

# **The Concept of National Citizenship in the Contemporary World: Identity or Volition?**

**Bucerius Law School, Hamburg  
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**Gerhard Casper**

The meaning of national citizenship appears to be undergoing substantial changes. While, in the past, the salient characteristic of citizenship seems to have been identity revealed or identity conferred, citizenship increasingly displays a volitional quality. I should like to attempt an assessment of this phenomenon.

The term “national citizenship” of course presupposes the notion of “nation” or “nation-state.” We all have an intuitive understanding of these terms, but once you begin to peel the onion, little remains to hold onto.

While “nation-state” clearly refers to such common elements as territory, people, and an organized “sovereign” state structure, it is often given further content in terms of people sharing a common culture, sometimes even ethnicity. The concept suggests a substantive differentiation from other nation-states.

Clearly, when we talk of nations, let us say Germany, we somehow assume that the Germans, as Germans, have much in common, but what *exactly* they have in common is subject to much dispute. Consider such ambiguous ethnicity defining variables as common descent, a community of customs, a community of beliefs, a sense of self-identity, a shared history, a shared language. Even before population genetics and modern migrations, each of these terms seemed to lead to more questions rather than to clear answers. Questions have become sharper since Germany acquired substantial numbers of naturalized Turks.

International law uses the concept of “nationality” to refer to the legal relationship between an individual and a state. As such, the concept does not imply any substantive characteristics. The international law concept of nationality is pretty much an empty vessel.

A state that under international law has sovereignty over its territory and general authority over its nationals is, to a large extent, free to establish nationality law and confer nationality as it sees fit. As we learned the hard way between World War I and the end of World War II, traditional international law did not even question the authority of a state to terminate the citizenship of any of its nationals. In response, the Universal Declaration of Human Rights has sought to limit the latter authority through recognition of a right to a nationality and a right not to be arbitrarily deprived of one's nationality. Many contemporary constitutions have similar provisions.

There are three basic modes for acquiring a country's nationality: (1) citizenship by descent, i.e., the biological mode (*ius sanguinis*); (2) birth on a state's territory, i.e., the territorial mode (*ius soli*); and (3) naturalization, i.e., the transformative mode. The rules governing the acquisition and loss of citizenship and various combinations of the three basic approaches can be as complex as the tax laws.

In the past, whichever of these modes or combination of modes prevailed in a national jurisdiction, many countries insisted that citizenship meant allegiance to one country only. While the workings of the three basic modes of acquiring nationality can easily lead to dual nationality in a fair number of instances, in the past this phenomenon was frequently dealt with by requiring the dual national to opt for one or the other citizenship. As long as most countries had the draft and men were called upon potentially to sacrifice their lives for their country of citizenship, national identity was something to be taken very seriously by the individual and it was taken seriously by states that were concerned with draft evasion. Citizenship could imply a fairly strong form of allegiance.

The importance of allegiance is illustrated by the naturalization oath that the United States has required, more or less in these words, ever since 1795: "I hereby declare on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; ..." These are strong words....

As late as 1931, the entry on dual citizenship in the *Encyclopedia of the Social Sciences* included the assertion that dual nationality is essentially an incongruity. Or, as a recent commentator puts it: “Dual citizenship was once thought an offense against nature, ... an immoral status akin to bigamy. One might be a dual citizen by virtue of the interplay of different citizenship regimes, but one could not openly maintain allegiance to more than one nation.” I shall return to this issue.

What follows from citizenship? What are the rights, what, if any, are the duties of a citizen?

In a hierarchy of rights associated with national citizenship, ordinarily the right to participate in governance (the right to vote and the right to hold office) is ranked at the top. However, throughout most of history and throughout most of the world, people have been subjected to rulers (monarchs, aristocrats, patricians, colonial powers, dictators) who did not grant their “subjects” any participatory rights. The substance of citizenship is, to a large extent, a function of *modern* constitutional arrangements that are based on the notion of popular sovereignty and the equality of citizens.

Even then, under many constitutions, substantial portions of the people, most prominently women, had no right to participate in governance. It did not occur to the American or French revolutionaries to enfranchise women. In the United States, that happened only in 1920, in France in 1944 (in democratic Switzerland in 1971).

Other political rights (freedom of speech, assembly, association, religion) may or may not depend on citizenship status. Indeed, in the EU, since the Maastricht Treaty of 1992, even voting rights have been partially uncoupled from citizenship.

Historically, perhaps as important as some political rights have been rights of ingress and egress, the right to move internally within a country, the right to protection. These rights find their expression in bureaucratic passport systems that have become a state monopoly only in the last two hundred years. They may or may not be a function of citizenship.

Economic rights—such as the right to hold property, to contract, to inherit, to seek employment—citizens usually enjoy, though they may also be granted (and frequently are granted) to noncitizens.

As concerns access to public services (education, social security, welfare, healthcare) there has been in most modern welfare states what Lord Goldsmith, the former English Attorney General, refers to as a “blurring of citizenship”: social and economic rights are not closely tied to citizenship status.

Furthermore, human rights law worldwide has come to occupy a status that makes citizenship less important in asserting rights that are viewed as *human* and that can be invoked against governments by citizens and noncitizens alike (as is most prominently the case with the European Convention on Human Rights that extends to more than 50 countries).

Are there duties that follow from citizenship?

Curiously, the answer is: hardly any *legal* duties.

In the past, military service was a prime example of a legal obligation, but volunteer armies have made this less salient in many countries. The one civic duty remaining in the United States is jury duty. Allegiance is mostly a *moral* or *ethical* matter and is ordinarily not subject to enforcement action, rare treason prosecutions excepted.

The duty to pay taxes tends to be primarily (though by no means exclusively) a function of residence and of the sources from which income is derived rather than of citizenship. The duty to pay taxes is frequently the subject of double taxation treaties.

The duty to obey other laws falls mostly on citizens and noncitizens alike. The United States passport includes language that reminds American citizens: “[W]hile in a foreign country, you are subject to its laws.”

Historically, one of the most interesting aspects of citizenship is that its salience is a rather recent phenomenon. Apart from citizenship at the local and/or city-state level, the very concept of citizenship does not gain much significance before the last quarter of the 18<sup>th</sup> century, or put differently, before the American and French revolutions.

Similarly, that is also true for the very concept of the nation-state. While obviously some countries can be traced way back (England, France, Japan, China), others are of very recent origin (Italy, Germany, many countries in the third world). The United States is actually one of the older nation-states, having existed for more than two hundred years under a single constitution.

In particular, as the historian Andreas Fahrmeir has argued, the correlation between nationality and ethnicity took center stage in the West only from the 1880s. I quote: “Three decades later, the success of nationalization appeared when British, French, German and, from 1917, American citizens of all ranks perceived themselves as part of a national community worth dying for in a war of unprecedented destruction.” Since then, vague notions of ethnicity and nationalism have led to ethnic cleansing and genocide, have caused much of the bloodshed of the 20<sup>th</sup> century and are continuing to shed blood in the 21<sup>st</sup> century.

Since World War II, and especially in recent decades, the law of citizenship has developed in the opposite, a nonnationalist, direction. For instance, the United States Supreme Court in 1967—in a case, *Afroyim v. Rusk*, that involved dual citizenship and voting in a foreign election—ruled that, under the Constitution, Congress had no power to divest a citizen of his citizenship absent *voluntary* renunciation. The Court said:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country, and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. ... Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

The historical concept of “volitional allegiance” that had its origins in the period of the American and French revolutions has acquired a meaning that until quite recently would have been unimaginable. The way the United States State Department web site deals with dual citizenship is to state laconically: “U.S. law does not mention dual nationality or require a person to choose one citizenship or another.” The State Department lawyers wisely do not pause to explain the meaning of “to renounce” in the abjuration oath that I quoted earlier.

Anecdotal evidence would suggest that citizens need not restrict themselves to “dual” citizenship. As people go about diversifying their citizenship portfolios, they easily may end up with multiple citizenships. I recently saw a law school application where the candidate, immediately following his date of birth, listed four citizenships. Fahrmeir refers to “individuals’ options for legal self-definition.” The notion of a “cosmopolitan citizen” has acquired a self-interested reality. The economist Lawrence Summers recently expressed concern about the development of “stateless elites” whose allegiance is to global economic success and their own prosperity.

The development is a worldwide one. Many countries have come to accept dual citizenship; in some instances, such as Italy, Ireland, and Mexico, they have actively embraced it for political reasons. India, a country whose constitution prohibits dual citizenship, has invented an “overseas citizen of India.” In a mostly conscription-free age, individuals are not so much concerned with contracting contradictory obligations, but with maximizing rights, including economic ones. It is not so much allegiance that is on their minds, but the benefits conferred by a foreign passport.

For instance, an American who is a dual citizen of any one of the 27 member states of the European Union, will benefit from the freedoms and the nondiscrimination rules of the EU in its entire territory. These privileges, in turn, have created an EU “citizenship” that is of increasing importance to the EU’s population of almost 500 million and that includes voting rights in local and European elections for citizens of the member states if they live in a member state other than their citizenship country. While national boundaries are still far from being viewed as morally arbitrary, regionalization and globalization are undercutting their significance.

It seems that citizenship is becoming more and more a matter of individual choice rather than identity. While there clearly is a shift in emphasis, the question is how radical this shift is.

Peter Spiro, an American law professor, refers to the “irreversibility of citizenship’s decline.” In reality, I believe that concepts of citizenship have always vacillated (to use Ferdinand Tönnies’ terms) between Gemeinschaft and Gesellschaft. Tönnies himself, of course, assigned the state and membership within it to the realm of Gesellschaft. The law cannot measure affective commitments.

The key to the success of a polity in the modern world, perhaps more than at any earlier time, is to create a well-governed public space. Of course, many human activities are effectively beyond the governance reach of the nation state either because world markets evade national regulations or because regulatory failures in one country have repercussions elsewhere. Yet, institutions of global governance by necessity are derivative of nation states and depend on their willingness to cooperate. Thus, to obtain good laws well executed we ultimately continue to depend on a mix of national interest and standards of right conduct that are voluntarily observed as part of a moral commitment to make the world work.

Individuals may hold multiple passports. Their affections may be torn among a number of different polities. In a globalized society affective associations are no doubt complicated. Nevertheless, over time, in a well-governed public space, consent may turn into identity.

John Page, a member of the first Congress of the United States and later governor of Virginia, expressed this perspective with great clarity in 1790. He argued that: “It is nothing to us, whether Jews or Roman Catholics settle amongst us; whether subjects of Kings, or citizens of free States wish to reside in the United States, they will find it their interest to be good citizens, and neither their religion nor political opinions can injure us, if we have good laws, well executed.” The emphasis is on the “if.”