IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE

Dual Nationality in the European Union

A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States

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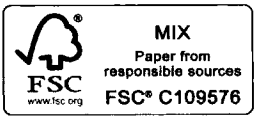

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Olivier Vonk
17 September 2011

Summary

The main objective of this book is to examine the phenomenon of dual nationality in the European Union (EU), particularly against the background of the status of European citizenship—a status that is linked to the nationality of each EU Member State. (Article 20(1) of the Treaty on the Functioning of the European Union provides that 'citizenship of the Union shall be additional to and not replace national citizenship'.)

The study consists of two parts. The first part (Chapters 1 and 2) sets out the approach towards (dual) nationality in Public and Private International Law as well as in EU Law, in particular by analysing the case law of the Court of Justice of the European Union (CJEU). The second part (Chapters 3–6) consists of an overview of the dual nationality regimes in four EU Member States—France, Italy, the Netherlands and Spain—and their possible effects on the EU as a whole.

Chapter 2 of the book is entitled the 'intra-EU context', since it primarily deals with the CJEU's approach towards a dual nationality consisting of two Member State nationalities. The country reports, on the other hand, deal with the 'extra-EU context' because the dual nationality policies of the countries under consideration predominantly affect non-Member State nationals. Thus, France and the Netherlands have for some time already faced the question how to integrate the (Muslim) immigrant population; Italy and Spain have long since adopted a system of preferential treatment for (Latin American) former emigrants and their descendants. The country reports demonstrate how dual nationality is used (or rejected) in these four countries.

Finally, the question whether the EU should in time acquire (limited) competence in the field of European nationality law is one of the major themes of this study. Regardless of one's stance on this question, it must be readily admitted that the subject of Member State autonomy in nationality law is becoming ever more salient with the enlargement of the Union and the growing relevance of European citizenship in the case law of the CJEU. In the opinion of this author, the study shows that the almost absolute autonomy of Member States in the field of nationality law is becoming increasingly problematic for the EU as a whole. Based *inter alia* on the findings from the country reports, the author takes the position that there is arguably a need for the (minimum) harmonization of European nationality laws.

Contents

General Introduction

The main objective of this study is to examine the phenomenon of dual nationality[1] in the European Union (EU), particularly against the background of the status of European citizenship—a status that is linked to EU Member State nationality. It is essential to stress at the outset that EU citizenship (also called Union citizenship) is additional to and does not replace Member State nationality.[2] EU citizens have, *inter alia*, the right to move and reside freely within the territory of the Member States.[3] The EU has no mandate to act in the field of nationality law, however, and the Member States have always jealously guarded their exclusive competence. Yet the fact that the EU lacks competence to interfere with the conditions placed by Member States on the acquisition and loss of their nationality does obviously not mean that questions of (dual) nationality have not arisen.

The following analysis of the role of dual nationality in the EU consists of two parts. The first part (Chapters 1 and 2) sets out the approach towards

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[1] A number of points need to be made clear at the outset. First, there is no substantive difference between dual nationality, on the one hand, and multiple and plural nationality, on the other, beyond the obvious fact that the latter can refer to more than two nationalities. For the sake of variety, this study uses all terms interchangeably. Second, the term 'nationality' will be consistently employed to denote the legal relation between an individual and a State. In the writings of many political and social scientists, however, the term 'citizenship' is often used to describe this legal relation. Although we will never use citizenship as a substitute for nationality in this study, the former term may come up in some of the citations.

Finally, the traditional pillar structure in EU law ceased to exist with the entry into force of the Treaty of Lisbon on 1 December 2009. Although one therefore no longer speaks of the 'Community' but of the 'Union', we have kept intact the references to the Community as used in the pre-Lisbon literature and case law, as well as to the European Court of Justice (ECJ), at present called the Court of Justice of the European Union (CJEU). The EU after the entry into force of the Treaty of Lisbon is based on two Treaties of equal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The latter is a revised form of the former EC Treaty. For a detailed overview of the Treaty of Lisbon see Michael Dougan, "The Treaty of Lisbon 2007: winning minds, not hearts", *Common Market Law Review* 45 (2008): 617–703.

[2] Article 20(1) TFEU/ex Article 17(1) EC reads: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to [the EC Treaty read 'shall complement', author's addition] and not replace national citizenship'.

[3] Under Article 21(1) TFEU/ex Article 18(1) EC, 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

(dual) nationality in EU law, in particular by analysing the case law of the Court of Justice of the European Union (hereafter referred to as the 'CJEU' or 'the Court' and until 1 December 2009 known under the name European Court of Justice (ECJ)). The second part (Chapters 3–6) consists of an overview of the national attitude towards dual nationality in four EU Member States, namely France, Italy, the Netherlands and Spain. Yet we begin Chapter 1, by way of introduction, with a general overview of the role of nationality law in municipal and international law, explain our choice for dual nationality as the subject of this book and, finally, discuss nationality law in a European context. This European context not only refers to the position of Member State nationality in EU law, but also to the part played by the Council of Europe in the area of nationality law: the latter has since long been active in nationality matters. The last section of Chapter 1, dedicated to *nationality* in the European context, provides a stepping stone to the actual subject of this study, to wit the specific role of *dual nationality* in the EU.

In Chapter 2 we therefore analyse the (relatively few) cases of the CJEU that involve questions of dual nationality. As most of them address issues of Private International Law (PIL), Chapter 2 examines in detail the place occupied by dual nationality in this area of law—both on the national and the European level. As for the CJEU case law, it was in particular the dual nationality case *García Avello*[4] and its follow-up case *Grunkin-Paul*,[5] both concerning the law on surnames, which triggered a debate on the need for uniform conflict and recognition rules in respect of personal status.[6] More recently, *Hadadi*[7] raised interesting questions as regards dual nationality in the framework of the Brussels IIbis Regulation.

García Avello and *Hadadi* address a particular case of dual nationality: both judgments involved dual nationals who held two Member State nationalities. We have therefore called this part of the discussion on dual nationality the 'intra-EU context'. The country reports, on the other hand, have been given

[4] Case C-148/02 *García Avello* [2003] ECR I-11613.

[5] Case C-353/06 *Grunkin-Paul* [2008] ECR I-07639. This case will be remembered, according to Meeusen, 'as the first case where the ECJ really interfered with the Member State choice-of-law process in matters of personal status and family relations'. Johan Meeusen, "The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC", *Zeitschrift für Europäisches Privatrecht* 18, no. 1 (2010): 200.

[6] The close relationship between nationality and personal status will be explained in Chapter 2. For a study combining the two fields see Michel Verwilghen, ed., *Nationalité et statut personnel. Leur interaction dans les traités internationaux et dans les législations nationales* (Bruxelles: Bruylant, 1984).

[7] Case C-168/08 *Hadadi* [2009] ECR I-06871.

the subtitle 'extra-EU context'. The reason is plain: the dual nationality policies of the countries under consideration predominantly affect non-Member State nationals. France and the Netherlands have already for some time faced the question of how to integrate the (Muslim) immigrant population, and Italy and Spain have long since adopted a system of preferential treatment for (Latin American) former emigrants and their descendants. The four country reports will demonstrate how dual nationality is used (or rejected) as an instrument for meeting these different objectives.

In the country reports we thus assess the place occupied by dual nationality in two traditional immigration countries (France and the Netherlands) and two traditional emigration countries (Italy and Spain). Although the latter two have also become immigration countries in recent decades, this development in not reflected in their nationality laws; rather, Italy are Spain are characterised by a strong focus on former emigrants and their descendants. The goal in these country reports is not just to provide a one-to-one comparison of legal provisions which have a bearing on the issue of dual nationality. Rather, the main aim of the case studies is try to find out what issues have arisen in relation to this phenomenon from the beginning of the previous century up to the present. In so doing, we will test—at least for the countries under discussion—the academic claim that both immigration and emigration countries increasingly tolerate dual nationality. (This claim is subject to the caveat, however, that it certainly does not hold true for all countries.[8]) Our discussion of dual nationality in the comparative chapters will also allow us to illustrate some of the problems related to dual nationality which are identified in the course of Chapter 1.

Perhaps stating the obvious, the comparative case studies show that multiple nationality occupies a different position in each of the States discussed, which can be accounted for by the different challenges to which they are exposed. Although this makes it somewhat difficult to draw comparative conclusions, it is also evidence of the fact that the attitude towards dual nationality is, to a large extent, rooted in the countries' different historical pasts. Nevertheless, it will also become clear that their position regarding dual nationality has not always been fixed, but has been subject to change over time too.

The decision to limit the comparative part to four countries means that this book is not a comprehensive study of the approach to dual nationality in all the Member States of the EU. The nationality laws of other (Member) States

[8] Thomas Faist, "Dual citizenship: Change, Prospects, and Limits", in *Dual Citizenship in Europe: From Nationhood to Societal Integration*, ed. Thomas Faist (Aldershot: Ashgate, 2007), 173.

will, however, sometimes be subject of discussion (particularly in Chapter 1) where relevant to the present study, but they are not described in any detail. The four countries were chosen not only because they are of particular interest for the subject under scrutiny—they represent a mix of immigration and emigration countries and therefore faced different challenges throughout the 20th century—but also because of the language barriers and other obstacles inherent in other pertinent cases (for example in Eastern Europe) or because these had already been recently investigated and described in English (Germany).[9] Yet, by confining ourselves to a limited number of countries in the comparative chapters we can, hopefully, provide a more thorough overview of the historical development of dual nationality than would have been feasible had more country studies been included. At the same time, the decision to only look at four countries in a detailed fashion should not affect in any way the overarching background of this study, namely the interaction between the nationality laws of the Member States and the European citizenship attached to Member State nationality.

As nationality law is still firmly within the competence of each individual State, studying the legal regime on nationality in different countries is by definition a comparative undertaking of different domestic rules.[10] Hence, half of this study is made up of the respective country reports. In addition, EU law

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[9] See for example, on the situation in Eastern Europe and Germany, Simon Green, "Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany", *International Migration Review* 39, no. 4 (2005); Jürgen Gerdes, Thomas Faist, and Beate Rieple, "'We are All "Republican" Now': The Politics of Dual Citizenship in Germany", in *Dual Citizenship in Europe: From Nationhood to Societal Integration*, ed. Thomas Faist (Aldershot: Ashgate, 2007); Enikö Horváth, *Mandating identity: citizenship, kinship laws and plural nationality in the European Union*, Dissertation European University Institute (Alphen aan den Rijn: Kluwer Law International, 2007); Rainer Bauböck, Bernhard Perchinig, and Wiebke Sievers, eds., *Citizenship policies in the New Europe* (Amsterdam: Amsterdam University Press, 2009).

[10] Consequently, there is long tradition of books with comparative analyses of nationality laws, among which Verwilghen, ed., *Nationalité et statut personnel. Leur interaction dans les traités internationaux et dans les législations nationales*; Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel* (Köln: Heymanns, 1989); Bruno Nascimbene, ed., *Nationality laws in the European Union - Le droit de la nationalité dans l'Union Européene* (Milano: Giuffrè Editore, 1996); Patrick Weil and Randall Hansen, eds., *Towards a European Nationality. Citizenship, Immigration and Nationality Law in the EU* (Hampshire: Palgrave Publishers, 2001); Rainer Bauböck et al., eds., *Acquisition and Loss of Nationality, Policies and Trends in 15 European Countries* (Amsterdam: Amsterdam University Press, 2006). These studies are complemented by others that explore particularly the relation between municipal nationality law and European citizenship. See for example Maarten Vink, *Limits of European Citizenship. European Integration and Domestic Immigration Policies* (Hampshire: Palgrave Macmillan, 2005).

plays a big part in this book—despite the fact that the Union lacks competence to act in nationality matters—as only possession of the nationality of a Member State of the EU gives access to European citizenship. We shall see, however, that the CJEU has imposed some constraints on the Member States' autonomy in matters of nationality. Thus, in *Micheletti*[11] the Court ruled that State competence in nationality law must be exercised with due regard to Community law. This was recently confirmed again in *Rottmann*,[12] a case in which Advocate General (AG) Maduro also stressed that although the acquisition and loss of nationality are in themselves not governed by Community law, 'the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen'.[13]

The question whether the EU should in time acquire (limited) competence in the field of European nationality law is one of the major themes of this study. Regardless of one's stance on this question, it must be readily admitted that the subject of Member State autonomy in nationality law is becoming ever more salient with the enlargement of the Union and the growing relevance of European citizenship in the case law of the CJEU. In this writer's opinion, the study shows that the almost absolute autonomy of the Member States is becoming increasingly problematic for the EU at large. Basing ourselves *inter alia* on the findings from the country reports, we take the position that there is arguably a need for the (minimum) harmonization of European nationality laws.[14]

In light of the above, dual nationality is a relevant subject to study in an EU context for at least two reasons. First, Member State policy towards multiple nationality has an effect on access to European citizenship for third country nationals (TCNs). After all, the toleration of dual nationality in combination with a preferential regime for certain groups living outside the EU removes some of the hurdles to becoming a Member State national and thus has a direct effect on access to European citizenship. Such a regime of facilitated access is in place in several Member States. Juxtaposed to this privileged

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[11] Case C-369/90 *Micheletti* [1992] ECR I-04239.

[12] Case C-135/08 *Rottmann* [2010] ECR I-01449.

[13] Para. 23 of AG Maduro's Opinion.

[14] The harmonization debate is in full swing. See for example Rainer Bauböck et al., "Introduction", in *Acquisition and Loss of Nationality, Policies and Trends in 15 European Countries*, ed. Rainer Bauböck, *et al.* (Amsterdam: Amsterdam University Press, 2006). The interaction between the nationality laws of the Member States and European citizenship is also currently being investigated in the framework of EUDO citizenship (http://eudo-citizenship.eu/), which is part of the European Union Democracy Observatory.

category is the category of non-privileged TCNs, who often have to meet stringent conditions to acquire the nationality of a Member State (and thus EU citizenship). As said, this part of the discussion has been called the extra-EU context.

Second, the case law on European citizenship—in particular the *García Avello* judgment (a case concerning the surname of children who held both Belgian and Spanish nationality)—shows that within a purely intra-EU context the possession of dual Member State nationality can have far-reaching consequences. *García Avello* is one of the cases discussed in Chapter 2 in relation to the role of dual nationality in PIL and EU law. There is a burgeoning literature on dual nationality, including several monographs and edited volumes,[15] but we are not aware of recent studies that have addressed dual nationality in a detailed fashion for these two specific contexts.[16]

Dual nationality is one of the most topical subjects among those who are currently studying nationality law. It is particularly interesting to note that dual nationality takes a middle road between two positions that in our opinion are no longer tenable today. On the one hand we have the ancient conception of nationality as the expression of an undivided allegiance of an individual to one (and only one) State, and on the other the postnational idea that the end of the nation-state—and thus the concept of nationality itself—is near. The first view can no longer hold true in our present age of large-scale migration and European integration, while the second neglects the fact that nationality is often still essential for the exercise of certain rights, and that the

[15] Patrick Weil and Randall Hansen, eds., *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe* (New York: Berghahn Books, 2002); David A. Martin and Kay Hailbronner, eds., *Rights and duties of dual nationals: changing concepts and attitudes* (The Hague: Kluwer Law International, 2003); Mohsen Aghahosseini, *Claims of Dual Nationals and the Development of Customary International Law. Issues Before the Iran-United States Claims Tribunal* (Leiden/Boston: Martinus Nijhoff Publishers, 2007); Alfred Michael Boll, *Multiple Nationality and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2007); Thomas Faist, ed., *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Aldershot: Ashgate, 2007); Thomas Faist and Peter Kivisto, eds., *Dual Citizenship in Global Perspective, From Unitary to Multiple Citizenship* (New York: Palgrave Macmillan, 2007).

[16] The conspicuous absence in Boll's study of multiple nationality in the context of PIL and EU law has been noted in various book reviews. See Hans Ulrich Jessurun d'Oliveira, "Book review of Alfred Boll's 'Multiple Nationality and International Law'", *The American Journal of International Law* 101 (2007); Ko Swan Sik, "Book review of Alfred Boll's 'Multiple Nationality and International Law'", *Netherlands International Law Review* 55 (2008): 408. See also Olivier Vonk, "De rol van dubbele nationaliteit voor toegang tot het Unieburgerschap en voor rechts- en forumkeuzebevoegdheid in het Europese internationaal privaatrecht", *Nederlands Juristenblad*, no. 27 (2011).

acquisition of the nationality of the host State provides a migrant with a secure residence status.

The phenomenon of dual nationality sits somewhere between these two positions. On the one hand, our age of migration can easily lead to bonds with more than one State; this is becoming increasingly recognized through the growing toleration of dual nationality (other important factors which have influenced this toleration are gender equality in nationality law and human rights considerations). On the other hand, it is a phenomenon that does not underplay the important role that nationality still fulfils today, notwithstanding the fact that a substantial number of rights have become dependent on residence rather than nationality over the years. In discussing this theme in Chapter 1, we have tried to give due regard to the abundant literature on dual nationality from disciplines other than law.[17] Consequently, although the chief focus of the study lies in examining the legal implications of dual nationality in EU law (and therefore PIL), other perspectives will occasionally be adopted as well. We feel it is essential to take a multi-disciplinary approach to dual nationality by not only studying it from a legal perspective but also by paying attention to the political, sociological or even psychological dimension; from a legal perspective, the phenomenon can again be approached from at least two different viewpoints: the individual and the State. In the course of this study we shall see how dual nationality impacts on both the individual and the State, at the municipal, international and European levels.

The opening sections of Chapter 1 concern general remarks on issues and principles of nationality; these preliminary observations are essential for a good understanding of the ensuing chapters. They address the legal notion of nationality, its historical background, the difference between nationality and citizenship, and the function of nationality in municipal and international law. Section 6 then moves on to explain the choice for multiple nationality as the subject of this book. It will be demonstrated that the number of persons holding multiple nationalities has tremendously increased over the last couple of decades, that dual nationality has become more accepted, but also that strongly divergent views on dual nationality still exist. The phenomenon is not only opposed for emotional reasons, but also for the legal difficulties it allegedly creates. The areas where possible problems may arise shall therefore be identified in Section 9. The inconveniences traditionally associated with dual

[17] Although we feel that the growing interaction between the legal and other disciplines in the field of nationality/citizenship is very valuable, the present study is nonetheless meant as a legal analysis of dual nationality. The input from other disciplines primarily serves to provide a broader perspective on the subject and is thus, by necessity, not a comprehensive discussion of the vast literature on dual nationality in non-legal disciplines.