STATELESSNESS AND THE RIGHT TO A NATIONALITY IN EUROPE: PROGRESS, CHALLENGES AND OPPORTUNITIES
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RATIFICATION, IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL AND EUROPEAN CONVENTIONS ON STATELESSNESS – THE ROLE OF STATES

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PACE has dealt with the issue of statelessness on many occasions. The first relevant Assembly recommendation was adopted in 1955, and the last resolutions in 2014 and 2016.

Despite the growing number of relevant international instruments, statelessness remains widespread all over the world, including in Europe. Latvia, Russia, and Estonia are mentioned as the member states with the highest numbers of stateless persons, although both the reasons for the emergence of statelessness, the legal framework, and the domestic policy approaches are quite different.

In the context of the subject of my intervention today, four major questions can be identified:

1. Is there a human right to a nationality?
2. Which conventions envisage rights in the field of nationality?
3. What kind of obligations are undertaken by the state parties to these conventions?
4. What kind of sanctions exist for non-compliance?

Article 15 of the Universal Declaration of Human Rights explicitly states that "Everyone has the right to a nationality". Paragraph 3 of Article 24 of the International Covenant on Civil and Political Rights specifically stresses this right with regard to children: "Every child has the right to acquire a nationality". Articles 7 and 8 of the Convention on the Rights of the Child reiterate this and add "the right of the child to preserve his or her identity, including nationality". Some aspects of the right to nationality are mentioned also in a number of other UN conventions.

Apparently, the right enshrined in these universal instruments cannot be interpreted as the right to any nationality chosen by the person. States are responsible for implementing this right by adopting appropriate national legislation. This is easier in the states which follow the *ius soli* principle with regard to citizenship, while those whose nationality laws are based on *ius sanquinis* face more challenges, in particular, with regard to children of foreigners, refugees, asylum-seekers, immigrants (including irregular migrants), etc.

To clarify the states' obligations in this field, several universal conventions have been adopted.

The Convention relating to the Status of Stateless Persons of 1954 introduced a definition of a stateless person and established an international protection regime for stateless persons. Before the adoption of this Convention, these problems were dealt with in an *ad hoc* manner (the "Nansen Committee" under the League of Nations is the best example). According to this definition, a stateless person is a person who is "not considered as a national by any State under the operation of its law". It should be noted that so far there is no equivalent to this Convention at the regional level.

The Convention on the Nationality of Married Women adopted in 1957 prohibited a widespread discriminatory practice when a wife was not considered as an equal right-holder and her nationality was dependent on the husband's nationality.

Finally, the Convention on the Reduction of Statelessness of 1961 set guidelines for ensuring the application of common standards and preventing conflicts between different domestic nationality laws.

At the European level, the European Convention on Nationality should be mentioned first. This Convention reaffirms major principles of the universal instruments mentioned above, in particular, gender equality, prohibition of discrimination, and prevention of statelessness of foundlings and children born on the territory of state parties.

At the moment, only 21 states have ratified this Convention, and 8 more signed but have not yet ratified.

Finally, an important Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession was opened for signatures in 2006. The adoption of this instrument was a response to the fact that state succession became a major cause for statelessness in Europe. Unfortunately, this Convention came too late to solve the numerous cases which followed the dissolution of the USSR, Yugoslavia, and Czechoslovakia. Even more regrettable is the fact that only 7 member states have ratified the Convention so far, and 2 more have signed but not yet ratified it.

Virtually all of the instruments mentioned above do not foresee individual complaints procedures. Only the 1961 Convention on the Reduction of Statelessness originally stipulated establishment of a special committee to consider applications, but because of the small number of ratifications this function was transferred to the general mandate of the UNHCR. Therefore, the interpretation of the states' obligations under these instruments substantially depends on the case-law of international courts.

As long ago as in 1923, the Permanent Court of International Justice decided, in the case of Nationality Decrees Issued in Tunis and Morocco, that the nationality legislation was not a matter of exclusively national competence but is subject to international law.

The "classic" Nottebohm case cited in most of studies of the nationality issues is not directly related to statelessness. However, the conclusion of the International Court of Justice that

recognition of nationality implies a genuine link with the state might have important legal consequences, for example in cases where immigrants or asylum-seekers are denied nationality of the state of their current residence because they allegedly retain their original citizenship.

The case-law of the European Court of Human Rights is of crucial importance for the European states. While the European Convention on Human Rights does not explicitly refer to the right to a nationality, the Court has found violations in several cases concerning rights and freedoms of stateless persons.

In the Kuric and others v. Slovenia judgment, the Court considered the issue of the so-called "erased people", some of whom became stateless following the dissolution of the former Yugoslavia and whose records were removed from the civil registry, as a result, they lost their right to residence. The Court found that the Slovenian authorities' prolonged refusal to resolve the applicants' residence status constituted an interference with their right to private and/or family life (Article 8).

In several cases of Latvian "non-citizens" (including Sisojeva v Latvia, Kaftailova v Latvia, and Shevanova v Latvia) the Court refrained from recognizing the right to a nationality as such. However, the Court extended the right to respect for private and family life under Article 8 to persons who had become stateless as a result of state succession with a view to protect them from adverse consequences, such as expulsion. According to the Court, the settlement of the status of such persons in conformity with Article 8 might, *inter alia*, encompass the acquisition of nationality by ordinary or preferential naturalisation.

In the meantime, in the case of Petropavlovski v. Latvia the Court recognized the discretionary power of national authorities to reject an application for naturalisation even when the applicant has met all formal requirements. In this case, the applicant was a pro-minority activist actively engaged in public campaigning against the government's citizenship policy. The Court did not find violations of Article 10 (freedom of expression) or Article 11 (freedom of assembly and association) raised by the applicant and did not consider the fact that he was a stateless "non-citizen" as significant.

In another case, Genovese v. Malta, concerning acquisition of nationality by descent, the Court ruled that access to nationality fell within the scope of protection of the Convention as part of a person's social identity, and therefore his or her private life (Article 8). In this case, the applicant, a British citizen whose father was Maltese, was prevented from obtaining Maltese citizenship because he had been born out of wedlock. The Court found that there had been no reasonable or objective grounds to justify such difference of treatment of the applicant merely because he born out of wedlock. Thus, it concluded that he was a victim of discrimination in the enjoyment of his right to private life (violation of Article 14 in conjunction with Article 8).

This judgment opens the door to possible further developments in the case law relating to the prohibition of discrimination in access to nationality and safeguards against statelessness.

The cases of Menesson v France and Labassee v France reveal one more essential aspect of the right to nationality, in relation to parenthood by surrogacy. The parenthood link with the

children born via surrogacy arrangements was recognized in the United States, where the relevant medical procedures were conducted, but not in France, because of the general prohibition of surrogacy under French law. The Court ruled that Article 8 of the Convention was violated. In this particular case all parties to the surrogacy arrangement were French nationals, but in similar situations, when the parties have different nationalities, the child's citizenship would be more complicated.

In the case K2 v the United Kingdom the applicant claimed that the deprivation of his British citizenship because of suspected terrorism-related activities violated his rights under the Convention. The Court unanimously declared the application inadmissible. It is important that the Court noted that K2 would not be left stateless by the loss of UK citizenship, as he had Sudanese citizenship.

The situation was somewhat different in the case Ramadan v Malta. The applicant was deprived of Maltese citizenship that he had acquired following his marriage to a Maltese national. The Maltese court annulled the applicant's citizenship on the ground that his only reason to marry had been to remain in Malta and acquire Maltese citizenship. In this case, neither Malta nor Egypt (the applicant's country of origin) recognized dual citizenship. However, the Court concluded that the applicant's right under Article 8 was not violated as he was not at risk of removal from Malta, and that he had not entirely convinced the Court that he had relinquished his Egyptian nationality nor demonstrated that he would not be able to re-acquire it if he had done so.

Therefore the question of whether the prohibition of the deprivation of citizenship resulting in statelessness is absolute still seems to remain open.

Legislation of most member states stipulate that a citizen cannot be deprived of their nationality if this act would leave the person stateless. However, there is an exception from this general rule: this limitation is not applied if the deprivation is based on the proven fact that the person had submitted false information in the course of naturalisation. One widely-covered case of the kind is the deprivation of Mikheil Saakashvili, former president of Georgia, of his Ukrainian nationality. According to the Ukrainian authorities, Saakashvili concealed some important information when he was granted citizenship. After he had acquired Ukrainian citizenship, his original Georgian citizenship was withdrawn, as Georgia did not permit dual citizenship. Therefore, Saakashvili became stateless. However, another Ukrainian president reinstated Saakashvili's Ukrainian citizenship two years later. Therefore, the case was never considered by the Court.

Several cases related to statelessness have been considered by other international judicial and quasi-judicial bodies.

For example, an even more complicated issue of alleged discrimination was tackled by the UN Human Rights Committee in the case Borzov v Estonia. According to Estonian law, the persons retired from foreign military are not eligible for naturalisation. Exception is envisaged for the spouses of Estonian citizens – however, only when this citizen has acquired Estonian nationality by birth. Thus, the provision stipulates different treatment of citizens on the basis

of the way of acquisition of citizenship. The Committee did not find a violation, and the fact that the applicant was stateless had no impact on the Committee's conclusions.

A new dimension is added in EU law, related to the relatively new and still vague concept of EU citizenship. In this context, a decision to withdraw a person's citizenship taken by national authorities results in the loss of the rights stemming from EU citizenship. This should, in principle, be a competence of the EU rather than that of national authorities. Several relevant cases were considered by the Court of Justice of the European Union.

In the Rottmann case, the applicant, an Austrian citizen, had acquired the German nationality through a naturalisation process and, in accordance with the Austrian legislation, lost his Austrian nationality. The German authorities later found out that Rottmann had concealed his criminal record, and his naturalisation was annulled, thus leaving him stateless. The Luxembourg Court ruled that withdrawing the nationality, granted by way of naturalisation, when it was obtained by fraud, does not violate EU law, unless it fails the proportionality test in regard to its consequences and effects in terms of EU law. Moreover, the Advocate General claimed that international law does not prohibit the loss of nationality even when it results in statelessness.

In another landmark case, Tjebbes, the European Court of Justice follows-up and further elaborates on the judgment in Rottmann. The applicant was deprived of his citizenship on the basis of the provision of Dutch law stipulating the automatic loss of nationality for nationals who were resident outside the Netherlands (or any other Member State of the EU) for ten years. The Court of Justice agreed in principle with *ex lege* stripping some EU citizens residing in third countries of their EU citizenship status. The Court stressed that the need to ensure a genuine link with the state is a public interest capable of justifying denaturalisation and that a ten-year rule as such is an appropriate means of achieving this. In the meantime, individual examination by the national authorities having regard to the consequences under Union law was required. These consequences included the possibility of maintaining a professional or family life across the Union, the possibility of maintaining a family life by continued access to the Union, the right to consular protection in a third state and the rights to family and private life and the best interests of the child guaranteed by the Charter of Fundamental Rights.

On the basis of stated above, state practice could be summarized as follows.

1. Even in those states where citizenship is based on i*us sanquinis*, elements of the *ius soli* approach are increasingly introduced in law and in practice, in particular, with regard to children born or found within their territories who otherwise would be stateless. This is a clear impact of international instruments mentioned above, even if some of the states who adopted this practice are not state parties to these instruments. However, this practice is not yet universal, as it should be.

2. As a rule, states avoid actions which could cause statelessness – however, with some notable exceptions. States are much more reluctant to offer a remedy when statelessness resulted from decisions taken by other states or other circumstances beyond their competence.

3. In academic discourse, citizenship is more and more often seen as an obsolete concept which restricts personal freedoms, not an instrument of dignity and rights but rather of complacency, hypocrisy, and domination. However, this approach is still energetically rejected by the states. The significance of citizenship is indeed being strengthened, apparently, as a response to globalization, including global migration, growing interdependence, and development of international standards in the field.

4. In the meantime, the concept of citizenship as "a right to have rights" seems to become increasingly outdated. More and more rights (particularly social rights) become linked to residence rather than citizenship.

5. A relatively new phenomenon of "quasi-citizenship" is in several cases used as a solution for the contradictions between the sovereign power of states and international obligations aimed at the eradication of statelessness. In this regard, Latvia and Estonia are relevant examples. In Latvia, under domestic law, "non-citizens" (i.e. former USSR citizens who were not recognized as citizens after the restoration of independence) are excluded from the definition of a stateless person, although they meet the definition of a stateless person under international law. They are considered as a separate legal category who enjoy a broad set of rights well beyond the minimum prescribed by the Convention relating to the Status of Stateless Persons but are still subject to restrictions in respect of political rights, employment, and land ownership. Estonia's approach is more flexible. Its national law avoids calling non-citizens stateless, but Estonia does not actively object when others do.

Conclusions

1. International instruments and particularly monitoring methods are still rather weak, specific mechanisms of individual complaints are non-existent, sanctions do not exist.

2. The case-law of international courts reflects major practical problems for the eradication of statelessness and offers some interpretations of basic principles. In the meantime, it mainly deals with specific aspects of statelessness prevention and so far does not suggest clear guidelines for dealing with many of the diverse cases of statelessness.

3. With regard to citizenship, international standards are much less far-reaching than with regard to other basic human rights. In this area, we still live in a "pure" Westphalian world where goodwill of the governments remains crucial.