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Realising Non-citizens' Right to a Nationality: A Pressing Human Rights Issue to Be Put Higher on the EU Agenda

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The study aims to highlight the controversial human rights situation of the so-called "non-citizens" residing in the Baltic successor states of the USSR that since have become members of the EU through the prism of fundamental rights and non-discrimination, and the detrimental impacts inherent to the lack of effective nationality with special regard to the inability to fully enjoy the rights and opportunities associated with EU citizenship. It stresses the utmost importance for the European Union to promote the human rights of non-citizens living in EU territory in the Baltic region, especially in Latvia and Estonia, where the vast majority of non-citizens belonging to the Russian-speaking minorities reside.

Introduction

The right to a nationality is a basic human right which constitutes the right of every individual to acquire, change and retain a nationality. This fundamental human right is enshrined in a series of international human rights instruments,[1] similarly to the prohibition of arbitrary deprivation of nationality, as well as

1 The Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The rights of stateless persons are specifically set out in the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

equality and non-discrimination rights.[2] Notwithstanding the fact that the right to a nationality is a basic right of everyone, non-citizenship continues to persist in the Baltic successor states of the USSR which are now Member States of the European Union with immense Russian-speaking populations who were left without a nationality after the restoration of independence in Latvia and Estonia in 1991.

This paper advocates to address the human rights situation of non-citizens who have been deprived of the protection provided by an effective nationality which constitutes a major human rights violation in itself on three levels, as it strongly interferes with the right to nationality, the prohibition of arbitrary deprivation of nationality and the right to equality and non-discrimination.

Nationality is a complex concept which has historical, social, cultural, legal and emotional implications. In order to define the meaning of the concept of nationality, the International Court of Justice (ICJ) provided a definition of nationality suggesting that *"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties."*[3] Nationality therefore requires an *effective link* between the State and the individual which derives from the recognition that in order for an individual to request citizenship from a state, there has to be some kind of link between the state and the individual, such as birth on the territory of the State *(ius soli)* or descent from a national of the State *(ius sanguinis).*[4] Further to the concept of a nationality, Blackman suggests that there is a distinction between nationality as a legal term, implying the membership of a state, and nationality as an ethnical term which suggests a historical relationship to a particular ethnic, racial or linguistic group.[5] Hence the concept of nationality is perceived very differently by national and international law. Domestic law views nationality as a relationship between an individual and the state which determines the national's individual rights. The right to a nationality is thus greatly seen as the right to have rights. International law, on

2 Article 2 of the Universal Declaration of Human Rights prohibits discrimination on the following ten grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. The same prohibited grounds are enshrined in Article 2 of the International Covenant on Economic, Social and Cultural Rights and Article 2 of the International Covenant on Civil and Political Rights. The listed grounds are nonetheless not exhaustive. The term "other status" has an open-ended intention; there may be further prohibition grounds to be considered, such as age, gender, disability, nationality and sexual orientation. The general non-discrimination clauses of each Convention are complemented by provisions prohibiting discrimination on specific grounds. The CERD and CEDAW Conventions are aimed precisely at eliminating discrimination based on race and gender.

3 The Nottebohm Case – Liechtenstein v. Guatemala (1955): Second Phase, International Court of Justice (ICJ).

4 Further to this principle, Latvia argues that it does not provide automatic citizenship to former USSR settlers due to the fact that their effective link was stronger towards other successor states of the Soviet Union than to Latvia which is the reason why Latvia put in place a naturalisation process which challenges the applicants' knowledge of the Latvian language, the country's history, constitution and anthem amongst others.

5 Blackman 1998.

the other hand, associates the concept of nationality rather with state sovereignty, considering that States have the sovereign right to decide who their nationals are.

Consequently, especially since the adoption of the Hague Convention, nationality issues have been viewed a domestic issue under international human rights law. However, this right is not absolute and States must comply with their human rights obligations concerning the granting and loss of nationality. Parra argues that state sovereignty over nationality laws has eroded and the doctrine of sovereignty must be reconciliated between nationality laws and international legal instruments with a view to reducing and avoiding statelessness, highlighting that the Court of Justice of the European Union (CJEU) also increasingly views Member State sovereignty as becoming limited in terms of nationality legislation.[6]

The number of those living without a nationality in the European Union is most striking in the successor states of the USSR: Latvia and Estonia[7] where thousands of non-nationals live in the legal limbo implied by the lack of an effective nationality. Estonia and Latvia joined the European Union with sizeable Russian-speaking populations who had been forced to migrate to these countries as a Russification measure during the Soviet era. Based on data provided by the Population and Housing Census in 2000, citizens of Latvia represented only 74.5% of the total population, while citizens in Estonia consisted of 79.9% of the population, meaning that at the time of the EU accession, approximately a quarter of the population of these countries were persons without an effective nationality. Following the collapse of the USSR, the Soviet citizenship lost legal effect and as a consequence of the restoration of independence in the Baltic States of Latvia and Estonia in 1991, many former citizens of the Soviet Union and their descendants were left without the protection and benefits of an effective nationality. This momentum was enhanced by the establishment of a vague legal and civic status, called *non-citizenship* which is an unprecedented phenomenon in international public law.

A quarter century after the establishment of the new states, in Latvia approximately 12% of the total population, while in Estonia approximately 6% of the population still live without a nationality in the European Union. In these countries, non-nationals and stateless persons are both living on the margins of mainstream society, disproportionately vulnerable to human rights violations and unable to participate in society in a number of ways.

6 Parra 2011.

7 Estonia and Latvia joined the European Union with a very high percentage of mostly Russian-speaking non-citizens. Based on data provided by the Population and Housing Census in 2000, citizens of Latvia presented only 74.5% of the total population, while in Estonia 79.9% of the population, meaning that at the time of the adherence to the EU, approximately a quarter of the population of these countries were persons whose nationality has not been determined. See Provisional Results of the 2000 Population Census (2002), Central Statistical Bureau of Latvia, Riga; Statistical Yearbook of Estonia (2003), Statistical Office of Estonia, Tallinn; Statistical Yearbook of Estonia (2003), Statistical Office of Latvia, Riga.

Historical Background of Non-citizenship

Following the collapse of the USSR in 1991, Latvia and Estonia regained its independence and restored extremely strict citizenship laws, following the *ius sanguinis* principle, leaving the sizeable population of Russian settlers inherited under the circumstances of state succession without a citizenship. Even though they resided legally in the successor states, Latvia and Estonia did not recognise the USSR settlers neither as citizens, nor as stateless persons but rather as individuals belonging to a new category in between citizens and the stateless. In terms of state succession, both Latvia and Estonia chose to retain the legal personality of the states that, *de facto,* lost their independence in 1940 as a result of occupation by the USSR, instead of acquiring new international legal personality. This is based on the principle that illegal actions may not create legal situations, invoked by Latvia and Estonia reflecting on the Soviet occupation which they considered to be illegal.[8] In accordance with this principle, the Baltic States of Latvia and Estonia re-established the interwar republics and proclaimed that all events that occurred during the Soviet occupation were illegal. The choice of legal continuity had particular implications on the re-establishment of interwar citizenship laws on the basis on which a sizeable part of the Russian speaking population of these countries were categorized as non-citizens. Accordingly, persons who were not descendants of those who were citizens of Latvia and Estonia prior to World War II had to naturalize in order to gain citizenship. The strict naturalization procedure discouraged former citizens of the USSR from application. Even though non-citizenship was originally established as a temporary measure to reflect on the ambiguous case of former USSR settlers, the situation of non-citizens remains an unsettled issue from a human rights perspective which has been subject to wide-ranging debates within the Baltic societies.

The non-citizenship of Russian-speaking ethnic minorities in successor states of the USSR is seen as a form of ethnic discrimination[9] to take revenge on the former citizens of the USSR stripping them of nationality. Non-citizenship is thus predominantly seen as a tool for historic retaliation against the former oppressors of the Baltic region.

Non-citizenship has also been associated with statelessness in the European context building on the momentum that similarly to stateless persons, non-citizens also do not enjoy the state protection inherent to an effective nationality. In this regard, Latvia and Estonia developed a unique, highly politicized understanding of citizenship and statelessness. Latvia ratified both statelessness conventions which suggests major commitment to the reduction of statelessness, while Estonia has not signed or ratified any of the statelessness related to the UN. Notwithstanding the positive statelessness-related developments in the past years to be explained later in this paper, statelessness must remain high on the political agenda in Latvia and Estonia.

8 Hellborg 2015, 11.
9 Gaponenko 2013.

Distinction and Nexus between Statelessness and Non-citizenship

Non-citizens are often referred to as stateless persons; this common perception shall be challenged in the following lines. According to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is someone *"who is not recognized as a national by any state under the operation of its law".* Considering that having a nationality constitutes a legal bond with a state and provides numerous rights as well as obligations, not having one leaves the concerned individuals greatly unprotected by the national legislation which eventually entails the incidence of legal ghosts. Statelessness may result from various causes, including state succession, arbitrary deprivation of nationality, discriminatory nationality laws, displacement, birth to a stateless person, lack of birth registration[10] or inability to fulfil certain requirements for the acquisition of a nationality.

Statelessness often prevents people from accessing fundamental human, civil, political, economic, social and cultural rights. The state of being stateless puts these individuals in a somewhat legal vacuum and non-existence. Not having a nationality entails the legal obstruction to access fundamental civil, political, economic, cultural and social rights that other people take for granted; they face extreme difficulties on a daily basis in accessing education, health care, employment opportunities and property rights. Getting married, registering the birth of their newborn children, opening a bank account, as well as travelling raise further challenges for them. And as they pass away, their death remains unknown to the world. Despite of the fact that international human rights law (namely the 1954 Convention) has rendered the individual a subject of international law, the enjoyment of human rights must be ensured by the states themselves. Thus, states are mainly responsible for addressing nationality issues and ensure the enjoyment of basic rights attached to a nationality (irrespective of having a nationality or not) for those residing in their territory.

Based on UNHCR estimates, statelessness affects 10–12 million people around the world, of whom approximately 600,000 reside in Europe,[11] and new cases of statelessness continue to emerge in the region.[12] In Europe, statelessness mainly affects populations who have lived in the same country for generations, including Roma living in the successor states of Yugoslavia and those unidentified persons who live in the Baltic states without a nationality. At the time of state disintegrations, these persons possessed personal documents which identified them as citizens of

10 Although the act of birth registration in most cases does not confer nationality in itself, it provides crucial evidence of the facts of birth (place and date of birth, name of the birth parents, father/mother), without which a child's claim to a nationality may not be recognized by a state.

11 In this context, Europe is defined as the geographical region comprising of 50 States: the 47 CoE Member States (including the 28 EUMS) and Belarus, as well as the Holy See and Kosovo (UNSCR 1244/99).

12 Statelessness related statistics are typically sporadic, as states generally do not collect precise data on stateless persons. According to UNHCR estimates, in 2015 a total number of 592,151 stateless persons lived in Europe. See UNHCR, Global Trends; Forced Displacement in 2015, Annex Table 1.

a country that ceased to exist. Consequently, although they were living in a country for decades or were even born there, they did not possess identity documents and therefore citizenship of the country of their habitual residence. As a result, from generation to generation they face limited access to education, health care, and work in their country of decades-long residence. Statelessness and its implications comparable to legal non-existence thus continue to persist in Europe as a hidden, greatly intergenerational phenomenon despite of all the existing international human rights instruments, including those relating to statelessness, ratified by most EU Member States. Therefore, statelessness remains a pressing human rights issue affecting thousands of individuals living in Member States of the European Union, as well as in its direct neighbourhood.

As mentioned above, according to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, by definition, a stateless person is someone who is *"not being recognized as a national by any state under the operation of its law".* Non-citizens, on the other hand, are *those former Soviet citizens and their children who are not citizens of any state, provided that on July 1, 1992 they were either registered as residing on the territory of Latvia, or it was their last place of registration.*[13] In Estonia, non-citizens are referred to as persons of undetermined status. By definition, statelessness and non-citizenship may not be considered as identical phenomena, nonetheless, the everyday realities of affected individuals demonstrate major parallels.

Non-citizenship is unprecedented in public international law, and as a result cannot be easily understood in the context of other legal status, including stateless persons, considering the extensive rights attributed to them which do not comply with those generally attributed for stateless persons outside of Latvia and Estonia. Therefore, non-citizens may not be seen neither as citizens, nor as stateless persons but rather as *individuals with a specific legal status, as beholders of the extensive rights and international liabilities* which suggests a partly acknowledged and effective legal bond between the state and its non-citizens. Even though these long-term permanent residents do not possess the *de jure* citizenship of Latvia and Estonia, they can apply for naturalisation through the dedicated procedure whereby they may be granted citizenship. Noteworthily, the social rights of non-citizens generally relating to an effective nationality do not differ significantly from those of citizens. As for the rights of non-citizens, they are granted the right to acquire a travel document, to reside in their country of permanent residence without a visa or residence permit (resulting from the right not to be expelled), to return, to have diplomatic protection abroad and to obtain citizenship through naturalization. Non-citizens benefit from almost the same social guarantees as citizens with regard to pensions and unemployment benefits. Non-citizens were also granted the right to preserve their native language and culture provided that it is in compliance with the domestic law. Further to children's right to a nationality, while fulfilling their international obligations stemming from the

13 Section 1 and Section 8, of the Law *On the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State.*

Convention on the Rights of the Child, the principle of *ius soli* has been increasingly incorporated in the nationality provisions in these countries providing for important safeguards to prevent the statelessness of children of non-citizen parents.[14]

Notwithstanding the extensive social benefits provided for non-citizens in Latvia and Estonia, they do not make up to their exclusion from crucial political rights and economic opportunities inherent to a (EU) citizenship. Non-citizens do not benefit from long-term mobility within the European Economic Area and are precluded from participating in political life, hence, decision-making at the national level and EU level. While in Estonia the right of all permanent residents to vote in local elections was already set out in the 1992 Constitution, in Latvia non-citizens remained disenfranchised at all levels.[15] This may be due to the assumption shared by the Latvian political elite that non-citizens constitute a potential threat to internal political stability, therefore, it is considered by the political leadership that non-citizens who do not wish to apply for naturalization should not be granted voting rights and therefore a say in politics and decision-making which are generally linked to full citizenship. Consequently, non-citizens enjoy no electoral rights; they can neither vote at general and EU parliamentary elections, nor be elected as members of parliament, government ministers, ombudspersons or members of the European Parliament. Their opinion therefore remains mostly hidden from European decision-makers, as their needs remain unaddressed by decision-makers in their country of long-term and permanent residence.

This paper argues that as eternal beholders of the right to reside in Member States of the European Union, non-citizens should enjoy identical political and economic rights as Latvian and Estonian citizens who are EU citizens. Not having the chance to participate in the political life of the country where they reside naturally implies their sense of isolation and exclusion from decision-making and public life. Due to the fact that Russian-speaking non-citizens live on the margins of society, they neither have the financial means, nor meaningful contact with native members of the society to develop their fluency in the Latvian and Estonian language. It may be also suggested that education may be an equally important factor of their social exclusion as their citizenship status.[16]

Consequently, they are disproportionately discriminated in the labour market in their country of residence for the lack of fluency in the official language, and are therefore obliged to work under the table, facing precarious employment and working conditions. Lacking legal work opportunities, non-citizens also tend to move to countries irregularly where they can make ends meet. Whereas Latvian and Estonian citizens benefit from free movement as EU citizens, non-citizens may not be legally engaged in other EUMS on an equal footing with Latvian and Estonian citizens. Although persons living in Latvia and Estonia holding non-citizen

14 Weissbrodt 2008, 89.
15 Cianetti 2014, 87.
16 Aasland 2002.

passports can travel visa-free within the European Economic Area, including EUMS under Regulation 539/2001,[17] they may not stay beyond 90 days within a period of 180 days and they need a visa to enter most third countries. This implies that they may not stay for longer than 90 days in a foreign country, neither they can work abroad legally.

The EU's Room for Manoeuvre in the Promotion of Rights of Non-citizens

When it comes to nationality issues, the EU's mandate is often contested. Similarly to the situation of stateless persons, this paper argues that the situation of non-citizens in the EU should be primarily addressed through the lens of the right of everyone to equality and non-discrimination where the EU does have competence. This competence is established by Article 21(1) of the EU Charter of Fundamental Rights which provides that:

> *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."*

Further to this general non-discrimination clause, Article 21(2) further proclaims that *"…any discrimination on grounds of nationality shall be prohibited."*

The prohibition of discrimination[18] based on the aforementioned prohibition grounds thus implies a limitation to a state's decision to grant citizenship. This would justify why the situation of non-citizens must be addressed at the higher (EU) level, considering that it clearly constitutes a human rights violation under Article 21 of the EU Charter, by not granting non-citizens automatically the nationality of the country of their long-term residence where they live for generations[19] on the sole basis of their

17 Except to the United Kingdom and Ireland.

18 The principle of non-discrimination can be concluded from several articles in different human rights treaties. Article 1(3) in ICERD prohibits any state party to discriminate against a certain nationality while deciding if citizenship or naturalization should be granted to that person. Article 9 in the 1961 Convention states that citizenship cannot be deprived due to a person's ethnicity, race, religion or political opinions. Further, Article 2 in the UDHR provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The norm of non-discrimination can also be found in Article 26 ICCPR where it states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

19 They would satisfy the conditions of both *ius soli and ius sanguinis* principles to be granted nationality automatically.

ethnic origin and membership of a national minority.[20] Addressing non-citizenship is therefore also an issue of minority protection.

Furthermore, although as explained above, statelessness and non-citizenship may not be considered to be identical terms, Member States should consider the objectives of the international instruments they have acceded to, including those on human rights, whereby they bear international obligations to protect the rights of everyone living in their territory, including stateless persons, as well as non-citizens.[21] In terms of arbitrary deprivation of nationality, although neither the acquisition nor the loss of citizenship is explicitly regulated by the Council of Europe (CoE) or the EU, decisions to confer and revoke citizenship are subject to both substantive and procedural requirements. For instance, an arbitrary deprivation of citizenship may amount to inhuman or degrading treatment prohibited under Article 3 of the European Convention on Human Rights, or violate the right to respect for private and family life protected under Article 8 of the same Convention.[22]

Conclusion

The paper concludes that non-citizenship is a human rights violation in itself, as it violates the fundamental human right to a nationality, the prohibition of arbitrary deprivation of nationality, as well as equality and non-discrimination rights, all enshrined in a series of international human rights instruments. Apart from the key human rights instruments, the statelessness conventions and nationality related CoE conventions (also providing for the avoidance of statelessness in relation to state succession), the EU Charter of Fundamental Rights could be further utilized for strategic litigation in light of Article 21 on non-discrimination with a view to advancing the nationality rights of non-citizens and to promoting their social inclusion. Although

20 Looking at secondary sources of EU law, we find that the EU has also addressed this vital principle, put in place some relevant instruments. In this respect, the EU Charter of Fundamental Rights which is the primary human rights tool which may be used for strategic litigation (based on its equality and non-discrimination provisions). In addition, some EU Directives also address discrimination, for instance, EU Directive 2000/78/EC which regulates measures for equal treatment in terms of employment, implying an increased burden of proof on the state.

21 Looking beyond the main UN human rights instruments, including the Universal Declaration of Human Rights, a vast majority of EU countries are State Parties to the 1954 Convention relating to the Status of Stateless Persons and many of them are parties to the 1961 Convention on the Reduction of Statelessness. Further to the mentioned UN Conventions, the Council of Europe (CoE) and the European Union (EU) have also legislated on issues directly relating to the prevention of statelessness and the protection of stateless persons. In the European context, on the one hand, the 1950 European Convention on Human Rights (CoE), the relevant case law of the European Court of Human Rights (ECtHR), the 1997 European Convention on Nationality (ECN) and the 2006 European Convention on the Avoidance of Statelessness in Relation to State Succession are of particular interest which were adopted under the aegis of the Council of Europe.

22 See OHCHR, The Rights of Non-Citizens, HR/PUB/06/11, Resolution 32/5/HRC, most recent UN Human Rights Council resolution on arbitrary deprivation of nationality, Report of the Secretary-General on human rights and arbitrary deprivation of nationality, A/HRC/10/34. Geneva, 2006. 23.

non-citizens are not citizens of their (EU) country of permanent residence, and thus may not be considered EU citizens, as long-term permanent residents living in EU territory, they should be granted identical rights inherent to EU citizenry. This would include the right to vote at EU Parliamentary elections, as well as those relating to free movement, so that they can live, work and study in any EU country which would be vital for their welfare and social integration in the European Union. To this end, the political (electoral) and economic rights of Russian-speaking non-citizens living in the Baltic EU Member States should be revisited in the framework of high-level policy debates both at the national and EU levels, addressed through a rights-based approach in light of the aforementioned human rights and relating principles.

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