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Concept of Nationality in International Law

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ABSTRACT

Nationality *is the legal relationship between a person and a nation state. Nationality normally confers some protection to the person by the state, and some obligations on the person towards the state. What these rights and duties are vary from country to country. Nationality affords the state jurisdiction over the person and affords the person the protection of the state. The most common distinguishing feature of citizenship is that citizens have the right to participate in the political life of the state, such as by voting or standing for election. Therefore, in modern democracies, the terms are synonymous, while in an absolute monarchy, there may be a legal or technical distinction between them. The primary objective of this study is to observe the present legal position with respect to law of nationality in private international law. It analyses the importance of nationality, of dual nationality and a stateless person and this present work aims at making analytical evolution of issues relating to concept of nationality and collects relevant literature on them. In addition, another purpose of this study is to bring out more information and give an explanatory analysis of the legal problem of nationality and private international law in the contemporary perspective. It is therefore necessary to evaluate the dichotomy between private international law and exploration and exploitation of the nationality in the contemporary perspective; and to discuss and analyse the general principles governing the nationality in the contemporary perspective.*

Keywords: Nationality, Dual nationality, Citizenship, Statelessness

INTRODUCTION

Nationality is membership of a nation or sovereign state. Nationality can be acquired by birth within the jurisdiction of a state, by inheritance from parents or by a process of naturalisation. Nationality affords the state jurisdiction over the person and affords the person the protection of the state.

By custom, it is the right of each state to determine who its nationals are. Such determinations are part of **nationality law.** In some cases, determinations of nationality are also governed by public international law-for example, by treaties on statelessness and the European Convention on Nationality.

The word **citizenship** is often used in a different sense when compared to nationality. The most common distinguishing feature of citizenship is that citizens have the right to participate in the political life of the state, such as by voting or standing for election. The term **national** includes both citizens and non-citizens.

Alternatively, nationality can refer to membership in a nation (collective of people sharing a national identity, usually based on ethnic and cultural ties and self-determination) even if that nation has no state, such as the Basques, Kurds, Tamils and Scots.

Individuals may also be considered nationals of groups with semi-autonomous status, which have ceded some power to a larger government, such as the federally recognised tribes of native Americans in the United States. Spanish law

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recognises the autonomous communities of Andalusia, Aragon, Catalonia, Valencia, Galicia and the Basque Country as "nationalities" while in Italy, the German speakers of South Tyrol are considered to be Austrian Nationals.

In several non-English speaking areas of the world, the cognate word for **nationality** in local language may be understood as a synonym of ethnicity, as **nation** can be defined as a grouping based on cultural and family-based self-determination rather than on relations with a state or current government. They (mostly non English speaking areas of the world) follow the principle of just sanguine rather than soil. Nationality cannot be change at least within a single generation, but rather can be adopted upon the acceptance of an individual within a national community. Such principle has potential to create a legal consideration, rather than following the legal code.

For example, there are people who would say that they are Kurds, that is, of **Kurdish nationality**, even though no such Kurdish sovereign state exists at least at this time in history. In the context of former Soviet Union and former Yugoslavia, nationality is often used as translation of the Russian and Serbo-Croatian terms used for ethnic groups and local affiliations within those states.

In fact, even today the Russian Federation, as an excellent example, consists of various people whose nationality is other than Russian, but they are considered to be Russian subjects and comply with the laws of the federation. Similarly, the term **nationalities of China** are one Nation, made out by nationalities, which are not politically recognised as nations or can be considered smaller nations within the Spanish Nation.

Definition and Meaning

Nationality may be defined as the legal status of membership of collective individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals. **Fenwick** defines the term 'Nationality' in the following words: "Nationality' may be defined as the bond which unites a person to a given State which constitutes his membership in the particular State, which gives him a claim to the protection of that state and which subjects him to the obligation created by the laws of that state. In the famous case of **Re Lynch** the British Mexican Claims Commission defined the term 'Nationality' in the following words: "A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. **A** man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is membership of an independent political community. This legal relationship involves rights and corresponding duties upon both on the part of the citizens no less than on the part of the State. A similar definition was given by the International Court of Justice in the **Nottebohm** case. According to the World Court under International Law, nationality is "a legal bond having as its basis a social fact of attachment, genuine connection of existence and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of state conferring nationality than with that of any other state". Thus the basis of nationality is the membership of an independent community. In **U.S. v. Wong Kum Ark**, Justice Gray held that the State may determine as to what type or class of people shall be entitled to citizenship. It is for the international law of each state to determine as to who is and who is not its national. This is, however, subject to particular international obligations. Although, nationality is

determined by the internal law of a State, it cannot claim that its determination must be acceptable to other States unless and until its determination is in conformity with the rules of international law. In **Nottebohm** case the World Court observed.

"A state cannot claim that the rules which it has thus laid down are entitles to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State, which assumes the defence of its citizens by means of protection as against other states.

Development of the Law of Nationality and its Importance

The rules of nationality are determined by state law. However, due to the lack of uniformity in state laws in regard to the nationality, many difficulties were experienced. Consequently, difficult problems of statelessness, double nationality, etc. arose. In Hague Conference of 1930, endeavour was made to end the conflicts arising out of divergent state laws in respect of nationality. Consequently a convention on the conflict of nationality law was signed and adopted. In this connection, an attempt was made to resolve the problems relating to nationality and statelessness. Besides this, convention of the nationality of married women was adopted in 1957. Last but not the least, convention on the reduction of statelessness was adopted in 1961.

International Importance of Nationality

Nationality is often determined by state laws. "Nationality is the principal link between an individual and International law. Under International law, nationality has often been used as a justification for the intervention of a government to protect another country. It may, however, be noted that international law does not create a correlative right in favour of the individuals. It creates rights only in favour of the states nationals. In **Paneyezys Saldutiskis** case, the Permanent Court of International Justice observed: in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals, respect for the rules of international law. The right is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the state and individual which alone confers upon the state the right of diplomatic protection, and it is a part of the function of diplomatic protection it has the right to take up a claim and ensures that respect for the rules of international law must be envisaged.

Modes of Acquisition of Nationality

Following are the modes of acquisition of nationality.

A. *By Birth***:** A person acquires nationality of the state where he is born. He also acquires the nationality of his parents at the time of his birth.

B. *Naturalisation***:** Nationality may also be acquired by naturalisation.

When a person living in a foreign state for a long time acquires the citizenship of that state then it is said to be state of nationality acquired through naturalisation. In

Nottebohm case, international court of justice held that in respect of grant of nationality there is no obligation of the states if that man has no relationship with the state of naturalisation. In this case, the court applied the principle of effective nationality.

C. *By resumption***:** Sometimes it so happens that a person may lose his nationality because of certain reasons. Subsequently, he may resume his nationality after fulfilling certain conditions.

D. *By subjugation***:** When a state is defeated or conquered, all the citizens acquire the nationality of the conquering state.

E. *Cession***:** When a state has been ceded in another state, all the people of the territory acquires nationality of the state in which their territory has been merged. In addition to the above mentioned modes, there may be some other modes whereby a person may acquire nationality. For example, if a person is appointed in the public service of another state, he acquires the nationality of the state.

Loss of Nationality

A. *By Release***:** In some states law provides that the citizens may lose nationality by release. In the loss of nationality by release it is necessary to submit an application for the same. If the application is accepted, the person concerned is released from the nationality of the state concerned.

B. *By deprivation***:** In certain states law may provide that if the national of that state without prior permission of the government obtains employment in another state, he will be deprived of his nationality.

C. *Long Residence Abroad***:** Yet another mode of the loss of nationality is the long residence abroad. State laws of many states contain provisions in this connection that if a person resides for a long period abroad, his nationality ends.

D. *By Renunciation***:** A person may also renounce his nationality. The need for renunciation arises when a person acquires nationality of more than one state. In such a condition, he has to make a choice as to which country he will remain a national. Consequently, he has to renounce the nationality, of the state.

E. *Substitution***:** Some states provide for the substitution of nationality. According to this principle, a person may get nationality of a state in place of the nationality of another state. This is called nationality by substitution whereby he loses the nationality of one state and acquires the nationality of another state.

Dual Nationality

The concept of dual nationality means that a person is a citizen of two countries at the same time. Each country has its own citizenship laws based on its own policy. Persons may have dual nationality by automatic operation of different laws rather than by choice. For example, a child born in a foreign country to US citizen parents may be both a US citizen and a citizen of the country of birth.

A US citizen may acquire foreign citizenship by marriage, or a person naturalised as a US citizen may not lose the citizenship of the country of birth. US law does not mention dual nationality or require a person to choose one citizenship over another. In addition, a person who is automatically granted another citizenship does not risk losing US citizenship. However, a person who acquires a foreign citizenship by applying for it may lose US citizenship. In order to lose US citizenship, the law requires that the person must apply for the foreign citizenship voluntarily, by free choice, and with the intention to give up US citizenship.

Intent can be shown by the person's statements or conduct. The US Government recognises that dual nationality exists but does not encourage it as a matter of policy because of the problems it may cause. Claims of other countries on dual national US citizens may conflict with US law, and dual nationality may limit US Government efforts to assist citizens abroad. The country where a dual national is located generally has a stronger claim to that person's allegiance.

Statelessness

Statelessness is an international problem in which

an individual has no formal or protective relationship with any state. This might occur, for example, if a person's parents are nationals of separate countries, and the mother's country rejects all offspring of mothers married to foreign fathers, but the father's country rejects all offspring born to foreign mothers. Although this person may have an emotional national identity; he or she may not legally be the national of any state.

CONCLUSION

In modern days the concept of nationality plays a very important role in the personal status of the individual. It is not only recently, but during early period also it played a very important role; for example in the period of Mahabharath and Ramayana when a person comes into the or enters the Rajya of another king, the Dhwarapalaka asks him to which state he belonged and why he came there at all. However, it has developed as a legal concept only recently; that is during eighteenth and nineteenth century. Today it is the concept of "nationality" which determines the personal status of individuals under international law.

Today it is generally accepted that contract determines the status. On a theoretical plan nationality is a conception arising out of a contract. Sometimes it may be expressed and sometimes it may be implied, but nevertheless it is a contract. It has been universally recognised that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where the facts giving rise to the question may have occurred. However, it has long been settled that questions affecting status are determined by the law of the nationality of the porosities and that broadly speaking such questions are those affecting family relations and family property. Moreover, it plays an important role in the essential validity of marriage, jurisdiction in divorce cases, adoption, nullity of marriage, legitimacy, legitimating, etc. Moreover, in the cases of company and corporation also it plays an important role. Therefore, in modern days the nationality plays a very important role under international law. Everything depends on this main and basic concept of nationality.

As far as nature and purpose is concerned, the term is easier to illustrate than it is to define. The idea underlying the concept is home, the permanent home. However, it is very difficult to define. No exact definition of the term nationality is available. Jurists like Lord Cranworth said that "By nationality we mean home, the permanent home". However, it is not fully accepted; because, nationality cannot be equated with home. It is because, as we shall see a man and still more a woman, may be nationality in a country which is not and never has been his home; a person may have two homes, he may be homeless, but he must have a nationality. However, there is often a wide gulf between the popular conception of home and the legal concept of nationality. Thus only a technical meaning can be given to home. Therefore, it is very difficult to define nationality because every technical word refuses to be properly defined. Still attempts were made to define the term "nationality". Under English law the concept of nationality is bedevilled by rules, these are complex, often impossible to justify in policy terms, and lead to uncertainty of outcome. As far as India is concerned, the questions relating to nationality is dealt both under Article 5 of the Indian constitution and also under the Indian Succession Act. As far as general rules are concerned there are five rules both under English law and under Indian law. Those rules are as follows:

A. No person can be without a nationality

B. No person can at the same time have more than one nationality

C. It denotes connection with a territorial system of law.

D. There is a presumption in favour of continuance of an existing nationality; and

E. The nationality of a person is to be determined according to the lex fori and not the very curious in their zeal to follow English precedent. Judges even ignored the specific provisions of the Indian succession Act 1925. Had they looked to the explanation to Section 16 it was possible for them to reach a different conclusion.

Therefore, in conclusion it may be said that the law of nationality plays a very important role in the personal status of the individual under International law. As far as common law countries are concerned the law is the same. There is no change. In India, the courts have followed the rules set by the English courts, but there are some changes. However, they have followed almost a major part of the precedents set by the English courts. There are certain criticisms with regard to law of nationality. Steps were taken to inform the law of nationality to a great extent. However, whatever may be the result, the concept "Law of nationality" plays a very important role under International Law.

SUGGESTION

The following suggestion can be given so as to reform the law of nationality.

1. The law relating to nationality must be liberalised so as to include or govern every type of problems. For example, in case of a child, if it is born out of a surrogate mother. Here the question is what is the nationality of such children or a child. Whether it gets the nationality of father or mother? Yet there is no authority on this point. It is only a recent development. The courts were yet to give their verdict on these types of cases. Moreover, the traditional law of nationality failed to keep pace with changing social patterns and social needs; so the law relating to nationality should be liberalised to include these types of cases.
2. There is no unanimity with regard to law of nationality. Even in case of common law countries, there are changes. There is no similarity among them. Therefore. there is need for unanimity of laws at least among common law countries.
3. In case of a Federal State, it is no longer appropriate to speak of a single system of law applying within a single territory.
4. We must reduce the rigidity of the constituent factors of nationality. That is, the factors of residence and intention.
5. There is no clear guidance as to what constitute residence and intention. Therefore, there is a need for certainty in these elements.
6. The factor of residence needs to be liberalised. Residence, in other words, should not necessarily mean the occupation of a fixed home.
7. In the development of law of nationality, the nationality of women, children under twenty-one especially those of broken marriages, of those legitimated and adopted, were neglected. Even in case of mentally afflicted persons, whether or not of full age they were neglected. Every one of these groups deserves and demands special and individual study more detailed and more adequate than so far been officially given.
8. There should be abolition of some rules of nationality which have become out of date or proved themselves inconvenient. For example, the rule with regard to revival of the nationality of origin during the interval between the loss of one nationality and the acquisition of another.
9. In case of capacity to acquire nationality, there is no clear choice of law rule. Therefore, there is a need to have clear choice of law rule.

10. Proof of change of nationality should be made easier.

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