

Fundamental rights and nationality – the experience of civil law countries

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Outline

- Two steps-reasoning:
 - 1st) Impact of fundamental rights in the law of nationality?
 - 2nd) Fundamental right to have a nationality?
 - Statelessness
 - Acquisition of nationality: towards a more 'rights-based approach'

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 costituzionale* 28.01.1983 – concern of Parliament for double nationalities not sufficient to justify excluding transmission *ius sanguinis a matre*

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 :
 - 1st generation : acquisition as an adult – exacting requirements – no 'right' to a nationality
 - 2nd generation & following : acquisition at birth, less exacting requirements – comes close to a 'right' to nationality – e.g. double *ius soli* – eg art. 1-5° **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'



- 2nd 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)