EXPERTISE

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THE CONCEPT OF DORMANT CITIZENSHIP: PRACTICAL EXPERIENCES AND EXAMPLES OF APPLICATION

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SECTION 1

The concept of nationality: an introduction

1.1. The historical development of dual nationality

Dual nationality is one of the most topical subjects among those currently studying nationality law and sits between two bookends. On the one hand there is the ancient conception of nationality as the expression of an undivided allegiance of an individual to one (and only one) State, and on the other the postnational idea that the end of the nation-state – and thus the concept of nationality itself – is near. The first view is thought to no longer hold true in our present age of large-scale migration and European integration, while the second neglects the fact that nationality is often still essential for the exercise of certain rights, and that the acquisition of the nationality of the host State provides a migrant with a secure residence status. The terms nationality and citizenship will be used interchangeably in this report.

1.2. The concept of nationality and the rights it entails

Nationality plays distinct roles in different fields of the law. It has traditionally been subject of discussion whether nationality law is in the first place part of public or private law. In any case, nationality plays (or has played) a role in public and private law, but is also of great relevance to both public and private international law. We shall briefly look at the meaning of nationality in these respective areas.

Until far into the 19th century, nationality played a significant role in private law. In the Netherlands, for example, it is only since 1869 that the rules of Dutch private law have applied equally to Dutch nationals and foreigners.[1] In his work on the origin of the notions nationality and citizenship, Guiguet shows that matters of private law called for a distinction between citizens and foreigners in 16th century France. This followed from the fact that the latter could neither inherit nor bequeath.[2]

Nationality is used in public law to distinguish nationals from aliens. This is done for the purpose of restricting certain rights – such as the right of sojourn or voting rights – to

[1] De Groot and Tratnik, 29.
[2] Guiguet.

nationals. However, a development can be discerned, in the Netherlands at least, to grant rights to aliens that were traditionally reserved for nationals.[3]

Nationality is used in private international law (PIL) as a connecting factor, especially in the field of personal status and family law.[4] It designates the legal system that should deal with a case which is linked to several jurisdictions. As a connecting factor, however, it has lost ground over time to habitual residence. An obvious problem arises when nationality is the connecting factor in cases which concern a dual or multiple national.[5] Some have therefore stated that the equality of the sexes in nationality law, as a result of which different persons within a family can possess different nationalities, has caused difficulties in the field of PIL. The problem of dual nationality in this field has also been raised in the context of a more inclusive nationality policy towards immigrants who are, for example, allowed to retain their nationality of origin upon naturalization or are attributed the host country's nationality at birth.[6]

It has been suggested that in practice it is the judge, much more than the legislator, who must confront the difficulties that result from dual nationality by deciding on the applicable law concerning dual nationals.[7] In this context De la Pradelle has stated: 'It is hardly logical to adopt, through the legislature, rules of attribution that increasingly expand multiple belonging,

[3] De Groot and Tratnik, 29. It is worthy of note that in 1988 the Netherlands abolished the nationality requirement for a lot of public functions. Certain State facilities, such as a number of subsidies, allocations and licenses as well as medical care and education are also dependent on legal residence and not on nationality. See Kortmann, 64.
In other countries, however, nationality seems to matter more because foreigners have fewer rights. In discussing the effects of not possessing French nationality, Lagarde mentions that non-nationals do not have political rights, have more limited freedom of press and cannot exercise public functions. Lagarde, 4.

[4] Saarloos argues, however, that 'nationality as a connecting factor for personal status … does not seem to be in line with the European idea of an area of freedom, security and justice'. He submits that habitual residence is a more suitable criterion. Saarloos, 315.

[5] In a French textbook the example is given of a 19-year-old dual national who possesses both French and Algerien nationality. As both countries refer to their national law concerning questions of personal status, this person's legal capacity is uncertain: under French law one reaches the age of majority at eighteen and in Algeria at the age of twenty-one. See Niboyet and De Geouffre de La Pradelle, 528-530.

[6] On this issue in the context of plans (which materialized by the law reform of 2000) for a more inclusive German nationality policy towards long-term immigrants, see Martiny, 1149 and Dethloff, 64.
Martiny concludes that cases of dual Turkish-German nationality already exist and that an increase of the number of Turkish-German nationals would not cause problems in the field of PIL. After all, the systematic preference for the German nationality would, quite simply, lead to the application of German instead of Turkish law. He points out however (as does Dethloff) that the reform plans paid no attention to the subject of dual nationality in private international law; dual nationality was merely discussed in the context of public law rights.

[7] De Geouffre de La Pradelle, 202.

while simultaneously refusing, through the courts, to sanction the majority of concrete manifestations of these belongings'.[8]

Lastly, nationality is used to define the personal substratum of the State and is therefore of preeminent importance in public international law. The position of nationality seems to be strongest in this field of the law as it is *the* factor which decides who belongs to a given State.

From this short overview on the role of nationality in different fields of the law, it may be concluded that nationality is of great importance but that some of its functions are waning. Certain classic public law rights are now also given to aliens or European citizens. As a connecting factor in private international law, nationality is faced with competition from habitual residence – even in the field of personal status and family law.

1.3. Acquisition of nationality *iure sanguinis* and the prohibition of renunciation

While questions of nationality law have traditionally been part of the State's reserved domain, recent decades have witnessed a growing body of international standards and guidelines in respect of acquisition and loss of nationality.[9] According to the international standards a child has the right to acquire the nationality of a parent, but States may make exceptions for children born abroad and may provide for a special procedure for children born out of wedlock.[10] What is more, a State may never make a distinction based on the maternal or paternal parentage.[11] In other words, the acquisition of nationality through the father (*ius sanguinis a patre*) needs to happen under the same conditions as the acquisition of nationality through the mother (*ius sanguinis a matre*). Moreover, a State may never regulate any ground for acquisition of nationality in a way which would result in ethnic, racial or religious discrimination. [12]

However, a State may provide that a child of a national born abroad only acquires the nationality of this parent if a) both parents are nationals; b) both parents lodge a joint

[8] Ibid., 196. See also Verwilghen, who refers to this practice as 'jouer sur deux tableaux à la fois', in other words, 'accepter l'accroissement des pluripatrides possédant la nationalité du for, mais décider de ne jamais tenir compte des nationalités étrangères de ceux-ci'. Verwilghen, 446.
[9] See in detail De Groot and Vonk.
[10] E.g. Art. 6 of the 1997 European Convention on Nationality and Council of Europe Recommendation 2009/13, Principle 10.
[11] Art. 9(2) of the 1979 Convention on the Elimination of All Discrimination of Women; European Court of Human Rights, 11 October 2011, *Genovese v. Malta*, Application no. 53124/09.
[12] Art. 5 ECN and Art. 5 of the 1966 International Convention on the Elimination of All Forms of Racial discrimination.

declaration; or c) one parent lodges a declaration.[13] A State may also differentiate between the first, second and subsequent generations born abroad.

In considering the different approaches to transmission of nationality by descent, it is worth remembering that countries also deal differently with loss of nationality. For example, some countries only provide for the loss of nationality by renunciation on the initiative of the person involved. However, not all countries recognize the right that a person may renounce his nationality provided that no statelessness is caused. This is especially the case in countries in the Arab world and to a lesser extent in Latin America. Others do not allow renunciation without permission during the period in which a man may be called for military service.

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[13] Art. 6 ECN.

SECTION 2

Dormant citizenship: The big picture

2.1. What is dormant citizenship?

Scholars have employed the term 'dormant citizenship' in various ways. In a strict sense, citizenship is considered dormant if the exercise of the rights and duties attached to that citizenship is suspended.[14]The term is mostly used to refer to the bilateral dual citizenship agreements that Spain concluded with numerous Ibero-American countries, as well as the Italian-Argentinean dual citizenship agreement. These agreements effectuated that dual citizens possessed a 'dormant' citizenship and an 'active' citizenship, which meant that that they could only exercise the rights and duties of one of their citizenships. Dual citizens could in principle activate their dormant citizenship by taking up domicile in that particular state. In that case, the other citizenship would become dormant. These agreements will be discussed in depth in Chapter 3 of this report.

In a broader sense, dormant citizenship may also refer to cases where persons are entitled to a certain citizenship that they can (re)acquire at will. An example are the Nordic agreements on citizenship law, the first of which was concluded in 1951 between Denmark, Norway, and Sweden.[15] The agreement determined that citizens of another contracting state could acquire citizenship under preferential conditions. Upon return, the original citizenship could be reacquired by declaration. Some scholars regard the citizenship that can be reacquired at will in this case as a 'dormant' citizenship. [16] However, it is questionable whether this designation is accurate, as a person does not possess a dormant citizenship in such a case but rather an entitlement to reacquire that particular citizenship.

[14] See for example: Sanchez 1977; Vonk 2012; Bauböck 1994.

[14] See for example: Christopolous 2009; Kovács and Tóth 2009.

[15] Agreement between Denmark, Norway and Sweden on the implementation of the provisions in section 10 of the Danish Nationality Act No. 252 of 27 May 1950, in section 10 of the Norwegian Nationality Act of 8 December 1950, and in section 10 of the Swedish Nationality Act (No. 382) of 22 June 1950, UNTS Vol 90, pp 3.

[16] Sturm 2001.

In a similar fashion, Donner uses the term for highly complex cases where a person is entitled to a particular citizenship due to certain territorial conceptions or border disputes. [17] An example is Ireland, as Article 3. 6 of the 2001 Irish Nationality and Citizenship Act determines that every person born in the *island of Ireland* (emphasis added) is entitled to Irish citizenship. This provisions may also cover person born in Northern Ireland who could also be considered as British citizens. Another example is South Korea, as the South Korean citizenship legislation is deemed to be applicable to the entire Korean peninsula. As a result, persons regarded by North Korea as its citizens might be entitled to South Korean citizenship as well. Donner regards such a citizenship as 'dormant' until the claim to that particular citizenship is exercised. However, it remains doubtful whether persons in all of these cases genuinely possessed a 'dormant' citizenship before the exercise of their claim. [18]

Lastly, some scholars regard citizenship as dormant if persons do not make use of their citizenship rights in practice (e. g. dual citizens who do make use of electoral rights in their country of origin). [19] As this does not affect the legal status of citizenship itself, these studies fall outside the scope of this report.

This report will focus on dormant citizenship *sensu stricto*, defining it as the suspension of the exercise of the rights and duties attached to a person's citizenship. Adopting a functional comparative legal approach, we will use the 'function' of dormant citizenship (i. e. the suspension of citizenship rights and duties) as a starting point for comparison. [20] This enables us to also cover legal arrangements that are not generally referred to as dormant citizenship but that nonetheless lead to similar results in practice.

2.2. Dormant citizenship in dual citizenship treaties, other international agreements, and domestic law

[17] Donner 2006.

[18] For example, it remains a matter of debate whether North Korean refugees could be perceived as dual nationals of both North Korea and South Korea See: Wolman 2012.

[19] See for example: Kumar 2013; Vera-Larrucea 2017.

[20] For an extensive discussion of the functional approach to comparative law, see: Zweigert, K. , and Kötz, H. 1996); Esin Öcürü, A 2006; Samuel 2014.

As discussed in the introductory chapter, the regulation of citizenship remains in principle in the *domaine reservé* of each state. A state cannot effectively declare another state's citizenship to be 'dormant' or 'active'. As a consequence, effectuating that dual citizens possess a 'dormant' citizenship and an 'active' citizenship requires international coordination through bilateral or multilateral agreements. First, such coordination can take place through international agreements on dual citizenship. Second, international agreements could suspend or activate certain specific citizenship rights or duties for dual citizens (e. g. agreements on military service obligations for dual citizens). Third, a state could suspend or activate rights or duties attached to its own citizenship for dual citizens on the basis of domestic law (e. g. by suspending electoral rights for dual citizens who are domiciled abroad). This could effectively make a state's own citizenship 'dormant', although such an arrangement would not affect the rights and duties attached to any other citizenship.

2. 2. 1. Dormant citizenship in dual citizenship treaties

States have regularly concluded international agreements with other states in order to coordinate matters regarding persons who are citizens of both state parties. First, such treaties may restrict dual citizenship. For example, the former socialist countries concluded numerous agreements aiming to prevent dual citizenship from occurring (see Hecker). Such restrictive agreements are of limited relevance for this report as they aim to avoid dual citizenship entirely rather than to provide for dormant citizenship. Second, treaties may be concluded to permit dual citizenship between the state parties. Such treaties may also contain provisions regarding the rights and duties attached to each citizenship. For each permissive dual citizenship agreement, these provisions are briefly discussed below.[21]

Spanish-Ibero American dual citizenship agreements

Between 1958 and 1979, Spain concluded agreements permitting dual citizenship with numerous countries in the western hemisphere. These agreements generally provide that a person who is a national of origin of one of the state parties can retain their original citizenship upon acquiring the citizenship of the other state party. The agreements subsequently determine that the rights and duties can only be exercised for the citizenship of

[21] An overview of dual citizenship treaties that were in force between at any moment between 1960 and 2022 in 201 states can be found here: Van der Baaren, Luuk and Maarten Vink (2023), GLOBALCIT Citizenship Law Dataset, v2.0, Dual Citizenship Codebook, Global Citizenship Observatory.

the country of domicile. For example, the agreement concluded between Spain and Bolivia determines in its third article that the granting of a passport, diplomatic protection and the exercise of civil and political rights, rights related to work and social security, and military obligations are governed by the country of domicile and that they may not, in their capacity as natives, be subject to the laws of the other state. Domicile can only be transferred if the person takes up habitual residence in the other contracting states and officially registers as such with that country's authorities. In case the person moves to a third state, the last state party in which that person was domiciled will remain his country of domicile for the purposes of the agreement.

In the late 1990s and early 2000s, additional protocols were concluded in order to amend the original agreements with the effect that the exercise of citizenship rights and duties was no longer restricted to the citizenship of the country of domicile. As these agreements constitute by far the most important cluster of treaties regarding dormant citizenship, they will be discussed in depth in section 3 of this report.

It must be noted that Spain also concluded a dual citizenship agreement with France in March 2021, which came in force on 1 April 2022. This convention is similar in nature to the other agreements as amended by the additional protocols, meaning that the exercise of rights and duties is not limited to one of the contracting states. In its third article, the Spanish-French convention determines that persons covered by it can obtain and renew their passports or identification documents according to the provisions of the regulations of both state parties.

Italian-Argentinian Convention on Nationality of 1971

The first article of the Italian-Argentinian Convention on Nationality of 1971 states that native nationals of either country are permitted to acquire the citizenship of the other state while retaining their original nationality. The third article of said Convention determines that the exercise of public and private rights, diplomatic protection, the granting of passports, and political, civil, social and labor rights is limited to the country where the new nationality is acquired. The fourth article of the Convention determines that when a person relocates their domicile to the country of origin, the rights and duties mentioned above will be resumed in that country.

In 2005, an additional protocol was concluded between Argentina and Italy in order to amend

these restrictions, determining that the laws of the country where nationality is acquired as well as the laws of the country of origin apply simultaneously, particularly (but not limited to) regarding the granting of passports and the exercise of political rights.

Agreement between the Russian Federation and Turkmenistan on the settlement of issues of dual citizenship of 1994

Russia concluded agreements permitting dual citizenship with Turkmenistan (in 1994) and Tajikistan (in 1996). Contrary to the Spanish and Italian dual citizenship treaties, these agreements not only cover persons who acquire the other state's citizenship voluntarily but also children born as citizens of both states. The Russian-Turkmen agreement determines that persons covered by the agreement can exercise all the rights, freedoms and obligations as a citizen of the state party in the territory of which they permanently reside (Article 5). The agreement also determines that social security rights and obligations regarding military service shall be determined by the state party in whose territory the person permanently resides (Article 5). The agreement also determines that a person covered by the agreement is entitled to diplomatic protection of both states, but that it shall be exercised in a third state by the state party in whose territory that person permanently resides (Article 6). The Russian-Tajik agreement does not contain most of these provisions, except that it contains a similar provision on diplomatic protection (Article 6). It must be noted that the Russian-Turkmen agreement was terminated in 2015. The Russian-Tajik agreement remains in force.

Italian-Swiss exchange of notes constituting an agreement on citizenship (24.04.1998)

Italy and Switzerland determined through an exchange of notes in 1998 that citizens of either state could acquire the citizenship of the other state while retaining their original citizenship. The agreement does not contain any provisions regarding the exercise of citizenship rights and duties.

Bosnian-Herzegovinan agreements on dual citizenship with Federal Republic of Yugoslavia, Sweden, and Croatia (2002-2007)

Bosnia and Herzegovina has concluded bilateral agreements permitting dual citizenship with (then) Federal Republic of Yugoslavia (FRY) (2002), Sweden (2004), and Croatia (2007). All three agreements determine that citizens of either state can acquire the citizenship of the other state party while retaining the citizenship they already held. The agreement concluded between Bosnia and Herzegovina and the FRY determines that persons covered by the

agreement are treated as a citizen of the state party where they are located and that they have possess all rights and obligations that derive from that state's citizenship, unless the agreement provides otherwise (article 5 and 6). Electoral rights can be executed in accordance with the legislation of both contracting states, implying that electoral rights can be executed in both states as long that is in line with the domestic law of each state (article 9). Diplomatic protection in a third state can be provided by both states, with the state of residence being required to do so if requested (article 10). The agreement concluded between Bosnia and Herzegovina and Croatia contains similar provision (Article 4-10). The agreement concluded between Bosnia and Herzegovina and Sweden only determines that regarding military service for persons covered by the agreement, the relevant provisions in Chapter VII of the 1997 European Convention on Nationality shall apply. Article 21(1) of the European Convention on Nationality determines that a person who possesses the nationality of two or more state parties shall only be required to perform military obligations in one of these states. In such cases, the state in which military obligations should be performed is (in absence of another international agreement on the matter) determined by the conditions outlined in article 21(2).

Italian-Paraguayan exchange of notes constituting an agreement on dual citizenship (26.02. 2019)

Italy and Paraguay determined through an exchange of notes in 2019 that citizens of either state could acquire or reacquire the citizenship of the other state while retaining their original citizenship. The agreement determines that persons covered by it may exercise civil and political rights derived from both nationalities in accordance with the internal legislation of each country (article 3).

This brief overview provides several remarkable insights. First, none of the dual citizenship agreements explicitly refers to the concept of dormant citizenship. The agreements suspend (certain) rights and duties attached to citizenship, but not citizenship status itself. The citizenship of which the rights and duties are suspended is then sometimes understood to be 'dormant'. This shows that dormant citizenship is primarily a legal-theoretical concept. Second, it is striking that the Russian and Bosnian-Herzegovinian dual citizenship agreements also suspend certain citizenship rights and duties for dual citizens covered by these agreements. Yet, as far as we were able to ascertain, this arrangement in generally not referred to as dormant citizenship in the context of these treaties. Their provisions are nonetheless similar to those of the Spanish and Italian-Argentinian dual citizenship agreements, in relation

to which the concept of dormant citizenship is frequently used. Third, the overview also suggests that the suspension of rights and duties for dual citizens is a phenomenon in decline. By the mid-2000s, both the Spanish and the Italian-Argentinian dual citizenship agreements were amended, allowing dual citizens to hold two active citizenships simultaneously. More recently concluded dual citizenship agreements either do not suspend citizenship rights and duties altogether, or do so in a limited manner. This suggests that dormant citizenship was mostly a transitory phenomenon that has come to play a marginal role, as more and more states fully accept dual citizenship. We also note that the *Micheletti* decision of the Court of Justice of the European Union may have played a role in the decline of dormant citizenship. Spanish doctrine had argued at the time of Spain's accession to the European Community that the Spanish dual nationality system should be accepted by other Member States because the Spanish nationality of a dual national would always be dormant if the person did not have domicile in Spain. The Court's decision in *Micheletti* made such considerations irrelevant. Since the judgment confirmed Member State autonomy in regulating nationality matters, there was no need for Spain to uphold a system which only allowed for one active nationality. This autonomy also meant that the effects of the nationality of a Member State cannot be restricted by other Member States. In other words, the possession of the nationality of a Member State is a fact that has to be recognized by the others. The recognition of this nationality cannot be subject to any additional conditions.

2. 2. 2. The suspension of specific citizenship rights or duties by international agreement

International agreements on dual citizenship are the most comprehensive solution for suspending or activating citizenship rights or duties for dual nationals. Alternatively, states may conclude international agreements regarding the exercise of a *specific* citizenship right or duty. For example, numerous states have concluded international agreements on the performance of military service by dual nationals. One of the classic objections to dual citizenship is that holding multiple citizenships may give rise to military service obligations in more than one state. International agreements can provide a solution for this problem, generally by determining that the performance of military service is in principle only required in the country of domicile or, alternatively, that a dual national of the contracting states may opt for military service in one of the contracting states (Hecker 1988). Germany is a party to the multilateral European Convention on Nationality, which covers conflicting military service obligations in its seventh chapter. In addition to that, Germany has concluded bilateral

agreement regarding conflicting military obligations of dual nationals with Argentina (1985), Denmark (1985), and Switzerland (2009).

2. 2. 3. The suspension of (specific) citizenship rights or duties by domestic law

In the absence of international agreements, a state could in principle limit the exercise of citizenship rights and duties derived from that state's citizenship for dual citizens. In that case, that state's citizenship could be regarded as a dormant citizenship. However, such a domestic arrangement would not affect the exercise of citizenship rights and duties derived from another state's citizenship.

Provisions in domestic nationality law that suspend the exercise of *all* citizenship rights and duties for dual nationals are very rare. One the few examples is Peru, as Peruvian nationality law determines that persons who are dual nationals exercise the rights and obligations of the nationality of the country where they reside and whose nationality they possess (Article 10 Law No. 26574 of 21 December 1995). It is unclear to what extent this provision is effectively implemented in practice. For example, the relevant laws and regulations do not in any way restrict the grant of Peruvian travel documents to dual nationals residing abroad.

States could also suspend the exercise of a *specific* citizenship right or duty by domestic law. For example, a state could in theory suspend the exercise of political rights for dual citizens who permanently reside in another country whose citizenship they possess. [22] However, in practice, states that restrict external voting generally do so on the basis of residence, meaning that voting rights are restricted for persons residing abroad regardless of whether they are dual citizens or not. [23]

2. 3. Conclusion

In this Chapter, we defined dormant citizenship as the suspension of the exercise of the rights and duties attached to one's citizenship. For dual citizens, this entails that they possess an active citizenship (the rights and duties of which they can exercise) and a dormant citizenship (the rights and duties of which they cannot exercise). A dormant citizenship can be activated

[22] See for a theoretical discussion of this conception of dormant citizenship: Bauböck 2006; Ziegler 2017.
[23] For an overview of the conditions for the exercise of electoral rights in 5 countries, see: Arrighi et al 2019.

(generally by changing one's place of domicile), in which case the roles are reversed. Effectuating that dual citizens possess a 'dormant' citizenship and an 'active' citizenship requires international coordination through bilateral or multilateral agreements. For this report, 21 relevant dual citizenship agreements were identified. These agreements were analysed in order to determine to what extent they provided for dormant citizenship.

First of all, none of the dual citizenship agreements studied in this chapter explicitly refers to the concept of dormant citizenship. The agreements suspend (certain) rights and duties attached to citizenship, but not citizenship status itself. The citizenship of which the rights and duties are suspended is then sometimes framed as a dormant citizenship. We therefore conclude that the term dormant citizenship is primarily a legal-theoretical concept that is used in certain legal traditions but not in others, even if the effects in practice (i. e. the (partial) suspension of citizenship rights and duties) are the same. The provided overview also suggests that the relevance of dormant citizenship has sharply declined. The Spanish and Italian-Argentinian dual citizenship agreements were amended in the late 1990s and early 2000s in order to allow dual citizens to hold two active citizenships at the same time. Other – more recent – dual citizenship agreements do not suspend citizenship rights and duties at all, or only to a limited extent.

Two alternative approaches to dormant citizenship were also discussed. First, states could suspend *specific* citizenship rights or duties by international agreement. Through such agreements, potential conflicts of law could be avoided for certain particularly contentious rights and duties (e. g. military service). Second, states could suspend or activate rights or duties attached to their own citizenship for dual citizens on the basis of domestic law. This would effectively make a state's own citizenship 'dormant', but it would not affect the rights and duties attached to any other citizenship. This solution can therefore only be partially effective and practical examples of this approach are exceedingly rare.

It can be concluded that dormant citizenship was mostly a transitory phenomenon. Over the past few decades, it has gradually been replaced by the acceptance dual citizenship and the toleration of the simultaneous exercise of citizenship rights and duties in more than one state.

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SECTION 3

Case studies: Spain, Italy and Portugal

3.1.1. Introduction

This section is dedicated to the quite particular attitude towards dual nationality in Spain. Although Spain may be characterized as a country which is at least in principle opposed to dual nationality,[24] it has been more than willing to accept dual nationality with countries to which it feels closely connected, in particular the countries in Latin America. To that end, dual nationality treaties were concluded between Spain and Latin American countries in the 1950s and 1960s, creating the possibility of acquiring a dual nationality. Yet under this system, the two nationalities could never be active at the same time: the nationality of the country where the dual national was permanently resident was active, while the other was a so-called 'dormant' or 'hibernating' nationality.

In addition to the dual nationality treaties – dubbed the 'conventional route' or *vía convencional* – subsequent modifications to Spanish nationality legislation allowed another route for obtaining dual nationality. This way of acquiring dual nationality – known as the 'legal route' or *vía legal* – is different from the conventional route in that it allows both nationalities to be active at the same time. The legal intricacies of both the conventional and the legal route will be discussed in the following.

The dual nationality treaties are a prominent feature of Spanish nationality law, but Italy also concluded such a treaty with a Latin American country, namely Argentina. As it is commonly acknowledged that this treaty of 1973 was inspired by the Spanish-Argentinean treaty, the Italian-Argentinean treaty will also be briefly discussed. In addition, we shall pay attention to treaties concluded between Portugal and some of its former colonies. These treaties do not address the issue of dual nationality, but accord far-reaching citizenship rights to the nationals of the contracting parties.

3.1.2. The Spanish Phenomenon of Dual Nationality

[24] Acquisition of Spanish nationality is in theory only possible after renunciation of the original nationality, although the renunciation requirement has not been enforced since 1971.

Although multiple nationality was traditionally seen as an anomaly, it could also be a goal to be pursued. Seen in this light, States can expressly recognize and support this phenomenon. Particular bonds can exist between States, justifying the possession of dual nationality of each other's nationals; dual nationality can also be a means to protect nationals living abroad. These considerations led Spain to conclude treaties on dual nationality with a number of Latin American countries from the 1950s onwards. Article 1 of these treaties provides that Spaniards can acquire the nationality of the Latin American country concerned without losing Spanish nationality. Conversely, Latin Americans can obtain Spanish nationality without losing their original nationality.

The first dual nationality treaty, concluded between Spain and Chile, entered into force on 28 October 1958. Other treaties were subsequently concluded with the following Latin American countries (the date indicates when the treaty was ratified by Spain)[25]: Peru (15 December 1959), Paraguay (15 December 1959), Guatemala (25 January 1962), Nicaragua (25 January 1962), Bolivia (25 January 1962), Ecuador (22 December 1964), Costa Rica (21 January 1965), Honduras (23 February 1967), the Dominican Republic (16 December 1968) and Argentina (2 February 1970). A final treaty, concluded between Spain and Colombia, was ratified on 7 May 1980.

Dual nationality has for a long time played a leading role in Spanish law.[26] The idea of dual nationality could already be found in Article 24 of the Spanish Republican Constitution of 1931, which distinguished two types of dual nationality. In the first place, nationals from Portugal and Latin American countries could, on condition of reciprocity, acquire Spanish nationality when residing in Spain without losing their original nationality. Second, the provision allowed Spaniards to naturalize in these countries without having to renounce their Spanish nationality, but only if this was not prohibited under the laws of those countries. Under this regime, called the *doble nacionalidad automática*, there was no reciprocity requirement.[27] The Republican Constitution was not granted long life and Article 24 was never implemented,[28] yet the ideas from the Republican Constitution on dual nationality were

[25] Aznar Sánchez, 28-29.
[26] Alvarez Rodríguez (1994), 109.
[27] Pérez de Vargas Muñoz.
[28] Virgós Soriano, 239.

adopted by the Franco government, thereby laying the foundation for the dual nationality treaties.[29]

3.1.3. The Background of the Treaties on Dual Nationality

In 1954 a modification of the Spanish Civil Code made it possible to conclude dual nationality treaties. Article 22 stated that, if expressly agreed on by a treaty, the acquisition of the nationality of a Latin American country or the Philippines would not produce the loss of Spanish nationality. The reverse was true when a national of a Latin American country or the Philippines acquired Spanish nationality.

Three reasons underlie the decision to draft treaties on dual nationality in the 1950s and 60s. In the first place, the still very strong historical and cultural ties between Spain and Latin America.[30] Especially during the first years of the Franco dictatorship, the cultural policy was very much determined by the shared Spanish-Latin American history.[31] From this perspective, the dual nationality treaties were an expression of the idea of *Hispanidad*.

A second reason was the emigration of many Spaniards to Latin America. Spain was a very poor country after the Second World War and emigration was seen as a way to escape poverty. There had always been Spanish migration to Latin America, the total number of Spanish emigrants to Latin America being estimated at almost 3,3 million in the period 1880-1930.[32] The 19th century in general was a period of massive emigration: 50 million Europeans emigrated between 1815 and 1930.[33]

The emigration to Latin America – and the problems posed by this development – inspired the Argentinean Juan Carlos Garay to propose a distinction between nationality and citizenship.[34] In his view, nationality was a natural fact expressing a person's sociological belonging (culture, traditions etc.) to a particular country. A nationality existed independently of person's will and could not be changed; Garay was also expressly opposed to dual nationality.

[29] Fernández Rozas, 240.
[30] Pérez Vera, 73-74.
[31] Joppke points to a distinction between Spain and other former colonial powers. Francoist Spain, being a pariah in a democratic postwar Western Europe, was looking for an alternative sphere of influence. This led to 'the rebuilding of postcolonial ties that had been ruptured more than half a century ago', which is 'rather different from the standard postcolonial *problématique* of regulating the transition from empire to nation-state'. Joppke, 112-113.
[32] Naranjo, 178-186.
[33] Sánchez Alonso, 1.
[34] Oyarzábal (2007), 755.

His proposal did not allow a change of *nationality*, but he suggested instead that one could acquire a different *citizenship*, namely by meeting requirements related to residence and work in another country.[35] Citizenship would entail political rights such as suffrage. The separation of the concepts of nationality and citizenship was devised to meet the problems of European migration to Argentina: immigrants could maintain their nationality of origin but still participate politically and economically as citizens in Argentinean life.[36] The Italian-Argentinean treaty, although allowing dual nationality, to a certain extent follows this reasoning. It stipulates that the nationality where the dual national is not domiciled is a 'dormant' nationality, meaning that the dual national cannot exercise public and private law rights in that country. He thus has two citizenships of a different value (*cittadinanze disuguali*). The distinction between an active and a dormant nationality was abolished by an additional protocol to the treaty that was signed in 2005 (see below).

Garay's theory has been criticized for proposing the impossible: no country could grant foreigners full political rights since this would allow them, for example, to have a say in the specific moral values of a people, or to exercise the highest public functions.[37] Instead of citizenship, De Yanguas therefore proposed to grant foreigners what he calls 'citadinage' (*vecindad* in Spanish). 'Citadinage' would include local voting rights and equality in matters of civil law. De Yanguas argued that his proposal, under which important rights are decoupled from nationality, also solved the problem of 'forced naturalization', which refers to the emigrant's almost 'compulsory' acquisition of a foreign nationality for economic reasons.[38]

The third and final reason for drafting dual nationality treaties was that Spain found itself in an internationally isolated position during Franco's dictatorship. To strengthen its position, and to establish economic growth, Spain sought to forge a tighter link with Latin America. In order to achieve this goal, Spain pursued an emigration policy, first to Latin America, and later to Western Europe.[39]

The Content of the Treaties on Dual Nationality

[35] De Castro y Bravo, 613-614.
[36] See also Buzzati, who argued that although Italian emigrants had become strongly linked to their new country of residence from an economic perspective, this had not weakened in any way their 'italianità'. Buzzati, 457-458.
[37] Yanguas Messía, 365.
[38] Ibid., 367.
[39] Calduch Cervera.

Let us turn to the content of the dual nationality treaties. In spite of minor differences, they have two elements in common.[40] First of all, not all nationals of the contracting States have the possibility to acquire a dual nationality. The treaties read, sometimes with different wordings, that only those who are nationals by origin of one of the contracting parties are eligible for a dual nationality.[41] Second, all treaties provide those who lost their nationality of origin upon acquisition of another one with the possibility to rely on the treaty in order to still obtain a dual nationality.

It should be emphasized that the treaties do not facilitate the acquisition of another nationality. Article 1 of the treaties states that in order to acquire the nationality of either country, the conditions of the nationality legislation of the country concerned must be satisfied. The treaties themselves thus merely provide for the possibility to acquire a dual nationality and refer to national legislation for the exact requirements that have to be met in order to acquire another nationality.[42]

Article 3 of the treaties is an important provision which makes clear that a dual national can never be subject to two different legislations at the same time. It provides that the legislation to be applied to the exercise of public and private law rights (in particular diplomatic protection, the conferral of passports and all political, social and labour rights) is that of the country where the dual national has his domicile. The other nationality is 'dormant' (often referred to in Spanish literature as *una nacionalidad durmiente/hibernada* or *en estado de latencia*).[43] This latter nationality is activated when the person takes up residence in the country of the dormant nationality. Activation of one nationality automatically means that the other is turned into a hibernating one. Article 4 provides a solution to the situation in which a dual national moves to a third country. In that case, the domicile for the purposes of the treaty is presumed to be the last place of domicile in one of the countries party to the treaty.

[40] Pérez de Vargas Muñoz.
[41] Aznar Sánchez, 32-33.
[42] Arroyo Montero, 194.
[43] No discussion exists with respect to the *effects* of the hibernating nationality: it is not activated until domicile is established in the country of that nationality. Until then, the hibernating nationality does not entail any civil or political rights. Discussion exists, however, as to the exact *status* of the hibernating nationality. Espinar Vicente argues that the hibernating nationality has in fact disappeared because it does not produce any civil or political effects ('una nacionalidad hibernada que no surte effectos civiles ni políticos, más que hibernada hay que considerla desaparecida'). Others, like de Castro y Bravo, do not share this opinion, but merely see the hibernating nationality as the one that is not preponderant. See Espinar Vicente, 333-334 and De Castro y Bravo, 333-334.

A brief word should also be devoted to Spanish private international law. Article 9.9 CC decides which law should be applied to dual nationals when nationality is used as a connecting factor. In case the dual nationality is acquired by way of the dual nationality treaties, Article 9.9 CC refers back to what the treaties provide. In the absence of international treaties or when they do not provide a solution, Article 9.9 CC considers as the effective nationality the one that coincides with the last habitual residence.

3.1.4. The Spanish Constitution of 1978

The 1978 Constitution (CE) is of importance for our examination of dual nationality in Spain. The reason is that Article 11.3 CE created, in addition to the *vía convencional* (referring to the acquisition of dual nationality under the dual nationality treaties), the *vía legal*.[44] Article 11.3 CE reads as follows (our translation):

'The State can conclude dual nationality treaties with Latin American countries or with countries that have had or will have a particular bond with Spain. In these countries, even if a reciprocal right is not granted to their own nationals, Spaniards will be able to naturalize without losing their original nationality'.

The first sentence refers to the dual nationality treaties that could be concluded. The second sentence has reference to the so-called 'automatic dual nationality'. This means that a Spaniard can acquire the nationality of a country with which Spain has a special bond without losing his Spanish nationality. In that case, the existence of a dual nationality treaty is not required, although the existence of such a treaty obviously indicates that a special bond with Spain exists.

Until the enactment of article 11.3 of the Constitution, Spanish legislation only accepted one type of dual nationality, namely the *doble nacionalidad convencional*. Article 11.3 CE was the first provision to allow dual nationality that was not regulated by a convention.[45]

[44] Pérez Vera, 80-81.
[45] Aguilar Benítez de Lugo, 233-234. Aguilar's statement that the 'doble nacionalidad convencional' and the 'doble nacionalidad automática' belong to one and the same category, i.e. 'doble nacionalidad como sistema', is representative for the Spanish legal doctrine. All the remaining instances of dual nationality are qualified by the doctrine as 'doble nacionalidad anómala/patológica'. See also Palao Moreno, Esplugues Mota and De Lorenzo Segrelles, 72.

3.1.5. Differences Between the Conventional and the Legal Routes to Dual Nationality (*vía convencional/vía legal*)

As from the enactment of the 1978 Constitution, there were two ways of acquiring dual nationality – the *vía convencional* and the *vía legal*. However, it makes a big difference which system is relied upon in order to obtain a dual nationality. Under the *vía convencional*, one of the nationalities is 'dormant', as the treaties do not allow both nationalities to be active at the same time. Under the *vía legal*, however, both nationalities are fully active.

Those who had relied on the dual nationality treaties could only activate their latent nationality if they met the conditions laid down in the dual nationality treaty concerned. As mentioned before, domicile determined which of the nationalities was active. The domicile could be changed by taking up habitual residence in the country of the other contracting party. A Chilean, for example, who also possessed a latent Spanish nationality would thus need to move his habitual place of residence to Spain in order to activate his Spanish nationality.[46] Only then he would be able to exercise his civil and political rights and obtain a Spanish passport. While living outside Spain, he was in theory a Spaniard, but was not entitled to a Spanish passport.[47] Those who had a latent Spanish nationality were as a consequence regarded as foreigners at the Spanish border when they wanted to enter Spain.[48] If they wanted to come to Spain as a tourist or establish themselves in Spain, they were subject to Spanish migration law.[49] It also seems that under the dual nationality treaties Spaniards who possess a dual nationality and are resident in Latin America need a visa to enter Spain. Espinar Vicente points to the fact that only the treaty between Spain and Guatemala, by virtue of Article 8, exempts those who rely on the treaty from a visa obligation.[50] No such article is to be found in the other treaties.

Another category of Spaniards should also be mentioned, namely those who renounced Spanish nationality upon acquisition of another nationality. These former Spaniards do not possess Spanish nationality, not even a dormant one. Paradoxically, however, these former Spaniards can more easily reactivate Spanish nationality compared to those who had kept a latent Spanish nationality. This is because they are not bound by the requirements laid down

[46] Aznar Sánchez explains that 'domicilio' is the place where a person establishes habitual residence with the intention of staying there permanently. Aznar Sánchez, 34.
[47] Alvarez Rodríguez (2002), 24.
[48] Cano Bazaga.
[49] Alvarez Rodríguez (2002), 61.
[50] Espinar Vicente, 337.

in the dual nationality treaties, and are only required to meet the conditions in Article 26 CC.[51] This article does not require the return to Spain for the reacquisition of Spanish nationality.

The legal regime sketched above led to a particularly strange situation: it was harder for a Spaniard to activate a latent Spanish nationality than it was for a former Spaniard who had voluntarily renounced Spanish nationality to reacquire it.[52] It is thus clear that the modifications to the Spanish dual nationality regime brought about after 1978 put Spaniards who had relied on the conventional route in a less favourable position than Spaniards who had relied on the legal route, or Spaniards who had even renounced Spanish nationality. In the first place, the group that had used the conventional route could only activate Spanish nationality by taking up residence again in Spain. No such requirement was imposed on those who had acquired dual nationality via the legal route. What is more, the position of those who had acquired a dual nationality under one of the treaties was even less advantageous in relation to those who had renounced Spanish nationality. For these former Spaniards, it was easy to reacquire Spanish nationality because they were not bound by the provisions in the dual nationality treaties. Most importantly, they were not required to move back to Spain in order to reacquire Spanish nationality. To resolve this imbalance it was decided to draft additional protocols to the dual nationality treaties.[53]

3.1.6. The Additional Protocols to the Dual Nationality Treaties

Drafting the additional protocols to the dual nationality treaties was done solely on the Spanish initiative.[54] As explained above, Spaniards who had taken the conventional route were after the enactment of the 1978 Constitution and the subsequent modification of Spanish nationality law in a less favourable position compared to those who had relied on the legal route.

A distinction must be made between two types of protocol. First, there are the protocols between Spain and Nicaragua (18 March 1999), Costa Rica (1 December 1998) and Bolivia (1 February 2002).[55] Article 2 of the protocol with Nicaragua, for example, states that

[51] The following requirements need to be complied with in order to reacquire Spanish nationality under Art 26 CC: 'b) declarar ante el encargado del Registro Civil su voluntad de recuperar la nacionalidad española c) inscribir la recuperación en el Registro Civil'.
[52] Arroyo Montero, 197.
[53] Cano Bazaga.
[54] Arroyo Montero, 198.
[55] The dates mentioned in this paragraph correspond with the entry into force of the protocols.

Nicaraguans and Spaniards who relied on the treaty in the past can renounce its application. The result is that a Nicaraguan can activate a latent Spanish nationality without establishing domicile in Spain.[56] The protocol put these Spaniards in the same position as Spaniards who obtained Nicaraguan nationality after the entry into force of the 1978 Constitution.[57]

Second, protocols were established with Honduras (1 December 2000), Guatemala (7 February 2001), Paraguay (1 March 2001), Peru (1 December 2001), the Dominican Republic (1 February 2002), Colombia (1 July 2002) and Argentina (1 October 2002). These protocols read that passports and other documents that serve as means of identification can be obtained and renewed in both countries or in both countries at the same time. These protocols therefore do not speak of a renunciation of the treaty, but make it possible to obtain a Spanish passport without having to move to Spain.[58]

These two different sets of protocols thus have the effect of turning a latent Spanish nationality into an active one. Consequently, those who had used the conventional route have been placed on an equal footing with those who had used the legal route. In addition, those who formerly only held a latent Spanish nationality are now also European citizens, even when not residing in Spain.

3.2 The Italian-Argentinean Treaty on Dual Nationality

Italy and Argentina signed a treaty on dual nationality on 29 October 1971, which entered into force on 12 September 1974.[59] This treaty provided for the possibility of acquiring a dual nationality, in spite of Article 8 of law 555/1912 (the Italian law on nationality then in force) which (at least officially) provided for the loss of Italian nationality after the voluntary acquisition of another one. Dual nationality was allowed under Italian nationality legislation in 1992, however, and both countries subsequently discussed the possibility of a revision of the treaty in December 2002. On 16 August 2005 these deliberations resulted in an additional protocol to the treaty.[60] Nevertheless, it seems that the desired outcome of the proposed amendment to the treaty had already been achieved informally before the additional protocol was officially discussed (see below).

[56] Although it may appear from reading the protocols that Spanish nationality is lost upon renunciation of the treaty, the contrary is true: Spanish nationality is in fact activated. After all, Article 11.3 CE provides that acquisition of the nationality of a Latin American country does not produce the loss of Spanish nationality.
[57] Cano Bazaga.
[58] Oyarzábal (2004).
[59] Panzera, 221.
[60] Oyarzábal (2007), 749.

The provisions of the Italian-Argentinean treaty on dual nationality are substantially the same as those in the Spanish-Argentinean treaty.[61] Thus, the Italian-Argentinean treaty also applies the distinction between an active and a dormant nationality. The dormant nationality can only be activated by taking up residence in the country of that nationality. Moreover, like its Spanish-Argentinean counterpart, the treaty does not apply to Italians and Argentineans who are dual nationals by birth.

Italian Academic Reactions to the Dual Nationality Ttreaty

Unlike in Spain, where the legal doctrine is particularly positive and understanding about the treaties on dual nationality, the conclusion of the Italian-Argentinean treaty attracted much criticism in the Italian literature. It is submitted that this has to do with the different relationship between Spain and Italy (on the one hand) and the Latin American countries (on the other). For Spain, the introduction of dual nationality is very much a reflection of the historical and cultural ties, and a way of showing that the country wants to maintain its close ties with Latin America. Italy does not have similarly strong ties. The dual nationality treaty is merely an attempt to keep alive the bond with Italian emigrants to Argentina.

As just said, Italian jurists were critical of the Italian-Argentinean dual nationality treaty. It is worth discussing some of their objections, particularly because this criticism is absent among Spanish commentators. First, there were complaints about the scope of the treaty.[62] It is maintained that a treaty specifically dealing with the nationality of both countries should also address the question of dual nationality acquired at birth – a situation which arises much more frequently compared to dual nationality acquired after naturalization. However, this is not the case as Article 1 of the treaty refers to Italians and Argentineans by birth who can acquire Argentinean and Italian nationality respectively. Morelli sees the exclusion of this group of dual nationals as a missed opportunity to resolve the problems resulting from dual nationality acquired at the time of birth.

Second, the idea of a 'dormant nationality' has been objected to because its significance is not clear. It is claimed that introducing a latent nationality will only complicate matters, and that facilitating the recovery of the Italian nationality in case of loss would have been a better solution. The confusion on how to interpret the status of the 'dormant nationality' can also be

[61] Treves, 296-297; Oyarzábal (2005), 102.
[62] Morelli, 153.

illustrated by the fact that some authors see this nationality as in suspense,[63] whereas others[64] regard this nationality as lost (yet with the possibility of very easy recovery by taking up residence in the country of which the nationality was lost).

A third point that has attracted criticism is the alleged unconstitutionality of the treaty. It is argued that the Italian Constitution does not allow the suspension of rights that are guaranteed by constitutional provisions. As the Constitution only knows one category of nationals, so the argument goes, any rule infringing on the unitary character of Italian nationality (i.e. every national has all the rights and duties resulting from the possession of Italian nationality), as the treaty does by creating a category of 'suspended citizens', violates the Constitution. Moreover, the treaty is discriminatory to naturalisees because only nationals by birth can rely on it.

Treves has replied to this latter point of criticism by relying on his abovementioned assumption that Italian nationality is lost upon acquisition of Argentinean nationality, although it can easily be obtained again by taking up residence in Italy. He argues, quite artificially in our view, in the following way: Every Italian acquiring another nationality loses his Italian nationality (remember that he thinks of the 'dormant nationality' as a lost nationality). Only the Italian national by birth can rely on the treaty to easily recover Italian nationality. However, there is no discrimination if you only allow an Italian by birth to rely on the treaty and not, for example, a naturalized Italian who acquired Argentinean nationality, because there is a different treatment of *foreigners*, not of Italians. As Italian nationality is lost, there can never be discrimination because the persons involved are no longer Italians.

It is distinctive for the Italian literature on the Italian-Argentinean treaty that the content of the 'dormant nationality' is so heavily debated. To our knowledge, this discussion does not feature prominently in the Spanish literature – if it is not altogether absent.

Italy's Current Approach to Dual Nationality and the Additional Protocol to the Italian-Argentinean Dual Nationality Treaty

The Italian-Argentinean treaty on dual nationality became irrelevant after the Italian reform of nationality law as brought about by law 91/92.[65] Article 11 of this law allowed dual

[63] Ibid.
[64] Treves, 298.
[65] Kojanec, 36. It must also be emphasized that very few Italians relied on the treaty in the past. In the first twenty years after the entry into force of the treaty only twenty Italians relied on it. See Papperini, 214.

nationality for Italians by stating that Italian nationality will not be lost by the sole fact of acquiring another nationality.

Let us come back to the reason why Italy wanted a treaty revision. Oyarzábal rightly observes that the revision was the result of Italy having accepted dual nationality in the 1992 Act.[66] In other words, the new norms concerning dual nationality adopted under the 1992 Act rendered obsolete the treaty of 1971.[67]

An additional protocol that would eventually be concluded on 16 August 2005 seemed inspired by the Spanish-Argentinean protocol in that for those who had relied on the treaty in the past, Article 2 provides for the possibility of acquisition and renewal of passports and other travel documents in both countries, also simultaneously.[68]

3.3. Bilateral Treaties Concluded between Portugal and Some of Its Former Colonies

Portuguese doctrine recognizes that one can approach dual nationality in distinct ways. First, the uncoordinated interplay between different municipal nationality laws can lead to the attribution of different nationalities to a person. Such a multiple claim on an individual was historically seen as an anomaly to be avoided. Second, multiple nationality can be pursued as a goal between different peoples, and thus reflects a development whereby individuals are allowed to identify with more than one State. Under the second approach, multiple nationality is no longer the inconvenient effect of State autonomy, but the object of legislation and – in the form of bilateral treaties – international cooperation.[69] If this is the doctrinal opinion in Portugal, one would expect to also encounter dual nationality treaties between Portugal and its former colonies. This is not the case, however. Although bilateral treaties exist between Portugal, on the one hand, and Brazil and some African countries, on the other, it is important to stress that these treaties are not about multiple nationality, but merely accord rights to nationals of the other contracting State that are normally reserved for the own nationals. Although application of these treaties will thus emphatically not have the effect of creating dual nationality, it has been argued that the wide scope of the rights granted under the

[66] Oyarzábal (2005), 103.
[67] Oyarzábal (2007), 750.
[68] From the fact that only express mention is made in the protocol of the right to simultaneously renew one's passport in both countries, Oyarzábal concludes that other rights mentioned in the original treaty (e.g. social and labour rights) are still subject to the original norms as laid down in the treaty. These rights can therefore not be exercised simultaneously in both countries. See Oyarzábal (2007), 753-754.
[69] Moura Ramos (1983), 183.

Portuguese-Brazilian treaty in particular, leads to similar results as when a dual nationality treaty had been concluded.[70]

Portugal and Brazil signed the Convention on Equal Rights and Obligations on 7 September 1971 (ratified by Portugal on 22 April 1972). The essence of this Convention is that Portuguese in Brazil and Brazilians in Portugal have the same rights and duties as the host State's nationals, apart from the rights that the Constitutions of both countries reserve for those who hold the nationality by birth. The 1971 Convention was the origin of the creation of a form of 'Lusophone citizenship', which was subsequently laid down in Article 15(3) of the 1976 Portuguese Constitution.[71] That article gave nationals of Lusophone countries, on condition of reciprocity, rights that were not accessible to other foreigners (with the exception of higher positions in the government, and service in the armed forces and the diplomatic corps). Article 15(3) was drafted in this way in order to make this 'Lusophone citizenship' also possible for the nationals of the former African colonies. However, the 'Lusophone citizenship' only exists in relation to Brazil, as only that country meets the reciprocity condition. It is thus interesting to see that Portugal responded to the decolonization from a perspective of citizenship and not of nationality.

The Luso-Brazilian citizenship status created by the 1971 Treaty has been strengthened by another treaty that calls for friendship, cooperation and consultation (ratified by Portugal on 14 December 2000).[72] Moreover, Article 15(3) of the Constitution was reworded and extended the range of political rights available to citizens.[73] As only Brazil has thus far met the condition of reciprocity, Brazilians permanently living in Portugal enjoy the same political rights as Portuguese nationals, without having to acquire Portuguese nationality. Although Brazilians are excluded from a few positions (e.g. president of the Republic), it is possible for them to be elected as Member of Parliament without having Portuguese nationality.

The bilateral treaties concluded with a number of African countries do not have as far-reaching consequences as the Luso-Brazilian treaty.[74] Although the starting point was the

[70] Moura Ramos (1983), 207.
[71] Ioannis Baganha and Urbano de Sousa, 460.
[72] Piçarra and Gil, 28.
[73] Article 15(3) of the Portuguese Constitution reads: 'With the exceptions of appointment to the offices of President of the Republic, President of the Assembly of the Republic, Prime Minister and President of any of the supreme courts, and of service in the armed forces and the diplomatic corps, in accordance with the law and subject to reciprocity, such rights as are not otherwise granted to foreigners shall apply to citizens of Portuguese-speaking states who reside permanently in Portugal'.
[74] Moura Ramos (2001), 225.

equal treatment of the nationals of the contracting States, this remained limited to rights of an economic and social nature. Equal status with regard to political rights has, to date, not been feasible.[75] Moreover, Portugal has a different relationship with each African country, which is expressed in the treaties accordingly.

With Cape Verde and Guinea-Bissau, Portugal concluded the same treaty on the equal treatment of each other's nationals and their possessions.[76] It is the most far-reaching treaty with an African country, although it is of such a nature that it could just as well have been concluded with a country with which Portugal did not share a common history and language.[77] A treaty on cooperation and friendship exists with São Tomé e Principe and provides for equal treatment concerning access to employment.[78] The least interesting treaties are those with Mozambique and Angola, which only provide for cooperation.[79]

Concluding Remarks

This section has examined the development of dual nationality in Spain from 1931 to the present as well as similar or comparable regimes in Italy and Portugal. We have seen that one of the distinct features of the Spanish dual nationality policy, the *conventional route* in which one of the two nationalities was dormant, lost much of its relevance when the *legal route* subsequently allowed both nationalities to be active at the same time. The discrepancy between these two ways of acquiring a dual nationality led to additional protocols that modified the dual nationality treaties. These protocols sought to equalize the position of those who had relied on the conventional route with those who had used the legal route.

By way of contrast, we note that dual nationality agreements containing the concept of dormant citizenship were discussed in other constellations too, although this proved not to be feasible – for example in the relation between France and Algeria. The Évian agreements of 18 March 1962 established Algerian independence and made Algeria a sovereign, independent State. These agreements did not fully address questions of nationality and only covered the *pied noirs* (French Algerians) by providing that they could acquire Algerian nationality after a three year transitory period. Nothing was decided concerning the Algerian Muslims, Algeria being opposed to dual nationality (for reasons of state building) as well as

[75] Moura Ramos (1992), 21.
[76] 'Acordo especial regulador do estatuto de pessoas e regime dos seus bens', ratified on 5 July 1976 and 7 January 1977 respectively.
[77] Moura Ramos (1983), 210.
[78] 'Acordo geral de amizade e cooperação', ratified by Portugal on 24 January 1976.
[79] 'Acordo geral de cooperação', ratified by Portugal on 12 December 1975 and 9 February 1979 respectively.

to a system of option rights (for fear that Algerians would exercise this right *en masse* and provoke a massive exodus to France).[80]

Boushaba provides clear evidence that before the Évian agreements were signed, two proposals had been advanced in which dual nationality featured prominently. France initially proposed dual nationality for the Europeans who would remain in Algeria after the country's independence. Boushaba remarks that this proposal entailed that the French nationality would only be 'en sommeil' – that is, non effective ('il ne jouera pas' in the words of Boushaba) – while living in Algeria; it would only be activated when the dual national established residence in France.[81]

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SECTION 4

Conclusion

This report has explored the concept of dormant citizenship. We defined dormant citizenship as the suspension of the exercise of the rights and duties attached to one's citizenship. For dual citizens, this entails that they possess an active citizenship (the rights and duties of which they can exercise) and a dormant citizenship (the rights and duties of which they cannot exercise). A dormant citizenship can be activated (generally by changing one's place of domicile), in which case the roles are reversed. Effective implementation of such an arrangement requires international coordination through bilateral or multilateral agreements. For this report, we identified 21 dual citizenship agreements that are of relevance to this study. These agreements were analysed in order to determine to what extent they provided for dormant citizenship.

First, our analysis revealed that none of the dual citizenship agreements explicitly refers to the concept of dormant citizenship. Instead, the agreements suspend (specific) rights and duties attached to citizenship, but not citizenship status itself. The citizenship of which the rights and duties are suspended is then in certain cases referred to as dormant citizenship in scholarly discourse. Therefore, we conclude that dormant citizenship primarily a legal-theoretical concept that is used in certain legal traditions but not in others, even if the effects in practice (i.e. the (partial) suspension of citizenship rights and duties) are the same.

Our analysis indicated that the relevance of dormant citizenship has declined over time. A large share of the dual citizenship agreements was amended in the late 1990s and early 2000s in order to allow dual citizens to hold two active citizenships at the same time. Other – more recent – dual citizenship agreements do not suspend citizenship rights and duties at all, or only to a limited extent.

We also discussed two alternative approaches to dormant citizenship. First, states could suspend *specific* citizenship rights or duties by international agreement. Through such agreements, states could avoid potential conflicts of law for certain particularly contentious rights and duties (e. g. military service – see chapter 2 of the 1963 Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases

of Multiple Nationality). Second, states could suspend or activate rights or duties attached to their own citizenship for dual citizens based on domestic law. This would effectively make a state's own citizenship 'dormant', but it would not affect the rights and duties attached to any other citizenship. This solution is therefore only partially effective and has clear limitations.

The case studies examined the development of dual nationality in Spain from 1931 to the present as well as similar or comparable regimes in Italy and Portugal. We have seen that one of the distinct features of the Spanish dual nationality policy, the *conventional route* in which one of the two nationalities was dormant, lost much of its relevance when the *legal route* subsequently allowed both nationalities to be active at the same time. The discrepancy between these two ways of acquiring a dual nationality led to additional protocols that modified the dual nationality treaties. These protocols sought to equalize the position of those who had relied on the conventional route with those who had used the legal route.

Our conclusion underscores that dormant citizenship has predominantly been a passing phase and appears to have been used exclusively where states were on friendly terms with one another. Even in that particular situation, as our brief discussion of Italian doctrine has shown, the exact legal status of dormant citizenship remained unclear and it never crystallized into a widely used concept. In recent decades, dormant citizenship has progressively been replaced by the widespread acceptance of dual citizenship and the accommodation of the simultaneous exercise of citizenship rights and responsibilities in multiple states. The study has also shown that effective implementation of dormant citizenship is challenging, as it requires international coordination. The report has additionally highlighted that dormant citizenship policies may be at odds with the obligations of EU Member States under European Union law.