

# Remarks on the Relationship Between the General Legal Nationality of a Person and his 'Sporting Nationality'\*

by Gerard-René de Groot\*\*

## 1. Function and definition of nationality

Nationality is both in international and in national law an important connecting factor for the attribution of rights and duties to individual persons and States. Under international law States have e.g. the right to grant diplomatic protection to persons who possess their nationality (Donner 1983). Under national law the obligation to fulfil military service and the rights to become a member of parliament or to have high political functions are frequently linked to the possession of the nationality of the country involved. However, there is no standard list of duties and rights which normally are linked to the nationality of a State under national and international law (de Groot 1989, 13-15; Makarov 1962, 30, 31; Wiessner 1989). National States are in principle autonomous in their decision which rights and duties will be connected to the possession of nationality, whereas under international law the consequences of the possession of a nationality are also subject of discussion (van Panhuys 1959). In sports the possession of the nationality of a certain State is - inter alia - of paramount importance in order to be qualified to represent this State in international competitions between athletes (Van den Bogaert 2005, 321-389).

Nationality can be defined as 'the legal bond between a person and a State'. This definition is, inter alia, given in Art. 2 (a) of the European Convention on Nationality (Strasbourg 1997). Art. 2 (a) immediately adds the words "and does not indicate the person's ethnic origin". In other words, nationality is a legal concept and not a sociological or ethnical concept. The nationality of a country in this legal sense (hereinafter: general legal nationality) is acquired or lost on the basis of a nationality statute (de Groot 1989, 10-12; Makarov 1962, 12-19). For example, a person possesses Netherlands nationality if he or she possesses this nationality by virtue of the general Netherlands nationality statute, i.e. the 1984 *Rijkswet op het Nederlanderschap* or other relevant legislation, rules of implementation, case law and legal practice.

## 2. The term 'nationality'

The word 'nationality' is etymologically derived from the Latin word '*natio*' (nation). A difficulty is that 'nation' can nowadays be used as a synonym for 'State', but also in order to refer to a 'people' in a sociological or ethnical sense. In the context of international and national law the word 'nationality' refers to the legal bond with the 'nation' as State, but in many languages words etymologically related to nationality are (or can be) used for the indication of the ethnicity of persons (e.g. '*Nationalität*' in the German language) (de Groot 2003b, 6-10).

A second difficulty is the relationship between the concepts 'nationality' and 'citizenship'. 'Nationality' expresses a person's legal bond with a particular State; 'citizenship' implies, *inter alia*, enabling an individual to actively participate in the constitutional life of that State. Often, the entitlement to citizenship rights and nationality coincide in practice. However, not everyone who possesses the nationality of a particular State also enjoys full citizenship rights of that State; small children may possess the nationality of a State, but they are not yet entitled to exercise citizenship rights. The opposite occurs as well: persons who are not nationals of a particular State may nevertheless be granted specific rights to participate in the constitutional life of that State. In some countries, for example, subject to certain conditions non-'nationals' are entitled to vote and be elected in local (municipalities) elections.

In the English language, the relationship between the two terms 'nationality' and 'citizenship' is even complicated in the context of

nationality law itself. In the United Kingdom, the term 'nationality' is used to indicate the formal link between a person and the State. The statute that regulates this status is the British *Nationality Act* 1981. The most privileged status to be acquired under this Act, however, is the status of "British citizen". Other statuses are: British Overseas Territories Citizen, British Overseas Citizen, British Subject without Citizenship and British Protected Person. In Ireland, it is the Irish *Nationality and Citizenship Act* 1956 that regulates who precisely possess Irish *citizenship*. In the United States, the Immigration and *Nationality Act* 1952 regulates who is an American *citizen*, but the Act also provides that the inhabitants of American Samoa and Swains Island have the status of American *national* without *citizenship* (Section 308; 8 U.S.C. 1408).

Also within several other languages a complicated relationship between terms for nationality (in the sense of a bond with the State) and citizenship can be observed. Compare e.g. Dutch: *nationaliteit-burgerschap*; French: *nationalité-citoyenneté* (see on these terms Guiguet 1997), German: *Staatsangehörigkeit-Bürgerschaft* (see Grawert 1973, 164-174), Portuguese: *nacionalidade-cidadania*; Spanish: *nacionalidad-ciudadania*. But in again several other languages only one term is used for both 'nationality' and 'citizenship' (e.g. Polish: *obywatelstwo*; Italian: *cittadinanza*; Swedish: *medborgarskap*), but frequently in those languages another word exists which indicates the nationality in ethnical sense (Italian: *nazionalità*; Polish: *narodowość*; Swedish: *nationalitet*).

## 3. General versus functional nationality

When international law refers to nationality, this reference has to be read as a reference to the general legal nationality of a State, acquired on the basis of a ground for acquisition provided by the statute on nationality of the State involved. This is e.g. the case, where art. 15 of the Universal Declaration of Human Rights states, that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Next to this general legal nationality which indicates the formal legal bond between a person and a State, States or International Organisations may - for special purposes - develop a so-called 'functional nationality' or "autonomous nationality" (Makarov 1962, 13-17; van Panhuys 1959, 140,141). If for certain purposes a functional nationality is introduced, the grounds for acquisition and loss of this specific functional nationality have to be defined in detail.

In this contribution, the question has to be answered whether the development of a functional autonomous sporting nationality is desirable? In principle, a negative answer of this question is advisable. The regulation of these grounds for acquisition and loss of such a functional nationality is a very complicated task, if one does not want to use simply the place of birth as the only ground for acquisition of the functional nationality without any ground for loss of the functional nationality involved. Even the fiction that one is deemed to have the nationality of the country where one has ordinary residence needs considerable further elaboration, because of the fact that the definition of residence differs from country to country.

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\*\* Professor of comparative law and private international law at the University of Maastricht, The Netherlands.



From left to right: Professor De Groot (University of Maastricht), Salomon Kalou (Ivory Coast / Feyenoord Rotterdam) and Marco van Basten (head coach of the Dutch national football team)

However, there is an attractive alternative for the development of a functional nationality, which comes quite close to an own sporting nationality, but is in fact not an independent notion and which does not require to regulate the grounds for acquisition and loss in detail. One could for the determination, whether a person qualifies to represent a certain State in international sporting competitions use as a basic requirement the possession of the general legal nationality of the country involved, but add - insofar as it is desirable - additional requirements which guarantee that the nationality is the manifestation of a genuine link between the person and the State involved. The essential questions are then of course, which additional requirement(s) should be added and in which cases these additional requirement(s) should be fulfilled?

If one uses the general legal nationality as a basic requirement for the eligibility of persons to represent a country in international sporting competitions, it is appropriate to pay special attention to the position of stateless persons and refugees. These persons should be eligible as representatives of their country of residence as a consequence of the Geneva Convention relating to the status of refugees (1951), respectively of the New York Convention relating to the status of stateless persons (1954) (compare art. 12 (1) of these conventions).

#### 4. Genuine link

The reason to add - in certain cases - (an) additional requirement(s) next to the condition of the possession of the nationality of the country involved, before a person qualifies to represent a country in international sporting competitions, is in order to ensure that a real, genuine link exists between the athlete involved and the country which he wants to represent. However, one has to realise that the general legal nationality normally is already a manifestation of such a genuine link. With other words: normally the general, legal nationality is only attributed, if a genuine link exists between the person involved and the State in question.

The expressions 'genuine link' or 'genuine connection' refer implicitly to the *Nottebohm* decision of the International Court of Justice (ICJ Reports 1955, 4 (23)). The Court concluded in that case in respect to the naturalisation of Mr Nottebohm by the State of Liechtenstein:

*"... a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."*

However, this decision does not deal with the validity of the conferment of nationality in general, nor with the validity of the acquisition of nationality by naturalisation, but exclusively with the right of a State to grant diplomatic protection to a national against another State (Randelshofer 1985, 421). Therefore, a conferral of nationality

without genuine link as such is valid. As a consequence, it may happen that a person possesses a nationality, which is not a manifestation of a genuine link between this person and the State involved.

#### 5. Intermezzo: national autonomy

Thus far no general agreement on the rules relating to the acquisition and loss of nationality exist. The fixing of such rules is within the competence of each State.

Art. 1 of the Hague Convention on certain questions relating to the conflict of nationality laws (1930) underpins: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'

This principal autonomy in nationality matters was already earlier recognised by the Permanent Court of International Justice in 1923 in the decision on the Nationality decrees in Tunisia and Morocco. The Court concluded that nationality questions 'belong according to the current status of international law' to the '*domaine réservé*' of national States.

The principle of autonomy in nationality matters is repeated in Art. 3 of the European Convention on Nationality (1997) and is also recognised by the European Court of Justice in the decision in *re Micheletti* (7-7-1992; ECR 1992, I-4258) (cf., de Groot 2003b, 18-20).

A consequence of the autonomy of States in matters of nationality is the possibility of statelessness or dual/multiple nationality. It may happen that no State attributes a nationality to a certain person, whereas another person may possess simultaneously the nationality of two or more States (Makarov 1962, 291-322).

The national autonomy in nationality matters is nowadays restricted by several bilateral and multilateral treaties. Bilateral nationality treaties are frequently concluded after the transfer of territory from one State to another and in cases of State succession (Makarov 1962, 128-140). An example is the Agreement concerning the assignment of citizens between the Kingdom of the Netherlands and the Republic of Surinam (1975) (*Overeenkomst betreffende de toescheiding van staatsburgers tussen het Koninkrijk der Nederlanden en de Republiek Suriname*).

In the past 75 years several multilateral treaties were concluded with relevance for nationality law (see on those treaties de Groot/Doeswijk 2004, 58-84).

The autonomy of States in nationality matters is also limited by general principles of international law. However, it is not easy to identify the content of those principles. In the 1997 European Convention on Nationality an attempt is made to codify the state of the art in respect of these general principles of international law which limit the autonomy of States in nationality matters. Art. 4 states:

'The rules on nationality of each State Party shall be based on the following principles:

- a. everyone has the right to a nationality;
- b. statelessness shall be avoided;
- c. no one shall be arbitrarily deprived of his or her nationality;
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.'

However, these general principles are rather vague. Art. 4 (a) does not indicate to which nationality a person should have a right; Art. 4 (b) lacks to mention in which ways statelessness should be avoided; and Art. 4 (c) does not provide criteria in order to establish that a deprivation of nationality was arbitrary. Exclusively Art. 4 (d) is concrete enough to apply directly (de Groot 2000, 123-128).

Art. 5 of the European Convention on Nationality 1997 gives two additional rules which could develop into general principles of international law regarding nationality. Art. 5 (1) prescribes that the rules of a State on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. However, in practice it is extremely difficult to establish when, e.g., a preferential access to the nationality of a State based on ethnic origin constitutes a discrimination in the sense of this provision (see, e.g., Par. 7 German nationality act and Art. 116 (1) German constitution; Art. 5 Greek nationality Act; Art. 22 (1) Spanish civil code (sefardic jews)) (de Groot/ Doeswijk 2004, 89, 90).

Art. 5 (2) obliges States to 'be guided by the principle of non-discrimination between its nationals, whether they are nationals at birth or have acquired its nationality subsequently.' This obligation is also extremely vague. Furthermore, in a comparative perspective, one can observe that many States do not observe this rule.

As was mentioned already above, no concrete limitation of the autonomy can be concluded from the ruling of the International Court of Justice in *re Nottebohm*.

In view of these facts, one has to answer the question whether many restrictions of the autonomy of States in nationality matters are caused by international conventions, customary international law and the principles of law generally recognised with regard to nationality, in the negative. The most important general restriction is that the grounds for acquisition and loss should not violate human rights (e.g. no discrimination on racial grounds)

The consequence is, that an enormous variety of grounds for acquisition and grounds for loss of nationality exists.

An indirect consequence of this fact for sports is an unequal competition for States with respect to excellent sporting (wo)men and shocking inequalities between athletes.

## 6. Grounds for acquisition of nationality: main categories

### 6.1 General grounds for acquisition

Although some international treaties aim to harmonise certain grounds for acquisition of nationality, one can still observe a huge variety of grounds for acquisition *ex lege*. The most current ways of acquisition of nationality by birth are acquisition *iure sanguinis* (by birth as a child of a national) and acquisition *iure soli* (by birth on the territory of a State).

Originally, all States which provided for an acquisition of nationality *iure sanguinis* nearly exclusively applied *ius sanguinis a patre* (in the paternal line); only in exceptional circumstances *ius sanguinis a matre* (the maternal line) was relevant (e.g. in case of a child born out of wedlock and not recognised by a man) (Gonset 1977). In practice, however, most children had the same nationality as father *and* mother, because women lost their own nationality at the moment of their marriage and at that moment acquired the nationality of their husband. This system was labelled by Dutoit (1973) as *système unitaire*. During the 20<sup>th</sup> century this system was gradually replaced by the so-called *système dualiste* which allowed married women to possess an

own independent nationality (Dutoit 1973-1980; Dutoit/Masmejan 1991; Dutoit/ Blackie 1993; Dutoit/ Affolter 1998; de Groot 1977).

Most countries now apply a *ius sanguinis a matre et a patre*: a child acquires the nationality if father or mother possesses this nationality (de Groot 2002a, 124). However, some countries provide for exceptions. In the first place, some countries exclude children born out of wedlock as a child of a foreign mother and a father who is a national (de Groot 2002a, 131-135) (see Art. 6 (1) (a) (2) European convention on nationality 1997). Secondly, several countries restrict acquisition of nationality if not both parents possess the nationality of the country involved (de Groot 2002a, 128). In the third place, many countries restrict the transmission of the nationality of a parent to a child born abroad to the first or second generation born outside the country involved (de Groot 2002a, 125-129) (see Art. 6 (1) (a) (1) European Convention on Nationality 1997).

The United Kingdom and Ireland traditionally applied *ius soli*; so did traditional immigration countries like the United States, most countries of Latin America (see Moosmayer 1963), Australia, New Zealand and South Africa. Increasingly, these countries do not apply a strict *ius soli* (birth on territory entitles to nationality), but prescribe additionally that at least one parent meets certain residence requirements (UK since 1983; Ireland since 2005).

Nowadays, most countries do not apply either *ius sanguinis* or *ius soli*, but a combination of both principles. Classical *ius soli* countries provide in case of birth abroad of a child of a national for an acquisition *iure sanguinis*, but often limit the transmission of nationality in this way to the first or second generation. At the other side, classical *ius sanguinis* countries have in the recent past introduced some elements of *ius soli* in order to reduce cases of statelessness or to stimulate the integration of the descendants of foreign families residing permanently on their territory (de Groot 2002a, 137-139).

Children born in wedlock have in principle at the moment of birth a family relationship with both father and mother: this family relationship is frequently the legal basis for the acquisition of nationality *iure sanguinis*. If a child is born out of wedlock, the family relationship with the father can be established later on by, e.g., recognition, legitimation or judicial establishment of paternity. Many legal systems provide that in this case the child acquires the nationality of the father, although several countries provide for additional requirements (de Groot 2002a, 131-133)

Many countries mention adoption as a ground for acquisition of nationality *ex lege*. Most of these countries require that the adoption involved was realized during the minority of the child. However, in some countries the age limit is lower (de Groot 2002a, 135, 136); Hecker 1985). Some countries only provide for nationality consequences of adoption when the adoption order was made by a court or by authorities of the country involved. However, an increasing number of nationality codes provide for the possibility that a foreign adoption order has nationality consequences if this foreign adoption order is recognized because of rules of private international law. In some countries, a special reference is made to the Hague Adoption Convention of 29 May 1993. In respect of adoption, one has to realize that many countries only know full adoption, which replaces completely the pre-existing legal family ties of the child with the original parents by a family relationship with the adoptive parents. Some countries provide (in most cases as an alternative: so e.g. France and Portugal) for a weak adoption (also called 'simple adoption'), which creates a family relationship with the adoptive parents, but does not disrupt all legal ties with the original parents. This so-called 'weak' adoption often lacks nationality consequences, whereas the full adoption has these consequences.

Most countries provide that, under certain conditions, children of a person who acquires the nationality of the country also acquire this nationality if they are still minors. A large variety of conditions for an extension of acquisition can be observed (de Groot/ Vrinds 2004). Next to these frequently occurring grounds for acquisition of nationality *ex lege* some States provide for other grounds for automatic acquisition of nationality. Some examples: Children born in France to foreign parents born abroad acquire French nationality *ex lege* when they reach

the age of majority. According to Austrian nationality law, an alien may acquire *ex lege* Austrian nationality by accepting an appointment as an ordinary professor at an Austrian university. Compare also in this context the legislation of the Vatican. French nationality can, if certain conditions are fulfilled, be acquired by a person born in France who enters the French army. In Spain the possession and continuous use of Spanish nationality for 10 years in good faith and based on a title registered in the civil register is cause for consolidation of the nationality if the title for the acquisition involved is annulled. In other words, continuous treatment as a national is, in case of good faith of the person involved, a ground for acquisition of nationality.

## 6.2 Option rights

In several countries certain persons can acquire, under certain conditions, the nationality of the country involved by lodging a declaration of option (de Groot 2002a, 144-154; Meessen 1966). The details of the conditions can not be elaborated here nor will the precise option procedure be described. However, it is important to stress that there are at least two distinct types of options. According to the law of some countries, a declaration of option can be made orally without any formality. Of course the declaration has to reach the competent authorities. Normally these authorities will make an official document, which will be signed in order to prove the declaration, but if such a document does not exist, the declaration can be proved by any other means. If a declaration was made, but not all the conditions giving a right to opt were fulfilled, the nationality is not acquired. If all conditions were fulfilled and the declaration can be proved, although no document exists, the nationality is nevertheless acquired. The authorities do not have the possibility to avoid the acquisition of nationality because of, for example, reasons of public policy or state security.

In some other countries, a person who uses his right of option must make a written declaration. The authorities control whether all the conditions are fulfilled, but they are also able to reject the option for reasons of public security or lack of integration. It is obvious that this kind of option is much weaker than the first category mentioned. It is therefore not surprising that, generally speaking, countries which have this second type of option rights often grant this right to considerably more persons than countries where the first type of option rights exists. One could also describe the second type of option rights as a quick naturalization procedure where the discretion of the authorities to refuse the acquisition of nationality is limited.

Some countries do not use the term 'option rights', but provide for the possibility to register as a citizen if certain requirements are met. If the authorities do not have any discretion in respect of the registration, such a right to register as a citizen is in fact an option right of the first mentioned category. If there is a discretion of the authorities, it can be classified as an option right of the second category.

In this context it also has to be mentioned that a couple of countries use the construction of a legal entitlement to naturalization: if certain conditions are fulfilled naturalization has to be granted on the application of the person involved. The authorities' discretion is reduced to zero. Such an entitlement comes close to the option rights of the first mentioned category. If the naturalization can still be refused for reasons of public policy or similar general reasons, the entitlement can be compared with the option rights of the second category.

## 6.3 Naturalisation

All countries provide for the possibility of acquisition of nationality by naturalisation, i.e. by a discretionary decision of competent authorities. In some countries a naturalisation has to be granted by act of parliament (e.g. Belgium, Denmark). In most other countries the power to grant naturalisation is given to the head of State, to the government or to a particular Minister. Treaty provisions which aim to harmonise the conditions of naturalisation are rare. Some treaties prescribe the facilitation of some categories of persons (like stateless persons or refugees), but only the European Convention on Nationality (1997) tries to take influence on one certain requirement for naturalisation: the length of residence, which should according to this Convention not exceed 10 years (although, at the occasion of the rat-

ification of this Convention Macedonia stipulated for the right to require nationality a residence of 15 years).

Comparative studies (de Groot 1989, 237-270; Walmsley 2001; Weil 2001, 17-35) learn that the variety of requirements for naturalisation is huge. Walmsley (2001) concluded correctly, that 'few countries have the same requirements for naturalisation or refer to them in the same terms as other States.'

The following requirements are frequent:

- \* Full age: in most countries, this implies having reached the age of 18 years. Nearly all countries provide for the possibility of a waiver of this condition.
- \* Residence (continuous residence creates a genuine link) but
  - the required length varies considerably. The period of residence required for naturalisation is for example
  - 3 years in Belgium
  - 4 years in Ireland
  - 5 years in the Czech Republic, Estonia, France, The Netherlands, Slovakia, Sweden, UK
  - 6 years in Finland
  - 7 years in Norway
  - 8 years in Cyprus, Germany, Hungary
  - 9 years in Denmark
  - 10 years in Austria, Greece, Italy, Luxembourg, Portugal, Spain
  - 12 years in Switzerland
  - 15 years in the Former Yugoslav Republic Macedonia.

Moreover, many countries do not require simple residence, but legal residence or even entitlement to reside permanently. In several countries the required period of residence must be uninterrupted. Therefore, also the way of calculation of this condition for naturalisation varies considerably from country to country.

- \* Immigration status: nearly all countries require that the applicant resides legally in the country at the moment of application for naturalisation. However, - as already mentioned - several countries prescribe that the whole required period of residence must be legal. Moreover, some countries require that the applicant must possess an entitlement to reside permanently in the country.
- \* Integration or even assimilation: in several countries the applicant has to successfully do an integration examination.
- \* Command of (one of) the national language(s): the degree of knowledge of a State's language which is required varies again. In some States a basic oral command is enough, some other States also require command to write the language.
- \* No danger for the security of the State. The concrete application of this requirement varies again from country to country. Several States influenced by the United Kingdom refer to this requirement by the condition that the applicant must be of 'good character'.
- \* Ability to support oneself: although this condition is frequently 'hidden' behind the condition with respect to the immigration status.
- \* Renunciation of a previous nationality: whether this condition is required depends on the general attitude of a State regarding cases of dual or multiple nationality.
- \* Oath of fidelity.
- \* Payment of a naturalisation fee. In some countries naturalisation is free of charge (Belgium, Luxembourg); other countries provide for a fee in order to cover the costs of the naturalisation authorities; again other countries require really high fees (some cantons in Switzerland).

Less frequent are, e.g., the following requirements:

- \* Health certificate (France).
- \* No intensive relation to another State (Austria).
- \* Benefit to the country.

## 6.4 Waiver or reduction of conditions for naturalisation

All States allow for a waiver of (most/all) requirements for regular naturalisation (de Groot 1989, 270, 271). Whether this exception is used for sports(wo)men differs considerably.

Moreover, all countries reduce the requirements for naturalisation for some specific groups of applicants, e.g. spouses of nationals, for-



mer nationals, refugees, stateless persons and sometimes also for nationals of specific other States.

Spain for example requires only a residence of 2 years for nationals of Latin American countries, Philippines, Andorra, Portugal, Equatorial Guinea and Sephardic Jews. Denmark and Sweden allow the naturalisation of nationals of other Nordic countries after a residence of 2 years (see de Groot, 2002b). Italy facilitates the naturalisation of nationals of other Member States of the European Union after a residence of 4 years.

The conditions for a facilitated acquisition of nationality for foreign spouses of nationals differs again enormously (de Groot 2005). In the past most States provided for an automatic acquisition of nationality by a foreign wife of a national (de Groot, 1989, 311, 312). Incidentally, this ground for acquisition still exists. Now, most States give married women an independent nationality status. However, in some countries the foreign wife of a national can acquire nationality without any residence requirement by lodging a declaration of option. The far majority of States facilitate the naturalisation of foreign spouses independent of their sex, but the precise requirements differ again enormously. For example: Italy allows the acquisition of Italian nationality by the foreign spouse after 6 month residence or 3 years marriage. The Netherlands allows an application for naturalisation after 3 years marriage (no residence required). Spain allows the naturalisation of the foreign spouse after 1 year residence.

## 7. Comparison of grounds for acquisition and the relevancy of compensation mechanisms

If one wants to compare the grounds of acquisition of nationality of several countries in order to get an impression of the unequal competition of the States involved regarding excellent athletes, one should not compare isolated grounds for acquisition, but should take into account all grounds for acquisition and all grounds for loss. For example, differences regarding naturalisation have to be evaluated and assessed in the perspective of the differences regarding other ways of acquisition of nationality. The same applies for differences regarding possibilities of acquisition by registration as a national or by declaration of option.

It is important to realise, that already the choice for a certain application of *ius soli/ ius sanguinis* implies an unequal competition of States in respect of sports(women) and unequal opportunities for athletes. The largest number of nationals (and therefore the biggest chance to find excellent athletes which could represent the country in international competitions) has a country which applies cumulative *ius soli* and an unlimited *ius sanguinis a matre et patre*. The smallest number of nationals (and thus the smallest chance to find excellent athletes which could represent the country) has a country which applies exclusively *ius sanguinis a patre* with limitation in case of birth abroad.

But in fact, if States do not apply *ius soli* or make exceptions regarding *ius sanguinis* this is often to some extent compensated by facilitated access to the nationality. A country which does not apply *ius soli*, may provide for the automatic acquisition of the nationality at the 18th anniversary by persons born on the territory of the State (e.g. France) (de Groot 2002a, 141) or by acquisition of nationality by lodging a declaration of option by a person born on the territory of the State (e.g. Netherlands, Portugal) (de Groot 2002a, 145, 146)

A country which provides for a limitation of the acquisition of nationality *ius sanguinis* in case of birth, may compensate this by creating the possibility of registration as a national for children of nationals born abroad (sometimes: if certain conditions are met) (Belgium, Germany, Portugal, United Kingdom) (de Groot, 2002a, 148, 149). And a non-acquisition of nationality *ius sanguinis a patre* by children born out of wedlock may also be compensated by a possibility of registration as a national for the children involved (sometimes: if certain conditions are met) (de Groot, 2002a, 148, 149).

These compensation mechanisms have as a result that the competition between States regarding excellent sports(women) gets again more equal. The introduction of an additional residence requirement for sports(women) after the acquisition of a nationality by one of

these compensation mechanisms would therefore not be acceptable, because it would cause new inequalities.

Some specific rules of international sport federations are problematic in this comparative perspective. Art. 3.3.3 of the FIBA 2002 Regulations states, that a team:

'may only have one player who has acquired the legal nationality of that country by naturalisation or by any other means after the age of 16' (van den Bogaert, 350, 351).

This rule causes inequalities. A person born on the territory of a *ius soli* country will always possess the nationality of the country of birth, often next to a nationality acquired *ius sanguinis*. A person born on the territory of the Netherlands as a child of foreign parents will only be able to get Netherlands nationality by a declaration of option after the 18<sup>th</sup> anniversary. It is essential to take into account this fact, if a federation wants to formulate nationality restrictions.

## 8. Naturalisation and an additional residence requirement

The most obvious unequal competition in respect to athletes can be observed in the different attitude and practices of States regarding the quick naturalisation of athletes. The question has to be raised and answered, whereas these differences regarding naturalisation should be compensated by the introduction of an additional requirement, which has to be fulfilled before the naturalised athletes may represent their new country in international sporting competitions. The content of the additional requirement should guarantee that the new nationality is a manifestation of an appropriate, genuine link with the State involved. In that perspective an additional residence requirement could prove to be useful: a naturalised athlete should - in principle - only be entitled to represent his new country in international sporting competitions, if he had his habitual residence for a certain uninterrupted period - *before or after the naturalisation* - in the new country.

However, such an additional residence requirement is not reasonable if already for other reasons a genuine link exists between the naturalised person and the State involved, but the person involved did until his naturalisation not acquire the nationality due to the choices which the State involved made in the field of nationality law. Sports(women) should not suffer disadvantages because of technical choices of States in respect of nationality law. I would like to submit, that a relevant genuine link between a person and a State always exists:

- in case of birth on the territory of the State
- for children of a national, both natural and adopted children<sup>1</sup>
- in case of the naturalisation of former nationals

If persons born on the territory of a State or children of a national of the State are naturalised by the State involved or acquire the nationality involved by registration, declaration of option or even by operation of law when they reach a certain age, this acquisition of nationality has to be considered as a compensation of the non (or partial) application of *ius soli* or *ius sanguinis*. An additional residence requirement would then not be fair.

The reintegration (re-naturalisation) of former nationals has to be considered as a compensation for differences between the States regarding the provisions on the loss of nationality. Some States follow the principle of perpetual allegiance and do not provide for any possibility to lose the nationality, whereas other States provide for a wide range of grounds for loss.

There is an enormous variety of grounds for loss of nationality. The 1961 Convention on the Reduction of Statelessness takes, *inter alia*, influence on the grounds for loss of nationality by rules which forbid loss of nationality if this would cause statelessness for the person involved, but the Convention also provides for many exceptions to this main rule. A very important development is manifested by Arts. 7 and 8 of the European Convention on Nationality 1997 which give

<sup>1</sup> Insofar I have difficulties with the decision taken by the FIFA-Emergency Committee in 2004 in reaction to the plans of Qatar to naturalise Brazilian football players, which i.a. uses as a cri-

terium that the biological father or mother was born in the territory of the relevant association. See on that decision Van den Bogaert, 359.

an exhaustive list of acceptable grounds for loss of nationality. The grounds mentioned in these articles are:

- voluntary acquisition of another nationality ;
- acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
- voluntary service in a foreign military force;
- conduct seriously prejudicial to the vital interests of the State Party;
- lack of a genuine link between the State Party and a national habitually residing abroad;
- where it is established during the minority of a child that the pre-conditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled;
- adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adoptive parents ;
- the renunciation of his/her nationality by the person concerned, under the condition that this person does not thereby become stateless.

Furthermore Art. 7 (2) allows, that a State provides for the loss of its nationality by children whose parents lose that nationality except in case of loss because of foreign military service or because of conduct seriously prejudicial to the vital interests of the State. However, children shall not lose their nationality if one of their parents retains it.

According to Art. 7 (3) loss of nationality may not cause statelessness with the exception of deprivation of nationality because of fraud.

Many countries provide for the loss of their nationality on several of these grounds (de Groot 2003a). Some countries only provide for the loss of nationality by renunciation on the initiative of the person involved (e.g. Poland, Portugal). On the other hand, not all countries recognise the right that a person may renounce his nationality provided that no statelessness is caused (e.g. Morocco).

In a comparative perspective, numerous other grounds for loss can be observed, which are not covered by the list of Arts. 7 and 8 of the European Convention on Nationality: Some examples:

- Foreign public service (e.g. France, Italy);
- General criminal behaviour (e.g. Spain, United Kingdom);
- Refusal to fulfil military service (e.g. Turkey);
- Using a foreign passport (e.g. Indonesia, Mexico).

It is necessary to take into account all these differences regarding the loss of nationality. The consequence has to be, that in case of reintegration of a former national, never an additional requirement should be imposed.

A difficult question is, whether an additional residence requirement should also apply in cases, where the nationality is *acquired after marriage* (automatically/ by declaration of option/ after a very short period of marriage)? On the one hand, comparative law shows that many States facilitate the access to nationality for the foreign spouse of a national immediately after the marriage or after only a short period. These States obviously consider the marriage as a manifestation of a genuine link with the State involved. On the other hand, not to require an additional residence requirement may cause sham marriages by athletes. A possible compromise could be to require - in principle - not only an additional residence of two years, but to pro-

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vide also that the time of marriage and residence are added. Such an addition of the time of marriage and the period of residence happens in e.g. Austria and Denmark in order to determine whether the foreign spouse qualifies for facilitated naturalisation (de Groot 2005)

In all cases where a genuine link is lacking, an additional residence requirement is reasonable. The next question is of course, how long the additional residence requirement should be. I submit that the required period of habitual residence should be shorter than the lowest residence requirement for regular naturalisation, which is in Belgium 3 years. It is therefore - in my opinion - attractive to require a habitual residence of two years of continuous residence immediately before naturalisation.<sup>2</sup> If at the moment of naturalisation this condition is not fulfilled, the naturalised athlete only qualifies to represent his new country, after he has resided two years in the new country (the period of residence directly before the naturalisation and after the naturalisation should be added up). If this condition is not fulfilled at the moment of naturalisation, the naturalised athlete only should be eligible to represent his new country after he fulfilled the two years requirement. A residence period of two years immediately before naturalisation should not be required, if the naturalised person had in the past a continuous and uninterrupted residence of five years in the country involved. Such an uninterrupted period of residence in the past guarantees already the existence of a genuine link of the athlete involved and the country of the new acquired nationality. In such a case there is no need anymore to require an uninterrupted habitual residence of two years immediately preceding the acquisition of nationality. Furthermore, this additional rule is realistic in view of the fact that young athletes frequently get part of their sporting education and make part of their sporting career in another country than the one where they grew up.

The remarks made above concentrated very much on inequalities caused by the different attitudes of States in respect of quick naturalisation. The introduction of an additional residence requirement would prevent that an athlete qualifies to represent a country in international competition without having a genuine link with the country involved.

In the perspective of the comparative analysis given above, we also can imagine cases where an athlete moved from his country of origin to another country and wants to represent that other country in international competition, but is not able to do that, because that other country has very severe conditions for naturalisation (e.g. a residence requirement of 10 years or more). It would be wise to study also that type of unequal opportunities for athletes. The question has to be raised, whether it should be made possible for athletes to apply for being eligible to represent their country of residence, after they had their habitual residence in that country for e.g. five years. The creation of such a possibility would also compensate disadvantages which are caused by the differences between the rules and practice of States in the field of naturalisation.

<sup>2</sup> To require a residence period of two years fits also with the facilitated naturalisation for special groups of foreign

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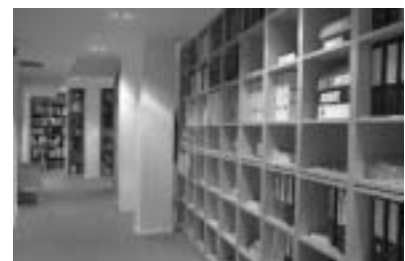
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## DE KEERSMAEKER VROMANS

THE BRUSSELS OFFICE OF THE  
ASSER INTERNATIONAL SPORTS LAW CENTRE

### Media, Entertainment, & Sports



Contact: Marinus Vromans  
Wetstraat 67 Rue de la Loi  
Brussel 1040 Bruxelles  
Tel: + 32 2 235 03 00  
Fax: + 32 2 235 03 03  
E-mail: mvromans@dkv-