Fundamental rights and nationality – the experience of civil law countries

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Outline

• Two steps-reasoning:
  – 1\textsuperscript{st}) Impact of fundamental rights in the law of nationality?
  – 2\textsuperscript{nd}) Fundamental right to have a nationality?

  • Statelessness
  • Acquisition of nationality: towards a more 'rights-based approach'

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I. Fundamental rights and nationality - Gender neutrality

• Equality women-men is completely accepted in all methods of acquisition of nationality:
  – *E.g.* : acquisition *ius sanguinis* - in all EU civil law countries, complete equality women/men for acquisition *ius sanguinis* – *a patre & a matre*
  – Even when acquisition *ius sanguinis* is nuanced : no impact of gender
I. Fundamental rights and nationality - Gender neutrality

• Equality women-men became reality after evolution where fundamental rights and constitutional courts played key role:

- **Germany**: Constitutional court 21.05.1974 - § 4.1 (acquisition *ius sanguinis a patre*) violates equality

- **Italy**: *Corte constituzionale* 28.01.1983 – concern of Parliament for double nationalities not sufficient to justify excluding transmission *ius sanguinis a matre*

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II. Fundamental right to a nationality

- Fundamental right to have a nationality less firmly established than other fundamental rights

- Two important trends have strengthened this right:
  - Concern to avoid statelessness
  - Move towards a more rights based approach in acquisition by foreigners
II. Fundamental right to a nationality
A. Statelessness

• Concern in all civil law countries to avoid situations of statelessness – rules adopted to that effect at various levels of acquisition:
  – Acquisition at birth
  – Acquisition as an adult – widespread adoption of provisions aiming to speed up acquisition by stateless – eg art. 5 (d) 2010 Greek Act: naturalization possible after 3 y. (instead of 7 y.)
II. Fundamental right to a nationality
A. Statelessness

• Acquisition of nationality at birth in situations of statelessness – very common occurrence - e.g.
  
  – **Sweden**: Art. 6 (option right to acquire nationality in case of birth in Sweden and statelessness)

  – **Spain**: Art. 17 § 1 lit. c Civil Code (automatic acquisition)
II. Fundamental right to a nationality
A. Statelessness

• In some countries, acquisition *ius soli* in case of statelessness recently nuanced – does not apply if child could obtain nationality of parents by registration – e.g. France, Finland, Belgium

• Eg. **Belgium**
  – Art. 10 CNB: provision acquisition if stateless at birth
  – Dec. 2006: no acquisition if acquisition of parents' nationality possible by registration
II. Fundamental right to a nationality
A. Statelessness

• Constitutional court 24.04.2008:
  – No constitutional right to acquire Belgian nationality
  – Nonetheless review by Court – test: no arbitrary refusal of nationality
  – New provision only acceptable if:
    • Read narrowly
    • Only applied if child has a right to nationality (not tied to discretionary assessment by foreign authority)
    • No application if parents cannot contact authorities of country of origin
II. Fundamental right to a nationality
B. Towards a more 'rights based approach'

• Long term trend (since 1980) in civil law countries: opening up possibilities of acquisition for newcomers – much wider recognition of acquisition *ius soli* in civil law countries (e.g. Germany 2000)

• Two different avenues:
  - 1\textsuperscript{st} generation: acquisition as an adult – exacting requirements – no 'right' to a nationality
  - 2\textsuperscript{nd} generation & following: acquisition at birth, less exacting requirements – comes close to a 'right' to nationality – e.g. double *ius soli* – eg art. 1-5\textdegree *Luxemburg* 2008)
II. Fundamental right to a nationality
   B. Towards a more 'rights based approach'

   • More recent trend – imposing additional requirements for acquisition – e.g. 'naturalization tests'

   • Overall, approach in civil law countries remains characterized by less emphasis on sovereignty and more weight on right(s) of candidates to nationality

   • Some examples
II. Fundamental right to a nationality

B. Towards a more 'rights based approach'

• 1st indication: legal framework made more objective and more foreseeable

• e.g. requirements of 'assimilation' disappeared and integration requirement objectively tested – no longer interviews with civil servants (e.g. Netherlands: interviews with local civil servants replaced by a test)
II. Fundamental right to a nationality
B. Towards a more 'rights based approach'

• 2\textsuperscript{nd} indication: more room for judicial review
• e.g.: France: Council of State maintains that there is no 'right' to naturalization but requires that all decisions pertaining to naturalization (refusal and inadmissibility) be comprehensively reasoned
II. Fundamental right to a nationality
B. Towards a more 'rights based approach'

- 3rd indication: greater concern for cost of procedure

- E.g.: Belgium – since 2000 Act all procedure are free of charge

- E.g. Luxemburg: fees for language courses and 'civil education' courses are paid by State (art. 7-1-c 2008 Act)