warranties extended by Article 12.4 of the International Covenant on Civil and Political Rights, stipulating that "No one shall be arbitrarily deprived of the right to enter his own country." However, this response has proved ineffective in preventing those fundamental human rights and freedoms from being infringed. There have been efforts to implement universal and regional standards, of which the European Convention on Nationality is one regional example. Its authors, being aware of the challenge to reconcile the traditionally (defensively) considered powers of the state, while also meeting the European model of human rights, sought an acceptable compromise. Article 3 of the Convention confirms the historic right of a state to statutorily define who is its citizen, and sets out the requirement of making citizenship under national regulations compatible with international treaties, as well as "customary international law and principles of law generally recognized with regard to nationality" (Czapliński, 1998: p. 49). The Convention authors went even further, having formulated rules that cannot be contradicted by national law that "*a. everyone has the right to a nationality; b. statelessness shall be avoided; c. no one shall be arbitrarily deprived of his or her nationality; d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.* Normative regulations of the Convention granted the right of citizenship to individuals belonging to groups particularly disadvantaged as regards citizenship, obliging States to enable the acquisition of citizenship *ex lege*. This special protection concerns: children ("one of whose parents possesses, at the time of the birth, the nationality of that State Party"); infants (one of whose parents possesses, at the time of the birth the nationality of that State Party"); infants (found in the State Party territory who would otherwise be stateless), who do not acquire another nationality at birth.

The Convention also restrains the freedom of naturalisation requirements and conditions by making it obligatory for "persons lawfully and permanently residing[36] in its territory" and the obligation to facilitate naturalisation for: spouses and children of citizens; children of naturalised citizens; adopted children; people born in a State and legally and permanently residing there; individuals who have legally and permanently resided in a State for a period since before they were 18 years of age, determined by the internal law of that State Party; stateless individuals and individuals recognised as refugees lawfully and permanently residing in the State. Article 7 of the Convention also reinforced the illegality of the *ex lege* loss of citizenship at the State's initiative, allowing

[35] (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[36] However, "the conditions for naturalisation, shall not provide for a period of residence exceeding ten years before the lodging of an application."

as sole exceptions a voluntary change of nationality or committing actions justifying the loss (acquiring the citizenship by means of fraudulent conduct, false information or concealment of any relevant fact; service in a foreign military service; conduct seriously prejudicial to the vital interests of the State; lack of actual ties; and establishing during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled. Still, concerning the conformity of Polish regulations with the Convention, it is particularly important that every state decision concerning an individual acquisition, loss or regaining of nationality is justified, and every decision is open to administrative or judicial review (Article 12 of the Convention).

III. IMPLEMENTATION OF INTERNATIONAL LAW AND THE EUROPEAN CONVENTION – THE POLISH CASE

On 14 February 2012, two years after its enactment, the Act on Polish Citizenship from 2 April 2009 was published. Its signing by the President of the Republic of Poland was preceded by a Presidential complaint[37] and a ruling of the Constitutional Court from 18 January 2012 (M.P. 2012). In the preventive control judgment, the Court declared that Article 30 governing the recognition as Polish citizen[38] complied with the Constitution.

[37] From 27 April 2009, filed under Article 122.3 of the Constitution

[38] Recognition as a Polish citizen can take place in relation to:

1) a foreigner residing continuously in Poland for at least three years under a settlement permit, a residence permit for a long-term EC resident or under a permanent residence permit, who has a stable and regular source of income in Poland as well as the legal title to dwelling premises;
2) a foreigner residing continuously in Poland for at least two years under a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, who:
   a) remains married to a Polish citizen for at least three years, or
   b) has no citizenship;
3) a foreigner residing continuously in Poland for at least two years under a settlement permit, obtained in connection with having a refugee status granted in the Republic of Poland;
4) a minor foreigner with a parent who is a Polish citizen, residing in Poland on the basis of a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, where the second parent. who does not have Polish citizenship, has agreed to this recognition;
5) a minor foreigner, with at least one parent whose Polish citizenship has been restored, if the minor resides in Poland on the basis of a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, where the second parent, who does not have Polish citizenship, has agreed to this recognition;
6) a foreigner residing continuously and legally in Poland for at least 10 years, who meets all the following conditions:
   a) he has a settlement permit, a residence permit for a long-term EC resident or a permanent residence permit,
   b) he has a stable and regular source of income in Poland as well as the legal title to dwelling premises;
7) a foreigner residing continuously in Poland for at least two years under a settlement permit, obtained in connection with Polish ancestry.

2. A foreigner applying to be recognised as a Polish citizen, except for a foreigner as referred to in section 1 points 4 and 5, is obliged to have a command of the Polish language, confirmed under

The Court concluded that the extension of the scope of recognition as Polish citizen is consistent with Article 137 of the Constitution. The case was considered in the full court[39] and there were dissenting opinions to the judgment from the following judges: Zbigniew Cieślak, Maria Gintowt-Jankowicz[40] Wojciech Hermeliński, Marek Kotlinowski, Teresa Liszcz and Marek Zubik.

Justifying the constitutional complaint, the President raised the argument that regulation of Article 137 of the Constitution with regard to granting Polish citizenship by the President of the Republic of Poland codifies the traditional norm – common law sanctioned[41] citizenship awarded by the Head of State,[42] and in his opinion the other cases (as indicated in Article 34 (1) of the Constitution) are incidental regulations derogating from the general rule of granting citizenship in the awarding act. The President also maintained that the provision regulating the prerogatives of citizenship is a constitutional norm of particular importance – its policy. The President indicated that the law on Polish citizenship of 1962 actually described the conditions for recognition as a citizen, and their extension results in depriving it of an exceptional character, which "leads to the erosion of Presidential prerogatives" (Constitutional Court: Press release). The President also pointed out that, by the Citizenship Act, the Head of State, as a representative of the State community, accepts a new member to the political organisation of citizens, to the State.[43] In the opinion of the President, the legislator limited the scope of the President's competence, as set by the constitutional legislator, in a way that is unacceptable. The law on obtaining citizenship through an administrative decision de facto, identical with the awarding[44] ,in the opinion of the President, violated regulation of Article 137 of the Constitution.

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an official certificate referred to in Article 11a of the Act on the Polish language as of 7 October 1999, a school graduation certificate in the Republic of Poland, or a certificate of graduating from a school abroad, with the Polish language of tuition.

3. Article 64 section 4 of the Foreigners Act of 13 June 2003 will be applied accordingly to determine whether a foreigner resides continuously in Poland.

[39] Andrzej Rzepliński – Presiding Judge, Stanisław Biernat, Zbigniew Cieślak, Maria Gintowt-Jankowicz, Mirosław Granat, Wojciech Hermeliński, Adam Jamróz, Marek Kotlinowski, Teresa Liszcz, Małgorzata Pyziak-Szafnicka, Stanisław Rymar, Piotr Tuleja, Sławomira Wronkowska-Jaśkiewicz, Andrzej Wróbel, Marek Zubik.

[40] I Judge Repporteur; Sławomira Wronkowska-Jaśkiewicz was II Judge Repporteur.

[41] The applicant adduced law doctrine as an evidence.

[42] The argument, however, was not supported by facto as the citizenship of II Republic of Poland was awarded by the Minister of the Interior (after consultation with the authorities of an applicant province and the respective authorities). A prerequisite was an impeccable life style, at least ten year stay in Poland and command of Polish. Regulations of other Member States do not confirm that, so for example, pursuant to Australian Act On Citizenship „*14. (1) The Minister may grant a certificate of Australian citizenship to a person who has made an application in accordance with section 13 and satisfies the Minister.*" (Australian Act).

[43] Sentence, justification. This is consistent with the case-law, as indicated the Constitutional Court. Recalling the Supreme Administrative Court resolution from 9 November 2998 ref Act OPS 4\/98: "the President of the Republic of Poland (. . .) when issuing the law on Polish citizenship, acted as Head of State, symbolizing the Majesty of the State, its sovereignty, fully discretionary authority of the Member State as regards the inclusion of the alien to the community of citizens of the Republic of Poland ").

[44] "Besides clearly referred to in the Constitution Presidential prerogatives implemented in momentous act of adoption new citizens to the community, equal indeed is the decision of the State administration."

1. SCOPE OF ANALYSIS

The statutory regulation of the Polish Citizenship Act of 2009 is another amendment to the provisions. The very fact of relatively frequent changes in the issue seemingly stable, as regulated by traditional norms, thus predestined to stability because regulating constitutional issues deserves legal analysis. The Polish legislator regulated the law on citizenship in subsequent Acts on Citizenship: 20 January 1920 (Dz.U. 1920), of 8 January 1951 (Dz.U. 1951) and of 15 February 1962 (Dz.U. 2000), each of which, except for the amendment of 1951, subjected it to numerous profound changes. It may be concluded that laws reflect the state-making or political-changing events of a similar nature, though this perception is contradicted by the law-making process after the transformation of 1989, firstly amending and finally adopting the new Act and serious dispute over constitutional principles.[45]

Previous changes in Polish citizenship law have already adjusted it to international standards of human rights. These adjustments were connected with the removal from Polish law of penalties (*sui generis*) of citizenship deprivation, and the effects of the decision. The importance of subsequent changes in law cannot be overestimated:

- firstly, to repeal the binding law within the scope of Article 12 providing for such a possibility toward a citizen residing abroad, including children;
- secondly, to more leniently amend the exclusion of children from the punishment.

Legal formulas for the deprivation of citizenship in Poland can be traced in both foreign and domestic solutions, namely in the provisions of the Act of 20 January 1920, on Polish State nationality, whose Article 11 allowed, as one of the instances of citizenship the "loss of Polish citizenship in the following cases: (…) 2) through the adoption of a public office or joining the military service of a foreign country without the consent of the competent provincial Governor (Government Commissioner for the City of Warsaw), given in cases where the intention to join the military service in a foreign country, in consultation with the relevant District Corps Commander."

It is worth remembering, despite the legal inappropriateness of this personal remark, that the constitutional complaint was lodged by President Lech Kaczyński and reiterated by Bronisław Komorowski. In this situation, it seems reasonable and necessary to subject the Polish citizenship law to analysis in the context of international law, answering not only the question of its conformity/conflict with international law, but also of unregulated issues that the legislator should have regulated. This is important as the constitutional complaint, despite referring to issues derivative to international law, was left on the margin of political and legal reflection, despite being obviously significant for at least two equivalent perspectives, namely the head of state prerogatives and an individual right to citizenship. Concerning these issues, the fundamental controversy should not be neglected, as the President perceives the citizenship solely as a tool "facilitating the settlement of the legal status of persons of Polish origin and persons residing in Poland due to political and social changes and massive relocations after the First and Sec-

[45] The Constitutional Tribunal pointed out that "The binding law of 1962, despite its numerous amendments, ceased to meet many modern challenges, such as: numerous migrations, multiple citizenship, frequent marriages of Polish citizens with foreigners and resulting issues of citizenship change by the spouse, the citizenship of children of married couples in which one spouse is not a Polish citizen, not settling a number of" historical precedents", such as the citizenship of Poles who lost it against their will."

ond World Wars."[46] According to the Petitioner, the continuation of recognition as Polish citizen in the Act binding in 1962, as well as in the Act in question of 2009, is of no practical purpose, and thus not sufficiently justified. The President not only dismissed the new regulation, but also denied the earlier legal status, as in his opinion the premises for derogation from granting citizenship ceased to exist due to substantial changes, but also rejected the recognition of the right to citizenship as a human right. In a parliamentary answer to the constitutional complaint, the Speaker stated that the regulation of Article 30 of the Act of 2009, extending the scope of reasons for recognizing Polish citizenship, is consistent with Article 137 of the Constitution. The extended disquisition contained arguments above all from the constitutional scope of the law. Such narrowing argumentation isn't surprising although can raise doubts The Speaker indicated constitutionally approved ways of acquiring citizenship, among which Article 34.1 enumerates birth to parents being Polish citizens (*ius sanguinis),* and provides for its voluntary acquisition at the request of a person, by power of the law or an act of the respective authorities. According to the Speaker, by the power of the Constitution, the President is entitled to grant citizenship to an individual, and the Constitution itself does not prohibit delegating the power "in respect of granting citizenship" to other authorities. Thus, the Speaker continued, since 1920 two norms of granting citizenship were created in Polish law: granting citizenship and recognition as a citizen by a discretionary act. The amendment introduced in the respective area by the Act of 2009 on the one hand maintained the empowered competence of governmental administration, i.e. a voivode, while on the other hand extended the group of persons authorized to citizenship by virtue of recognition specifying premises for recognition or refusal to recognize as the citizen. A specifically individual decision of recognition as a citizen is, in that case, by the power of the Act, an administrative decision; a voivode is obliged to objectively verify whether an applicant meets the requirements and the decision is subject to judicial review. On the other hand, the presidential decision, in the Speaker's opinion, is discretionary and thus not subject to judicial review.

Paradoxically, the Presidential representative present at hearing consistently considered as unconstitutional the Act of 2009, submitting the decision-making authority to judicial review, thus the human right to be recognized as a citizen.

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[46] The Constitutional Tribunal shared the standpoint: "Recognition as Polish citizen provided by the Act of 1920 was to serve the settlement of the legal status of Poles (people of Polish descent) returning to the reviving homeland, and persons residing in the territory of the new Republic of Poland. Due to the emerging State and a new category of its citizenship, the institution in question was, first and foremost, to confirm the readiness of great number of people who until now could not be Polish citizens. Recognition as a citizen then, had a specific character, not so much an act of incorporating a foreigner to the community of citizens, but rather making this community constitutional. That is evidenced by the wording of the Act: "Polish citizenship serves any person (…) who" or "Citizens of other countries who are of Polish descent and their progeny will be recognized as citizens of The Polish State". The Act differentiated granting citizenship "at the request of a person who wants to obtain it."

Granting the citizenship provided by the Act of 1951 served to settle the citizenship of persons who had permanently resided in Poland since at least 9 May 1945 without having a specific citizenship. This Act also provided for recognition as a citizen, as well as allowed citizenship to be granted. Both Acts, while providing recognition of citizenship as a means to its acquisition, aimed at clarifying / ordering the issue after two world wars that resulted in profound territorial and political changes, accompanied by a massive relocation of population. Recognition as a citizen met the requirement of settling citizenship issues after the disasters."

In the closing remarks, the Speaker referred to international law arguments, specifically saying that "the disputed Act of 2009 implements the European Convention on Nationality adopted by the Council of Europe on 6 November 1997, signed by Poland on 29 April 1999 though still not ratified."

Pursuant to the Convention's requirements, the Act facilitates the acquisition of citizenship for foreigners who legally reside in Poland, and provides for the use of an administration decision.

The issues were not addressed by the President, thus neither the Petitioner nor the Speaker explained the reasons for Poland signing the European Convention on Nationality and not ratifying it for over twelve years, i.e. what has changed in the citizenship policy of Poland as regards the Convention of the Council of Europe, or what important issues are protected by its non-ratification and not implementing the Convention.

The Attorney General also stated that Article 30 of the Act of 2009 is not inconsistent with Article 137 of the Constitution. The Attorney General supplemented constitutional and legal arguments with a politically-interesting dispute with the Presidential standing, stating that arguments valid after the First and the Second World Wars have been exhausted.[47] He recalled the Act on Repatriation of 9 November 2000, which indicates that a person arriving in Poland on the basis of a repatriation visa acquires Polish citizenship by virtue of law as of the day of crossing the border, so without the participation of the President, by an administration decision of issuing a repatriation visa.

The Tribunal recognised the acquisition of Polish citizenship: *ex lege* or *ius sanguinis*; and by being granted by the President ("a solemn, peremptory, discretionary and unilateral act by means of which a foreigner is included into the community of the Polish state") and bound by an administrative decision, (a voivode is obliged to issue the decision when the foreigner meets the eligible requirements, and recognition may only be refused when "the acquisition of citizenship would pose a threat to the defence or security of the state, or to the protection of security and public order," as administrative decision, is subject to judicial review).

[47] The Constitutional Tribunal rejected this opinion. ("Indicated reasons for considering as a citizen are of solely historical value and are no longer valid") accepting the Presidential standing. Still, neither the President nor the Constitutional Tribunal referred to facts regulated by citizenship restoration under Article 38 of the Act of 2009. To "1. A foreigner who lost his Polish citizenship before 1 January 1999, on the basis of: 1). 11 or 13 of the Act of 20 January 1920 on citizenship of the Polish State (Journal of laws No. 7, item 44, as amended. 7)), 2); 11 or 12 of the Act of 8 January 1951 on Polish citizenship (OJ No 4, item 25), 3); 13, 14 or 15 of the Act of 15 February 1962 on Polish citizenship (OJ 2001 No. 28, item 353, as amended. 8)) Polish citizenship restored, at the latter's request.

2. The Polish citizenship shall not be restored to a foreigner who: 1) voluntarily joined the armed forces of the Axis or their allies in the period from 1 September 1939 to 8 May 1945; 2) held the public office in the period from 1 September 1939 to 8 May 1945 in the Axis or their allies; 3) acted to the detriment of Poland, especially its independence and sovereignty, or participated in human rights violations.
3. Polish citizenship shall not be restored to a foreigner if it constitutes a threat to national defence or State security, or the protection of the safety and public order."

FINAL REMARKS

The Act, by the power of Article 30, has significantly broadened the number of approved cases and, by abolishing discretion, created simplified and transparent implementation instruments – having met the statutory requirements – for the right of citizenship and institutional control by the state of law. The Act does not pose any threats to state security, as the respective decisions are closely related to Article 64.1 of the Act on Foreigners, setting conditions on granting a permit for entry into and residence of a long-term resident of the European Communities, Permanent residence is regulated in the Act on Entering, residing and Exiting from the Republic of Poland of Nationals of the European Union Member States and their Family Members of 14 July 2006 (Dz.U. 2006), while refugee residence is covered by the Act on Granting Protection.

The Act on Citizenship entering into force may bring Poland closer to the ratification of the signed Convention on Nationality of the Council of Europe. These undertakings comprise a long, difficult and controversial process of redefining citizenship, and of understanding such fundamental notions as nation and state. Proof of how important and controversial this is comes in the form of the dissenting opinions to the judgment of the Constitutional Tribunal – derived from different philosophy backgrounds, namely:

- on one hand by Judge Hermeliński: "… I wish to clearly emphasise that – similarly to the majority of the bench adjudicating in this case – I recognise that the Act under analysis manifests the intention to simplify (…) and to modernise the legal institution of Polish citizenship, and to adjust it to the up-to-date legal and social requirements (including also Poland's membership in the European Union as well as the requirements of the European Convention on Nationality, adopted by the Council of Europe of 6 November 1997). However, this does not change the fact that Article 30(1) of the challenged Act fails a confrontation with the relatively conservative provisions on citizenship included in the Constitution. Thus, the implementation of examined intentions of the legislator should be regarded only on condition that the Constitution will be amended."
- on the other hand, Judge Liszcz stated, "it is primarily the interest of the state. The new regulation has undoubtedly arisen under the influence of the not-yet-ratified European Convention on Nationality, takes into account only the interest of foreigners who apply for Polish citizenship – often not due to ties that bind them with our country, but for the purpose of improving their social status, or even in order to avoid the threat of extradition. It does not, however, take into account the interests of the Republic of Poland to a sufficient extent, making it possible for its authorities to implement a reasonable immigration policy. The Constitution links citizenship with having certain particular political rights. The liberalisation of acquiring Polish citizenship on the basis of "claims" undermines the value of citizenship, which negatively affects the authority of the Republic of Poland; in my view, this also implies the non-conformity of the challenged regulation to Article 1 of the Constitution, which stipulates that the Republic of Poland is the common good of all its citizens."

It seems, however, that, despite the new Act, members of the civil society are not linked with a narrow creek of doubts, but rather divided by the ocean of the world visions and notions. Still, re-capitulating the conclusion of the analysis, one should remind,

regardless of the reasons underlying the State not regulating the right to citizenship in the form of a treaty (in the Covenant on Civil and Political Rights), neither protecting against the arbitrary deprivation and change of citizenship and that negligence evaluation, in the case of Poland, or any other state, does not change the legal nature of the Universal Declaration of Human Rights, support for this Declaration constitutes the unilateral act for any single state. In this respect the primary importance has article 15 of the Universal Declaration of Human Rights It seems that neither the Republic of Poland nor any of its governments would like to give impression that is not bound by the commitment expressed in the Declaration to respect its standards.

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