

**DUAL CITIZENSHIP OR DUAL NATIONALITY: ITS DESIRABILITY
AND RELEVANCE TO NAMIBIA**

by

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ABSTRACT

This dissertation endeavours to determine whether the concepts nationality and citizenship are interchangeable, or whether they each mean something very specific. In order to ascertain where the "origin" of using the terms nationality and citizenship interchangeably might have occurred, a closer look at antiquity and its practices is necessitated. The question is also addressed whether a person could be in possession of dual nationality and/or dual citizenship. The desirability of any dual status is also discussed and whether such dual status is to be tolerated and if yes, under which, if any, conditions.

KEY WORDS

Citizenship, nationality, *jus soli*, *jus sanguinis*, dual nationality, dual citizenship, international law, *domicile*.

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CHAPTER ONE

Introduction – defining the concepts relating to nationality and citizenship

Searching for a definition of the terms “nationality” or “citizenship”, one is invariably bombarded with views, opinions and philosophies. Upon closer inspection it becomes clear that scholars, lawyers and politicians alike often use these terms interchangeably. “Nationality in the sense of citizenship of a certain State must not be confused with nationality meaning membership of a certain nation in the sense of race.”¹ Namibian legislation² by way of an example uses the term “citizenship” instead of “nationality” and so fails to draw a clear distinction between the two concepts. One may become tempted to ask, if the learned persons amongst us hold such conflicting views, how is Joe Public supposed to know or understand these concepts, which can be daunting and confusing? In this dissertation an attempt will be made to clarify and simplify the issues relating to nationality, citizenship and multiple statuses.

The question of nationality and/or citizenship is generally a very personal and often an emotional matter. This becomes even more so for persons who were born in one country, yet have made a life for themselves in another country – in essence a person of dual status. The following may be a typical example of such a case: Abigail is born in Italy to an Italian mother and a Dutch father. Her parents emigrate to the then South West Africa (now Namibia) when Abigail is 5 years old. In 1990, Namibia becomes an independent, sovereign state and Abigail is at the time aged 22 years. What might Abigail’s nationality/citizenship status be? Is she an Italian national by way of having been born in Italy, or is she an Italian citizen? What about her father’s Dutch nationality, does it also “affect” her, and if so, in what way? Being resident (domiciled) in Namibia, does it make her a citizen or national of Namibia? Does she have single, dual or even multiple citizenship and/or nationality? Is it even

¹ Boll AM *Multiple Nationality and the International Law* (2007) 66. Boll quoted Oppenheim, LFL *International Law. A treaties* (1905) 588.

² Namibian Citizenship Act 14 of 1990 as compared to the European Convention on Nationality that only uses the term “nationality”.

necessary to answer any of the above questions; does it really matter, and if yes, then to whom and when?

In evaluating the various definitions that one may find relating to nationality and citizenship, it becomes clear that neither term carries a clear and concise meaning. Spiro states that historically citizenship status was considered a matter of national self-definition, whilst nationality was equated with identity and in most cases coincided with ethnic, religious or other sociocultural community markers.³ In broad terms, **nationality** may be defined as a people having common origins or traditions and often comprising a nation,⁴ or as the country of a person's citizenship or country in which the person is deemed a national,⁵ or as the state or country in which a person belongs because of birth or through naturalisation.⁶ Nationality may also be defined as the legal bond between a person and a State, thus making nationality a legal concept.⁷ Cook-Martin states that nationality may also be referred to as assumed citizenship, postulating that this type of citizenship reflects "a subjective sense of identification rather than a legally defined status linking the individual to a broader community".⁸ **Citizenship** on the other hand may be defined as the status of a citizen with rights and duties, being a native or naturalized member of a state or other political community.⁹ De Groot states that "citizenship implies enabling a person to actively participate in the constitutional life of a particular State".¹⁰ Cook-Martin refers to citizenship as legal citizenship, which according to him, defines an individual's membership in a state prescribed by formal official rules or laws.¹¹

³ Spiro PJ "A New International Law of Citizenship" *The American Journal of International Law* Vol. 105 No. 4 (October 2011) 694.

⁴ <http://wordnet.princeton.edu> [accessed: 30 September 2013].

⁵ <http://www.immigration.com> [accessed: 30 September 2013].

⁶ <http://www.krootlaw.com/info-library/legal-directory> [accessed: 2 May 2014].

⁷ De Groot G-R "Sporting Nationality: Remarks on the Relationship between the General Legal Nationality of a person and his 'Sporting Nationality'" *The International Sports Law Journal* (2006) 2 [accessed via <http://www.questia.com> on 18.June 2014].

⁸ Cook-Martin D *The Scramble for Citizens Dual Nationality and State Competition for Immigrants* (2013) 6.

⁹ <http://wordnet.princeton.edu> [accessed: 2 May 2014].

¹⁰ De Groot *op. cit.* 3.

¹¹ Cook-Martin *supra* at 6.

Considering the above definitions, it becomes clear that the concepts of nation, state and nation-state also need to be discussed in order to reach a better understanding of what nationality and citizenship entail. According to Renan¹² a “**nation** is a spiritual principle, the outcome of the profound complications of history; it is a spiritual family not a group determined by the shape of the earth.” The nation is thus the culmination of a long past of endeavours, sacrifices and devotions.¹³ Miller¹⁴ is of the opinion that “the nation is conceived as a community extended in history and with a distinct character that is natural to its members.” According to Oommen,¹⁵ a nation can be created in various ways and from a variety of bases and circumstances, the two commonest being a territorial state or political community and a community of culture. Hoffman mentions that the state has also been defined as an institution which claims a monopoly of legitimate force for a particular territory.¹⁶

Antiquity, however, was unfamiliar with the term nation and according to Renan, classical antiquity had republics, municipal kingdoms, confederations of local republics and empires.¹⁷ “Gaul, Spain and Italy, prior to their absorption by the Roman Empire, were collections of clans, which were often allied among themselves but had no central institutions of dynasties.”¹⁸

Adejumobi postulates that a **modern nation-state** consists of a collection of nationalities all bound together through the tie of citizenship.¹⁹ “Citizenship is an instrument of social closure through which the state lays claim to and defines its sovereignty, authority, legitimacy and identity.”²⁰ Oommen²¹ by way of an example states that Britain is a multi-national state where the British people not only share a

¹² Renan E *What is a Nation?* (1990) 19.

¹³ *Ibid.*

¹⁴ Miller D *On Nationality* (1997) 36 [Accessed from Oxford Scholarship Online on 15 October 2013].

¹⁵ Oommen TK *Citizenship and National Identity* (1997) 16.

¹⁶ Hoffman, J “State and Nationalism” in Hoffman J *Citizenship beyond the State* (2004) 49.

¹⁷ Renan *supra* at 8.

¹⁸ *Ibid.*

¹⁹ Adejumobi S “Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa” *Human Rights Quarterly* 23 (2001) 151 & 152.

²⁰ *Ibid.*

²¹ Oommen *supra* at 18.

common citizenship identity, but also have their specific national identities – English, Welsh, Scottish and Irish. From this it may thus be concluded that a nation is a territorial entity to which the people have an emotional attachment and to which they invest a moral meaning.²²

Considering the foregoing, nationality may therefore be defined as the collective identity which the people of the nation acquire by identifying with the nation whether ancestral or adopted.²³ It may thus be said that nationality is something for the most part unchosen and unreflectively acquired,²⁴ and according to Cook-Martin can span more than one jurisdiction as when, for example, ethnic Germans in Namibia identify with the German nation.²⁵

Boll²⁶ states that, strictly speaking, the term “national” applies to every individual in a territorial nation-state who has the duty of permanent allegiance to that state, and therefore nationality should essentially be a term of international law which denotes that there is a legal connection between the individual and the state for external purposes. The concept of ‘nation’, according to Miller “conveys the idea of a circumscribed body of people bound together by common customs and capable of being represented by a prince or parliament”²⁷ It may be deduced that national communities therefore exist when their members recognise one another as compatriots and believe that they share similar characteristics.²⁸ The connection that links an individual to a particular state is labelled a link of “nationality”, irrespective of what the particular individual’s ethnic background, origin or identity might be.²⁹ Nationality thus “indicates no more than that a person belongs to a certain State”³⁰ and as such in terms of international law, affords the state jurisdiction over the person and affords the person the protection of the state. In Article 15(1) of the

²² *Ibid.*

²³ Oomen *op. cit.* 19.

²⁴ Miller *op. cit.* 44.

²⁵ Cook-Martin *op. cit.* 7.

²⁶ Boll AM *op. cit.* 58.

²⁷ Miller *supra* at 30.

²⁸ *Id.* at 22.

²⁹ Boll *supra* at 58.

³⁰ *Per* Nestadt JA in *Tshwete v Minister of Home Affairs* 1988 (4) SA 586 (A) at 613.

Namibian Constitution, the notion of "nationality" is used to establish a child's right to acquire a name and nationality from birth.³¹ According to Sales, nationality is always a constructed identity which is rooted in the past as well as in contemporary social institutions.³²

In the 16th century, Habermas³³ postulated, kingdoms gave birth to those territorial states (England, France, Portugal, Spain and Sweden) which were later gradually transformed into nation-states. The nation-state provided both the infrastructure for rational administration as well as the legal framework for free individual and collective action. In its classical usage, nations are communities of people of the same descent, who are geographically integrated to form a settlement or neighbourhood.³⁴ Such communities essentially share a common language, customs, culture and traditions, but are not yet politically formed into state organisations.³⁵

The origins and early history of **nation-states** are, however, disputed. A major theoretical issue is: "Which came first, the nation or the nation state?" and Professor Steven Weber of the University of California, Berkeley, has advanced the hypothesis that the nation-state is an inadvertent by-product of 15th-century advances in map-making technologies.³⁶ Herzog³⁷ suggests that the nation-state came into being in the 18th century in America and Europe. In the late 19th century the nation-state flourished in Europe and from then on spread to other regions of the world, mainly through the colonisation of newly discovered territories.³⁸ Miller³⁹ on the other hand, states that " 'nation' must refer to a community of people with an aspiration to be politically self-determining and 'state' must refer to the set of political institutions that they may aspire to possess for themselves." From this, one may conclude that the

³¹ The Constitution of the Republic of Namibia 1990 [<http://www.gov.na/constitution1>].

³² Sales R "What is 'Britishness', and Is It Important?" in Calder G, Cole P and Seglow J *Citizenship Acquisition and National Belonging* (2010) 124.

³³ Habermas J "Citizenship and National Identity" in: *The Condition of Citizenship* (1994) 21.

³⁴ *Id.* at 22.

³⁵ *Ibid.*

³⁶ "How Maps Made the World". *Wilson Quarterly*. (Summer 2011). [Retrieved: 28 July 2011].

³⁷ Herzog B "Dual Citizenship and the Revocation of Citizenship" *Democratic Paths and Trends Research in Political Sociology* vol. 18 (2010) 91.

³⁸ *Ibid.*

³⁹ Miller *op. cit.* 19.

misperception of "nation" instead of "state" is a fundamental error, even if one that is encouraged by everyday usage.⁴⁰ Sales suggests that the notion of "nation state" contains fundamental contradictions between "a state, which holds sovereignty within particular geographical borders, in which certain common rights are taken for granted and the notion of a nation which suggests some common history and culture."⁴¹

It is, however, today understood that a **sovereign state** is a non-physical juridical entity of the international legal system that is represented by a centralised government which has supreme independent authority over a geographic area.⁴² According to Miller, it is the territorial element that has shaped the connection between nations and states.⁴³ A sovereign state thus has a permanent population, a government and the capacity to enter into relations with other sovereign states.⁴⁴ Holston and Appadurai⁴⁵ postulate that "nation-states have always pursued to establish citizenship as that identity which subordinates and brings together all other identities to create a uniform body of law". Class differences always had a fundamental influence on the traditional distinction between citizen and subject, and according to Strydom, when all inhabitants of a state are subject to one government body, class differences are eliminated.⁴⁶ The rise of nation-states, according to Turner, required the creation of *national citizenship*.⁴⁷ Hoffman, on the other hand, postulates that nations are communities that do not have to produce states in order

⁴⁰ *Ibid.*

⁴¹ Sales *op. cit.* 124.

⁴² "The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. ... The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states. These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other states." — *Crotty v An Taoiseach* [1987] IESC 4 (9 April 1987).

⁴³ Miller *op. cit.* 25 - 26.

⁴⁴ Shaw MN *International Law*. (2003) 178.

⁴⁵ Holston J and Appadurai A "Cities and Citizenship" *Public Culture* (1996) 187.

⁴⁶ Strydom HA "The theory of citizenship: a reappraisal" *The Comparative and International Law Journal of Southern Africa* Vol. 18 No. 1 (1985) 106.

⁴⁷ Turner B "Citizenship, Nationalism and Nation-Building" in *The SAGE Handbook of Nations and Nationalism* (2006) 226.

to be “adequate” nations, as national identity is but only one way in which people differentiate themselves.⁴⁸

According to Matheson, **citizenship** “reaches back to the time when men first began to group themselves together in societies for common life and government more comprehensive than the village.”⁴⁹ Borchard⁵⁰ states that citizenship traces its origin to the time when the city was the largest sovereign unit to which the individual was attached. Its meaning has therefore resultantly expanded with the growth of the unit into the modern state of today. According to the Aristotelian model, which was based on the concept of the Greek *polis*, a citizen is one who either takes or is subject to, its decisions. The citizen must therefore be integrated into the political collective.⁵¹ Citizenship was thus intimately connected with the right to vote, to actively participate in public life. Morse⁵² proposed that citizenship was a term generally used to describe the political relationship which existed between an individual and the sovereign state. This was either natural or acquired. It has been advanced by Holston that cities have always been the stages for politics,⁵³ whilst Turner opines that modern citizenship is a political product of the English Civil War, the American War of Independence and the French Revolution.⁵⁴ The idea of citizenship has, according to Cole, “dominated political theory since the beginning of that discipline.”⁵⁵ In essence political theory explores the core questions of “what it is to be a political community and what it is to be a member of such a community,” and therefore the idea of citizenship gives the political community its form and content.⁵⁶

⁴⁸ Hoffman *op. cit.* 11.

⁴⁹ Matheson PE “Citizenship” *International Journal of Ethics* Vol. 8 No.1 (Oct. 1897) 22.

⁵⁰ Borchard EM, *Diplomatic Protection of Citizens Abroad* (1970) 7.

⁵¹ Alfonsi A “The Emerging Stirrings in Western Europe” in *Citizenship and National Identity* 55.

⁵² Morse AP *A Treatise on Citizenship by Birth and Naturalisation* (1881 ed) at preface x <http://heionline.org> [accessed on 12 September 2014].

⁵³ Holston and Appadurai *op cit.* 189.

⁵⁴ Turner *op. cit.* 227.

⁵⁵ Cole P “Introduction: ‘Border Crossings’ – The Dimensions of Membership” in Calder G, Cole P and Seglow J, *Citizen Acquisition and National Belonging* (2010) 1.

⁵⁶ *Id.* at 2.

The term "citizenship" may, therefore, not only be used to denote that an individual belongs to a state for the purpose of international law, but is best used to describe the individual's civil and political rights under the state's municipal law.⁵⁷ According to Sejersen, citizenship denotes an active mode which defines the duties of the citizen and a passive mode which denotes rights and entitlements.⁵⁸ Sales opines that citizenship is "not an ethnic, blood and soil concept, but a more abstract political idea, that implies equal legal, political and social rights for people inhabiting a certain national space."⁵⁹ According to Hoffman, the modern perception of citizenship is based on the presumption that everyone in society is entitled to the same rights and responsibilities.⁶⁰ Cole states that in theory citizenship is established by a shared national identity, promotes social cohesion, provides a setting for (democratic) participation and acts as a motivator for citizens to make the sacrifices that social justice may demand.⁶¹ According to Morse, "citizenship in the narrow sense, confers the imprescriptible right to speak for the community, to act as its authoritative exponent."⁶²

Historically, according to Cook-Martin, *residence* in a state's jurisdiction made the individual available for official administration, but did not automatically make him/her a member of such state.⁶³ Citizenship has, however, become a complicated issue as a result of citizenship admission practices having become cumbersome and problematic.⁶⁴ Köchler suggests that the overemphasis on state sovereignty in the traditional nation-state has led to the individual being held hostage by an abstract entity (the nation state) and has thereby negated his/her autonomy and individuality as citizen.⁶⁵ The individual is thus completely absorbed, resulting in a false and

⁵⁷ Dugard J *International Law: A South African Perspective* (2012) 282.

⁵⁸ Sejersen TB "I vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century" *International Migration Review* Vol.42 No.3 (2008) 526.

⁵⁹ Sales *op. cit.* 137

⁶⁰ Hoffman *op. cit.* 52.

⁶¹ Cole *op. cit.* 9.

⁶² Morse *op. cit.* 6.

⁶³ Cook-Martin *op. cit.* 6.

⁶⁴ Van Gunsteren H, 'Four Conceptions of Citizenship' in Van Steenberg B ed, *The Condition of Citizenship* (1994) 38.

⁶⁵ Köchler H "The Concept of Nation and the Question of Nationalism" in Dunne M and Bonazzi T, eds *Citizenship and Rights in Multicultural Societies* (1995) 44.

misleading sense of unity being created. A case in point might be the divided loyalty or allegiance that a person who belongs to a certain tribe, but whose tribal lands have been divided by artificial national borders and whose country of “forced”⁶⁶ residence is now at war with the other country where the “rest” of his tribe resides, experiences.

Dual status, whether it be dual-citizenship or dual-nationality, denotes that individuals combine membership in and of two nation-states. Such a dual-status usually arises whenever a person is born within the territory of a country where the law of territoriality (*jus soli*) holds, but whose parents, or only one parent, are nationals of a country that observes the blood principle (*jus sanguinis*).⁶⁷ Such an individual would thus theoretically be able to be a national of his/her country of birth as well as of his/her country of decent. Spiro advances that with the increase in international migration, “many states broadened birth right citizenship to include not only those born within the nation’s borders but also those born in other countries to citizen parents.”⁶⁸ “Dual citizenship challenges one of the most stable and long lasting assumptions of the modern era, namely that the nation-state constitutes the highest institution and largest group of people to which an individual can affirm allegiance.”⁶⁹ According to Sejersen “dual citizenship does not fit a neat absolute definition of a state as a closed territory with a defined homogenous citizenry”.⁷⁰ It is commonly accepted that national identity is linked to language, culture and ethnicity and according to Hoffman, there is thus no need to assume that such national identity has to be singular rather than plural in form.⁷¹

⁶⁶ “Forced residence” in the sense that tribal members living in different nation states are not able to freely move within their tribal lands where a national border may run through such land. Citizenship practices often “complicate” the free movement of such tribal members. An example may be found with the Owambo people whose tribal lands stretch from the North of Namibia across the Kunene River to the South of Angola.

⁶⁷ Faist T and Gerdes J, *Dual Citizenship in an Age of Mobility* (2008) 4.

⁶⁸ Spiro JP “Dual Nationality and the Meaning of Citizenship” *Emory Law Journal* Vol. 46 No. 4 (Fall 1997) 1418.

⁶⁹ Howard MM “Variation in dual citizenship policies in the countries of the EU” *International Migration Review* 39.3 (Fall 2005):697(24).

⁷⁰ Sejersen *op. cit.* 524.

⁷¹ Hoffman *op. cit.* 56.

It is trite that person A being a member of State X may request diplomatic protection from State X in an instance where State Y violates person A's rights. In terms of international law, State X's rights to protect person A stems from the link of nationality that should exist between person A and State X.⁷² According to Leigh "the theory of diplomatic protection has its origin in the willingness of States to concede to each other jurisdiction over all persons and property within their respective territorial jurisdiction, while at the same time reserving the right to afford their nationals protection in the event of injury to person or property resulting from an act undertaken by another State in breach of international law."⁷³ With regard to diplomatic protection, it is often argued that when a person of dual status requests diplomatic protection, such dual status may lead to difficulties.

In Southern Africa the relationship between the state and its subjects has essentially been one that was, and largely still is, formed around "ethnic" nationalities and as a result, the Western idea or concept of nationalism and the nation-state has not transferred easily to the African continent.⁷⁴ In contrast to the developed states, the growing obsession in Africa with regard to belonging, nationality and citizenship has been a major factor in Africa's various liberation struggles.⁷⁵ Iroanya⁷⁶ postulates that due to the existence of diverse ethno-cultural groups within the same state, various crises exist in most African states ensuing from the political competition for resource control. Dorman *et al*/ maintain that the other debate in Africa concerns ethnicity and whether ethnic groups are rooted in older identities, or whether they were colonial constructions as it has been suggested that most Africans move in and out of multiple identities.⁷⁷

⁷² Leigh GIF "Nationality and Diplomatic Protection" *The International and Comparative Law Quarterly* Vol. 20 No. 3 (July 1971) 453.

⁷³ *Id.* at 455.

⁷⁴ Heater D *Citizenship: The civic ideal in world history, politics and education.* (1990) 131.

⁷⁵ Nyamnjoh FB "Local Attitudes towards Citizenship and Foreigners in Botswana" *Journal of Southern African Studies* Vol.28 No.4 (Dec 2002) 755.

⁷⁶ Iroanya RO *Citizenship-Indigeneship Contradictions and Resource Control in Africa: A case for the African tradition of Ubuntu* Paper presented at 7th Annual Africa Day Conference, UNISA (June 2005) 1.

⁷⁷ Dorman S, Hammett D and Nugent P *Making Nations, Creating Strangers – States and Citizenship in Africa* (2007) 6.

As may be gleaned from the above, the issues pertaining to nationality, citizenship and dual or multiple statuses can be confusing and daunting. This dissertation endeavours to clarify and to possibly simplify the various issues relating to nationality, citizenship and dual or multiple statuses. An attempt is made to trace the origins of the concepts of nationality and citizenship, to identify the origin of dual or multiple statuses and to determine the influence that the various international charters and other international instruments have or may have on nationality and citizenship. A closer look is taken at how Africa and in particular Namibia views and deals with nationality and citizenship.

It is submitted that the conclusion reached will clearly define whether an individual can be a dual national and/or a dual citizen. It is further envisioned that the global view that dual status is becoming more prevalent, and that such dual status should be encouraged and welcomed in African states, will be supported, as it may bring with it more positive economic results than the negative features that are continually postulated.

CHAPTER TWO

The origin of citizenship and nationality

"He, and only he, is a citizen who enjoys a due share
in the government of that community of which he is a member."

Aristotle

In ancient times the terms citizenship and nationality had different meanings even though they are used interchangeably today. Citizenship, throughout history, has often been seen as an ideal status, closely allied with freedom, an important status with legal aspects including rights, and it has sometimes been seen as a bundle of rights, or a right to have rights⁷⁸. The ancient Greeks and Romans, and later the Europeans, give us valuable insight into and provide a foundation for what we today term nationality/citizenship.

The ancient Greeks

Citizenship was a fundamental concept in the history of ancient Greece and classical Athens. As the alleged ancestor of modern democracies and of western political theory, classical **Athens** played a key role in the historical understanding of political culture.⁷⁹ Among the ancients, birth itself never fixed the political station conferred by privilege to a citizen. Under the laws of the Athenians, the child followed the nationality of its parents and thus the blood tie (*jus sanguinis*) determined nationality.⁸⁰

⁷⁸ Leary V "Citizenship, Human rights, and Diversity" in Alan C. Cairns, John C. Courtney, Peter MacKinnon, Hans J. Michelmann, David E. Smith. *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives*. (2000) 247.

⁷⁹ Lambert S *Citizenship in classical Athens* Departement Geschiedenis en Kunstgeschiedenis (UU) 2004 <http://www.narcis.info/research> [accessed: 12 September 2014].

⁸⁰ Morse A *Treatise op. cit.* at 12. It is not the spot of earth upon which the child is born that connects him/her to the national society, but rather the relationship of the child's parents to that society.

Athenian men were essentially divided into three groups namely the citizens, the *metoici* (resident aliens) and slaves. An Athenian citizen was - a male⁸¹ older than 18 years and whose forbearers had been Athenians for three generations. Such a citizen could be elected to all offices of the state and enjoyed all the rights of free men. Athenian citizens were all extremely proud of their origin, irrespective of whether they were wealthy, poor or destitute.⁸² All inhabitants paid the same taxes and served in the army in accordance with their income; as knights with their own horse and a suitable retinue, or in the navy as captains of triremes, which they themselves took care to man. Participating in the administration of the *polis* was taken for granted from the citizen who voted, judged and took care to be informed about what was happening in the city.⁸³

Athenian citizenship was thus essentially based on the obligations of citizens towards the community, rather than on rights given to its members. The people had a strong affinity with the *polis* as their personal destiny, as the destinies of the entire community were strongly linked.⁸⁴ Important political and judicial offices were rotated to widen participation and to prevent corruption.⁸⁵

In addition to religious privileges and duties, the concept of citizenship for the ancient **Greeks** revolved around political and economic rights at local level. An important aspect of *polis* citizenship was exclusivity, as with *polis* was meant both the political assembly as well as the entire society.⁸⁶ Inequality of status was widely accepted, as citizens had a higher status than non-citizens, such as women, slaves or barbarians.⁸⁷ Citizenship was not seen as a separate activity from the private life of the individual person - there was no distinction between public and private life.⁸⁸

⁸¹ In ancient times women were not allowed to play an active role in society. Society was ruled by men alone and women were simply ignored.

⁸² Hall JV *Ancient Greece Citizens* (2008) <http://EzineArticles.com/948123> [accessed: 30 September 2013].

⁸³ *Ibid.*

⁸⁴ Hosking G *Epochs of European Civilization: Antiquity to Renaissance*. (2005) 1 - 2.

⁸⁵ *Ibid.*

⁸⁶ Pocock JGA *The Citizenship Debates* (1998) 32.

⁸⁷ *Id.* at 33.

⁸⁸ *Ibid.*

The obligations of citizenship were thus deeply connected into one's everyday life in the *polis*. Matheson writes that in the ancient Greek world, the city was the unit of government and its area was limited by the fact that all citizens were to take part immediately and in person in the duties of government.⁸⁹

"Barbarians live in tribes and empires; Greeks live in city-states", Heater⁹⁰ quotes the common belief held with pride by the ancient Greeks and the unique sophistication of Greek civilisation was testimony to this. The Greek city-states were also the first instances in which judicial functions were separated from legislative functions in the law courts.⁹¹ Selected citizens served as jurors and they were often paid a modest sum for their service.⁹² For the Greeks, citizenship thus related to the rights of a person within a community as well as the relationship amongst the citizens as members of a *polis* or community.⁹³

The Ancient Romans

In the early history of Rome, only those who were Romans by birth could boast of the proud title of "citizen"⁹⁴. A select few *peregrine*,⁹⁵ who were domiciled at Rome and who had been naturalised, could also lay claim to the title of "citizen". The right to Roman citizenship was firstly acquired by birth to parents who were Roman citizens, secondly through liberation under certain circumstances, and thirdly by a special concession granted by the people and the senate.⁹⁶

In the Roman Empire, *polis* citizenship expanded from small scale communities to the entire empire.⁹⁷ Although roman citizenship was a prized relationship which was not

⁸⁹ Matheson *Citizenship op. cit.* at 23.

⁹⁰ Heater D *World Citizenship and Government* (1996) 1.

⁹¹ Hosking *op. cit.*

⁹² *Ibid.*

⁹³ Boll *Multiple Nationality op. cit.* at 61.

⁹⁴ Morse *A Treatise op. cit.* at 20.

⁹⁵ A *peregrini* is not a citizen, but a free person. Free men were divided into *peregrini*, *Latini* and *Italici*.

⁹⁶ Morse *supra* at 29.

⁹⁷ Milne, B *The History and Theory of Children's Citizenship in Contemporary Society* (2013) 28.

widely extended, the Romans, however, realised that granting citizenship to people from all over the empire legitimised Roman rule over conquered areas.⁹⁸ In the course of time, citizenship was no longer a status of political agency, but had been reduced to a judicial safeguard and the expression of rule and law.⁹⁹

Roman citizenship was, however, more complex and legalistic than Greek citizenship. Full citizenship entailed six privileges of which four were public rights and two private rights.¹⁰⁰ The public rights related to service in the army, voting in the assembly, eligibility to public office and the legal right of action and appeal, while the private rights pertained to intermarriage and trade with other Roman citizens.¹⁰¹ Citizenship opened the possibilities for careers for which non-citizens were not eligible. Roman citizenship further guaranteed complete equality before the law as neither race, religion nor riches were determinants for acceptance.¹⁰² Roman citizenship related to pride, patriotism, duty and devotion to the law.

The significance of Roman citizenship is, however, best understood in terms of Roman Law. Roman Private Law was personal and controlled, and was applied to all Roman citizens wherever they were. If one was a Roman citizen, then Roman law usually applied.¹⁰³ A Roman who had "lost" his citizenship as a result of having been captured in war by the enemy and so becoming a slave to his captors, could resume his Roman citizenship upon his return to Roman lands provided he never returned to the enemy.¹⁰⁴

A Roman citizen, under Roman Law, was entitled to all rights of a citizen, whereas a *peregrinus* (a foreigner who cherished domicile elsewhere) was debarred from

⁹⁸ <http://citizenship.askdefinebeta.com> [accessed on 2 May 2014].

⁹⁹ Refers to the Latin phrase *civis romanus sum* - *I am a Roman citizen* which implied, in a wide sense, all the rights and duties associated with the status of Roman citizenship. In Acts 22 Paul the Apostle, when imprisoned and on trial, claimed his right as a Roman citizen to be tried before the Caesar, and the judicial process had to be suspended until he was brought to Rome.

¹⁰⁰ Heater *Citizenship op. cit.* at 16.

¹⁰¹ *Ibid.*

¹⁰² *Id.* at 17.

¹⁰³ An example of this may be found in the Bible in Acts 22: 25-29, where the story is told of Paul who was about to be flogged by Roman soldiers.

¹⁰⁴ Boll *Multiple Nationality op. cit.* at 63.

certain legal rights.¹⁰⁵ A *peregrine* could, for example, not make a testament as this “right” was reserved for Roman citizens only. *Peregrini* were, however, able to conclude legal transactions with Roman citizens, but only in the form as required by the Roman *ius civile* and provided they were given the right to do so.¹⁰⁶

Under ancient Roman civil law, *domicili* gave to the person the character of inhabitant of the city where he was established. It did not confer the character of citizen.¹⁰⁷ The growth and organisation of the growing Empire brought into prominence the double aspect of citizenship being at once local and imperial.¹⁰⁸ Resultantly in the fourth century, the Romans introduced the concept of dual “Latin” and “Roman” citizenship, thus enabling a man to be simultaneously a citizen of his own city as well as of Rome.¹⁰⁹ According to Morse, there were three ways in which the ancient Latins could become Roman citizens, namely (1) the Latin left his native city to come to Rome to establish himself and thus became entitled to demand the title of Roman citizen; (2) when a Latin had fulfilled certain honourable offices or stations, in either the civil or military services of his (new) city; or (3) a law of *sensilia Glauca* offered citizenship to Latins who should successfully maintain a charge of embezzlement against a Roman magistrate.¹¹⁰ Heater suggests that the Romans annexed the loyalties as well as the lands of their defeated enemies in “exchange” for Roman citizenship.¹¹¹ Morse further advances that, later during the classical period, a man might be a citizen of several states – one by origin, one by adoption and one by election.¹¹²

¹⁰⁵ Cilliers AC, Loots C and Nel HC *Herbstein and Winsen The Civil Practice of the Supreme Court of South Africa* (2009) 391.

¹⁰⁶ Schiemann G “Peregrinus” in: *Brill’s New Pauly* <http://www.brillonline.nl.oasis.unisa.ac.za> [accessed: 29 July 2011.] This position, however, changed through the creation of a specific *praetor peregrinus*.

¹⁰⁷ Apathy P (Linz) “Domicilium” in *Brill’s New Pauly*. Later under Roman-Dutch law, the Dutch jurists determined domicile to mean actual or permanent residence.

¹⁰⁸ Matheson *Citizenship op. cit.* at 27.

¹⁰⁹ Heater *Citizenship op. cit.* at 16.

¹¹⁰ Morse *A Treatise op. cit.* at 22.

¹¹¹ Heater *supra* at 16.

¹¹² Morse *supra* at 22.

While the Western Roman Empire fell in 476 AD, the Eastern Empire headquartered at Constantinople endured. It has been suggested that as a result of historical circumstances, Western Europe evolved with two competing sources of authority — religious and secular — and that the ensuing separation of church and state was a "major step" in bringing forth the modern sense of citizenship.¹¹³

Philosophers and political thinkers

Aristotle recognised that citizenship was a relative term depending upon the features of any given constitution.¹¹⁴ The Greek concept of citizenship resulted from the bond forged by the intimacy of participation in public affairs. Citizenship was neither a right to be claimed, nor a status to be conferred on anybody outside the established ranks of class, no matter how worthy an outsider might have been.¹¹⁵ Citizenship was seen as an inherited privilege, the responsibility of which was to be shouldered with pride.¹¹⁶ According to Aristotle, a good citizen should possess the knowledge and capacity required to rule and to be ruled.¹¹⁷

Aristotle's conception of citizenship was that it was a legally guaranteed role in creating and running government.¹¹⁸ Aristotle's sense of citizenship depended on a "rigorous separation of public from private, of *polis* from *oikos*, of persons and actions from things" which allowed people to interact politically with equals.¹¹⁹ For Aristotle citizenship was possible generally in a small city-state since it required direct participation in public affairs¹²⁰ with people knowing "one another's characters".¹²¹

¹¹³ Gross F *Citizenship and ethnicity: the growth and development of a democratic multiethnic institution* (1999) xi, xii, xiii & 4.

¹¹⁴ Heater *Citizenship op. cit.* at 3.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Ibid.*

¹¹⁷ *Id.* at 3.

¹¹⁸ Taylor D, Turner B & Hamilton P (eds) *Citizenship: Critical Concepts* (1994)151.

¹¹⁹ Pocock *op. cit.* 32.

¹²⁰ Heater D *A Brief History of Citizenship* (2004) 18.

¹²¹ *Ibid.*

Plato's idealised community was one of citizens who kept common meals to build common bonds.¹²² A key part of citizenship was obeying the law and being "deferent to the social and political system" and having internal self-control.¹²³

Bartolus, a distinguished professor of Roman Law at Perugia who lived in the first half of the 14th century, concluded that Roman traditions justified the belief that the people as a whole should hold ultimate sovereign power.¹²⁴ He accepted the need for elected representatives and felt it necessary to define a person's eligibility for this status. Bartolus also distinguished between citizenship acquired by birth and that acquired by conferment.¹²⁵ The Roman statesman **Cicero**, while encouraging political participation, saw that too much civic activism could have consequences that were possibly dangerous and disruptive.¹²⁶

Medieval Europe

During the Renaissance and growth of Europe, the transition was from people being subjects of a monarch or lord to being citizens of a city and later to a nation.¹²⁷ Having its own law, courts and independent administration was a distinguishing characteristic of a city.¹²⁸ Weber states that being a citizen often meant being subject to the city's law in addition to assisting with the choosing of officials. Cities were defensive entities, and its citizens were persons who were "economically competent to bear arms, to equip and train themselves."¹²⁹ As new political patterns and relationships evolved during the Middle Ages, the characteristic feature of these relationships was that of multi-faceted loyalty,¹³⁰ where both the church and the prince claimed allegiance. Geographically and culturally coherent nation states in

¹²² Heater *A Brief History op. cit.* at 14-15.

¹²³ *Ibid.*

¹²⁴ Heater *Citizenship op. cit.* at 23.

¹²⁵ *Ibid.*

¹²⁶ Burchell D "Ancient Citizenship and its Inheritors" in Isin, Engin F, Bryan S Turner (co-eds) *Handbook of Citizenship Studies* (2002) 89.

¹²⁷ Taylor *op. cit.* 161.

¹²⁸ Weber M *Citizenship in Ancient and Medieval Cities* (1998) 44.

¹²⁹ *Ibid.*

¹³⁰ Heater *Citizenship supra* at 20.

some recognisable modern form were already beginning to emerge in various parts of Europe. The inhabitants of these lands came to identify themselves primarily as for example Englishmen, Irishmen, Frenchmen etc., resulting in feelings of patriotism and nationalism beginning to emerge.¹³¹ The medieval Frenchman was *subject* to the monarch and not considered a *citizen* of France. The term citizen was confined to the relationship of freely exercised rights and duties to a city or town and was founded on the twin principles of freedom and fraternity.¹³²

According to Heater, qualification for citizenship varied greatly from city to city and over time. It was common place to group citizens into major and minor classes, as for example property ownership signified a greater intent of commitment to the community than just being an ordinary city dweller.¹³³ A high proportion of the citizenry also became engaged in political and administrative activities of various kinds.¹³⁴ Sejersen expresses that according to Marshall "the development of citizenship has been in constant progress for more than 200 years to encompass a wider array of civil, social and political rights in order to limit class conflict."¹³⁵

Jus soli versus jus sanguinis

Of the two principles of nationality, *jus sanguinis* (right of blood) is probably the older, submits Flournoy,¹³⁶ as it was the sole means of determining nationality considering that an individual belonged to a family, a tribe or a people and not to a territory. Although nations usually came to occupy well defined territories upon attaining civilisation, they continued to be regarded as a collection of tribes, clans and families.¹³⁷ During the 18th century *jus soli* was the dominant criterion in Europe, following feudal traditions which linked the person to the lord who held the

¹³¹ Heater *Citizenship op. cit.* at 20.

¹³² *Id.* at 21.

¹³³ *Id.* at 22.

¹³⁴ *Ibid.*

¹³⁵ Sejersen "I vow" *op. cit.* at 525 with reference to Marshall TH, *Citizenship and Social Class – and Other Essays* Cambridge University Press 1950.

¹³⁶ Flournoy RW (Jnr) "Dual Nationality and Election" *The Yale Law Journal*/Vol. 30 No.6 (1921) 546.

¹³⁷ *Ibid.*

land were the person was born.¹³⁸ The French Revolution and the decree of the 1804 Civil Code reintroduced the Roman custom of *jus sanguinis*, which principle was adopted throughout Europe in the 19th century and later became transplanted to the colonies.¹³⁹

Safran¹⁴⁰ expressed that when states were defined in terms of the sovereignty of feudal lords or monarchs, "citizenship" applied according to the principle of *jus soli*, whilst with the creation of "nation-states" and a state being based on the sovereignty of the national community, *jus sanguinis* became the common operative principle.

Jus sanguinis inheritance of the father's social and/or national status was the principle that applied by natural law to the nobility and the common man.¹⁴¹ It may be averred that nationality in terms of *jus sanguinis* is therefore automatically imposed on a person by operation of the law at the time of birth.¹⁴² Most European countries follow the *jus sanguinis* principle of nationality conferred by birth of a parent or both parents, or ancestor(s) who is already a citizen of a particular country.¹⁴³ This principle may hold true for an infinite number of descendants, even if such descendant is born outside of the country of nationality. The infinite acquisition of nationality through *jus sanguinis* has, however, been limited by most states to the first or second generation born outside of the country of nationality.¹⁴⁴

An early form of partial *jus soli* dates from Cleisthenes' reform of ancient Athenian law.¹⁴⁵ It developed further in the Roman world, where citizenship was extended to

¹³⁸ Bertocchi G *The Evolution of Citizenship: Economic and Institutional Determinants* IZA (2006) 5.

¹³⁹ *Id.* at 6.

¹⁴⁰ Safran W "Citizenship and Nationality in Democratic Systems" in *International Political Science Review* (1997) 314.

¹⁴¹ <http://h2ooflife.wordpress.com/jus-soli-origins> [accessed on 22 January 2014].

¹⁴² Azizi S, Hajiazizi B & Hassankhani R "Absolute and conditional application of Jus Sanguinis" *International Law Research* Vol 1. No. 1 (2012) 130.

¹⁴³ Aspan, M Esq. Aspan Law Office, Immigration Attorney. www.aspanlaw.com/law-240.Birthright-Citizenship [accessed on 22 January 2014].

¹⁴⁴ Azizi *et al supra* at 131. The acquisition of such nationality is often subject to both parents or at least one parent being a national of the country of nationality. This holds true for countries such as the United Kingdom, Germany and the Netherlands to mention a few.

¹⁴⁵ <http://www.britannica.com> Cleisthenes of Athens [Accessed 02 May 2014].

all free inhabitants of the Roman Empire especially with the Edict of Caracalla.¹⁴⁶ It was much later with the independence of the English colonies in America and the French Revolution that the foundations for *jus soli* were laid.

In times past, a "natural born subject" was deemed a natural subject of the King if born within his domain (*jus soli*) and not born to foreign representatives or to the women of foreign invaders.¹⁴⁷ Scott states that the principle of birth within a country conferring nationality is a natural principle and applies alike to all persons born in the country, without reference to the nationality of their parents.¹⁴⁸ (Nation)States became feudal since a feud or estate was given for life and later made inheritable.¹⁴⁹ The tenant of the feudal estate typically swore allegiance to and tendered military service in exchange for protection promised by the feudal superior. This relationship had nothing to do with common blood or descent from common ancestors.¹⁵⁰

In the colonies, the colonists were viewed by the British aristocracy as property of the realm by way of *jus soli*, since they were born on the property of the monarch.¹⁵¹ The children of peasants/bonded servants/serfs were also considered property of the soil on which they were born since they inherited the bond of their father to the land that they rented from the Lord of the Manor estate.¹⁵² *Jus soli* was not a principle that applied in common law to the freeman class, but only to the indebted class and its children.¹⁵³ This principle also applied to the children of immigrants to England who were deemed to be *jus soli* subjects of the Kingdom as they had been born on the King's land - their father's foreign subjection was inapplicable to them.¹⁵⁴ This in essence implied that the child of an immigrant, born on the King's land obtained

¹⁴⁶ Kemp A *The Rise of Western Civilization* (2009) 138 [<http://books.google.com.na>] [accessed on 06 May 2014].

¹⁴⁷ <http://h2ooflife.wordpress.com/jus-soli-origins> [accessed on 22 January 2014].

¹⁴⁸ Scott, JB "Nationality: Jus Soli or Jus Sanguinis" *The American Journal of International Law* Vol.24 No.1 (1930) 59.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Id.* at 60.

¹⁵¹ <http://h2ooflife.wordpress.com/jus-soli-origins/> [accessed on 22 January 2014].

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

English nationality irrespective of the fact that he/she could (also) have obtained the foreign nationality of their father through *jus sanguinis*.

Aspan postulates that *jus soli*, commonly known as "birth right nationality", is mainly applied in developed countries seeking to increase their citizenry since the nationality of a person is determined by the place of birth.¹⁵⁵ Bertocchi states that *jus soli* is generally the norm for common law countries whereas *jus sanguinis* is generally the law in civil law countries.¹⁵⁶

Kerber is of the opinion that the idea of *jus soli* is treated more liberally by the USA, as children born on US soil to foreigners become citizens by birth,¹⁵⁷ whereas for example children born on French soil to foreigners may become citizens if they reach the age of 18, have lived in France for five years and have committed no crime. Birth on German soil and prolonged residence, by contrast, has no bearing on German citizenship.¹⁵⁸

Citizenship

In the emerging nation-states, the territory of the nation was its land and citizenship was an idealised concept.¹⁵⁹ Increasingly, citizenship related not to a person such as a lord or count, but it rather related a person to the state on the basis of more abstract terms such as rights and duties.¹⁶⁰ In the Greek and Roman world the rights of citizenship reflected the fact that political interaction was seen as taking place within communities as opposed to between communities.¹⁶¹ Hereditary nationality eventually gave way to an acquired nationalism.¹⁶² In contrast, the

¹⁵⁵ Aspan *op. cit.*

¹⁵⁶ Bertocchi *op. cit.* 6.

¹⁵⁷ Kerber LK "The Meanings of Citizenship" *Journal of American History* Vol. 84 No. 3 (1997) 834.

¹⁵⁸ *Ibid.* See Article 4 of the German Nationality Act of 22 July 1913 (Reich Law Gazette I p. 583 – Federal Law Gazette III 102-1), last amended by the Act of 23 July 1999 (Federal Law Gazette I pp. 1618 ff.)

¹⁵⁹ Heater *A Brief History op. cit.* at 159.

¹⁶⁰ *Ibid.*

¹⁶¹ Boll *Multiple Nationality op. cit.* at 65.

¹⁶² Habermas *Citizenship op. cit.* at 23.

modern concept of nationality has feudal European roots and is essentially related to power over territory as well as natural persons.¹⁶³

Habermas maintains that citizenship was never conceptually tied to nationality, but that the concept of citizenship developed out of Rousseau's notion of self-determination.¹⁶⁴ Everyone should be in a position to expect that all will receive equal protection and respect as an individual, as a member of an ethnic or cultural group, as a citizen. One may thus deduce that citizenship contains two essential aspects, namely a functional and non-functional aspect.¹⁶⁵ Flemming proposes that the functional aspect refers to the legal relationship that exists between the individual and the state, whereas the non-functional aspect refers to the individual's sense of cultural identity and community – his "nationality". It is suggested that as the importance of functional rights reserved for citizens increases, so will the need for aliens (foreigners) to pursue citizenship also increase.¹⁶⁶ This, according to - Flemming,¹⁶⁷ is, however, not resultant out of a sense of cultural affinity, but rather out of a need to secure and ensure a material future.

Citizenship in a liberal state essentially embodies two types of relationship, one being vertical and the other horizontal. The vertical relationship concerns the citizen and the state, where the state provides protection to the citizen and the citizen owes the most onerous duty to the state being military service.¹⁶⁸ The horizontal plane determines the relationship between citizens where a sense of community, sharing loyalty, history and national character are developed. Kerber states that in liberal tradition, rights are implicitly paired with obligations and the more citizenship is experienced as an economic entitlement or a passive obedience to the law rather than an active engagement in civic life, the harder it will become to distinguish

¹⁶³ Boll *op. cit.* 61.

¹⁶⁴ Habermas *op. cit.* 24.

¹⁶⁵ Fleming MC "The functionality of Citizenship" *Harvard Law Review* Vol. 110, No.8 (1997) 1814 <http://www.jstor.org/stable/1342045> [accessed: 20 May 2011].

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Id.* at 1815.

between citizens and non-citizens.¹⁶⁹ Flemming states that the Treaty of Maastricht¹⁷⁰ refers to the vertical relationship as “politico-legal” being called citizenship, whereas the horizontal relationship is referred to as “historic-biological” referring to the sense of belonging to a nation, also called nationality.¹⁷¹ Article 8(1) of the Treaty states that every person holding the nationality of a Member State shall be a citizen of the (European) Union.

It has been suggested that notions of citizenship rights emerged out of this spirit of each person identifying strongly with the nation of their birth.¹⁷² Heater argues that a modern type of citizenship is one which lets people participate in a number of different ways,¹⁷³ often understood to be a legal status. Citizenship is not a “be-all end-all” relation, but only one of many types of relationships which a person might have.¹⁷⁴ The idea that participating in law-making is an essential aspect of citizenship continues to be expressed by different thinkers. When there are many different ethnic and religious groups within a nation, citizenship may be the only real bond which unites everybody as equals without discrimination — it is a “broad bond” as one writer described it.¹⁷⁵ Citizenship may also be an ideal to be sought after and practiced in different sites or domains according to Stokes.¹⁷⁶

Klaaren supports the notion that four broad theories of citizenship may be identified, namely cultural citizenship, membership citizenship, lawful status citizenship and post-national citizenship. Cultural citizenship identifies a particular culture, whereas membership citizenship draws a sharp distinction between the status of citizens and non-citizens.¹⁷⁷ Lawful status citizenship extends citizenship through law – in

¹⁶⁹ Kerber *op.cit.* 834 - 835.

¹⁷⁰ Maastricht Treaty Article 8(1) February 1992 <http://www.eurotreaties.com/maastichtext.html>

¹⁷¹ Fleming *op. cit.* 1818.

¹⁷² Taylor *op. cit.* 137.

¹⁷³ Heater *A Brief History op. cit.* at 157.

¹⁷⁴ *Ibid.*

¹⁷⁵ Gross *op.cit.* xi - xii.

¹⁷⁶ Stokes, G “Citizenship” in Galligan, B and Roberts, W *The Oxford Companion to Australian Politics* (2008) Oxford Reference Online [<http://www.oxfordreference.com/views/>] [accessed on 9 July 2013]

¹⁷⁷ Klaaren, J “Citizenship” in Woolman, S and Bishop, M *Constitutional Law of South Africa* 2nd edition (2002) 60-4.

essence viewing all persons who are lawfully and permanently residing within the country to be presumptively full members of the national community. Post-national citizenship views all persons as entitled to human rights on account of their identification as human beings.¹⁷⁸

Alfonsi postulates that citizenship developed not just as a response to popular pressure, but also as a consequence of regulation by the state of the standards of living of the people and of the expectations that emerged in time.¹⁷⁹ He further maintains that "citizenship today means connection with one another, a coming together, a search for collective points of reference, to protect individual rights."¹⁸⁰ Turner argues that citizenship is a juridical status that confers a specific socio-political identity and therefore plays an important part in determining the redistribution of economic resources within society.¹⁸¹

Jensen¹⁸² hypothesises that modern citizenship was forged and exists in the Westphalian international system,¹⁸³ which is composed of modern states with identifiable borders. Hassim opines that while citizenship creates a formal framework for rights and obligations, it can also theoretically be understood to confer equality in the public sphere, but in practice may be used to create insiders and outsiders in a particular political system.¹⁸⁴ By setting the limitations of citizenship,¹⁸⁵ the state establishes the conditions for full membership in the community, thus effectively limiting the rights and access of foreigners.¹⁸⁶ Although there are universalist tendencies in citizenship laws, the application thereof is not uniform as permanent

¹⁷⁸ *Ibid.*

¹⁷⁹ Alfonsi *The Emerging op. cit.* at 56.

¹⁸⁰ *Id.* at 58.

¹⁸¹ Turner *Citizenship op. cit.* at 229.

¹⁸² Jensen J "Introduction: Thinking about Citizenship and Law in an era of change." in *Law and Citizenship* (2006) 4.

¹⁸³ It is postulated by Henry Kissinger that the peace of Westphalia laid the foundations for the "principles of a system of 'international relations'" as we know them to be in existence today. Kissinger H *World Order* (2014) 26 & 27.

¹⁸⁴ Hassim S "From Presence to Power: Women's Citizenship in a New Democracy" *Agenda* No.40 *Citizenship* (1999) 7.

¹⁸⁵ Only an individual can have citizenship – a minor or convicted criminal have defined nationality without being citizens in any effective sense of the term. Heater *Citizenship op. cit.* at 249.

¹⁸⁶ *Ibid.*

residents, for example, do not have the right to vote in local and national elections, but they do have the same economic rights as other citizens.¹⁸⁷ Hampshire argues that admission to citizenship should be straight forward, “since (national) laws affect non-citizen residents as much as citizens and there are no legitimate grounds on which the former can be excluded from democratic decision making, while the latter are included.”¹⁸⁸

Nationality

From the above one may conclude that the early Roman idea of nationality involved belonging to a group of persons, the group or nation being determined either by lineage or geography.¹⁸⁹ Nationality was not specifically linked to a political or legal status.¹⁹⁰ Nationality denotes informal membership in or identification with a particular nation (which is *not* a synonym for country or state).¹⁹¹

Safran suggests that in the *ancien régime* of France prior to the revolution, membership in a nation was defined in terms of a sharing of religion, social relationships, duties, rights and cultural patterns.¹⁹² The leaders of the French Revolution, however, introduced a new element namely that “the nation consisted of all inhabitants of a territory who obeyed the law, paid taxes and performed various other duties required of all citizens.”¹⁹³ The nation was thus defined in purely political terms and since these elements were protected and promoted by the state,

¹⁸⁷ Stokes *op. cit.* In the South African case of Labri-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another 1998 (1)SA 745 (CC), 1997 (12) BCLR 1655 (CC) the court considered the claims of a number of teachers to be protected from employment discrimination. The court protected the jobs of these permanent residents who were largely of African origin, articulating a type of “lawful status” citizenship.

¹⁸⁸ Hampshire J “Becoming Citizens: Naturalization in the Liberal State” in Calder G, Cole P and Seglow J *Citizenship Acquisition and National Belonging* (2010) 80.

¹⁸⁹ Boll *Multiple Nationality op. cit.* at 65.

¹⁹⁰ *Ibid.*

¹⁹¹ Vonk O *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* (2012) 19.

¹⁹² Safran *op. cit.* 315.

¹⁹³ *Ibid.*

it came to define the nation resulting therein that the concept of citizenship and nationality became fused.¹⁹⁴

Miller¹⁹⁵ postulates that the modern idea of nationality is distinguishable from older beliefs due to its emphasis on collective self-determination. If we say that a set of people compose a nation we are saying something about how they conceive of themselves. "National identities can remain unarticulated and yet still exercise a pervasive influence on people's behaviour."¹⁹⁶

Macklin opines that nationality, or legal citizenship, is a status and not an on-going performance.¹⁹⁷ Nationality does not impose a juridical performance requirement but simply refers to the legal status of membership held by an individual in relation to a territorial nation state.¹⁹⁸

Hoffman postulates that "historically a national identity could not become explicit without the divisive institutions of the state."¹⁹⁹ As state sovereignty developed into a power that is impersonal and abstract, the territorial "container" of this power assumes an explicit national form, resulting therein that state sovereignty in its modern form allows no competitors.²⁰⁰

Nationality may be acquired either by birth or soil (*jus soli*) or by blood or descent (*jus sanguinis*). It is deemed a universal principle that every person has the right to a nationality, which principle is enshrined in the constitution of most nation-states. Scott claims that there seems to be no single principle which the nations appear to be willing to accept as a test of their laws on the matter of nationality, as some prefer *jus sanguinis*, others *jus soli*, or a combination of both in differing degrees.²⁰¹

¹⁹⁴ *Ibid.*

¹⁹⁵ Miller *On Nationality op. cit.* at 17.

¹⁹⁶ *Id.* at 27.

¹⁹⁷ Macklin A "Exile on Main Street: Popular discourse and Legal Manoeuvres around citizenship" in *Laws and Citizenship* (2006) 23 and 29.

¹⁹⁸ *Ibid.*

¹⁹⁹ Hoffman *State and Nation op. cit.* at 50.

²⁰⁰ *Ibid.*

²⁰¹ Scott *op. cit.* 58.

The acquisition of nationality either through birth or blood would be less complex to determine if states would simply employ either the one or the other principle.

From the foregoing historical perspective, one may conclude that nationality is in essence determined either by birth and/or bloodline. Nationality embodies a cultural heritage and is often described as a spiritual and/or emotional bond to a particular culture, heritage, language and people or tribe. Nationality therefore mainly pertains to ancestral affiliation and is accordingly not influenced by absence from the state. Citizenship, on the other hand and in historical perspective, is mostly determined by valid domicile in and the acceptance of certain civic duties towards a particular state. Citizenship in essence thus refers to a person's political and civic participation in a specific state. Citizenship therefore confers the right to reside, vote and to be politically active in a state and as such is influenced by absence from the state in question.

Presuming and postulating that nationality and citizenship are clearly distinct concepts pertaining to different aspects of a person's allegiances, is it then correct to refer to a person possessing either dual nationality or dual citizenship? The next chapter addresses this question in greater depth to determine how a person's dual or multiple status, if possible, is to be named.

CHAPTER THREE

Nationality and International Law

From the discussion above, it may be seen that citizenship does not automatically reflect nationality. Nationality describes the specific, primary relationship between the state and an individual, giving rise to particular rights and obligations in relation to that individual on the plane of the law of nations.²⁰² It may thus be argued that nationality does not give rise to citizenship rights *per se*. The conditions on which citizenship is acquired are essentially regulated by municipal law.²⁰³

Borchard states that the history of the legal relation between the state and individuals, its own citizens and aliens, is largely a history of transition from the system of personal law(s) to the territoriality of law. In ancient Rome, only Roman law was universal and its enjoyment was limited to Roman citizens only.²⁰⁴ On the other hand, the Germanic peoples knew no such system of personal laws as it was their universal custom that the law of the conquering tribe replaced that of the conquered.²⁰⁵ Aliens had no rights and were therefore under the protection of and governed by the law of their protector. In the later Middle Ages and with the development of agriculture came greater permanency of habitation on the part of the Germanic nations.²⁰⁶

When considering that, under Roman law, a Roman citizen was entitled to all rights of a citizen, it seems harsh that a *peregrinus* was debarred from certain legal rights. This position, however, changed through the creation of a specific *praetor peregrinus*, essentially a Roman magistrate, who was mainly responsible for handling legal disputes among *peregrini* or between a Roman and a *peregrinus*.²⁰⁷ The

²⁰² Boll *Multiple Nationality* 71.

²⁰³ *Id.* at 75.

²⁰⁴ Borchard *Diplomatic Protection* 4.

²⁰⁵ *Id.* at 5.

²⁰⁶ *Op. cit.* 5.

²⁰⁷ Cilliers *et al Herbstein and Winsen* 391.

peregrine praetor not only settled disputes as between Romans and *peregrines*, but also created general rules in the form of edicts, resulting in the formation of a completely new system of private law that was dubbed *ius gentium* – law “common to all mankind”.²⁰⁸ An *incola*, being a person who is either domiciled or resident in the area of the court’s jurisdiction, on the other hand, essentially possessed the same private rights as a citizen, thus enjoying the same advantages as natural born citizens.²⁰⁹ An *incola* may thus either be a citizen or a domiciled foreigner, whereas a *peregrinus* is neither so domiciled nor resident in the court’s jurisdictional area.²¹⁰

History, however, shows that the lack of loyalty among emigrant colonists was an early indicator of the decay of the quality of civic virtue which had supplied the moral underpinning for a successful *polis*.²¹¹ Individual values were replacing communitarian values and the sense of citizenship was put under strain by ever widening social differences.²¹² Heater is of the opinion that vague ideas of human unity can be traced through many generations of Greek thought and consequently the concepts of world citizenship and the world state were born in the Western world as a result of Greek philosophical speculation.²¹³

Heater advances that although the Christian ambition to become a global unifying force was shattered by the Reformation, a sense of international community could not be entirely dispensed with.²¹⁴ Heater acknowledged that although there is much

²⁰⁸ Trnavci G “The meaning and scope of the Law of Nations in the context of the Alien Tort Claims Act and International Law” in: *The Law of Nations* Vol.26:2 [2005] 199.

²⁰⁹ Cilliers *et al Herbstein and Winsen* at 394. In terms of South African and Namibian law, the terms *incola* and *peregrinus* are of importance with regard to not only jurisdiction, but to other procedural matters as well. *Herbstein and Winsen* at 392, states that the courts have not clearly defined the terms *incola* and *peregrinus*, but some guidance was given in *Magida v Minister of Police* 1987 (1) SA (1) at 8D In terms of modern law the intention to remain permanently or indefinitely in addition to residence constitutes an essential concept of domicile.

²¹⁰ *Id.* at 394. In terms of South African law (and by association also in terms of Namibian law) an *incola* is a person who is either domiciled or resident in the area of the relevant court’s jurisdiction but not in respect of the whole of South Africa. Prior to Union in 1910, a person domiciled or resident in one colony was considered a *peregrinus* in the other three colonies and as such liable to be arrested or to have his property attached to found or confirm jurisdiction

²¹¹ Heater *World Citizenship op. cit.* at 3.

²¹² *Ibid.*

²¹³ *Id.* at 13.

²¹⁴ *Id.* at 85.

debate in literature about the harmonising force of law, there nevertheless remained a powerful desire to codify the rights and duties of states and so to consolidate them as political and legal entities.²¹⁵

Although nations usually came to occupy well defined territories upon attaining civilisations, they continued for a long time to be regarded as a collection of tribes, clans and families rather than as a single people subject to territorial jurisdiction.²¹⁶ Generally, the history of modern international law is said to have started in the seventeenth century, as the ancient Greek city states had already concluded treaties with each other on such matters as, for example, how best to treat prisoners of war.²¹⁷ In the year 1648, the Peace of Westphalia was concluded to mark the end of the Thirty Years' War and also at the same time to confirm an earlier arrangement emanating from the 1555 Peace of Augsburg.²¹⁸ The 30-Years-War was, according to Borchard, an epoch making event in the history of international law from which emerged the principle of territorial independence as opposed to imperialism.²¹⁹

Dugard is of the opinion that the roots of international law are, however, to be found in the ancient histories of the Egyptians, Jews, Greeks and Romans.²²⁰ It is believed that the early writers of international law came from Spain and Italy, but Grotius is nevertheless acknowledged to be the father of international law.²²¹ Trnavci writes that the ancient Roman jurists dealt with two types of law that transcended the law of the Roman empire, namely the law of peoples (*ius gentium*) and natural law (*ius naturale*).²²² The Roman jurist Gaius distinguished *ius gentium* from *ius civile* (for use by Romans only) stating that every community governed by laws and customs uses partly its own law and partly laws common to all mankind.²²³ The law which a

²¹⁵ Heater *World Citizenship op. cit.* at 85.

²¹⁶ Flournoy *Dual Nationality op. cit.* at 546.

²¹⁷ Klabbers J "International Law" (2013) 4.

²¹⁸ *Id.* at 5 The effect would be that Europe would be divided into a number of territorial units and that each of these units could decide which religion to adopt, the result being the creation of sovereign states and therewith the birth of the modern state system.

²¹⁹ Borchard *Diplomatic Protection op. cit.* at 7. Also see Kissinger *World Order op. cit.* at 30.

²²⁰ Dugard *International Law op. cit.* at 7.

²²¹ *Ibid.*

²²² Trnavci *op. cit.* 200.

²²³ *Id.* at 201.

people make for its own government belongs exclusively to that state and is called the civil law (*ius civile*), but the law which natural reason appoints for all mankind is called the law of nations because all nations make use of it.²²⁴

Donner maintains that as the sovereign power of the prince was subject to no law other than the laws of God and nature, which alone were binding on princes, therefore the sovereign State was considered to have a legal personality of its own.²²⁵ It was this artificial person, the sovereign, on whom the rules of the *ius gentium* were binding and who participated in international intercourse.²²⁶ Over time, as the internal sovereignty was transferred from the king to the people, so the international personality of the sovereign ruler was transferred to the sovereign people.²²⁷ Trnavci, however, submits that the Roman notion of *ius gentium* is not identical to the modern meaning of international law.²²⁸ *Ius gentium* was not law regulating relationships among independent states, but rather internal or national Roman law that regulated the relationships among private persons.²²⁹

Donner opines that the doctrine of equality of sovereign States essentially followed on from the theoretical construction of the legal personality of the ruler.²³⁰ The international community was in this way composed of sovereign states, the requirement for statehood being the existence of a sovereign exercising supreme authority internally and representing his subjects externally.²³¹ Regardless of the size of the State, each one is considered to be the equal of the other, resulting therein that the international community of the modern world is based on the territorial sovereignty of States and their equality of rights.²³² According to Klabbers,

²²⁴ Trnavci *op. cit.* 201.

²²⁵ Donner R *The Regulation of Nationality in International Law* (1994) 3.

²²⁶ *Id.* at 3.

²²⁷ *Id.* at 5.

²²⁸ Trnavci *op. cit.* 202.

²²⁹ *Ibid.*

²³⁰ Donner *op. cit.* 4.

²³¹ *Id.* at 5.

²³² *Ibid.*

international law grew out of the interactions of states and the commentaries of learned observers.²³³ Benhabib holds forth that “this emergent body of law is ‘a legal order’ even if it has no specific point of organisation in the form of law-producing institutions.”²³⁴ It is further postulated that the boundaries of global law are not set by national borders but rather by “invisible” professional communities and social networks.²³⁵

As a sovereign State enjoys exclusive sovereign rights within its territory, it follows that other states have a duty not to interfere in its internal affairs. The fundamental rule of the international regime is that states should look after their own and only their own.²³⁶ Every state is bound to respect the independence of every other sovereign state and therefore the courts of one country will not sit in judgment on the acts of the government of another state, when these acts were done within its own territory.²³⁷

According to Dugard, **international law** may be defined as a body of rules and principles which are binding upon states in their relations with one another.²³⁸ At the end of the 19th century, the central topics in international law that emerged included the law of treaties, the law of responsibility and acquisition of territory and dispute settlement.²³⁹ Early international law mainly concerned itself with states only, but since 1949 it has been accepted that international organisations such as the United Nations (UN) and its specialised agencies enjoy international legal personality.²⁴⁰ There is, however, no central body in international law with the power to enact and enforce rules binding upon all states.²⁴¹ The rules of international law are mainly to be found in agreements between states and in international custom, and therefore it

²³³ Klabbers *op. cit.* 5.

²³⁴ Benhabib S “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times” in Faist T and Kivisto P *Dual Citizenship in Global Perspective* 2007 257.

²³⁵ *Ibid.*

²³⁶ Boll *Multiple Nationality op. cit.* at 11.

²³⁷ Donner *op. cit.* 7.

²³⁸ Dugard *op. cit.* 1.

²³⁹ Klabbers *op. cit.* 9.

²⁴⁰ Dugard *International Law op. cit.* at 1.

²⁴¹ *Id.* at 3.

may be stated that international law is essentially a horizontal system in which lawmaker and subject are legal *persona*²⁴² relating to one another on the basis of equality. Although the International Court of Justice (ICJ) at The Hague may be used to settle disputes between all states in the world, international courts, however, have jurisdiction only over those states that have consented to their jurisdiction.²⁴³

From the above it may thus be concluded that the two major sources of international law, custom and treaty, both work on the assumption of a regular, formalised contact between regular, formalised entities such as states.²⁴⁴ The notion is that states act through formally designated organs and representatives, come to some form of agreement and that such agreements should have legal effect.²⁴⁵ Klabbers postulated that traditionally anything states consented to, as law, would become recognised as a source of international law.²⁴⁶

Bisschop holds forth that in international law "nations" are an unknown quantity, being a conception of municipal law and denoting a group of persons who through racial, religious or economic ties are bound together to follow a common pursuit.²⁴⁷ A state, being a political conception, may comprise of a number of nations, as for example Great Britain which consists of the English, Irish, Scotch and Welsh nations. Accordingly a national (individual) of a State is thus internationally only known through the State to which he/she belongs. Bisschop concludes that an individual is thus recognised as a member of the world community, and for organisational purposes, is labelled with nationality as belonging to a certain group or state among the various states into which mankind is divided.²⁴⁸

²⁴² Dugard *Ibid.*

²⁴³ *Id.* at 4.

²⁴⁴ Klabbers *op. cit.* 37.

²⁴⁵ *Ibid.*

²⁴⁶ *Id.* at 40.

²⁴⁷ Bisschop WR "Nationality in International Law" *American Journal of International Law* Vol. 37 No.2 (Apr. 1943) 320.

²⁴⁸ *Id.* at 323.

Protection of one's person and property against internal or external assault is the primary function of the state on behalf of its citizens.²⁴⁹ A stateless person is therefore at risk, because he/she has no right to request the assistance with regard to the authority and power of a state to defend him/her against any enemies. The legal requirements²⁵⁰ for "state protection" have varied over the ages and still do as between different countries.

It is asserted that as a principle among the attributes of sovereignty is the right of a government to decide who shall be deemed a citizen (national).²⁵¹ Borchard states that it is by virtue of the personal relationship involved in sovereignty and citizenship that the state may declare its laws binding on its citizens even when they are abroad and by virtue whereof its obligations to those non-resident citizens continues to exist.²⁵² The framing of nationality legislation is therefore effected by each state having complete legislative capacity within its own territory yet being subject to international law.²⁵³ A state thus has a right to exercise diplomatic protection on behalf of a national – it is, however, under no obligation or duty to do so²⁵⁴ - and acts "not as an agent but as the protector of the interests of its nationals while they are abroad."²⁵⁵

Diplomatic Protection

With the intensification of travel and migration, and increase in time that individuals spend outside their country of nationality and primary residence, diplomatic protection for the individual becomes an important right in a hyper-mobile world.²⁵⁶ Diplomatic protection's very purpose, according to Forcese, is to protect nationals

²⁴⁹ Heater *Citizenship op. cit.* at 250.

²⁵⁰ *Ibid.* Ever since the Greek city-state the four basic requirements have been participation in the political process, involvement in the administration of the law, enrolment in military service and the payment of taxes.

²⁵¹ Borchard *Diplomatic Protection op. cit.* at 486.

²⁵² *Id.* at 8.

²⁵³ Donner *op. cit.* 10.

²⁵⁴ Dugard *International Law op. cit.* at 290.

²⁵⁵ Leigh *Nationality op. cit.* at 455

²⁵⁶ Stasiulis, D and Ross, D "Security, Flexible Sovereignty and the Perils of Multiple Citizenship" in *Citizenship Studies* 10:3 (2006) 344.

abroad, sometimes in circumstances where their connections to the protecting state have become tenuous.²⁵⁷ As a result of the unequal recognition of dual nationality by states, the concept hereof creates significant difficulties for governments seeking to protect their citizens.²⁵⁸ The difficulties stem largely from the unsettled state of international law in relation to diplomatic protection of dual nationals.²⁵⁹ “The effective nationality principle might therefore best be viewed not as a standing requirement that must coexist at the time diplomatic protection is asserted by the protecting state, but rather as a means of evaluating whether a nationality was at any past juncture properly granted - the effective nationality principle being a threshold test.”²⁶⁰

Forcese is of the opinion that diplomatic protection should always be available to those accorded nationality by *jus soli* or *jus sanguinis*.²⁶¹ This remains true even if the connection between the individual and the protecting state later becomes tenuous, as no principle of international law bars a person from acquiring a second nationality through, for example, naturalisation.²⁶² The question arises whether an individual who possesses dual nationality may be represented diplomatically, and if so, whether by both or only one of his/her national States.²⁶³ According to Leigh a number of solutions have been tried - depending on the situation – such as to give effect to the nationality at birth; to give effect to the nationality used by the individual; and not to permit representation by one state of nationality against another state of nationality.²⁶⁴

Forcese²⁶⁵ suggests that international law has traditionally said little about nationality, although the Hague Convention²⁶⁶ itself specifies that nationality

²⁵⁷ Forcese G “Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in modern International Law” in: *The George Washington International Law Review* (March 2005) 484.

²⁵⁸ *Id.* at 491.

²⁵⁹ *Ibid.*

²⁶⁰ Forcese *supra* at 484.

²⁶¹ *Id.* at 487.

²⁶² *Id.* at 488.

²⁶³ Leigh *Nationality op. cit.* at 459.

²⁶⁴ *Ibid.*

²⁶⁵ Forcese *op. cit.* 481.

decisions need not be recognised where these are inconsistent with “international conventions, international custom and the principles of law generally recognised with regard to nationality.” Ultimately it is, however, for international law to determine whether nationality has been conferred in a manner not inconsistent with international law for the purpose of diplomatic protection.²⁶⁷ The ruling in the *Ambati*²⁶⁸ case, according to Leigh, leaves no doubt that the rule of effective nationality essentially consists of three elements, all three of which must be present at the time when diplomatic protection is sought.²⁶⁹ These three elements are (1) that the claimant is a national at the date of the injury, (2) that the claimant is a national at the date of the claim; and (3) that the link of nationality has remained uninterrupted during the intervening period.²⁷⁰ Naujoks²⁷¹ advances that in 1955, the International Court of Justice (ICJ) had decided that “in so far as a genuine link exists with both states of nationality, then the country of *domicile* is entitled to protect that person’s interests”.²⁷² The ICJ’s approach to diplomatic protection of dual nationals seems particularly reasonable in light of the evolution of the concept of *erga omnes*.²⁷³ An obligation *erga omnes* is a principle of international law in which all states can be held to have a legal interest in their (dual) national’s protection.²⁷⁴

Stasiulis and Ross advance that diplomatic protection is founded on an imagination of adversarial relations between states in order that protection occurs by one state against another state.²⁷⁵ In the global war on terror, collaboration therefore occurs

²⁶⁶ Convention of Certain Questions Relating to the Conflict of Nationality Laws, April 1930 art 1 [referred to as The Hague Convention].

²⁶⁷ Dugard *International Law op. cit.* at 285.

²⁶⁸ *United States v Venezuela* (The *Ambati* case) in JB Moore, History and Digest of International Arbitrations to which the United States has been a Party Vol. III at 2347.

²⁶⁹ Leigh *Nationality op. cit.* at 456.

²⁷⁰ *Ibid.*

²⁷¹ Naujoks D “Dual citizenship The discourse on ethnic and political boundary-making in Germany” *Focus Migration* 2.

²⁷² *Lichtenstein v Guatemala* 1955 (Nottebohm decision) ICJ Reports 23, p. 20 ff.

²⁷³ Dugard *supra* at 278 & 279.

²⁷⁴ The Institute of International Law went even further in resolving that the international obligations to ensure the observance of human rights is an *erga omnes* obligation.

²⁷⁵ Stasiulis and Ross *op. cit.* 344.

among nation-states against a non-state entity and suspected members of this non-state entity, such as for example al-Qaeda.²⁷⁶

International conventions pertaining to nationality

In the aftermath of World War II, numerous treaties were signed extending the protection of international law to individuals²⁷⁷ and the administration of the international community of today developed out of that which preceded it.²⁷⁸ The **League of Nations**, being largely “Eurocentric” in its membership and its concerns,²⁷⁹ was set up under the Covenant which comprised the first 26 articles of the Peace of Paris,²⁸⁰ establishing a machinery of collective security with the sovereign state as basis. From the provisions of the Covenant it becomes clear that international law was excluded in matters falling within the reserved domain being the domestic jurisdiction of each member state, as international law only governs the relations between independent states.²⁸¹ The **United Nations** differs in many respects from the League of Nations as it is an organisation of sovereign states being parties to the Charter which is in the form of an international treaty.²⁸²

In international law the basic principle is thus that states have the right to determine the rules which would govern the attribution of their own nationality. Early nationality law was, according to Spiro, constrained by the interests of states *vis-a-vis* each other and not by the interests of individuals.²⁸³ International commissions acting under special treaties or rules of their own often provide for special methods of establishing citizenship/nationality and have had occasion to pass upon various forms of evidence of citizenship/nationality. The mere exercise of the voting

²⁷⁶ *Ibid.*

²⁷⁷ Determining *inter alia* how nationality and citizenship should and would be governed between states.

²⁷⁸ Stasiulis and Ross *op. cit.* 4.

²⁷⁹ Dugard *International supra* at 11.

²⁸⁰ Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 as quoted in Donner *op. cit.* 9.

²⁸¹ Donner *op. cit.* 10.

²⁸² *Ibid.*

²⁸³ Spiro *A New International op. cit.* at 698.

privilege in a state has been held by international commissions neither to confer citizenship nor to deprive the foreigner of his alienage.²⁸⁴

International human rights have, however, taken on overwhelming significance as they have replaced national rights.²⁸⁵ Kerber further states that “the rights and claims of individuals are legitimated by ideologies grounded in a transnational community through international codes, conventions and laws on human rights, independent of their citizenship in a nation state.”²⁸⁶ Turner opines that “human rights are enjoyed by individuals by virtue of being human and as a consequence of a shared vulnerability”.²⁸⁷ It is observed that a majority of states have become signatories to international documents, which determine the regulation of human rights, of which nationality/citizenship forms but one aspect.²⁸⁸

The **Universal Declaration of Human Rights** was proclaimed in December 1948, the main aim being the equality of rights and law. Donner postulates that the Declaration was proclaimed as a common standard of achievement for all peoples and all nations.²⁸⁹ The Declaration unequivocally asserts that “all human beings are born free and equal in dignity and rights”.²⁹⁰ It further states in Article 15 that “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”²⁹¹. Its moral authority is enhanced by the universality of its acceptance by members of the United Nations and although not legally binding on states, the content of the Declaration has been included in a number of constitutions drafted after 1948, such as, for example, the Namibian and South African Constitutions.²⁹² Spiro states that it is regrettable that with this Declaration the “discourse shifted away from an order-centered orientation and instead recognised the individual’s

²⁸⁴ Borchard *Diplomatic Protection op. cit.* at 490 - 491.

²⁸⁵ Kerber *The Meanings op. cit.* at 851.

²⁸⁶ *Ibid.*

²⁸⁷ Turner *Citizenship op. cit.* at 234.

²⁸⁸ Donner *op. cit.* 131.

²⁸⁹ *Id.* at 191.

²⁹⁰ Kerber *supra* at 852.

²⁹¹ Orfield LB “The legal effects of dual nationality” *The George Washington Law Review* (1949) Vol. 17. No.4 434.

²⁹² Donner *supra* at 191.

interest in nationality to be a matter of international law".²⁹³ In essence the Declaration did not place an obligation on any state to grant an individual a nationality.²⁹⁴

The **African Charter of Human and Peoples Rights** is recognised as a regional "pact" and was adopted in June 1981 at a meeting of the Organisation of African Unity.²⁹⁵ The Charter contains no provisions for the right to nationality, but its Article 18 does provide that the family shall be the natural unit and the basis of society and as such shall be protected by the state. Under the same Article, mention is made that the state shall ensure the elimination of every discrimination against women as well as ensure the protection of the rights of women and her children, as stipulated in international (writer's emphasis) declarations and conventions.²⁹⁶

The European Union has grown steadily since the modest proposal in 1950 for the fusion of the French and German coal and steel industries.²⁹⁷ According to Aust, the European Coal and Steel Community (ECSC), establishing a common market in coal and steel, came into being in 1952 with France, Germany, Italy and the Benelux countries being the initial members.²⁹⁸ **The Maastricht Treaty** made provisions for the amendment of the treaty that established the European Economic Community (EEC) to establish the European Community (EC), more commonly referred to as the European Union (EU)²⁹⁹ and was signed into effect on 7 February 1992. The fundamental aim of the EU is to bring its member states together economically, socially and politically and as a result thereof has become a complex regional organisation.³⁰⁰ Although the EU has a certain degree of supranational power,

²⁹³ Spiro *A New International op. cit.* at 710.

²⁹⁴ *Ibid.*

²⁹⁵ African Charter of Human and Peoples Rights adopted in Nairobi on 27 June 1981 [accessed on 20/09/2014 at www.humanrights.se/ /African-Charter-on-Human-and-Peoples-Rights]

²⁹⁶ Article 18(3)

²⁹⁷ Aust *A Handbook of International Law* (2010) 431.

²⁹⁸ *Ibid.*

²⁹⁹ The Maastricht Treaty - Provisions amending the Treaty establishing the European Economic community with a view to establishing the European Union, Maastricht, 7 February 1992 [accessed on 6/02/2014 at www.eurotreaties.com/maastrichteu.pdf].

³⁰⁰ Aust *op. cit.* at 433.

through its governance treaties, the EU is not a federation.³⁰¹ Under C, Part Two – Citizenship of the Union, - provision is made for every person holding the nationality of a Member State to also be a *citizen* of the Union. Every citizen shall further also have the right and freedom to move about freely within the territory of the Member States limited and subject to conditions laid down in this Treaty.

Article 8b interestingly provides for every citizen of the Union residing in a Member State of which he/she is not a national, to have the right to vote and to stand as a candidate at municipal elections in the Member State in which he/she resides and under the same conditions as nationals of the Member State. Thus a national of Austria residing in Denmark may vote and stand for municipal elections in Denmark.

Article 8c stipulates that every citizen of the Union shall in the territory of a third country in which the Member State of which he/she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State and on the same conditions as nationals of that State. In practice this means that a Danish national visiting Namibia should be afforded diplomatic or consular protection by the German Consulate in Namibia, as Denmark has no representation in Namibia.

A number of developments in international law illustrate an increasing trend towards the recognition of citizenship as a human right, most notably the **European Convention of Nationality of 1997**,³⁰² which is a Convention of the European Council. The objective of the Convention³⁰³ is to establish the principles and rules relating to the nationality of natural persons and rules regulating military obligations

³⁰¹ Aust *Ibid.*

³⁰² Council of Europe *European Convention on Nationality* 1997, ETS 166.
<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>

³⁰³ The Convention entered into force on 1 March 2000. Signatories who have ratified their signature and in whose State territory the Convention has come into force are Austria, Denmark, Finland, Germany, The Netherlands, Portugal and Sweden. France, Italy and Russia have signed but not ratified the Convention. States that have not signed include Belgium, Ireland, Monaco, Spain, Switzerland and the United Kingdom. None of the Non-member states, including Canada, the USA and the Holy See, have signed the Convention. [Information obtained from: <http://conventions.coe.int/Treaty/Commun/> accessed on 6 February 2014].

in cases of multiple nationality, to which the internal law of State Parties shall conform.³⁰⁴ The Convention shall apply to the territory or territories as specified by the State who is a signatory hereof and has deposited its instrument of ratification /acceptance /approval or accession.

In its preamble, the Convention states that "in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals", as well as "desiring to avoid discrimination in matters relating to nationality". The Convention further defines nationality as "the legal bond between a person and a State and does not indicate the person's ethnic origin" and multiple nationality is defined as "the simultaneous possession of two or more nationalities by the same person". With regard to multiple nationalities, the Convention provides that States party to the Convention shall allow "children having different nationalities acquired automatically at birth to retain these nationalities". Each State shall furthermore also facilitate the recovery of its nationality by a former national who lawfully and habitually resides on its territory.³⁰⁵

Articles 3 and 9 respectively regulate that each State shall determine under its own law who are its nationals and shall further also be guided by the principle of non-discrimination between nationals. In Article 14 it is determined that each State Party shall allow children having acquired different nationalities automatically at birth, to retain these nationalities. The same provision is also applicable to those nationals who automatically acquired an additional nationality by virtue of marriage.

Although the European Convention on Nationality is one of the few documents where only the concept of nationality is referred to, there is, however, one Article where the principles of nationality and citizenship have been combined. Chapter VI regulates state succession and nationality and Article 18 thereunder determines the principles in relation thereto. Provision is made that in matters of nationality in cases of State succession, each State Party concerned shall take account particularly of:

³⁰⁴ Article 1 and Chapter VII, Article 21 of the European Convention on Nationality.

³⁰⁵ Article 9.

- The genuine and effective link of the person concerned with the State; (relates to nationality)
- the habitual residence of the person concerned at the time of State succession; (relates to citizenship)
- the will of the person concerned; (pertains to free election/choice and therefore relates to citizenship)
- the territorial origin of the person concerned (relates to nationality).

The Namibian Citizenship Act³⁰⁶ regulates the acquisition or loss of Namibian citizenship. In terms of Section 2 of the Act, one may become a Namibian citizen by descent, marriage, registration or naturalisation. It is submitted that it is a misnomer to become a citizen by descent – one may claim nationality by descent if nationality of the State in question is determined by *jus sanguinis*. In terms of Article 15 (1) of the Namibian Constitution, one becomes a Namibian national by birth. The Article states that children shall have the right from birth to acquire a nationality. In terms of Article 4, a person shall be a Namibian citizen³⁰⁷ by birth or descent if either the father or mother or both had been Namibian citizens at the time of birth of such person. Namibia thus follows mixed principles in determining nationality namely *jus soli* (birth) and/or *jus sanguinis* (descent).

Domicile

It is settled in law, writes McElevy, “that the acquisition of a domicile of choice is no mere inclination arising from a passing fancy or is thrust upon a person by an external but temporary pressure.”³⁰⁸ According to Bauder the term domicile has its roots in the Latin noun *domicilium* which can be translated as household, home or

³⁰⁶ Act 14 of 1990 [www.parliament.gov.na/acts_documents/163_act_14_of_1990.pdf].

³⁰⁷ The Namibian Constitution [www.gov.na/.../Namibia_Constitution] uses the terms “national” and “citizen” interchangeably. It would have been more appropriate to state that persons may claim Namibian nationality on grounds of birth or descent and not refer to same a citizenship, which is an elected choice made by a national of another country or state to become a member (citizen) of another country or state.

³⁰⁸ McElevy P “Regression and Reform in the Law of Domicile” *The International and Comparative Law Quarterly* Vol. 56 No. 2 (April 2007) 455.

residence.³⁰⁹ Morse states that the “liability of a defendant to be sued before a Roman forum was limited to the time when he happened to be resident in Rome.”³¹⁰ It is suggested that the laws of Rome always yielded to those of the *lex originis*. According to Morse “the consequences of domicile had an operation similar to citizenship.”³¹¹ Bauder argues that it may be deduced that “the principle of domicile refers to citizenship based on effective residence since a person is a citizen of the polity in which he/she resides, independent of ancestry, location or birth.”³¹²

Taking the above into consideration, domicile may therefore be defined as the place where a person usually resides (permanent home) with the fixed intention of remaining there and to which, whenever absent therefrom, he/she has the intention of returning.³¹³ Historically when people were principally attached to the soil, domicile or the permanent home was the test and criterion for status, both civil and political.³¹⁴ Since the late Middle Ages, according to the common law theory of statutes, a person’s legal relations depend on his domicile.³¹⁵ To the Dutch jurists of old, domicile seems to have meant actual permanent or indefinite residence.³¹⁶

The concept of domicile is, furthermore, of considerable importance in a number of areas of law. The place of residence, for example, is an important criterion for taxation purposes and Bauder opines that in legal cases when courts need to decide on the dominant nationality of a person with dual status, domicile plays an important role.³¹⁷ Essentially the law of domicile rests on two principles, firstly that everyone shall have a domicile at all times, and secondly that each person should have one and only one domicile at any time. “Domicile is an artifice of the law and not an expression of fact”.³¹⁸ Domicile is a “connecting factor” or link between a person and

³⁰⁹ Bauder H “Domicile citizenship, human mobility and territoriality” *Progress in Human Geography* Vol. 38(1) (2014) 92.

³¹⁰ Morse *A Treatise op. cit.* at 23.

³¹¹ *Ibid.*

³¹² Bauder *supra* at 92.

³¹³ Domicile Act, Act 3 of 1992 www.justice.gov.za/legislation/acts/1992-003

³¹⁴ Borchard *Diplomatic Protection op. cit.* at 555.

³¹⁵ Apathy *Domicilium*.

³¹⁶ Cilliers *et al Herbstein and Winsen op. cit.* at 391.

³¹⁷ Bauder *supra* at 95.

³¹⁸ Forsyth C *Private International Law* 5th ed. (2012) 133.

the legal system or rules that will apply to him/her in specific contexts. There are essentially three types of domicile:

- **Domicile of origin** is the domicile that every person acquires at birth. A legitimate child born during the lifetime of its father has its domicile of origin in the country in which the father is/was domiciled at the time of the birth. This is simply a domicile that is assigned by operation of law for reasons of efficacy.³¹⁹
- **Domicile of choice** is acquired by residing in a country with the intention of continuing to do so permanently or indefinitely. Generally, where a person abandons their domicile of choice in a particular country but does not acquire a new domicile elsewhere, the domicile of origin will revive and continue to govern his/her legal position until a new domicile of choice or of dependency is acquired.³²⁰

According to Cronje and Heaton, two requirements must be met before a domicile of choice can be acquired, namely the person must actually settle at the particular place (*factum*) and must secondly have the intention of residing permanently at that place (*animus*).³²¹

- **Domicile of dependency** arises in respect of children under the age of 21 years, married women and mentally disordered persons. Their domicile will generally be the same as, and will change (if at all) in accordance with, the domicile of the person on whom they are deemed to be legally dependent.³²²

Nationality as a connecting factor was, according to Donner, introduced by the French Civil Code of 1804 which provided that the status and capacity of a Frenchman is to be decided by his nationality regardless of whether he is domiciled

³¹⁹ Cronje DSP and Heaton J *The South African Law of Persons* 4th ed. (2011) 42.

³²⁰ Domicile and Habitual Residence, Section 9 p 4.

www.lawreform.ie/fileupload/.../wpBabitualResidence.htm [accessed on 8 May 2014].

³²¹ Cronje & Heaton *supra* at 43.

³²² Domicile and Habitual Residence Section 10 p 4.

abroad.³²³ Before the Civil Code, domicile had been the principle determinant of status throughout Europe. The question whether domicile could be equated with citizenship for the purposes of diplomatic protection was dealt with in the *Laurent*³²⁴ case, where it had been decided that the law of war recognises that in certain cases an individual may acquire the character of the country in which he is resident. Donner further argues that the decision in the *Laurent* case was defective and the only instance in which domicile would determine nationality was where the person claimed or owed a double allegiance.³²⁵ In the *Anthony Barclay* case, cited by Donner, it was reasoned that “the subject or citizen of one State domiciled in another acquires, in some respects, privileges and incurs liabilities distinct from those possessed in right of his original birth or citizenship. But he still remains the subject or citizen of the state to which he originally belonged.”³²⁶

According to Kruger and Verhellen,³²⁷ both common and civil law countries most recently use the criterion of “habitual residence”. Similarly, the conventions of the Hague Conference on Private International Law almost always refer to “habitual residence”, rather than domicile or nationality.³²⁸ It is, however, widely agreed that it is the *lex fori* which determines where a person is domiciled no matter what the *lex causae* might be.³²⁹

From the above discussions, it can be concluded that nationality in essence represents a person’s political status by virtue of which allegiance to some particular country is owed, whereas domicile connects to one’s civil status and provides the law

³²³ Donner *op. cit.* 6.

³²⁴ *Messrs T and B Laurent v. United States* (Dec 1854) Reports of International Arbitral Awards Vol. XXIX pp. 11 – 25. A claim was brought by British-born subjects who had settled in Mexico and from whom, during the Mexican War of 1847, United States forces had confiscated money to which the claimants had had legal title and for this they claimed compensation.
http://legal.un.org/riaa/cases/vol_XXIX11-25.pdf [accessed on 23/09/2014]

³²⁵ Donner *supra* at 38.

³²⁶ *Id.* at 39. *Anthony Barclay v. United States*, No. 5 (1891) in Moore, JB *History and Digest of the International Arbitrations to which the United States has been a party* Vol. III 1898.
<https://archive.org/stream/historyanddiges01statgoo#page/n60> [accessed on 03/10/2014]

³²⁷ Kruger T and Verhellen J “Dual Nationality = Double Trouble?” *Journal of Private International Law* Vol. 7 No. 3 (2011) 604.

³²⁸ *Ibid.*

³²⁹ Forsyth *op. cit.* 135.

by which one's personal rights and obligations are determined. It thus follows that a person may be a national of one country but be domiciled in another. The general rule that has been practically uniformly adopted is that domicile neither confers nor forfeits citizenship.³³⁰

Bauder expresses the opinion that domicile can serve as a citizenship principle as it presents a practical alternative for reconfiguring formal citizenship to include populations that are mobile across borders.³³¹ It is postulated by Bauder that domicile has been called the "missing link" that could be an alternative premise for citizenship, as domicile-based citizenship could be granted to people independently of the place and community of birth.³³² A person would not be bound for life to a particular territory, but what would count is the intention to stay permanently and if the intention changes, then that particular citizenship would "expire", since "maintaining the citizenship of a territory in which one no longer resides defies the very logic of the domicile principle."³³³

It may be stated that nationality rather than citizenship is a determining factor with regard to the operation of international law. From the numerous sources mentioned above, it becomes clear that, although the term "nationality" and "citizenship" are used inter-changeable, their purpose and meaning are by no means similar to warrant such inter-changeability. Margiotta and Vonk question that if nationality is primarily perceived as a legal bond between a person and a certain state, then why is it not possible to maintain legal bonds with more than one state?³³⁴ It is argued that many people possess various non-state loyalties which can conflict with state loyalty, yet no one would argue that these loyalties are incompatible with being a citizen.³³⁵ Naujoks states that, according to private international law, the principle of effective citizenship means that the applicable law is that of the country to which a

³³⁰ Borchard *Diplomatic Protection op. cit.* at 558.

³³¹ Bauder *op. cit.* 93.

³³² *Ibid.*

³³³ *Id.* at 95 and 96.

³³⁴ Margiotta C and Vonk O "Nationality Law and European Citizenship: The Role of Dual Nationality" *Robert Schuman Centre For Advances Studies EUI Working Papers RSCAS 2010/66 2.*

³³⁵ *Ibid.*

person has an effective tie – the country of normal residence/domicile.³³⁶ It may thus be argued that having more than one national connection is possible, but to maintain more than one citizenship would be undesirable and should not be (easily) tolerated.

Spiro advances that the parameters of nationality and citizenship do not entirely coincide, as African Americans prior to the 14th Amendment of the American Constitution, provide a classic historical example of being a national of a state and at the same time not enjoying the full rights of citizenship.³³⁷ In the case of *United States v. Wong Kim Ark* (1898) the Court held that “it is the inherent right of every independent nation to determine for itself and according to its own constitution and laws what classes of persons shall be entitled to its citizenship (my emphasis).”³³⁸

One may conclude from the above discussion that domicile should play a greater role in determining who the citizens of a certain State are. It is submitted that in order to determine whether or not a person could or should be able to claim diplomatic protection from a certain State, the required effective link should pertain to citizenship (determined through effective domicile) rather than nationality, as this would make such determination easier than to determine which (multiple) nationality at the time in question was effectively the (most) dominant nationality.

In the following chapter the incidence and desirability of dual status will be discussed in greater depth. The nationality practices of various European countries will also be discussed.

³³⁶ Naujoks *op. cit.* at 2.

³³⁷ Spiro *Dual Nationality op. cit.* at 1417.

³³⁸ 169 U.S 649, 668 as quoted by Spiro *Ibid.*

CHAPTER FOUR

Dual-status – its origin and desirability

"It is better to tolerate a man with two wives than a man with two countries."

George Bancroft.

"The growth in dual nationality presents more opportunities than dangers, freeing individuals from irreconcilable choices and fostering connections that can further travel, trade and peaceful relations."

David Martin and Alexander Aleinikoff

In the fourth century, the Romans introduced the concept of dual "Latin" and "Roman" citizenship, thus enabling a man to be simultaneously a citizen of his own city as well as of Rome.³³⁹ Morse writes that when the *lex Julianan municipalis* had given Roman citizenship to all of Italy and from the date of the Constitution of Caracalla (Caesar), no matter in what city the local domicile was, Rome became the common country and all inhabitants became citizens.³⁴⁰ Every member of any municipality had at least double citizenship as he was a citizen of Rome as well as of the smaller municipality.³⁴¹ The granting of Roman citizenship to all free inhabitants of the Roman Empire resulted therein that the distinction between Roman citizen and *peregrinus* became obsolete.³⁴² Dual citizenship therefore became a common status in Rome for political reasons and while it may have been unacceptable for a Roman citizen to be subjected to foreign authority, it was beneficial to Rome that foreigners possess Roman citizenship.³⁴³ The Romans thus effectively annexed the loyalties as well as the lands of their defeated enemies in "exchange" for Roman citizenship.³⁴⁴

³³⁹ Heater *Citizenship op. cit.* at 16.

³⁴⁰ Morse *A Treatise op. cit.* at 25.

³⁴¹ *Id.* at 22.

³⁴² Schiemann *Peregrinus*.

³⁴³ Boll *Multiple Nationality op. cit.* at 63.

³⁴⁴ Heater *Citizenship supra* at 16.

History tells that the ties between the individual and the various levels of sovereigns in feudal Europe were complicated. The notion of one individual having ties, even reciprocal rights and obligations, to more than one sovereign was, however, not unknown in feudal Europe.³⁴⁵ According to Boll, the increased freedom of movement in Europe had come about due to the elimination of feudal ties and made the early 19th century the golden age for the codification of citizenship laws.³⁴⁶

Early models of nationality and citizenship, according to Spiro,³⁴⁷ worked from the presumed personal relationship between the individual and the sovereign, a relationship that was rooted in the laws of nature and therefore deemed perpetual. Before the French and American revolutions, political status was associated with the perception of unchosen perpetual allegiance which was regarded as a natural vertical tie between the individual subject and the king. These ties were unbreakable.³⁴⁸ The law did thus not recognise dual nationality as a legitimate status.³⁴⁹

As a result of increased globalisation, many more children are born either to parents from two different countries or on the soil of an increasing number of states³⁵⁰ that allow for citizenship by place of birth.³⁵¹ Spiro states that dual nationality was long disfavoured under traditional theories of the individual's relationship to the state,³⁵² as the possible divided loyalties of dual nationals represented a serious potential threat from within the state in times of international conflict.³⁵³ According to Margiotta and Vonk, French paranoia was triggered during World War I towards naturalised persons of enemy origin – German, Austrian and Ottoman.³⁵⁴

³⁴⁵ Boll *Multiple Nationality op. cit.* at 175.

³⁴⁶ *Ibid.*

³⁴⁷ Spiro *Dual Nationality op. cit.* at 1419.

³⁴⁸ Herzog *Dual Citizenship op. cit.* at 90.

³⁴⁹ Spiro *supra* 1420. Perpetual allegiance could, however, not change the fact of greater global mobility. The most significant strain of dual nationality was found between Great Britain (adhering to perpetual allegiance) and the United States to which British subjects were emigrating. Perpetual allegiance worked against the transfer, not division, of allegiances.

³⁵⁰ States following *jus soli* are Canada, the United States of America, Argentina, Bolivia, Brazil, Ecuador, Fiji, Guatemala, Honduras, Jamaica, Lesotho, Mexico, Namibia, Pakistan, Peru, Uruguay and Venezuela to mention a few.

³⁵¹ Howard *Variation op. cit.* at 1.

³⁵² Spiro *supra* at 1414.

³⁵³ *Id.* at 415.

³⁵⁴ Margiotta and Vonk *Nationality Law op. cit.* at 2.

Spiro writes that a committee of experts from the League of Nations in 1926 drafted a convention on nationality in which it was not sought to reduce the incidence of dual nationality, but rather to look at ways to manage the associated conflicts through constraints on the exercise of diplomatic protection.³⁵⁵ In 1930, the League of Nations felt that, in the interest of the international community, all members should recognise that every person should have one and only one nationality. The very concept of dual nationality was seen as fundamentally opposed to the on-going formation of the modern international order based on the nation state.³⁵⁶ After World War II and especially with expanding global trading, people became more mobile and mixed, resulting therein that many more international marriages took place, which in turn produced more bi-national children than at any other time in history. Parents and children of such unions spent considerable time in and felt loyalties and allegiance to both countries.³⁵⁷

Dual-status, by allowing multiple belonging, rights and responsibilities, inhabits a curious place, as on the one hand it is seen to undermine traditional citizenship while on the other opponents thereto worry that (new) nationals might lack sufficient loyalty to their new country.³⁵⁸ Spiro argues that the incidence of dual nationality is the inevitable result of the failure to develop a universal rule of nationality.³⁵⁹ The growing popularity of dual status, however, does more than evidence the decline of single citizenship.³⁶⁰ In a world that demanded singular nationality,³⁶¹ individuals could be assumed to opt for a particular nationality because it was their first (and only) choice.³⁶² Faist is of the opinion that dual citizenship is a simultaneous rather

³⁵⁵ Spiro *A New International op. cit.* at 702.

³⁵⁶ Howard *Variation op. cit.* at 3.

³⁵⁷ *Id.* at 4.

³⁵⁸ Bloemraad I "Who claims dual citizenship? The limits of Postnationalism" in: *International Migration Review* (2004) 3.

³⁵⁹ Spiro *Dual Nationality op. cit.* at 1417.

³⁶⁰ Spiro JP "Dual Citizenship: A Postnational View" in: *Dual citizenship in global perspective: from unitary to multiple citizenship* (2007) 195.

³⁶¹ At the League of Nations Conference of 1930 it was stated that "the Conference is unanimously of the opinion that it is very desirable that states should, in the exercise of their power of regulating questions of nationality, make every effort to reduce so far as possible cases of dual-nationality..."

³⁶² Spiro *Dual Citizenship supra* at 195.

than a successive form of citizenship by which one may retain only one citizenship at a time.³⁶³ I disagree and it is submitted that dual nationality is a simultaneous rather than a successive form of nationality, whereas citizenship status should be successive rather than simultaneous. Often dual nationality is a status of little choice as same may have been conferred to a child born in a country that confers nationality through *jus soli* on a parent(s) whose nationality is conferred through *jus sanguinis*. Citizenship on the other hand, according to the writer hereof, is most often a chosen "status" and as was hypothesised in the foregoing chapter, could be closely linked to the principle of domicile and if so, it should follow that citizenship status would and should be successive rather than simultaneous.

A Chinese delegate of the 1930 League of Nations Conference stated that "Nationality is not merely a matter of law, it is not a matter of accident, it is not a matter of technicality – it is a matter of the heart."³⁶⁴ Sik³⁶⁵ states that dual nationality is created by international law which gives states the sovereign right to regulate and determine how nationality may be obtained and how same may be lost. It is, however, the interplay of different approaches that gives rise to cases in which individuals hold nationality in more than one state,³⁶⁶ but there are, according to Sik³⁶⁷, essentially three ways in which dual nationality is created; namely by marriage, by birth and by voluntary acquisition. These ways may be more or less desirable and therefore also more or less avoidable³⁶⁸ and are discussed below.

Marriage – A woman marries a foreigner and most often through *domicile* in her husband's country acquires a second nationality.³⁶⁹ The wife, by reason of her marriage, will in all probability not cut her ties with her country of origin as she is still

³⁶³ Faist and Gerdes *Dual Citizenship op. cit.* at 21.

³⁶⁴ Acts of Conference, vol II: Minutes of the first committee, League of Nations doc. C 351(a)M. 145(a) 1930, V 48.

³⁶⁵ Sik, KS *De Meervoudige Nationaliteit* (1957) 60.

³⁶⁶ Spiro *Dual Nationality op. cit.* at 1417.

³⁶⁷ Sik *supra* at 60.

³⁶⁸ *Id.* at 319.

³⁶⁹ It is arguable whether or not *domicile* should be deemed a determinant of nationality. It is trite that domicile is generally freely chosen and may therefore be linked to citizenship.

linked thereto through her family, culture and upbringing.³⁷⁰ Dual nationality would thus be the most accurate description of the wife's social position in her husband's country as well as her emotional state with regard to her country of origin.³⁷¹

In this instance, Sik argues, the husband's state will primarily answer the question of whether the wife should take the nationality of her husband, or whether she should (automatically) lose or keep her own nationality, by considering both the interest of the marriage and the interest of the wife. It is suggested that allowing a wife to become a dual national by reason of marriage would result in few, if any, unavoidable conflicts between the states in question.³⁷²

Margiotta and Vonk postulate that the cause of "marital" dual nationality resulted from the equalisation of the sexes in nationality law.³⁷³ Prior to the 1970s, a woman had no independent position in nationality law and as a result lost her nationality upon marrying a foreigner, automatically acquiring her husband's nationality. The woman could thus not transmit her original nationality upon her children.³⁷⁴

It is submitted that the above mentioned position of attaining a foreign nationality through marriage is misguided. It is suggested that an individual can merely attain "automatic" citizenship in the spouse's State and not nationality since nationality is a status acquired through either birth or descent.

Birth – Dual nationality that has arisen by birth and has as a rule been acquired due to the competing operation of *jus soli* and *jus sanguinis* differs materially from dual nationality acquired through marriage.³⁷⁵ Sik argues that dual nationality acquired by birth will be more difficult to eliminate as the state's interest in this instance is of primary importance, since nationality acquired at birth forms the foundation on which

³⁷⁰ Sik *op. cit.* 319.

³⁷¹ *Ibid.*

³⁷² *Id.* at 320.

³⁷³ Margiotta and Vonk *Nationality Law op. cit.* at 3.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

the formation of the state rests. It would be difficult to expect from either state to give up such an acquired nationality in order to avoid dual nationality occurring.³⁷⁶

Orfield claims that most cases of *jus soli* will involve birth in the physical territory of the state.³⁷⁷ Where both parents have the same nationality only one *jus sanguinis* will apply. It is further argued by Orfield that no other legal principles than those of *jus soli* and *jus sanguinis* should be applied to nationality at birth,³⁷⁸ and I am in agreement with this point of view. Orfield is furthermore of the opinion that the application of *jus soli* to children born of foreigners of certain classes (eg. foreign consuls or transient aliens) results in some unfortunate cases of dual nationality.³⁷⁹

By voluntary acquisition – A person who is already in possession of a(n) (original) nationality and on grounds of a voluntary legal action, according to Sik, obtains another nationality signals that he/she wishes to break the juridical and political bonds of the original nationality.³⁸⁰ Such an individual cannot reasonably expect to keep his/her original nationality, as this would create a strong impression that he/she does not unconditionally accept his/her new nationality. One cannot expect from a state to provide its nationality to an individual who only sees therein a means to achieve his/her economic endeavours and who acknowledges that he/she wants to give their loyalty to two states.³⁸¹

It is submitted that the reasoning in the above paragraph is flawed in that a person cannot renounce their nationality which has been (and can only be) acquired either by *jus soli*, *jus sanguinis* or a combination of these two principles. The only exception would be in the case where a nationality was “automatically” acquired through marriage and even in such a circumstance it is hypothesised that marriage brings

³⁷⁶ Margiotta and Vonk *Ibid.*

³⁷⁷ Orfield *The legal op. cit.* at 430.

³⁷⁸ *Ibid.*

³⁷⁹ *Id.* at 431.

³⁸⁰ Sik *op. cit.* 321.

³⁸¹ *Id.*

with it an automatic acquisition of citizenship rather than nationality. If one were to stable a camel with horses, the camel would not with the effluxion of time or due to the fact that it was stabled with horses become a horse. In the same way when, for example, an Arab marries a Russian, the Arab would not become an ethnic Russian by living in Russia for any number of years or simply due to having married a Russian. It is my submission that the Arab person could become a Russian citizen, but never a Russian national as he or she was not born into that status.

Spiro³⁸² warns that one should, however, not underestimate the sentimental obstacle to naturalisation,³⁸³ where it involves abandoning one's birth nationality. It is postulated that fewer aliens would naturalise in a regime where dual nationality would not be accepted or tolerated, as many aliens may be unwilling for either sentimental or economic reasons to cut their ties to their homelands.³⁸⁴ Miller³⁸⁵ claims that at an international conference on dual nationality, "immigrant spokespersons complained that renunciation of native citizenship constituted an enormous psychological and practical barrier to naturalisation". During the early 1960s, this was specifically the case in Germany when only about 0.3 percent of Germany's foreign residents elected to become naturalised.³⁸⁶ Cook-Martin postulates that the "state to which an individual belongs by birthplace or kinship determines or affects one's political voice, identity and status derived from the place occupied by one's country in a global hierarchy of nation-states".³⁸⁷

Consistent with international law, dual nationality remains a status that states may accept or reject at their option. When a sovereign state thus grants full functional

³⁸² Spiro *Dual Nationality op. cit.* at 1465.

³⁸³ Naturalisation is an act by which an alien is made a citizen (not a national) of a particular state or country. In order to qualify, such person must meet a number of statutory requirements such as permanent residence, language competence, be of "good moral character" and must often take an oath of allegiance.

³⁸⁴ *Ibid.*

³⁸⁵ Miller, MJ "Dual citizenship: A European Norm?" in: *International Migration Review* Vol. 23, No.4 (1989) 948.

³⁸⁶ *Id.* at 945.

³⁸⁷ Cook-Martin *The scramble op. cit.* at 97 & 98.

citizenship³⁸⁸ to an individual who has a parallel relationship to a different community, that individual's national identity is then not necessarily the same as that of the passport being held³⁸⁹ - mere citizenship does not automatically reflect nationality. The 1997 European Convention on Nationality requires parties to it to recognise dual nationality where it results from mixed-nation parentage.³⁹⁰

Borchard is of the opinion that the following four principles dominate the bond of nationality, namely –

1. The idea of legal attachment expressed in former times by membership in a clan or tribe, advancing later into the broader bond of membership of a city, state and nation.
2. The exclusiveness of nationality as ascribed by public law (only one nationality to an individual) even though differences in municipal law of different states have occasionally endowed an individual with plural nationality.
3. The principle of mutability which permits the individual at the present day to change his/her nationality.
4. The principle of continuity by which the nationality of origin is retained until a new one is acquired – emigration without naturalisation in another state does therefore not break the bond of (original) nationality.³⁹¹

Donner states that there are treaties which on the one hand provide for the principle of dominant nationality and on the other there are treaties which encourage dual nationality.³⁹² Such treaties are mainly signed between two or more states which have a common desire to strengthen the historical ties between them as, for example, Spain and the Dominican Republic. These treaties often provide that

³⁸⁸ Full functional citizenship status grants the holder thereof all rights of citizenship, including the right to vote and to hold office.

³⁸⁹ Fleming *The Functionality op. cit.* at 1817.

³⁹⁰ Recognising that, in matters concerning nationality, account should be taken both of the legitimate interests of the State and those of individuals. Desiring to avoid discrimination in matters relating to nationality. The Maastricht Treaty's preamble further also frames dual-citizenship as a right.

³⁹¹ Borchard *Multiple Nationality op. cit.* at 19.

³⁹² Donner *The Regulation op. cit.* at 131.

nationals of one contracting party resident in the territory of the other may, in conformity with the legislation of the country of residence, acquire its nationality and submit to its laws while retaining their nationality of origin.³⁹³ Accordingly the idea was not to establish two concurrent nationalities of equal validity, but rather the co-existence of a “full” nationality together with a secondary “dormant” nationality, the dominant nationality being that of the country of domicile.³⁹⁴

Donner cites that a Hong Kong court explained that dual nationality was not one half of one nationality and half of another.³⁹⁵ Dual nationality was in fact two complete nationalities as far as English law is concerned, and from this it followed that a person possessing dual nationality did not owe less allegiance than a person who only possessed one (British) nationality.³⁹⁶

The courts have, according to Donner, when confronted to determine the nationality of a person who is claimed as a national by more than one State, applied the doctrine of dominant or effective nationality.³⁹⁷ Rode states that the crux of this doctrine determines that where there is a conflict between two governments regarding the nationality of a claimant, who is a dual national, the nationality of the claimant’s habitual residence should prevail over his/her other nationality.³⁹⁸ In the *Canevaro* case,³⁹⁹ brought before the Permanent Court of Arbitration in 1912, the Court firstly accepted that Rafael Canevaro had both Italian and Peruvian nationality by operation of the respective nationality laws of the two countries in question. The Court then proceeded to investigate which nationality the claimant actually used for purposes of diplomatic protection – the effective nationality test.⁴⁰⁰

³⁹³ Donner *op. cit.* at 203.

³⁹⁴ *Id.* at 204.

³⁹⁵ *Id.* at 205. *Inouye Kanao v The King Hong Kong*, Full Court, 16 July 1947 Case no. 103.

³⁹⁶ *Ibid.*

³⁹⁷ Donner *supra* at 41.

³⁹⁸ Rode ZR “Dual Nationals and the Doctrine of Dominant Nationality” *The American Journal of International Law* Vol. 53 No. 1 (Jan 1959) 140. It speaks for itself that the theory of dominant nationality has nothing to do with the application of nationality questions under municipal law (p 144).

³⁹⁹ *Italy v Peru* 1912 (Canavero) *American Society of International Law* Vol. 6 No. 3 (July 1912) <http://www.jstor/stable/2187082> [accessed on 05/10/2014]

⁴⁰⁰ Leigh *Nationality op. cit.* at 462.

In the *Nottenbohm*⁴⁰¹ case, the International Court of Justice rendered an individual stateless in the international sphere on the grounds that (his) naturalisation occurred without the contemporaneous facts of a connecting link. The court emphasised the need for real and effective nationality as the basis for diplomatic protection.⁴⁰²

According to Donner, there must be the fact of permanent residence in a State and further evidence that in that State lies the centre of the individual's interest. As a standard of international law the meaning of the link differs from that of domicile – it is a mixture of fact and law.⁴⁰³ Mosk points out that the terms “dominant” and “effective” nationality may not be used interchangeably as “effective” nationality has international effect, while “dominant” nationality means “the one that has stronger ties to one state – a concept of relativity.”⁴⁰⁴ Martin and Aleinikoff are of the opinion that whenever laws, rights or obligations conflict, states should give primacy to the country of principal residence.⁴⁰⁵

Safran argues that a reason for opposing dual status is the fear of dual loyalty,⁴⁰⁶ whereas Orfield suggests that the most valid objection to dual nationality arises in states where status and personal rights are dependent on nationality, rather than domicile.⁴⁰⁷ According to Spiro, the risks of dual nationality have largely diminished as democracies rarely if ever make war on one another. War, or the threat of war, ultimately made dual nationality problematic in a hostile world.⁴⁰⁸ Diplomatic protection is, furthermore, no longer exclusively a function of nationality where states take care of their own. According to Spiro, diplomatic protection is covered by

⁴⁰¹ *Lichtenstein v Guatemala* [1955] ICJ Reports 4 at 20-1. The issue was whether international recognition should be given to a nationality determination in circumstances in which no real and objective link ever existed. [<http://www.refworld.org/docid/3ae6b7248.html>] [accessed 10 September 2014].

⁴⁰² Dugard *International Law op. cit.* at 284.

⁴⁰³ Donner *The Regulation op. cit.* at 119.

⁴⁰⁴ Mosk RM “Claims of Dual Nationals and the Development of Customary International Law: Issues before the Iran-United States Claims Tribunal by Mohsen Aghahosseini” *The American Journal of International Law* Vol. 102 No, 1 (Jan 2008) 219.

⁴⁰⁵ Martin DA and Aleinikoff TA “Double Ties” *Foreign Policy* No. 133 (Dec 2002) 81.

⁴⁰⁶ Safran *Citizenship op. cit.* at 330.

⁴⁰⁷ Orfield *The legal op. cit.* at 428.

⁴⁰⁸ Spiro *Dual Nationality op. cit.* at 1461.

the umbrella of international human rights, in which the international community protects the abused regardless of nationality.⁴⁰⁹

Persons who enjoy a dual status are often seen by others to experience more advantages than disadvantages. Some of the advantages entail the right to take up residence and work in either country without losing the right to also do so in the other country.⁴¹⁰ Today the major objections to dual status are based on the fundamental concepts of nation state, national identity and loyalty,⁴¹¹ whereas much of the earlier opposition to dual nationality had been based on the fears of global instability and interstate conflict.⁴¹² Although some states still approach dual nationality with hostility, Margiotta and Vonk maintain that dual nationality is no longer a legal impossibility.⁴¹³

Fleming opines that a fundamental change in the composition of the state's "nation" must be entertained if the multicultural citizens within a state are to be effectively accommodated.⁴¹⁴ This accommodation does, however, not affect the duties that the individual and the state owe each other. Nationality should be considered an unique and exclusive status that incorporates the individual's historical and cultural notion of national allegiance.⁴¹⁵ Nationality should thus be viewed as a mechanism through which individuals may declare their personal identity within the global political spectrum.

The most important consequence of nationality on the international plane is that a state may protect or intervene on behalf of its nationals when they are harmed by other states. The right involved pertains to the customary international law of the state of nationality, and in terms of international law, its exercise is at the complete

⁴⁰⁹ Spiro *supra* at 1462.

⁴¹⁰ Hammar T "Dual citizenship and Political Integration" in: *International Migration Review* (1985) 447 <http://www.jstor.org/stable/2545849> [accessed 30 September 2013].

⁴¹¹ *Id.* at 448.

⁴¹² Habermas *Citizenship op. cit.* at 4.

⁴¹³ Margiotta and Vonk *Nationality Law op. cit.* at 2.

⁴¹⁴ Fleming *The Functionality op. cit.* at 1819.

⁴¹⁵ *Id.* at 1827.

discretion of the state.⁴¹⁶ According to Spiro, before the advent of human rights, diplomatic protection stood as the only constraint on the exercise of state power against individuals on sovereign territory.⁴¹⁷ Rules relating to the international recognition of nationality are relevant in international terms, but not on the level of municipal law. Recognition of nationality in municipal law is relevant only when municipal law expressly regulates when multiple nationality will or will not be recognised.⁴¹⁸

Herzog explains that the revocation of citizenship is not a random policy that is introduced for election purposes, but is contingent on militarised conflicts.⁴¹⁹ "Citizenship as a social construction has more to do with the actual needs of the state than with a general coherent and stable ideological perception."⁴²⁰

The Namibian Citizenship Act,⁴²¹ under Section 26, expressly prohibits dual status as it states that "no Namibian citizen shall also be a citizen of a foreign country". The Namibian Constitution under Article 4(8) provides, however, that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship even when they have, after independence, acquired the citizenship of any other country by any voluntary act. Namibian nationals are thus allowed to hold dual status, whereas Namibian citizens are prohibited to hold such dual status. In *Tlhoru v Minister of Home Affairs*,⁴²² the Court found that it is consistent with the Constitution to require renunciation of other citizenships by persons wishing to become Namibian citizens by naturalisation (writers underlining). The Court, however, further noted that this does not apply to Namibian nationals by birth or descent.

Sejersen postulates that dual citizenship can be seen as an extension of individual rights and therefore the question of dual citizenship may also be analysed by

⁴¹⁶ Boll *Multiple Nationality op. cit.* at 114.

⁴¹⁷ Spiro *A New International op. cit.* at 704.

⁴¹⁸ *Id.* at 150.

⁴¹⁹ Herzog *Dual Citizenship op. cit.* at 95.

⁴²⁰ *Ibid.*

⁴²¹ Act 14 of 1990.

⁴²² [2008] NAHC 65 (2 July 2008).

focusing in the individual.⁴²³ Globalisation and improved communication technologies have, according to Sejersen, created opportunities for individuals to live across various geographical locations simultaneously.⁴²⁴ Many states exist with a multitude of nations living within their borders and resultantly citizenship is a constantly changing concept and practice.⁴²⁵ It is submitted that Sejersen's reference to dual citizenship would have been contextually more appropriate had she referred to dual nationality, although it has to be admitted that the concept of citizenship is constantly changing.

Spiro is of the opinion that international norms are emerging to protect an individual right to maintain dual nationality and that both practice and theory in this regard have become noticeably more receptive to dual status.⁴²⁶ The 1997 European Convention of Nationality, according to Spiro, represents a watershed as the first multilateral undertaking that protects dual nationality.⁴²⁷ Furthermore, and at a time when global mobility has produced a rise in the number of birth dual nationals, fewer states persist in requiring those born with dual nationality to elect one at attaining majority.⁴²⁸

Nationality practices of various states

Switzerland, in order to avoid statelessness, accepts the consequences that dual-nationality may bring about and therefore, neither on account of marriage or naturalisation, seeks to avoid dual nationality. By maintaining such a liberal point of view, Switzerland sees nothing unnatural nor unacceptable in the fact that the love for and the ties to the country of origin remain, despite obtaining a new "nationality".⁴²⁹

⁴²³ Sejersen "I vow" *op. cit.* at 526 - 527.

⁴²⁴ *Ibid.*

⁴²⁵ *Id.* at 543.

⁴²⁶ Spiro *A New International op. cit.* at 733.

⁴²⁷ *Id.* at 734.

⁴²⁸ *Id.* at 735.

⁴²⁹ Sik *op. cit.* 316.

In 1946, **Canada** introduced the status of independent Canadian citizenship and thus made Canada the first member of the British Commonwealth to establish citizenship distinct from the "Mother Country".⁴³⁰ The 1946 Citizenship Law reflected the national logic that national loyalty should be exclusive and therefore multiple allegiances should not be allowed. After the introduction of the Citizenship Act of 1977, citizenship was perceived as a natural right that the government cannot revoke.⁴³¹ The 1977 Citizenship Act articulated the principle that Canadian-born citizens can never lose their citizenship.⁴³² It is submitted that the foregoing use of the term citizenship is unfortunate as the term nationality would have been more appropriate; consequently, a Canadian national can never lose his/her nationality.

Safran writes that early American society was shaped out of the diverse ethnic communities that had immigrated in large numbers and was characterised by an openness to outsiders and a relative absence of historical constraints.⁴³³ Exhibiting commitment to democracy, equality and the other values enshrined in the US Constitution, defined being an "American".⁴³⁴ Conrad states that in the contemporary US, the incidence of important rights and corresponding duties has become significantly dissociated from the legal status of citizenship.⁴³⁵ Despite its multi-national origin the **United States of America** does not explicitly allow dual national allegiances, the reason therefore presumably being that since the US was created out of an armed revolution and has since participated in many wars, its citizenship is perceived as an issue of national security.⁴³⁶

Spiro advances that in the 1800s it was generally felt that those who voluntarily maintained dual nationality posed a threat to the protection of the community and President Grant in his annual address to Congress in 1874 decried this state of affairs

⁴³⁰ Herzog *Dual Citizenship op. cit.* at 97.

⁴³¹ *Ibid.*

⁴³² *Id.* at 98.

⁴³³ Safran *Citizenship op. cit.* at 318.

⁴³⁴ *Ibid.*

⁴³⁵ Conrad SA "Citizenship" in Hall, KL ed. *The Oxford Companion to American Law*. 2002. Oxford Reference Online [<http://www.oxfordreference.com/views/>] [accessed on 9 July 2013]

⁴³⁶ Herzog *supra* at 97.

and stated "... persons claiming the benefit of citizenship, while living in a foreign country, contributing in no manner to the performance or duties of a citizen of the United States to use these claims of citizenship of the United States simply as a shield for the performance of obligations of a citizen elsewhere."⁴³⁷

Today, everyone within the jurisdiction of the US is accorded most of the rights and protections of the Constitution, although certain rights have traditionally been "reserved" for American citizens only. Conrad writes that "permanent resident aliens' share with citizens the duty to contribute to the defence of the US against foreign enemies, to pay applicable taxes and to obey the law, but only citizens are subject to jury duty and may hold the office of president."⁴³⁸ It is submitted that only *nationals* of the United States of America should be eligible for jury duty and to hold the office of president.

In **Israel** dual citizenship is legally and explicitly permitted. Herzog⁴³⁹ claims that Israel's demographic needs made additional Jewish immigrants essential and therefore different attitudes towards dual citizenship were constructed which consequently advanced a different understanding of the ties between the individual and the state. Consistent with the ethnic principle of the Israeli State, the 1950 Law of Return explicitly refers to the right of only Jews to reside in Israel.⁴⁴⁰ The Israeli parliament, nevertheless, enacted an additional statute to regulate citizenship in Israel and in their discussions whether the state should allow dual citizenship, came to the conclusion that same was ultimately justified to encourage immigration.⁴⁴¹ From the foregoing, it may be deduced that citizenship and nationality were used interchangeably and it is submitted that referring to Jewish nationality would have been more appropriate.

⁴³⁷ Spiro *Dual Nationality op. cit.* at 1432.

⁴³⁸ Conrad *op. cit.*

⁴³⁹ *Id.* at 99.

⁴⁴⁰ *Id.* at 100.

⁴⁴¹ Herzog *Dual Citizenship supra* at 101.

In 1870, the German Empire enacted a law that made *jus sanguinis* the operative principle for granting citizenship, which principle is still applicable today. The Empire, essentially a confederation of sovereign kingdoms, grand duchies and free cities, knew no central **German** citizenship. Inhabitants were citizens by virtue of having been granted citizenship by the sovereign province in which they lived.⁴⁴² Being strongly *jus sanguinis* based, German citizenship was easier to acquire for persons of German ethnicity, even with limited ties to Germany, than it was for foreigners who had continuously lived in Germany for many years.⁴⁴³

Green writes that the key aim of the 1913 "Act" was to enable German emigrants to the United States to retain their German nationality alongside their U.S citizenship down through the generations.⁴⁴⁴ *Ius sanguinis* transmission of nationality was initially limited to a German father until in 1975 this privilege was extended to German women as well. It is only since 1993 that either parent is able to transmit German nationality to a child irrespective of their marital status.⁴⁴⁵ The reformed German Nationality Law of 2000 refrained from generally acknowledging dual nationality, but it did introduce a limited *ius soli* regulation that entitles children born in Germany to foreign parents to hold German nationality even if they possess another nationality. At the age of majority, but not later than 23 years of age, however, such children must decide on one of their two nationalities.⁴⁴⁶ Green postulates that the new Citizenship law furthermore also limits the automatic inheritance of German nationality abroad to the first generation.⁴⁴⁷ It is suggested that German nationality law correctly provides that foreigners can never become German nationals irrespective of how many years they have been resident in Germany. Such foreigners should, however, be able to become citizens since they have been domiciled by choice in Germany for many years.

⁴⁴² Safran *Citizenship op. cit.* at 21.

⁴⁴³ Sejersen *I vow op. cit.* at 541.

⁴⁴⁴ Green S "Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany" *International Migration Review* Vol. 39 No.4 (Winter 2005) 924.

⁴⁴⁵ *Ibid.* 925.

⁴⁴⁶ Naujoks *Dual Citizenship op. cit.* at 1.

⁴⁴⁷ Green *ibid.*

In 1992, the **Italian** government recognised the importance of dual citizenship and since the 15th of August 1992, any Italian citizen who had acquired the citizenship of another country nevertheless maintains his/her Italian citizenship.⁴⁴⁸ In terms of a ministerial circular of April 1991, which is still in force today, the descendants of Italian emigrants who had been attributed another nationality *iure soli* but have never renounced their “inherited” Italian nationality have unrestrictedly transmitted their Italian nationality to their descendants.⁴⁴⁹ Margiotta and Vonk postulate that even “a person who can prove descent from an Italian who emigrated before the unification of Italy in 1861 is entitled to Italian nationality, provided that the Italian ancestor was alive at the time of unification.”⁴⁵⁰ The new 1992 legislation, however, recognised that becoming a citizen of another country is necessary for the full participation and integration in the society of residence.⁴⁵¹ It would seem that the Italian Government understands the differentiation between nationality and citizenship and has made provision in its laws to enable its nationals to hold dual nationality as well as to be citizens of not only Italy itself, but also of another country of choice/residence.

Safran states that the British approach to nationality and citizenship is more complicated as there is no single comprehensive law in Britain that defines these categories.⁴⁵² Great Britain itself evolved as a **United Kingdom** from four distinct nations – English, Scottish, Welsh and Irish – and these subjects were not “national” of Britain⁴⁵³ and hence England’s aggressive assertion of the common law doctrine at the beginning of the 19th century, according to which it was simply not possible for a British national to become naturalised in another country as “no such letter of naturalisation divests our natural-born subject of the allegiance, or in any degree alters the duty which they owe to us, their lawful Sovereign.”⁴⁵⁴ During the colonial

⁴⁴⁸ Fendi, M “Transnational citizenship: multiplicity of rights, responsibilities and opportunities.” in: *People and Place* Vol. no. 14.4 (2006) 37.

⁴⁴⁹ Margiotta and Vonk *Nationality Law op. cit.* at 9.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Fendi *op. cit.* 37.

⁴⁵² Safran *Citizenship op. cit.* at 323.

⁴⁵³ *Ibid.*

⁴⁵⁴ Spiro *Dual Nationality op. cit.* at 1422.

era, everyone born within the British Empire held a similar nationality status and all exercised the full rights of British subject should such colonial subject come to the United Kingdom.⁴⁵⁵ In 1948, the first major reform of nationality law was adopted according to which the single status of "British subject" was applied to all those born in the British crown dominions, whereas birth in a British protectorate did not in general confer British subject status.⁴⁵⁶ A distinction between the immigrants from the Old and New Commonwealth was, however, brought about with the 1971 Immigration Act which introduced the concept of "patriality". A "patrial" was defined as someone who was born in the UK or whose parents or grandparents had been born in the UK.⁴⁵⁷ Safran stated that before the coming into force of the 1981 British Nationality Act, *jus soli* was applied to individuals, regardless of ancestry, born in the UK or in a British crown colony. After 1981, however, British nationality has predominantly been accorded on the basis of *jus sanguinis*, whether or not the child was born in the UK.⁴⁵⁸

From the above discussion, it becomes clear that the concepts of nationality and citizenship are continuously used interchangeably by too many states, making it quite difficult to determine whether a provision made in a specific nationality law refers to nationality or citizenship. Due to the blurring of the distinction between citizenship and nationality, it would seem that modern understanding of these terms has also changed significantly. Citizenship has resultantly become an all-inclusive term, whereas nationality is only referred to when talking about a person's race or ethnicity.

What may be stated with some degree of certainty is that for most people nationality refers to a person's roots, their heritage, their origin and culture, their national identity as belonging to a certain race or nation. For the ordinary man in the street, citizenship means his right to be economically, socially and even politically active within a specific society or country. For the majority of people the incidence of

⁴⁵⁵ Margiotta and Vonk *Nationality Law op. cit.* at 8.

⁴⁵⁶ Manby B *Struggles for citizenship in Africa* (2009) 28.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Safran *Citizenship op. cit.* at 24.

nationality and citizenship coincide, meaning they happen to be a national of state "A" as well as a citizen thereof, whilst for a minority of people the one does not automatically include the other. Taking the above discussions into consideration it would probably be more expedient to use a twofold manner when referring to citizenship. 'National citizenship' would refer to a national who is also a citizen of his/her state of "origin", whereas 'citizenship' would refer to a person who is a national of one state, but has elected to be a citizen of another state, unrelated to his/her state of "origin or nationality".

In the following chapter the question of citizenship and nationality in the African context will be discussed. Due to Africa's mainly colonial past, nationality and citizenship have a different meaning and are not necessarily understood intuitively or in Western or European terms. In Africa, race and ethnicity play a significant role in determining who is either a citizen or a national.

CHAPTER FIVE

An African perspective with special reference to Namibia

In the preceding chapters an attempt was made to clearly differentiate between the concepts citizenship and nationality. African literature on the subject makes maintaining the differentiation difficult as the various writers on the subject, as well as national laws with regard thereto, use these terms interchangeably. This chapter will mainly focus on how Africa deals with citizenship/nationality.

In Africa, the application of the term **nationality** becomes particularly problematic in all those cases where people of the same national origin belong to several states as citizens.⁴⁵⁹ In 1884 in Berlin and prior to the partitioning of Africa, citizenship under African local governance was customary, carefully edged in tradition and jealously guarded against tyrannies.⁴⁶⁰ Manby suggests that many of Africa's new states faced a particular challenge to create an "imagined community" among groups of people thrown together without their own permission.⁴⁶¹ The inhabitants of the 'colonies' automatically became citizens of the imperial countries, ostensibly with the same rights as home citizens.⁴⁶² Nationals of each imperial country and its 'colonies' and/or its 'protectorates' were, in terms of international law, regarded as citizens of that imperial country, since both were under the care of the same imperial country.⁴⁶³ The vast majority of African colonies that were subject to civil law countries practicing *jus sanguinis* stuck to this principle after independence, and Bertocchi maintains that many former UK and Portuguese colonies rejected the *jus soli* tradition and switched to an often strongly ethnically-tinged version of *jus sanguinis*.⁴⁶⁴ For most present African states, according to Oyelaran and Adediran,

⁴⁵⁹ Oommen *Citizenship op. cit.* at 14.

⁴⁶⁰ Oyelaran O and Adedira MO "The African case" in Oommen *op. cit.* 179.

⁴⁶¹ Manby *Struggles op. cit.* at 4.

⁴⁶² *Ibid.*

⁴⁶³ *Id.* at 180.

⁴⁶⁴ Bertocchi & Strozzi *The Evolution op. cit.* at 9.

citizenship at independence became constitutional and divorced from the people's existential conditions.⁴⁶⁵

In 1929, Suleman Abdul Karim, the son of an Indian father and African mother, was sued by a white settler Ernest Carr for the recovery of a debt in the High Court of Nyasaland, now Malawi. Karim could have asked for exemption under Nyasaland statutes because a "non-native" was not permitted to give credit to natives; however, Karim elected to stand trial as a "non-native".⁴⁶⁶ Judge Haythorne Reed noted that the defendant did not wish to take the defence that he is a native and further observed that "a native is defined as a native of Africa not being of European or Asiatic race or origin"⁴⁶⁷ - the defendant thus held "non-native" status because of his Indian father. The Judge further stated that: "A person's race or origin does not depend on where a person is born, just as a child of European parents being born in India or China is therefore not an Indian or Chinaman."⁴⁶⁸ Race thus depends on the blood in one's veins. Lee further maintains that the term "native" was a key organising principle of colonisation in Africa – its universality in the context of Africa was the tacit assumption that it referred to a person who was black.⁴⁶⁹

To understand why several African states accept or sanction differential citizenship based on multi-ethnic social structures, one has to understand that a crisis exists in most African states due to the existence of diverse ethno-cultural groups within the same state.⁴⁷⁰ Although redesigned in form, so Adejumobi contends, the "colonial political structure and later state formation witnessed no radical or qualitative transformation in the post-colonial era in most African states beyond the change of personnel"⁴⁷¹. Heater suggests that the ideas of nationalism and the nation-state

⁴⁶⁵ Bertocci & Strozzi *supra* at 9.

⁴⁶⁶ Milner-Thornton JB *The Long Shadow of the British Empire: The ongoing Legacies of Race and Class in Zambia* (2011) 110.

⁴⁶⁷ Lee CJ "Jus Soli and Jus Sanguinis in the Colonies: The Interwar Politics of Race, Culture and Multiracial Legal Status in British Africa" *Law and History Review* Vol.29 No.2 (May 2011) 498.

⁴⁶⁸ *Id.* at 498.

⁴⁶⁹ *Id.* at 506.

⁴⁷⁰ Iroanya *Citizenship-Indigeneship op. cit.* at 2.

⁴⁷¹ Adejumobi *Citizenship op. cit.* at 160.

have not transferred with any comfort to the African continent as a result of the imperially delineated boundaries which were determined by diplomatic and military means, unrelated to any sense of identity the inhabitants might have felt.⁴⁷² Cooper states that the new states of Africa needed something around which diverse peoples could build a sense of communality⁴⁷³ and consequently post-independence political leaders were faced with the hard task of welding into a nation peoples diverse in language, ethnicity and religion,⁴⁷⁴ and as the ruling in *Carr v Karim* evidences, racial descent played a vital role in determining status.⁴⁷⁵ Dorman *et al* suggest that “decolonisation often led to the hasty transfer of power to Africans, while state-building was still a work in progress at the time of independence.”⁴⁷⁶ According to Manby, the colonisers left a legacy of legal systems that had created a many-tiered citizenship structure whose central feature was racial discrimination.⁴⁷⁷ The fact that borders between African states were, and still are, “artificial” contributes to the “national” project experiencing problems. The acceptance of these borders, however, gave individual states *carte blanche* to do to their citizens what they liked.⁴⁷⁸

Adejumobi suggests that the colonial political structure was predicated on the logic of dualism.⁴⁷⁹ On the one hand there was the central state governed by civil laws, which was the domain of the colonisers and basically urban based, and on the other there were the native authorities which enforced customary laws. It has been put forward that the colonial state ensured that there was no local regulatory check on the chief who, in line with the wishes of the colonial authorities, invented and reinvented what constitutes “customary laws”.⁴⁸⁰ Throughout Africa, so maintains Manby, racial discrimination determined not only political rights, but also freedom of

⁴⁷² Heater *Citizenship op. cit.* at 131.

⁴⁷³ Cooper F “Conflict and Connection: Rethinking Colonial African History” *The American Historical Review* Vol. 99 No. 5 (Dec. 1994) 1519.

⁴⁷⁴ Shaw *International Law op. cit.* at 131.

⁴⁷⁵ Lee *op. cit.* 507.

⁴⁷⁶ Dorman *et al Making Nations op. cit.* at 5.

⁴⁷⁷ Manby *Struggles op. cit.* at 4.

⁴⁷⁸ *Id.* at 6.

⁴⁷⁹ Adejumobi *Citizenship op. cit.* at 157.

⁴⁸⁰ *Id.* at 158.

movement and the right to hold land.⁴⁸¹ White settler societies have, according to Turner, institutionalised citizenship as a form of national inclusion while continuing to exclude African communities.⁴⁸² As a result a debate continues to rage in most of Africa as to who is a citizen and who is not – the “settler” or the “native”,⁴⁸³ and while national citizenship was liberalised with civil laws applicable to all, the local state remains largely ethnicised. Ethnic identity, as opposed to citizenship identity, determines who in the state gets what, when and how much.⁴⁸⁴

Post-independence governments are thus faced with the challenge of cementing national identity within the state that both divides communities and encloses multiple ethnic groups. Dorman *et al* state that those who immigrated into the region during the colonial period are deemed to be outsiders and whose claim to citizenship is seen as “less” authentic.⁴⁸⁵ In Africa, history is taken very seriously and old claims are thus contested hotly,⁴⁸⁶ as land remains symbolic of citizenship and nationhood, despite the increased “modern” understanding of legal citizenship.⁴⁸⁷

Democratisation raised the status of citizenship and after African independence the colonial subject became a nominal citizen.⁴⁸⁸

According to Young,⁴⁸⁹ the Colonial state imposed three classifications of the African subject:

1. Racially as African,
2. territorially as a native of the continent/units of colonial partition, and
3. tribally as a member of an ethnic category.

⁴⁸¹ Manby *Struggles op. cit.* at 4.

⁴⁸² Turner *Citizenship op. cit.* at 226.

⁴⁸³ Adejumobi *Citizenship op. cit.* at 160.

⁴⁸⁴ *Id.* at 161.

⁴⁸⁵ Dorman *et al Making Nations op. cit.* at 11.

⁴⁸⁶ Anti-colonial nationalism is often driven by historical grievances which are related to the expropriation of land and the removal of legitimacy and livelihood from the local population.

⁴⁸⁷ Dorman *et al supra* at 18.

⁴⁸⁸ Young C “Nation, Ethnicity and Citizenship: Dilemmas of Democracy and Civil Order in Africa” in *Making Nations; Creating Strangers* (2007) 242.

⁴⁸⁹ *Id.* at 248.

Ethnicity on the other hand, was based on the variable list of common attributes:

1. Language,
2. shared cultural practices and symbolic resources,
3. a belief in common ancestry; and
4. shared consciousness of belonging to a named group.⁴⁹⁰

Young submits that most post-colonial independence rulers had some inkling of the fragile state of their new domain, and therefore, nation-building became the order of the day.⁴⁹¹ Nationality was invariably married to the doctrine of self-determination, whereas ethnicity is joined to cultural self-preservation.⁴⁹² The ideal for new states was that citizenship should confer on citizens the right to equal protection under law, would guarantee the right of belonging, and would entitle participation and full access to the social provisions of the state.⁴⁹³

Oyelaran and Adediran⁴⁹⁴ maintain that citizenship from the African perspective applies to three realities and refers to:

1. The African's membership in a given polity or in a definable civil society with an identifiable, institutionalised focus of authority for its own governance;
2. rights, privileges, obligations and disabilities accruing to the African by reason of such membership; and
3. citizenship refers to both the existential and experimental realities which the African copes with by virtue of that membership.

Africa's colonial history has thus made the rules governing the transition to independence particularly sensitive, especially in the context of citizenship law. The cases of individuals who have been deprived of citizenship relate to those whose presence is resented today, but who were recognised as colonial subjects prior to

⁴⁹⁰ Young *op. cit.* 250.

⁴⁹¹ *Id.* at 248.

⁴⁹² *Id.* at 252.

⁴⁹³ *Ibid.*

⁴⁹⁴ Oyelaran and Adediran *op. cit.* 175.

independence.⁴⁹⁵ Manby argues that the differences in the legal systems of the colonisers have influenced the principles that have been applied since independence.⁴⁹⁶ The territories of the British Empire in Africa were essentially categorised as colonies, dominions or protectorates. Colonies and dominions were part of the “crown dominion” whereas protectorates were nominally foreign territory managed by local government structures established under British protection.⁴⁹⁷

In colonial systems, Margiotta and Vonk argue, it often happened that the colonial power allowed the retention of its nationality for those who acquired the nationality of the newly independent state – dual nationality was thus explicitly accepted.⁴⁹⁸ At independence, however, many African countries took the decision that dual citizenship should not be allowed, as they wished to ensure that those who might have a claim on another citizenship had to choose between the two possible loyalties.⁴⁹⁹ Many African states have, however, in recent years changed their rules to allow dual citizenship.⁵⁰⁰

Most African countries, according to Manby, apply a compromise in their laws governing citizenship between the two basic principles of *jus soli* and *jus sanguinis*.⁵⁰¹ Apart from citizenship by birth,⁵⁰² many African countries emerging from colonialism also confer citizenship by ‘registration’.⁵⁰³ Thus, while nationality on the basis of *jus sanguinis* and/or *jus soli* remains generally accessible, citizenship by registration (and naturalisation) has been restricted. An applicant for the latter category must demonstrate an unequivocal willingness to become a citizen, must

⁴⁹⁵ Manby, B “Citizenship Law in Africa A Comparative Study” *Open Society Justice Initiative* (2010) 21. [accessed on 1 July 2014 at www.opensocietyfoundations.org/reports/citizenship-law-africa]

⁴⁹⁶ *Id.* at 28.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Margiotta and Vonk *Nationality Law op. cit.* at 7.

⁴⁹⁹ Manby *Citizenship Law supra* at 58.

⁵⁰⁰ *Ibid.* The African countries allowing dual nationality are Angola, Burundi, Republic of Congo, Djibuti, Gabon, Gambia, Ghana, Kenya, Mozambique, Rwanda, São Tomé and Príncipe. South Africa allows dual nationality but only with the official permission of the government.

⁵⁰¹ *Id.* at 32.

⁵⁰² Here once again citizenship is used synonymously with nationality. It is writers contention that nationality is conferred at birth, while citizenship is elected and granted once certain criteria have been met, such as by registration.

⁵⁰³ Oyelaran & Adediran *op. cit.* 182.

generally be of good character and must show a clear intention to be domiciled in that particular country.⁵⁰⁴ It is understood that citizenship by registration and/or naturalisation may be withdrawn for various reasons such as the voluntary acquisition of citizenship from another country, by marriage, having obtained the citizenship fraudulently, or through false representation, etc.⁵⁰⁵ Numerous court cases have, however, determined that citizenship by virtue of birth cannot be withdrawn – thus a person who is a citizen of state “A” by birth cannot be deprived of his/her citizenship.⁵⁰⁶

Nigeria

The concept of Nigerian citizenship did not exist prior to British colonial rule.⁵⁰⁷ In 1960, Nigeria became a sovereign state and resultantly various Acts were promulgated with regard to Nigerian citizenship.⁵⁰⁸ Nigeria’s Independence Constitution created Nigerian citizenship⁵⁰⁹ and one important feature of Nigerian citizenship laws before 1974 was the absence of any form of economic activity discrimination between Nigerian citizens and foreigners. With independence, however, Nigerians became the masters of their own political destiny and resultantly the opinion became widely held “that political independence without indigenous control of the economy meant very little for an under-developed country like Nigeria.”⁵¹⁰ Consequently in early 1974, no person other than a Nigerian citizen could be the owner or part owner of any economic enterprise in Nigeria. The

⁵⁰⁴ Oyelaran & Adediran *op. cit.* 184. This category of citizenship aims at giving individuals the opportunity to become citizens of their own free will, irrespective of where they may have come from.

⁵⁰⁵ *Id.* at 185.

⁵⁰⁶ *Id.* at 187.

⁵⁰⁷ Okoli KC “Nigerian Citizenship Law: A Current Perspective” *Journal of African Law* Vol. 34 No. 1 (1990) 27.

⁵⁰⁸ Nwogugu, EI “Recent changes in Nigerian Nationality and Citizenship Law” in: *The International and Comparative Law Quarterly* Vol. 25, no. 2 (1976) 423. The independence Constitution of 1960 made provision for Acts of Parliament to regulate citizenship and so the Nigerian Citizenship Act 1960 and Nigerian Citizenship Act 1961 were enacted. These acts were subsequently incorporated in the Republican Constitution of 1963. In 1968 the Nigerian Citizenship (Validation) Decree was proclaimed.

⁵⁰⁹ Okoli *supra* at 27.

⁵¹⁰ Nwogugu *supra* at 424.

Nigerian Enterprises Promotion (Amendment) Decree of 1973 was enacted to give the Nigerian citizen a privileged position in the country's internal trade and commerce *vis-a vis* aliens.⁵¹¹

As a result hereof and prior to the promulgation of the Enterprises Decree, foreign businessmen in Nigeria, particularly those involved in the distributive trade, wished to acquire Nigerian citizenship in order to enable them to continue to operate businesses covered by the Decree. The Ministry of Internal Affairs became inundated with applications for citizenship. In order to avoid that foreigners who had no real link to Nigeria would not exploit the liberal conditions for the acquisition of Nigerian citizenship solely for the purpose of economic gain,⁵¹² the Constitution (Amendment) Decree of 1974 was then promulgated, which Decree repealed the Nigerian Citizenship Acts of 1960 and 1961.

Under the "new" Decree, Nigerian citizenship may be acquired by birth, registration or naturalisation. Under this Decree there are five categories of persons who may become Nigerian citizens, namely:

- Persons born in Nigeria before 30 September 1960 if either parents or grandparents were born in Nigeria;
- any person born outside Nigeria before or on 30 September 1960 if his/her father was born in Nigeria;
- any person born in Nigeria after 30 September 1960 if either his/her parents or at least one grandparent was born in Nigeria;
- any person born after 30 September 1960 if he/she was born in Nigeria and at the time of his/her birth either parent was a citizen of Nigeria by registration or naturalisation or he/she was born outside of Nigeria and at the time of his/her birth both parents were citizens of Nigeria by registration, naturalisation or birth;

⁵¹¹ Nwogugu *op. cit.* 426.

⁵¹² *Id.* at 427.

- any minor, whether or not he/she was born in Nigeria, whose mother was a citizen of Nigeria at the time of his/her birth and if he/she was born out of wedlock to a father who was not a citizen of Nigeria.⁵¹³

It is submitted that it would have been more accurate to state that Nigerian nationality could be acquired by birth or descent, whereas citizenship could be acquired by either registration or naturalisation. Nigerian nationality laws were specifically enacted to protect Nigerian nationals from possible economic exploitation by foreigners and therefore a clear distinction between nationality and citizenship would have been befitting.

Nigeria follows the *jus soli* principle of conferring Nigerian nationality and dual status is not allowed, although a Nigerian citizen who was entitled to dual citizenship under the 1963 Constitution was, as a general rule, entitled to retain such citizenships indefinitely.⁵¹⁴ A foreigner wishing to become a Nigerian citizen, first needs to renounce his/her present citizenship.⁵¹⁵ Dual status would only be allowed in circumstances where the foreigner wishing to become a Nigerian citizen is unable to renounce his/her present nationality.

Adesoji advances that Nigeria, like other societies the world over, struggles with the "indigenes-settler" syndrome.⁵¹⁶ The various settler groups in different parts of the country have always maintained that having settled in a place for a long period of time gives them the status of indigenes and no longer that of a settler. Adesoji further argues that the successive Nigerian Constitutions led to the distinction between national and local citizens and this has, furthermore made it difficult to promote citizenship and constitutionally guaranteed citizen rights.⁵¹⁷

⁵¹³ Nwogugu *op. cit.* 428.

⁵¹⁴ Okoli *op. cit.* 37.

⁵¹⁵ *Id.* at 432.

⁵¹⁶ Adesoji AO "Indigeneship and Citizenship in Nigeria: Myth and Reality" *The Journal of Pan African Studies* Vol. 2 No. 9 (March 2009) 154.

⁵¹⁷ *Id.* at 155.

Nwogugu observes that the Decree prescribing the modes and qualifications for the acquisition of Nigerian citizenship does not discriminate between persons of African descent or nationals of African states and other foreigners.⁵¹⁸ The same requirements are demanded from all foreigners, irrespective of colour or creed. The general trend in the law is, however, to make the acquisition of Nigerian citizenship difficult, which ties in with the new economic rights conferred on Nigerian nationals under the Nigerian Enterprises Promotion Decree of 1972.⁵¹⁹ This sentiment is echoed by Okeke and Okeke who postulate that the conditions for becoming a Nigerian citizen range from easy (by birth) to hard (naturalisation). The condition to be met by a non-Nigerian, wishing to acquire Nigerian citizenship through naturalisation include that such a person must have been domiciled in Nigeria for not less than 15 consecutive years or 15 years in aggregate over a 20 year period.⁵²⁰

Botswana

Botswana became independent in 1966 and since then, according to Nyamnjoh, identity politics became increasingly important alongside more exclusionary ideas of nationality and citizenship, as minority claims for greater cultural recognition and plurality were encountered by majoritarian efforts to maintain the status *quo* of an inherited colonial hierarchy of ethnic groupings.⁵²¹ Tswana customs not only acknowledge the individual's rights to participate in communal affairs, but also provide against a *kgosi* (king) abusing his authority through constant reminders that a king is king only because of his followers.⁵²²

Nyamnjoh states that while legal provisions might promise citizenship to all in principle, the practice is one of inequality among individuals and groups.⁵²³ In Botswana one finds that there is a hierarchy of citizenship fostered by political,

⁵¹⁸ Nwogugu *op. cit.* 438.

⁵¹⁹ *Id.* at 439.

⁵²⁰ Okeke GN & Okeke CE "The Acquisition of Nigerian Citizenship by Naturalisation: An Analytical Approach" *IOSR Journal of Humanities and Social Sciences* Vol.8 Issue 2 (Jan 2013) 58.

⁵²¹ Nyamnjoh *Local Attitudes op. cit.* at 755.

⁵²² *Id.* at 756.

⁵²³ *Ibid.*

economic, social and cultural inequalities which enable some individuals and groups to claim and articulate their rights better than others.⁵²⁴ Not all outsiders are welcome and not all who are welcome are accorded the same respect, privileges or rights by Botswana.⁵²⁵

According to Nyamnjoh, longstanding assumptions of citizenship and nationhood are being questioned and Botswana minorities are employing a variety of methods to seek better “political representation, material entitlements and cultural recognition” for themselves as groups.⁵²⁶ “While every Botswana national can claim to be a citizen or “local” legally, some such as the BaKalanga are perceived in certain Tswana circles as less authentic citizens or locals.”⁵²⁷ Nyamnjoh postulates that citizenship and belonging, even for nationals of the same country, are all a matter of degree.⁵²⁸

The Botswana Citizenship Act⁵²⁹ determines that a person becomes a Botswana citizen by birth or descent only. If a dual status is present, then the other citizenship must be renounced upon the attainment of the age of 21 years. Failure to renounce the other citizenship will lead to the loss of Botswana citizenship. Mere birth within the country does not confer citizenship and is only possible if the father of the child is a Botswana citizen. A person may claim citizenship by descent if the father is a citizen regardless of his country of birth. It is possible to obtain Botswana citizenship through marriage if a person is married for longer than 5 years or such person has continued to reside in Botswana for longer than 5 years prior to the marriage to a Botswana citizen.⁵³⁰

⁵²⁴ Nyamnjoh *Local Attitudes op. cit.* at 758.

⁵²⁵ *Ibid.*

⁵²⁶ *Id.* at 760.

⁵²⁷ *Id.* at 762.

⁵²⁸ *Ibid.*

⁵²⁹ Botswana Citizenship Act 1998.

⁵³⁰ *Ibid.*

Botswana does not allow dual citizenship and a Botswana citizen is able to renounce his/her citizenship. A Botswana citizen by birth or descent may apply to have their citizenship reinstated if they had previously renounced their Botswana citizenship.⁵³¹

From the preceding discussion one may draw the conclusion that Botswana equates a national with a citizen. The mere fact that a person can only become a Botswana citizen by either birth or descent gives a clear indication that reference in actual fact should have been made to Botswana nationality by birth or descent.

South Africa

According to Klaaren the origins of South African citizenship lie in the regulation of the mobility of its people. History teaches that provincial elites drafted a series of comprehensive immigrations laws before joining together in the Union.⁵³² National Party legislation, after the 1948 electoral victory, attempted to completely regulate African movement and identity documentation.⁵³³ Strydom postulates that from the distinction sometimes drawn between nationality and citizenship, it was understood that nationality is merely a formal indication of state membership whilst citizenship implies a person's political participation and enjoyment of political rights.⁵³⁴ He further states that the freedom of the state to make its own arrangements concerning nationality and citizenship without interference from international law, explains how apartheid South Africa could have denied citizenship to the majority of South Africans yet have invested them with nationality for purposes of international law.⁵³⁵ Neocosmos avers that ethnic nationalism was what the apartheid state "attempted to produce with its plan to turn rural areas denoted as 'traditional

⁵³¹ Botswana Citizenship Act Section 17.

⁵³² Klaaren *Citizenship op. cit.* at 60-1.

⁵³³ *Id.* at 60-2.

⁵³⁴ Strydom *The theory of op. cit.* at 103.

⁵³⁵ *Ibid.* In essence black South Africans were vested with South African nationality but were denied citizenship, thus effectively denying citizenship rights such as the right to vote, to own property etc.

homelands' into 'independent' or 'self-governing states' – the so-called Bantustans".⁵³⁶

Klaaren suggests that prior to the advent of constitutional democracy, the Republic had a concept of citizenship which was largely based on statute and "simply did not count for much."⁵³⁷ From 1990 to 1994, citizenship was placed within the framework of a constitutional democracy and the South African Citizenship Act 88 of 1995 was largely a consolidation of pre-existing law.⁵³⁸ Klaaren postulates that the aim of the 1995 Act was to create a unified national citizenship regime and therefore it repealed the various statutes governing the citizenships of the homelands.⁵³⁹ South African citizenship has not been based on membership in a political Republic or membership in a cultural bloc or individual participation in a post-nationalist universal human rights culture, but is instead based on residence as acknowledged through law.⁵⁴⁰

South Africa is technically a *jus soli* jurisdiction with a territorial right to citizenship which is restricted at law.⁵⁴¹ Citizenship by birth is limited by legislation to a child born in the Republic to a South African citizen or to parents who are both permanent residents. Dual-nationality is generally allowed although provision has been made for the criminalisation of dual-nationality where the use of the foreign nationality is made to gain an advantage or to avoid responsibility or a duty.⁵⁴²

South African legislation also falls foul of clearly differentiating between nationality and citizenship. Reference is also made to becoming a citizen by birth (which should be nationality at birth) and a person being able to hold dual nationality.

⁵³⁶ Neocosmos M "The Apartheid State and Migration to South Africa: From Rural Migrant Labour to Urban Revolt" *From 'Foreign Natives' to 'Native Foreigners' Explaining Xenophobia in Post-apartheid South Africa* (2006) 39. www.codesria.org/IMG/pdf/neocosmos-3.pdf

⁵³⁷ Klaaren J "South African Constitutional Citizenship" I*CON Symposium: The Evolving concept of citizenship in constitutional law 5 October 2009. <http://www.citizenshiprightsinafrica.org> [accessed on 13/10/2012]

⁵³⁸ *Id.* at 60-3.

⁵³⁹ *Id.* at 60-5.

⁵⁴⁰ *Viewed from the past, the future of SA Citizenship* Draft FMSP Working Paper: 12 May 2009.

⁵⁴¹ Klaaren *supra* at 60-14.

⁵⁴² *Ibid.*

Namibia

Cognisance must be had of Namibia's, formerly known as South-West Africa, colonial history. Before the first official annexation of South-West African territory occurred, the country was solely inhabited by its native people, although as from about 1805, a number of missionaries tried to convert the inhabitants to the Christian faith.⁵⁴³ In 1883, Adolf Lüderitz bought Angra Pequeña from the Nama chief Joseph Fredericks. In 1884, German chancellor Otto von Bismark promised to protect the territory which had been sold to Lüderitz, (today known as Lüderitzbucht) thereby establishing German South-West Africa as a colony. Germany formally made representations at the Cape Colony to ensure that its claim to the territory was known, and during June 1884, Great Britain formally recognized German possession of the territory. In July of the same year, Walvis Bay was incorporated in the South African Cape Colony.⁵⁴⁴

In 1915, South Africa, being a member of the British Commonwealth and a former British colony, occupied the German colony of South-West Africa. South-West Africa remained under British South African rule until about 1918 and from 1919 – 1945 South-West Africa became a League of Nations mandate.⁵⁴⁵ In 1946, when the League of Nations was superseded by the United Nations (UN), South Africa refused to surrender its earlier mandate to be replaced by a UN mandate, which mandate required closer international monitoring of the administration of the territory. The original mandate was revoked by the UN in 1966 and the struggle against South African rule eventually led to Namibia becoming an independent Republic on 21 March 1990.⁵⁴⁶

Blumhagen in his doctoral thesis writes that an own nationality for German colonies was not at the order of the day, as these colonies were not considered to be states

⁵⁴³ Dierks K Dr *Chronology of Namibian History. From pre-historical Times to Independent Namibia* 1999 www.klausdierks.com [accessed on 3/07/2014].

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

in their own right.⁵⁴⁷ German nationality was generally acquired through obtaining Federal citizenship and this principle also found application in the various German protectorates.⁵⁴⁸ As the majority of settlers in South-West Africa were of German origin, it was through this principle and the applicable descendency principle that German nationality and citizenship were thus transferred to descendants of the German settlers.⁵⁴⁹

In accordance with being a territory under indirect British rule, the South-West Africa Naturalisation of Aliens Act 1924⁵⁵⁰ was passed which provided that every adult European who, being a subject of any of the late enemy powers, was domiciled in the territory would be deemed to have become a British subject naturalised under the Act of 1910, unless a declaration to the contrary was signed within six months after the commencement of the Act. The 1924 Act states that the Naturalisation of Aliens Act, 1910 "shall be of force and effect within the Territory" as with the commencement of the 1924 Act.⁵⁵¹

Considering Namibia's history, it is easy to understand that the peoples of her territory were first subjected to German laws, then English law, then South African legislation and finally were able to draft and enact their own legislation. This led to Namibia's people holding various nationalities due to the successive nature of colonial rule. Descendants of the first German settlers have generally retained their German nationality as did those of British descent who settled in the territory. Any person born in the then South-West Africa, whilst under South African administration, automatically became a national of South Africa. Pre-independence it was typical for individuals of European descent to be dual nationals. Post-independence and with the promulgation of the Namibian Citizenship Act 14 of 1990, dual status was no longer acceptable or allowed.

⁵⁴⁷ Blumhagen HE *Die Doppelstaatigkeit der Deutschen im Mandatsgebiet Südwestafrika und ihre völkerrechtlichen Auswirkungen* (1939) 3.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ (Act No. 30 of 1924)

⁵⁵¹ South West Africa Naturalisation of Aliens Act 1924 (Act No, 30 of 1924) published in Government Notice No. 121/1924 82 - 83.

The enactment of Namibia's own Constitution and Citizenship Act led to the institution of litigation as dual nationality was no longer allowed in terms of present Namibian legislation. The Namibian Constitution is silent on the holding of dual nationality, although it does provide that Namibians by birth or descent may not be deprived of their Namibian citizenship even if they have, after independence, acquired the citizenship of another country by any voluntary act.⁵⁵² The Citizenship Act per Section 26 clearly prohibits a "Namibian citizen to also be a citizen of a foreign country."

In *Le Roux v Ministry of Home Affairs and Immigration and others*,⁵⁵³ the Court found that "...there is an automatic acquisition of nationality for those born in Namibia. They cannot be deprived of that, even if they have acquired citizenship of another country." In *Berker v Ministry of Home Affairs and Immigration & Others*,⁵⁵⁴ the Court held that the Immigration Official had acted unlawfully by depriving a Namibian citizen by birth of her Namibian passport by virtue of the fact that she was also in possession of a German passport and nationality, which nationality she held by virtue of one of the parents being a German national.

The Namibian courts have expressed that, in terms of the Namibian Constitution, a person who is a Namibian national by birth or descent cannot be deprived of his/her Namibian nationality even if he/she is in possession of another nationality. Namibian nationals are thus allowed to be dual nationals. A person who became a Namibian citizen by means of naturalisation or registration may not hold the nationality of another country.

With the enactment of Namibian legislation it again becomes clear that the interchangeable use of nationality and citizenship has done the general population no favours. Even the judgements given by the courts have the propensity to use the terms interchangeably. All the judgments, however, make it very clear that being a

⁵⁵² The Constitution of Namibia Chapter 2, Article 4.

⁵⁵³ 2011(2) NR 606 (HC).

⁵⁵⁴ (A 36-2011) [2012] NAHC 51.

Namibian national by birth or descent allows such national to hold a dual status of nationality. From the gist of the judgements given it seems trite that a person who became a Namibian citizen through naturalisation or the limited regime of registration is not allowed to hold a dual status. Whether this dual status is to refer to nationality or citizenship is, however, unclear.

Taking specifically the Namibian situation into consideration, it is submitted that the drafters of the Namibian Constitution envisaged that all persons who had a bond with South-West Africa would and should be able to become Namibian "citizens" upon the attainment of independence. The "once off" one-year period after independence in which "foreigners" could become Namibian citizens by means of registration, indicates that the independent Namibia wanted all persons within its national borders to be part of the new nation, irrespective of their origin or nationality, provided such a person could prove an uninterrupted period of domicile in the country of not less than five (5) years. Many "foreign" nationals became Namibian citizens by registration as many had grown up in South-West Africa, and as young adults were contributing to and participating in its economic, social and political development at the time of independence. The choice was made to become a citizen for economic, social and to some degree political reasons. This choice was never made to renounce one's "foreign" nationality. To put it differently – a European person having grown up in Africa does not become a native African by mere choice. Such person could possibly be referred to as a European African, similar to how Africans refer to themselves in America – African American.

Having regard to the colonial histories of African nations, one gets the sense that the newly independent states wanted to make a differentiation between nationality and citizenship, but did not know how to achieve this without engaging in outright "reverse discrimination". It is also trite that the descendants of the settlers or colonialists know no other "home" than the African state that they were born and raised in, yet they remain very conscious of their "settler/colonial" roots. It is suggested that especially in Africa, where the European man invaded the territory of the African man and settled there, the distinction between who is a national and who

is a citizen should be clearly defined. As was customary in ancient times, all those who were/are born within the sovereign territory of a state should become nationals of that state, whereas all persons who wish to make an economic, social and/or political contribution towards the growth and/or development of the state should be afforded the right to become a citizen when certain criteria have been met. Citizenship should not and writer hereof maintains that it cannot, determine nationality and vice versa.

Many African states have enacted legislation that is prohibitive of dual citizenship. This view is supported in so far as dual citizenship is understood in the context of citizenship meaning civil rights and duties owing to a specific national community. Domicile or place of habitual residence is often used in municipal law to determine jurisdiction and it is submitted that the law of domicile should also be a determinant of effective citizenship. As domicile law thus prescribes that every person should have only one domicile at any one time, so every person should have only one citizenship at any one time.

In the concluding chapter following hereunder, an opinion will be given whether it is proper to refer to dual nationality or dual citizenship. Whether any dual status should be entertained and if yes, what its consequences if any would be, will also be discussed.

CHAPTER SIX

Conclusion

Are we any closer to a definitive answer to the question of which is the more appropriate term to describe any dual status - dual nationality or dual citizenship? It was established that the ancients were not familiar with the concept of nationality. On the other hand, the term citizen had meaning to them as this was a status that conferred certain rights and obligations on a person and was related to being a member of a certain city-state. Dual-citizenship became an acceptable status under Roman rule as it was beneficial to the Romans that some persons be citizens of Rome as well as citizens of their city of origin. Only when empires, kingdoms and fiefdoms later formed nation-states, did the term 'nationality' come into use, essentially describing a person who was a member of a specific nation-state - thus what transpired was that a person became, for example, an Italian national and a citizen of the city of Rome.

Benhabib asserts that the volatile and often uncertain mixture of practices such as citizenship and sovereignty, which have characterised our understanding of modern politics since the 1648 Treaty of Westphalia, have understandably given rise to conflicting commentaries and interpretations.⁵⁵⁵ Spiro states that "nationality" and "citizenship" used to be clearly distinguishable since only nationality was salient in international law, but since these terms are repeatedly used interchangeably, it is his contention that "citizenship" may emerge as the more dominant description with all of its implications of equality and rights.⁵⁵⁶ In essence this view is supported by Cook-Martin who postulated that citizenship in developing countries is often used in an attempt to resolve internal inequalities.⁵⁵⁷

⁵⁵⁵ Benhabib *Twilight op. cit.* at 206.

⁵⁵⁶ Spiro *A New International op. cit.* at 717.

⁵⁵⁷ Cook-Martin *The Scramble op. cit.* at 99.

Bisschop argued that "the 1930 Conference at The Hague for the codification of international law could not find a solution for the difficulties attached to statelessness and double nationality for the simple reason that the various States adhered to their absolute sovereignty which gave them the right to decide who would be their nationals."⁵⁵⁸ In 1934, Bisschop already advanced that the individual should be granted the basic human right of being a (world) citizen first and foremost.⁵⁵⁹ National identity and citizenship are neither mutually exclusive nor does one pre-suppose the other. Oyelaran and Adediran assert that while "national identity is a socio-psychological disposition, citizenship is both a legal status conferrable on individuals as members of a polity and the existential experience of such individuals regardless of their *de facto* national identity."⁵⁶⁰

Let us return to the example used of Abigail who was born in Italy to an Italian mother and Dutch father and whose parents immigrated to the then South West Africa (now Namibia) when Abigail was 5 years old. In 1990, Namibia became an independent, sovereign state and Abigail was at the time aged 22 years. The question was posed whether Abigail possessed dual (or multiple) nationality or dual citizenship. A further question was also asked whether her dual or multiple statuses were of importance to anyone.

The answers to the questions posed above are not clear cut. Spiro contends that maintaining additional national attachments becomes an expression of individual identity,⁵⁶¹ which contention is supported by Heater who declared that "the individual who genuinely feels a multiple identity does not need to experience this richly coloured persona every moment of his/her conscious life. Just as a duck will fly, swim or waddle depending on the circumstances, so the citizen will identify with his/her locality, state or the world depending on circumstances".⁵⁶² Benhabib supports the above statements made by averring that we are moving away from

⁵⁵⁸ Bisschop *Nationality op. cit.* at 324.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Oyelaran and Adediran *The African op. cit.* at 176.

⁵⁶¹ Spiro *Dual Nationality op. cit.* at 1416.

⁵⁶² Heater *Citizenship op. cit.* at 323.

understanding citizenship to be national membership and are increasingly moving towards a citizenship of residency which strengthens the multiple ties to locality, to the region and to transnational institutions.⁵⁶³ Spiro argues that by extending citizenship, solidarity will be enhanced by facilitating full political integration.⁵⁶⁴ Every citizen has one or many national identities according to Hoffman and due to this there is a need to detach nationality from the state, since a national identity (or identities) forms part of the way individuals see and express themselves.⁵⁶⁵ This can, however, only be achieved when a realistic way has been found to look beyond the state.⁵⁶⁶

From the above, it would seem that whether a person is a dual national or dual citizen is of importance to the individual and also relevant to the state in which such a person resides. The argument was made that nationality is determined by applying either the principle of *jus soli*, *jus sanguinis*, or a combination of the two principles. Nationality in effect has more to do with ethnicity and race (the blood that runs through your veins) than with custom, religion or common language, although these may play a part in determining nationality. It is contended that simply the place of birth does not determine a person's nationality – the example was used that a European child, being born in Asia does not make such a child an Asian. Another example that may be used is that persons of African origin having lived in America for many generations (still) refer to themselves as African-American. Such persons still refer to their "roots" or nationality, being African. If we accept that nationality is "inherited" and as such requires no positive action to be taken to acquire such nationality, then it should follow that an individual could be a national of more than one nation or race. Dual or multiple nationality should then not pose any legal impediment to the holding of such dual or multiple nationality. From this it then further follows that, since nationality is "inherited", nothing can be done to denounce it – a European living in Africa will not become an African in terms of nationality or

⁵⁶³ Benhabib *Twilight op. cit.* at 262.

⁵⁶⁴ Spiro *A New International op. cit.* at 741.

⁵⁶⁵ Hoffman *State and Nationalism op. cit.* at 58.

⁵⁶⁶ *Id* at 59.

race and can therefore not renounce his/her "Europeanism". To use another example – a dog and cat who grow up together will copy some of the behaviours of the other, but despite them living together in harmony for many years, the dog will not become a cat and *vice versa*. It can, however, be postulated that although their "nationalities" may differ, they share the same "citizenship" of the common household that they live in.

It has also been determined that citizenship is "that political artefact through which the state constitutes and perpetually reproduces itself as a form of social organisation" as Adejumobi succinctly stated.⁵⁶⁷ Kerber opined that it is in citizenship that the personal and political come together, because citizenship is about how individuals make and remake the state.⁵⁶⁸ It has been argued that citizenship refers to social, economic and political rights that citizens have pursued and even fought in revolutions for. The concept of citizenship pertains to the participation or voice that those who permanently reside within a State wish to have with regard to how such a particular State is governed in terms of social, economic and political development.

Shababi contends that the diversity of the political society of today requires that the "condition of membership be grounded not in an exclusionary pre-political heritage of belonging, but in a civic bond of association."⁵⁶⁹ Benhabib on the other hand, is of the opinion that the current state of global interdependence requires new modalities of cooperation and regulation.⁵⁷⁰ Spiro is of the belief that state discretion is no longer unfettered and that citizenship practice must account for the interests of individuals as well as those of the state.⁵⁷¹ Benhabib further postulates that political participation, particularly within the European Union, is heralding a new institution of citizenship as a result of the universalistic extension of civil and social rights.⁵⁷²

⁵⁶⁷ Adejumobi *Citizenship op. cit.* at 152.

⁵⁶⁸ Kerber *The Meanings op. cit.* at 854.

⁵⁶⁹ Shababi, OAP "Who is afraid of constitutional patriotism? The binding source of citizenship in constitutional states." *Social Theory and Practice* Vol. 28 (2002) 404.

⁵⁷⁰ Benhabib *Twilight op. cit.* at 262.

⁵⁷¹ Spiro *Dual Nationality op. Cit.* at 717.

⁵⁷² Benhabib *supra* at 262.

Having regard to the development of political history, it is clear to see that citizenship and nationality were not treated as being one and the same concept. Citizenship has always been a status that people strived to attain, and as Strydom so aptly pointed out "political rights are a result of the pursuit of citizenship and not an essential requirement for citizenship."⁵⁷³ It is contended that wanting to be or to become a citizen of a certain state has very little to do with a person's nationality, but much to do with where that person wants to exercise his/her rights as citizen - where that person chooses to be an active member of society.

It is submitted that as a person cannot renounce their nationality no matter where in the world they find themselves to be, every person should, however, be able to change their citizenship status as and when required. To state it differently – being a national of state "A" it should not automatically be presupposed that such a person is also a citizen of state "A". National of state "A" could be a citizen of state "Y" as such person may have chosen to be an active member in state "Y". The global mobility of persons is more of a reality today than 50 or 60 years ago and these facts support the hypothesis that persons may wish to change their citizenship on more than one occasion. Spiro advances that the increased toleration of dual nationality strongly suggests the demise of exclusivity and a redefinition of citizenship.⁵⁷⁴ Writer hereof postulates that where a person's domicile is, is also the place where such person's (current) interests lie and where such person would want to make a contribution to society – in essence where your heart is, there is your home. Spiro contents that "mandating access to citizenship on a territorial basis and accepting dual nationality will enhance the rights of those who would otherwise be excluded."⁵⁷⁵

The international common law position that every state may decide who its citizens are is not affected by the above argument. States still have the right to decide whom they would want to allow becoming a citizen. It is trite that requirements for

⁵⁷³ Strydom *The theory of op. cit.* at 109.

⁵⁷⁴ Spiro *Dual Nationality supra* at 1453.

⁵⁷⁵ Spiro *A New International supra* at 738.

citizenship are found in all nationality laws and such requirements should remain for the attainment of citizenship. My argument is substantiated by the case of *United States v. Wong Kim Ark* (1898) where the Court held that “it is the inherent right of every independent nation to determine for itself and according to its own constitution and laws what classes of persons shall be entitled to its citizenship (my emphasis).”⁵⁷⁶ It is further asserted that every person be able to hold only one citizenship at a time – in accordance with the law of domicile – and therefore it would be appropriate to require a person to renounce their previous citizenship in order to attain a new/different citizenship.

Turner is of the opinion that the protection offered by national citizenship (more appropriately nationality) is declining and yet the state remains important in the enforcement of social and human rights. He defines social rights as those entitlements enjoyed by citizens and which are enforced by courts within the national framework of a sovereign state.⁵⁷⁷ What then of Abigail and her “situation”? Taking all the foregoing into consideration it would be correct to state that she is a dual national by birth – Italian mother and Dutch father, both of whom have “transferred” their nationality to Abigail through the principle of *ius sanguinis*. In terms of Namibian law, Abigail could have elected to acquire Namibian citizenship after independence. Should Abigail at some point decide to relocate, say to Italy permanently, she would then acquire Italian citizenship “on top” of being an Italian national by birth. She would have to renounce her acquired Namibian citizenship, as Namibia does not allow dual *citizenship* for those persons who were not born in Namibia and of Namibian citizen(s). As Spiro has stated, dual nationality “should not be merely tolerated but should be embraced and the renunciation of foreign allegiances required in the citizenship oath should be eliminated.”⁵⁷⁸

It is agreed that if Spiro might be correct in his assumption that the term “citizenship” will eventually replace the concepts of nationality and

⁵⁷⁶ 169 U.S 649, 668 as quoted by Spiro *Ibid*.

⁵⁷⁷ Turner *Citizenship op. cit.* at 234.

⁵⁷⁸ Spiro *Dual Nationality supra* at 1416.

citizenship, then it must also follow that a differentiation be made with regard to the all-inclusive term citizenship. Persons born within a certain state may not only be "citizens" by birth but also by election and should therefore then not merely be referred to as citizens. As Turner has already used the term 'national citizenship' for persons who should have been referred to as nationals, it is suggested that should the term 'citizenship' become a more inclusive term, then nationality be referred to as 'national citizenship' since in the opinion of the writer hereof this term would indicate that a person was both a birth right citizen as well as a citizen by choice in the same state.

In summation, nationality and citizenship are not interchangeable and do not mean the same thing. Since nationality is "inherited" and determined by birth, nothing can be done to renounce nationality status. Citizenship on the other hand, is a status that can be either automatically acquired (by birth and continued residence in the state of nationality – "national citizenship") or one can perform any voluntary act to acquire the citizenship of a state unrelated to a person's nationality. If citizenship is to be understood as political and social rights that may be acquired with a certain state or community, then it stands to reason that a person should also be able to renounce the citizenship of one state for the citizenship of another state or community.

It is suggested that dual or even multiple nationality should be embraced, but dual citizenship should be curtailed. States should consider allowing "foreigners" to become their citizens without requiring of such foreigner to renounce his/her nationality, which it is submitted, a person is unable to do. Renouncing another citizenship that had been acquired (either by birth or voluntary act) should be renounceable if the receiving state does not allow dual citizenship. An individual who is a "national citizen" of State A and who wishes to become a citizen of State P should, it is submitted, renounce their State A citizenship without forfeiting their State A nationality, which would remain "effective" irrespective in which State the particular individual would choose to be a citizen.

Spiro is of the opinion that citizenship status (as an overarching concept) will continue to carry protective benefits and therefore “habitual residents and their progeny should not be relegated to non-citizen status indefinitely”.⁵⁷⁹ At some future point (after the effluxion of a set time period) territorial presence should give eligibility for citizenship acquisition.⁵⁸⁰

Leigh suggests that the requirement for formal nationality for the purpose of diplomatic protection be done away with.⁵⁸¹ He argues, and I agree, that the effective link criterion be the only requirement for purposes of diplomatic protection, as this would allow a state to bring a claim on behalf of any individual who is effectively connected with such a state, irrespective of whether such individual is a national in the formal sense.⁵⁸² It is further contended that this may, in time, result in access to international justice by a far larger class of people than is currently the case.⁵⁸³ Hoffman argues that support is needed for policies that make it easier for residents to become citizens, possibly then resulting therein that or nationality may become ‘dual’ or ‘multiple’.⁵⁸⁴

In final conclusion, I propose that the confusion which exists as to whether a person is a dual national or a dual citizen may easily be removed and addressed. The international community is the main culprit in perpetuating the confusion as it allows the terms citizenship and nationality to be used interchangeably – this is clearly seen in the wording of international conventions and the various nationality laws. It is suggested that the international community agree thereto that *citizenship* be defined as a status that may and can be freely chosen and as such resultantly be freely relinquished and (easily) changed. *Nationality* on the other hand, should be defined as a “status” that is acquired by operation of the law and at birth either through the principle of *jus sanguinis* or *jus soli* or even a

⁵⁷⁹ Spiro *A New International supra* at 720.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Leigh *Nationality supra* at 470.

⁵⁸² *Ibid.*

⁵⁸³ *Id.* at 475.

⁵⁸⁴ Hoffman *State and Nationalism supra* at 63.

combination of the two principles. It is opined that no combination of the two nationality principles be entertained as this would curb the acquisition of multiple nationalities by operation of the law. It further stands to reason that a nationality status acquired at birth cannot be changed. To use an animal analogy - if you were born a camel, you will die a camel, no matter where in the world you resided during your life time.

I agree with the sentiments of Hoffman and Spiro mentioned above, that the acquisition of citizenship be made easier and that nationality should play no part in such acquisition. A "national citizen", that is a person who is a national and citizen of a certain state, should not be required, and neither should this be an automatic consequence, to relinquish their nationality upon the attainment of a "foreign" or new citizenship. It is proposed that citizenship acquisition be closely linked to the principle of *domicile* and that it become common practice through which an individual may only have one citizenship at a time, but may hold dual or multiple nationalities. It is further submitted that it is the status of *citizen* that allows an individual to take part in the economic, social and political activities of the chosen state. It stands to reason that each state be allowed to determine who its citizens should be and what a prospective citizen should "bring to the table" to be granted such citizenship.

The next question that may now be asked is to whom would a state extend diplomatic protection – the citizen or the national? It has been briefly discussed in the above chapters that the effective nationality link be replaced by an effective domicile link or requirement. I propose that should the international community move towards an effective domicile principle, it would become irrelevant whether the individual in question seeking diplomatic protection is a national and/or a citizen – the effective domicile link would give the protecting state the necessary *locus standi*.

It may be concluded, and considering the opinions of the various writers consulted on this subject to write this dissertation, that the incidence of dual or multiple nationalities poses a minimal, if any, threat to the international community. Allowing

persons from different nations, tribes, ethnicities and cultures to become members of a different state, should be left at the discretion of the state in question. Granting citizenship to a variety of different peoples may enhance foreign trade, encourage economic growth and social diversity. Granting citizenship to a "foreigner" should, however, be linked to a specific period of domicile in the country as well as the "passing" of certain citizenship requirements as may be determined by each individual state. I suggest that by allowing persons of different nationalities to become citizens in Africa may bring with it more positive economic results and much needed growth and development. The increased global mobility of people and the "shrinking" of the world due to technological advances, make exclusionary practices difficult to maintain especially seen in the light of greater global tolerance and acceptance of diaspora contributing socially and economically in other parts of the world.

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