

**COUNCIL OF EUROPE CONVENTIONS AND THEIR IMPACT ON STATE PRACTICE : THE WAY FORWARD,** Alenka Prvinšek

**1.Intoduction**

Dear ladies and gentlemen, dear colleagues, dear friends,

Council of Europe gathered all of us at 4th European Conference on Nationality; in this regard, let me be permitted to express personal appreciation for great work done by the Secretariat in order to organise the event in terms of the content, as well as logistics.

The list of today speakers reflects genuine and unique approach of Council of Europe towards the nationality; the variety of speakers from high dignitaries to Academics and practitioners reflect multidimensional nature of nationality, not only as legal category, but indicates also its political, social, economic and cultural dimension.

I had an honour to attend all three previous conferences, and a privilege to be invited as one of the speakers at the fourth one.

Given the fact that throughout all my career, when I was still working for the Ministry responsible inter alia also for nationality in the State of which nationality I hold I dealt with nationality, and I continued to deal with it from the point of view of migration, my today presentation on »Council of Europe conventions and their impact on state practice: the way forward« shall reflect primarily the thoughts of practitioner who deals with these matter for 30 years.

## **2. The role of Council of Europe as legislator of international law**

Twenty years ago the Central and East European nations turned the page in their contemporary history by entering the process of democratic reforms of their societies. The political developments which followed, led in some cases to creation of new Statehoods : new States emerged on the map of Europe .

By the beginning of nineties of 20th century Council of Europe had 24 members, twenty years later the membership almost doubled, now it counts 47.

The changes of State Sovereignty coupled by reforms in number of new democracies were imperative for the new beginning of the work of Council of Europe also in domain of nationality; in comparison to the UN legal instruments, the European Convention on Protection of Human Rights and Fundamental Freedoms with the Protocols does not list right to a nationality as a human right .

The progress in regard to protection of individual and access to nationality presents Protocol 4 to the ECHR :

### **ARTICLE 2**

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave any country, including his own.

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.

The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

### **ARTICLE 3**

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

No one shall be deprived of the right to enter the territory of the State of which he is a national.

### **ARTICLE 4**

Collective expulsion of aliens is prohibited.

Considering **the duty of the State to admit or readmitt** the individuals who are their nationals by ex lege legal effect, there is no single piece of Council of Europe legislation which would bind the States to accept back their nationals inspite of the fact that according to internal legislation the States acgnowledge them as the nationals.The mere fact of lack of registration as a citizens is still the main obstacle for full access to the nationality.

The Protocol 4 also introduced relevant guarancy for the aliens : prohibiting collective expulsion of aliens, while on another hand there is no harmonised norm which would limit collective transfer of nationality beyond the border by the means of naturalistaion, where factual ties almost don' t exist.

The Council of Europe with its unique mandate as legislator of international law in Europe, from Atlantic coast at the West to Vladivastok in the East, unites countries which are members of the European Union as well those which are not. In terms of international migration of persons, it brings together the countries of origin and countries of destination, where migrants settle down establishing genuine link with the countries where they found new home also with objective to become the nationals. And this is one of the challenges for the organisation also for the future, not necessary limited to geographical space of European continent, but also its neighbourhood. Nevertheless, Council of Europe's conventions are opened also for non-members; principles and rules developed by the experts with reach practical experience and Acadmeics may be used also as promotion of the standards which have been developed in Europe beyond its borders.

### **3. The art of play: The conventions on nationality of the Council of Europe**

No man is an island,  
Entire of itself.  
Each is a piece of the continent,  
A part of the main.  
If a clod be washed away by the sea,  
Europe is the less.

**To whom the bell tolls, *John Donne* (1572-1631)**

In the area of Council of Europe, twenty years ago, the concept of single nationality was still prevailing over the concept of multiple nationality. The Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality from 1963 was the first treaty of Council of Europe which dealt primarily with consequences of multiple nationality, in particular with military service. The convention was amended by the two Protocols, whereas in particular the second one from 1993, ratified only by three States, provided the legal ground for exchange of information on multiple nationality in

order to facilitate the loss of nationality ; the protocol was in fact the response on migration challenge : increased levels of migrants in the space of some Western European States who turned from short term admission for the purpose of labor, to permanent stay. Instead of departing to their countries of origin, taking into account that many of them concluded marriages, having had children born in the country of new residence and work, they decided rather to apply for Nationality by the means of naturalisation. Already in 1993, the questions on need to further develop integration of migrants into receiving societies was prevailing among the requests for further developments. As mentioned at the beginning, the prevailing concept in that time was single nationality. It is not surprising that the expert body mandated to deal with nationality at the level of Council of Europe was the Committee of experts on multiple nationality, CJ- PL. As the consequence of adjustment of the legislation on nationality to the reality , many States introduced concept of multiple nationality. This fact was nevertheless reflected also in the name of expert body of Council of Europe which was in 1995 on request of the Committee of experts on judicial cooperation addressed to the Committee of the ministers, renamed to the Committee of experts on nationality , CJ-NA.

The initiative to develop new comprehensive instrument on nationality was launched by the end of 1992. The vast of the preparatory work of the European Convention on Nationality was developed by the working party of CJ NA, between 1994 and 1996 ; on 6th of November 1997 the Convention was opened for signatures, it entered into force on 1st of March 2000.

At the present, 20 States ratified the convention, while 9 States remained with signature and still 18 Members have neither ratified nor signed the treaty.

From the point of view of the areas covered by the ECN one must come to the conclusion that it is unique instrument, the most comprehensive international treaty on nationality which has been so far developed in Europe and also elsewhere, although not perfect; in fact it presents codification of nationality limited by the compromise on its content achieved between the States during its adoption.

Overtaken from the UN instruments, it reinforces valuable fundamental principles as basis of the rules applicable in domain of nationality – by introducing right of everyone to a nationality, avoidance of statelessness, prohibition of arbitrary deprivation of nationality as well as prohibition of automatic affect of marriage or dissolution of a marriage on nationality of the spouse of the national of State party. From the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws , the ECN overtook the principle of the Competence of the State , while the principle of non – discrimination is overtaken from the European Convention on Protection of human rights and fundamental freedoms.

The Convention introduced progressive developments of principles applicable in the field of State Succession as basic response on challenges that occurred as the result of political changes related to dissolution of the States.

The added value of the instrument is its openness and neutrality in regard to the consequences of single or multiple nationality. The basic procedural safeguards – each decision on nationality shall contain the reasons in writing, and that all decisions shall be opened for administrative or judicial review in conformity with the law, as well as that the fees should be reasonable – reflected the need for higher standards of protection of individuals. By introduction of these safeguards many states have had to change material legislation, which allowed issuance of decision without giving the reasons in writing, excluding also possibility to challenge negative decision with appeal. The individuals got an important legal guaranty to challenge and test the decision at the Court and in this way to protect their rights against possible arbitrary decision or misuse of the discretionary power.

Given the fact that statelessness related to State Succession presented one of the acute areas which called for further action, CJ/NA and its working party got the mandate to develop the rules on avoidance of statelessness related exclusively to state succession. The preparatory work of the draft of new instrument was developed between 2002 and 2005. At the beginning the prevailing opinion of the experts was that this should be the Protocol to the ECN, while at the very end, at the last plenary meeting of the CJ NA in October 2004 the experts were of the opinion that this should be rather the new convention.

The Convention on the avoidance of statelessness in relation to State succession was opened for signature on 19th of May 2006 and entered into force on 1st of May 2009. Although only 5 states have ratified it so far, it presents another unique instrument which builds on principles of ECN as well as on principles contained in UN Conventions on Statelessness, it presents unique instrument which sets the rules primarily on obligations of the State successor and predecessor State in regard of avoidance of statelessness which might potentially occur to the persons affected by State succession, and even their children born after State succession. If such an instrument would be in place by the beginning of nineties, I am personally convinced that the overall figure of stateless persons affected by State Succession would be much lower than it was.

Given the fact that avoidance of statelessness was a part of permanent mandate of the expert committee, the experts of ad hoc committee on nationality further explored and developed non binding instrument in this field which was adopted roughly a year ago (9th of December) by the Committee of Ministers to member states: Recommendation CM/Rec(2009)13 on the nationality of children. Although adopted as »soft law« it might be a rich inspiration for national legislators.

## 2. The way forward

By these very basic highlights about both treaties I wished only to underpin the relevance of development of new concepts and their impact on changes of internal legislation of Member States. Without scientific proof ( which would request thorough comparative analysis of the entire legislation on nationality of all the members of the Council of Europe) I am convinced that the ECN had immense impact on the changes of internal legislation of member States of Council of Europe not only those which are bound by the treaty, but also those which are not.

Preamble to the European Convention on Nationality contains important guiding principles about the overall aim of the treaty. For myself, the most relevant of all is the part which stipulates the balance between the legitimate interest of the State and legitimate interest of individuals in matters related to nationality.

Council of Europe committee of experts on nationality dealt almost with all relevant challenges in this field, either in the format of conventions, recommendations or reports. During last years the most of the efforts have been dedicated to the developments of the fields relevant for the protection of the individuals, namely avoidance of statelessness in particular in situation of state succession and later with the rights of the most vulnerable category of persons, children.

Specifically, I would like to point out on report on consequences of multiple nationality and the report on misuse on nationality. Both reports clearly address the most acute areas where further development would be needed, let me list the most relevant ones related to multiple nationality only

- Private international law / harmonization of criteria to be adopted for the choice of the relevant nationality
- Military service / although it is dealt with the convention or bilateral treaties, elaboration of possible model bilateral convention could be useful
- Civil status registration/ to explore the mechanism to facilitate registrations in the States concerned, e.g. registration of birth, marriage or death in at least State of birth and State of marriage or death. We should be aware of the fact that accelerated migration during last two decades in Europe and elsewhere contributed not only to dual nationality, in many cases also triple
- Political rights
- Integration and multiple nationality
- Perpetuation of multiple nationality
- Multiple nationality and State succession
- Compatibility with respect for fundamental rights of the legislative provisions adopted to reduce cases of multiple nationality , a comparative study of European

legislation might be useful, or at least well maintained updated database of European legislation

- Right to a nationality/ whether a right to the acquisition of nationality should be affirmed. whether effective links between a foreign national and a State exist and whether the possession of another nationality should constitute an obstacle to the acquisition of the second nationality
- Multiple identity and multiple residence as a consequence of multiple nationality
- Travel difficulties in case of entry to the State with the passport of another Nationality
- Exchange of information and interstate co/cooperation, in particular in the light of applicable standards on data protection
- Acquisition or retention of a nationality and conservation of other nationalities

During the last session of the committee, in December 2008, the following topics have been proposed for consideration of further developments

- “changing the legal nature of naturalisation in a contemporary world”
- loss / deprivation of nationality, “the loss of Nationality on the initiative of the State and the use of discretionary power”
- multiple nationality: legislation, policies and practices
- double jus soli / the concept of “possession d’état”
- concept of bad faith and good faith
- proof of nationality
- interstate exchange of information on nationality [in cases related to the statelessness of newborn children]
- promotion of the ECN, evaluation of the experience and best practices
- best practices in the field of nationality and the link with immigration in general
- the proof of nationality
- societal tests

In particular the point about the loss of nationality on the initiative of the State and the use of discretionary power drew attention of the experts in panel discussion. According to ECN, art 7, the intervention of the State in the nationality of individual is permitted if certain conditions are met, inter alia threat to vital interest of the State or fraudulent conduct or concealment of relevant circumstances and facts important for decision. These situations are definitely the challenge for each administration, given that the procedural safeguards request application of highest standards also from the field of human right standards. This becomes relevant also in the light of the case law of the European Court of Human rights. Development of the practical guidelines for procedures in this field would thus contribute to better protection of the individuals and could set up the standards which would not

compromise decision making body, nevertheless they could contribute to harmonised approach in the field which request as all matters on nationality, multidisciplinary approach