Democracy and Citizenship: A Legal Perspective

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Outline

- Historical development of the concepts of nationality/citizenship and democracy
- Impact of human rights
- Citizenship and International Law
- Democracy and elections
- Concluding remarks
- Additional sources.
Institutional Developments throughout History

• League of Nations (Council and Permanent Court of International Justice)
• United Nations (Security Council, General Assembly, International Court of Justice)
• Growth of the United Nations system (Charter and treaty-based monitoring system)
• Regional human rights systems
• Human Rights Council and the Universal Periodic Review (UPR)
Human Rights’ Supervisory Mechanisms

- **Types of mechanisms:**
  - Political
  - Judicial and quasi-judicial
  - Fact-finding missions

- **Types of solutions:**
  - Binding
  - Non-binding.

- **Violations of human rights as a threat to international peace and security**

- **Responsibility to Protect** doctrine (2005 World Summit Outcome Document)
Legal Perspective

• Nationality refers to the legal bond/relationship between a person and a State. In a non-legal context the term ‘nationality’ is used to denote an ethno-national identity.

• Obligations on nationals/ protection of nationals (diplomatic and consular protection)!

• Everyone has a right to nationality/ obligation to avoid statelessness.
Some Relevant Case Law

- *Nationality Decrees*, PCIJ, 1923
- *Nottebohm*, ICJ, 1955
- Nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality.
- *Real and effective nationality*, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of these States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: there is the *habitual residence of the individual concerned* but also the *centre of his interests*, his *family ties*, his *participation in public life*, *attachment* shown by him for a given country and inculcated in his children, etc.
Citizenship

• The French revolution was decisive, but the concept has roots in antiquity;
• Citizenship:
  • 1) Freedoms and equality before the law
  • 2) Political rights
  • 3) Linking civil rights and political rights
  • 4) Emergence of socio-economic rights – standard of living.
• *Ius sanguinis*/* jus soli* as basis for citizenship.
• Non-discrimination (Art. 5(d)(iii), CERD; European Convention on Nationality, Art. 5.)
Citizenship and International Law

- Institutional developments
- Internationalization of human rights law
- Importance of citizenship
- Regulation under domestic law and international law
- Treaties and customary international law
- Case law of the International Court of Justice (and the Permanent Court of International Justice)
- Case law of other judicial and quasi-judicial bodies.
- Non-binding international and regional instruments.
Relevant International Human Rights Instruments

- UDHR (1948), Art. 15;
- CEDAW (1979), Art. 9;
- CRC (1989), Art. 7;
- ACHR, Art. 20 (1969);
- European Convention on Nationality (1997);
Withdrawal of Citizenship

• Art. 7, EC on Nationality (1997):
  ➢ Voluntary acquisition of another nationality;
  ➢ Acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
  ➢ Voluntary service in a foreign military force;
  ➢ Conduct seriously prejudicial to the vital interests of the State Party (serious crimes, etc);
  ➢ Lack of a genuine link between the State Party and a national habitually residing abroad.
State Succession

• Unification/ transfer of territory/ dissolution/ secession
• A person should not remain stateless: burden with State where the person resides (as a general rule)
• Factors to be taken into account: Genuine and effective link to the State/ habitual residence/ respect for the will of the person involved/ territorial origin.
• Problems re citizenship in some Baltic countries for ethnic Russians (Latvia, Estonia)/ slow process of naturalization; problems with double citizenship.
Treatment of Non-Citizens

• Reduction of the gap in terms of rights of citizens and non-citizens: international law and domestic law (constitutional guarantees)

• Differences remain, especially re political rights

• States should ensure to everyone within their jurisdiction the rights and freedoms recognized under the relevant instrument (Art. 2, ICCPR; Art. 1, ECHR; Art. 2, CRC; etc)

• However, see the case law of the ECtHR as to what means being/coming within the jurisdiction of a State (Bankovic, Issa, Al Jedda, Al Skeini, etc).
Treatment of Minorities

• League of Nations
• Change of focus with the UN system
• Return of minority rights (post Cold War)
• Minorities (national, ethnic, religious, and linguistic)
• UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (GA Res. A/RES/47/135, 1992)
• Framework Convention for the Protection of National Minorities
Post Cold-War Period: Towards Democracy

• Confrontation between the two blocs during the Cold War period: military, economic and ideological
• 1993 – World Conference on Human Rights in Vienna (x15):
  ➢ Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.
Democracy and International Law

- **Article 21, UDHR:**
  1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
  2. Everyone has the right of equal access to public service in his country.
  3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.
Concluding Remarks

• The impact of the normative and institutional development of human rights law on citizenship and enjoyment of human rights.

• Democracy, rule of law, human rights and participation in public life.

• Treatment of minorities and non-citizens as indicative of the level of democracy in a country.
Additional Sources (1)

- **Work of the International Law Commission (ILC):**
  - Nationality in relation to the Succession of States/
  - Nationality including Statelessness/
  - Expulsion of aliens/
  - Right of Asylum

- **European Court of Human Rights Factsheets**
- **Democracy and human rights** (UN)
- **Democracy and the United Nations**
- **Rule of Law - Democracy and Human Rights** (OHCHR)
- **Compilation of UN documents on democracy**
Additional Sources (2)


• Steven Wheatley, Democracy, Minorities and International Law (Cambridge University Press, 2005).

• Richard Burchill (ed), Democracy and International Law (Ashgate, 2006).