Concepts of dual and multiple nationality as a theoretical problem in modern international law

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Abstract. The phenomena of dual and/or multiple nationality cause a large number of problems emerging in various fields, i.e. taxation, military service, diplomatic protection, etc. Due to this, the need to peruse traditional and modern trends in international legal regulation of the phenomena afore-referred is quite essential. The purpose of this paper consists in selecting and identifying the main directions of international and domestic policy regarding bi- and polypatrism. The research of the same attempts to distinguish the concepts of "dual" and "multiple" nationality. The article examines international legal practice in the field of dual and multiple citizenship, as well as the practice of States to resolve problems caused by the said phenomena. Whereas some States do prohibit their citizens by way of their domestic legislation from retaining citizenship of other states, the other part of countries, on the contrary, recognizes the existence of such legal phenomenon and attempts to settle the matter by making bilateral treaties. The article is based on materials of the UN International Law Commission contained proposals for solving legal problems in this area. Finalizing the paper, the conclusion is forwarded in respect of certain peculiar aggravations treated as having an objective order which relate to the appropriate unified measures to reach the settlement of dual and multiple nationality problem conditioned by the availability in the laws of various states of individual features of ethno-historical, socio-cultural, religious, etc. nature, affecting the current state of their lawful requirements in this matter, as well as a complex combination of relevant negative and positive consequences.

Keywords: international law, dual nationality/citizenship, multiple nationality/citizenship, diplomatic protection.

The phenomenon of nationality, classically clustered by the legal science in two of its manifestations – as an municipal institute and that one of international law, actively began to develop as late as in the end of XIX – early years of XX century. It is based on the ideas of national unity and equality of citizens. A special subspecies in the cluster of citizenship is dual nationality, the emergence of which generates a number of problems.

Traditionally, the citizenship is an object of domestic law, which, however, does not preclude the increasing role of the international legal regulation of the same. This is mainly due to the emergence of such interstate phenomena as statelessness and dual (multiple) nationality. In this regard, there is a need for international regulation, most often set forth by both multilateral and bilateral treaties, which influenced the comprehensive outcome of regulation of relationships connected with nationality at domestic level. In this regard, P. Spiro noted the special point in this respect, namely the emerging trend towards the formation of a "new international law of citizenship". This is due to adoption in the XX century of a number of international acts that made significant rectification of the previously existing regime of international citizenship law, expanded the scope of international law in this matter. Nevertheless, according to Spiro, this does not mean a comprehensive regulation of citizenship specifically by international law. Domestic authorities continuously remain under priority, but already within the limits set forth by the international legal framework [1].

Both in legal literature as well as in practice itself, along with dual citizenship, the term "multiple citizenship" is quite often used. Whatever might it be, neither international nor domestic legal acts contain a clear distinction between these terms, which are often used as synonyms. The identification of these concepts or their distinction on a quantitative basis (the presence of two nationalities – dual citizenship; more than two – multiple) does not seem to be correct. Dual citizenship by its nature is a special case (with narrow scope) of multiple citizenship, but the former, along with the phenomenon of statelessness, preceded the emergence of a more waste and general concept – "multiple citizenship".

Following the ascertained tradition of distinguishing the phenomena of "dual" and the "second" citizenship, one can trace out the delimitation between dual and multiple citizenship (dual and multiple nationality). The essence of the "second" citizenship lies in the fact that the state as if does ignore the availability with its proper citizens of other nationalities that is; it considers a person having the only and unique its own citizenship. The number of such legal connections with States is virtually unlimited. If any State recognizes the second citizenship of its own citizens by editing the relevant laws or entering a respective bilateral agreement provided the acceptance of another citizenship, we are talking about such a legal phenomenon as dual citizenship. Thus, dual citizenship arises upon naturalization in another country with the consent

or permission of the State of origin, whereas multiple citizenship arises without the knowledge of the State. Based on the above, it is necessary to distinguish the situations when a second citizenship is acquired on a legal basis, that is, if there is an appropriate rule of domestic law or of an international treaty (i.e. dual citizenship) and when this happens by passing or without the knowledge of the State (i.e. multiple citizenship).

Along with this, it should be accentuated that dual citizenship often emerges as a result of a conflict of laws on citizenship of different states. We are talking about the application of the principles of conferring citizenship under the "right of blood" (jus sanguinis) and under the "right of soil" (jus soli). The United Nations International Law Commission has been working out the problem of dual (multiple) citizenship since the middle of the XX century. In the course of the work, a mechanism was proposed to eliminate these legal discrepancies, consisting in the implementation by States at the birth of a person of the general principle (jus soli or jus sanguinis) in order to assign citizenship [2]. At the same time, according to the general rule laid down in the Hague Convention dt. of 1930, which regulates some issues related to the Conflict of Laws on citizenship, each State itself determines in accordance with its laws who shall be deemed as its citizen [3]. As follows from the above, such a mechanism is not in line with the effective norm of international law and cannot be realized in reality.

Along with territorial changes, which resulted in expansion of migration processes, the relevant roots of dual citizenship are also linked with the interstate marriages. In accordance with the domestic legislation of a number of countries, dual citizenship may arise for a woman when she marries a citizen of another state. Such a situation may arise if the spouse's State prescribes the entry into citizenship of a woman when marrying the citizen of the latter, and the State of the woman entering into marriage, in turn, does not deprive her of citizenship in the case of naturalization in another country. The adoption of such norms has been associated with the emergence of movements in defense of the women's rights for equality with men since the middle of the XX century. States began to abandon the previously existing tradition of determining the citizenship of a child along with the principle of "jus soli" by the citizenship of the child's father [4]. Moreover, with the adoption of the Convention on the Nationality of a Married Woman dt. of January 29, 1957, women, when marrying a citizen of another State, have the right to retain the citizenship of origin and enter into the citizenship of her husband in a simplified manner. All this has led to an even greater spread of dual citizenship.

The domestic causes of dual or multiple citizenship encompasses the activities of persons themselves acquiring other citizenship, including in violation of the laws of States (multiple citizenship), and purposeful state policy expressed in increasing the number of persons with dual citizenship by attracting citizens of specific States in order to preserve historical ties with related

peoples, assure sustainable influence of the former metropolies on the colonies or destabilize the international situation. The relevant example is represented by the case with Hungary and Slovakia, when both States adopted amendments to their citizenship laws in 2010. Hungary abolished the requirement of residence for naturalization, thereby making it possible for ethnic Hungarian minorities to naturalize in neighboring States, while Slovakia stated that any Slovak citizen who voluntarily acquires citizenship of a foreign State will be deprived of that of the Slovak State. Rainer Bauböck argues that although both laws do not infringe international law, they are still unacceptable from the point of view of the democratic concept of citizenship [5]. The situation itself creates a political rather than a legal problem, however, it cannot be denied that Hungary's policy aimed at strengthening ties with ethnic Hungarians abroad objectively provoked an increase in cases of dual citizenship.

Multiple citizenship is a source of a large number of problems that arise out due to non-availability of bilateral treaties between the respective States. At the same time, it sounds absurd to provide for all cases of its occurrence conclusion of such bilateral instruments between almost all countries of the world. In this regard, the eminent Russian scholar S. V. Chernichenko, who has devoted more than one work to the research of issues related to persons in international law including the problem of the citizenship, construes a global solution to the problem of bi- and polypatrism on the base of making bilateral treaties. Multilateral agreements in this situation do not seem to be effective because of the frequent opposite positions of the States regarding the regulation of relevant issues concerned the citizenship. Nevertheless, the afore-referred author admitted the acceptability of concluding multilateral treaties on citizenship issues between countries with similar legal systems [6].

The issue of diplomatic protection of persons with dual or multiple citizenship attracts huge attention. State practice shows that citizenship as such is a legal reflection of the fact of the relationship between a person and the State and entitles the State to protect this person. Fundamental in this matter is the Hague Convention of 1930, which contains a provision on the inadmissibility of diplomatic protection of a citizen against a State whose nationality he also possesses. Questions are raised by situations related to the need for diplomatic protection of a bi- or poly-patrid from a State whose citizen he is not. As a general rule, enshrined in the Convention, diplomatic protection will be provided by the State whose legal relationship with the person will be recognized as sufficiently effective. We are talking about the so-called "effective citizenship", which has received the most famous embodiment in practice in the "Nottebohm case" considered by the International Court of Justice of the United Nations [7].

As per the words of P. Spiro, despite the traditional understanding to the contrary, the Nottebohm case was not a case of dual citizenship, since he did not adhere to this status under

any circumstances [8]. However, the Court's decision paid great attention to this status in the context of international law. Recognizing citizenship as an institution of domestic regulation, the Court nevertheless considered it necessary to be guided by the norms of international law in the implementation of protection. This is due to the fact that when two States grant their citizenship to the same person, this situation is no longer limited to domestic law alone. When deciding on the case, the principle of "effective citizenship" was applied, determined by such factors as “the habitual residence of the individual concerned, 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.” [9]. However, according to the Special Rapporteur of the International Law Commission, J. Dugard, such a concept “it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection.” [10]. This is due to the opportunity that has arisen in the conditions of economic globalization and migration to legally acquire citizenship even of those States with which persons are not connected in any way. In his report on the topic, Dugard repeatedly pointed out the need for flexible application of the so-called "Nottebohm principle".

The states have used to recourse to several ways to overcome the dual citizenship problem and negative consequences thereof. These methods are aimed either at eliminating bipatrism as such, or at mitigating its implications. As far as the range of domestic measures apt for confrontation is concerned, the most common is the recommendation to choose one out of the two available citizenships upon reaching the age (option).

Viewing the discourse of domestic countermeasures against polypatrism expansion, the international ones seem to be more effective and fruitful due to the point that national legislation because of its unilateral nature, is unable to completely exclude the cases of conflicts of laws on citizenship and, as a result, cannot take into account possible changes in the municipal acts of other countries.

As per the content, the dual (multiple) citizenship agreements could be classified, from one side, into international treaties which the purpose is to prevent the occurrence of dual (multiple) citizenship as such, and, from the other side, the treaties aimed merely at resolving its most aggravating implication. The first ones encompass the European Convention on the Reduction of the Number of Cases of Multiple Citizenship and on Military Duty in Cases of Multiple Citizenship of 1963, the bilateral treaties of the USSR with Mongolia, Romania, Poland, Czechoslovakia and Bulgaria of the 50s and 60s, etc. on the prevention of cases of dual citizenship.

The second cluster of treaties is purported to deliver any possible ways to eliminate the consequences of dual (multiple) citizenship, which cause a large number of interstate disputes in practice. They include the European Convention on Citizenship of 1997, which allows for the preservation of multiple citizenship acquired automatically (by birth or marriage), and recognizes the right of participants to allow the emergence of multiple citizenship upon naturalization [11]. Besides it also needs to be included therein the bilateral treaties between the States aimed at formation of relevant regulation of dual citizenship [12]. Basically, the States use to make such agreements to preserve cultural and historical ties with related peoples.

As followed from the above, the phenomenon of dual and multiple citizenship represents an ambiguous complexity of qualities that combine a set of both positive and negative features, which makes it difficult to determine the attitude towards it from the side of the international community. The afore-said nature in its turn complicates the elaboration of proper international means to resolve the arising problems of bi- and polypatrism, therefore, the various other issues, not limited to diplomatic protection, taxation or military service are still expected the adequate resolution thereof, requiring further research in order to fulfill the gaps in international law.

References

1. Spiro P. J. A new International Law of Citizenship // American Journal of International Law. – 2011. – T. 105, № 4. – P. 710-715.

2. Document:— A/CN.4/84 Nationality Including Statelessness — Survey of the Problem of Multiple Nationality, by the Secretariat / Topic: Nationality including statelessness / Extract from the Yearbook of the International Law Commission:— 1954,Vol. II/ URL: https://legal.un.org/ilc/documentation/english/a_cn4_84.pdf (accessed: 29.07.2021).

3. League of Nations, Treaty Series, vol. 179, p. 89. // URL: https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=518&chapter=30&clang=_en (accessed: 11.08.2021).

4. Hammar T. Dual Citizenship and Political Integration // International Migration Review. 1985. Vol. 19. No. 3. – P. 443.

5. Rainer Bauböck (ed.). Dual citizenship for transborder minorities? How to respond to the Hungarian-Slovak tit-for-tat // EUI Working Paper RSCAS. - 2010/75. – P. 3.

6. Chernichenko S.V. International legal issues of citizenship / S.V. Chernichenko // M.: International affairs, 1968. – P. 109.

7. The United Nations International Court of Justice found Liechtenstein's claim against Guatemala in the Nottebohm case inadmissible on the basis of facts confirming

Liechtenstein's lack of right for Nottebohm's diplomatic protection against Guatemala, since his naturalization in that State was motivated by the intention to separate from the Government of his country of origin and not for the purpose of exercising any rights and obligations relating to the acquired status. // URL: https://www.icj-cij.org/public/files/summaries/summaries-1948-1991-ru.pdf (accessed: 03.08.2021).

8. Spiro P. J. *supra* note 1, P. 699.

9. Nottebohm Case (Second phase). Judgment of 6 April 1955. Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 1948-1991 – P. 33. URL: https://legal.un.org/icjsummaries/documents/english/st_leg_serf1.pdf (accessed: 03.08.2021).

10. Document A/61/10. Report of the International Law Commission on the work of its fifty-eight session (1 May-9 June and 3 July-11 August 2006). P. 30. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf (accessed: 03.08.2021).

11. European Convention on Nationality. Strasbourg, 6.XI.1997. URL: https://rm.coe.int/168007f2c8 (accessed: 03.08.2021).

12. Since the middle of the last century, Spain has concluded treaties on dual nationality with more than 10 Latin American States.