

The Right to Citizenship – Slovenia and Australia

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Abstract

Most people across the world automatically assume citizenship at birth or acquire citizenship by descent or naturalisation. Since the growth of the concept of citizenship from the French and American Revolutions, it has become an important principle to the nation state and individual. Citizenship is the right to have rights. However, the right to citizenship is limited. In some cases when territorial rule changes the citizenship laws may exclude individuals resident in the territory. This article compares the development of the first citizenship laws in Australia and Slovenia, and the impact that these new laws had on the residents of both states. The first citizenship laws established by Australia were in 1948. More than forty years later in 1990, when Slovenia finally obtained independence from the former Yugoslavia, the new country was able to establish their own citizenship laws. The result of the Slovenian citizenship laws saw many former Yugoslav citizens who were resident in Slovenia being without citizenship of any state. Subsequently, these people were declared stateless. On the other hand, for Australia, the outcome was relatively smooth with the transition from British subjects to Australian citizenship.

Key words: Australia; Citizenship, Human Rights; Nationality; Slovenia; Statelessness

Introduction

For many people, nationality (citizenship) is a natural part of a person's life. Citizenship is the legal status that connects an individual to a nation state.¹ Citizenship provides a sense of belonging within and with a state.² The evolution of citizenship has seen the concept play an important role in building a nation, and in assisting a nation to formulate an identity. Citizenship arose from the American and French Revolutions where people had an allegiance to a master, through voluntary citizenship,³ to individuals acquiring a legal status. The transition from allegiances to a legal status meant that the citizens became equal, no be subservient to a king (or master).⁴ The French Revolution saw the rise of the nation state.⁵ Citizenship differentiated between

¹ Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalised World,' *Indiana Journal of Global Legal Studies*, Vol. 7, No. 2, 2000: p. 521.

² Peter Werbner and Nira Yuval-Davis, 'Women and the New Discourse of Citizenship,' quoted in Lyn Jamieson, 'Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity', *Soliologia* Vol. 34, 2002: pp. 14-15.

³ Joan Gundersen, *Independence, Citizenship, and the American Revolution*, Chicago: University of Chicago Press, 1987, pp. 60-77.

⁴ John Salmond, 'Citizenship and Allegiance, Nationality in English Law,' *The Law Quarterly Review*, Bd 69, 1902, pp. 50-54.

⁵ Rogers Brubaker, 'The French Revolution and Invention of Citizenship,' *French Politics and Society*, Vol 7, No 3, 1989: pp. 30-49; Jürgen Habermas, *Citizenship and National Identity*, in Bart Van Steenberghen, *The Condition of Citizenship*, London: SAGE Publications, 1994, pp. 20-22.

a French citizen and a foreigner by affording them different sets of rights.⁶ That is, political rights were only afforded to citizens of France. French citizenship was codified.⁷ Citizenship could be obtained by a person who was born in France, if at least one of the parents was French and were domiciled in France.⁸ The Declaration of the Rights of Man and Citizen in 1789 reinforced the rights of the citizen and man within the French territory. Even though there was limited reference to the citizen, article 6 provided that 'every citizen has a right to participate personally, or through his representative, in its foundation', and that all citizens were equal in the eyes of the law.⁹ The focus on rights extended to liberty, property, security and the resistance to oppression.¹⁰ However, the declaration did not guarantee that everyone would automatically obtain citizenship.

The American and French revolutions, along with the Haitian Revolution¹¹ and Spanish Revolution, have all dealt with the transition of the inhabitants of the territory from subjects to citizens.¹² This shift saw citizenship gain a legal status for the first time, and, as Jean-Jacques Rousseau argues, provided the basis for equality among the community of citizens within the state.¹³ At the individual level, citizenship provides a person with a sense of belonging and rights. Those individuals that have no citizenship of any country lack a sense of belonging to a state and access to rights. Hanna Arendt¹⁴ describes citizenship as the right to have rights, which is absolute and guaranteed. However, this is an aspirational proposition, because in practice there are more than 10 million people that have no citizenship of any state in the world, with more than 600,000 of these people located across Europe.¹⁵ Under international law these people are declared stateless. This article explores the importance of citizenship as a right. The article also provides a case study of the actual and potential for statelessness to occur when both Slovenia and Australia established their respective citizenship laws for the first time.

Citizenship, Statelessness & Human Rights

Citizenship is multidimensional and is both a legal and social concept. Citizenship can mean different things to different people, the state and different states. Citizenship is a membership that has and continues to be used to develop equality among citizens of a state. **A national identity is multidimensional**,¹⁶ a political concept which is the

⁶ *ibid.*

⁷ French Civil Code 1803, in Marie-Claire Foblets, Zeynep Tanasmayan, Country Report: Belgium, EUDO Citizenship Observatory, European University Institute, 2010, p. 2.

⁸ *ibid.*

⁹ Declaration of the Rights of Man and Citizen, National Assembly of France August 26 1789, accessed 2 February 2015 http://www1.curriculum.edu.au/ddunits/downloads/pdf/dec_of_rights.pdf

¹⁰ *ibid.*, article 2.

¹¹ Jeremy Popkin, *A Concise History of the Haitian Revolution*, West Sussex: Blackwell Publishing, 2012, pp. 170-180.

¹² Malick Ghachem, 'Slavery and Citizenship in the Age of the American Revolutions,' *Historical Reflections*, Vol 29, No 1, 2003: pp. 10-15.

¹³ Alubabari Desmond Nbete, 'The Social Contract Theory: A Model for Restructuring a True Nigerian Nation-State,' *International Journal of Humanities and Social Science*, Vol. 2, No. 15, 2012: pp. 267-270. Jean-Jacques Rousseau's philosophy on gender from 1762, in Sirkkuy Hellsten, Anne Maria Holli, Krassimira Daskalova, *Women's Citizenship and Political Rights*, New York Palgrave MacMillan, 2005, pp. 14-16.

¹⁴ Hannah Arendt, *The Origins of Totalitarianism*, New York: Harcourt, Brace and Company, 1951, pp. 266-298.

¹⁵ Network for Change, *Working Together to tackle Statelessness in Europe*, Annual Report, European Network on Statelessness, 2014-15, p 4.

¹⁶ Anthony Smith, 'National Identity and the Idea of European Unity,' *International Affairs*, Vol 68. No 1, 1992: pp. 55-76.

crucial bond between the citizen and nation state.¹⁷ Citizens have an assumed identity (consciousness) where they belong to a state. The state establishes an identity to set itself apart from other nation states. A nation state's power is articulated through the laws and regulations that have been granted to its subjects [citizens].¹⁸ Jürgen Habermas argues the national identity is formed under constitutional patriotism and a common set of constitutional principles, such as fundamental rights and democratic institutions, that bind the community.¹⁹ The nation state and its identity is defined by a national consciousness,²⁰ which is facilitated by political activation of the citizen,²¹ along with the right to assume citizenship.

The rise of the nation state saw the right to nationality (citizenship) become an important legal concept both internationally and nationally. International law has and continues to provide states with the ability to regulate and determine who its citizens will be. Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws affirmed this principle: 'It is for each State to determine under its own laws 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'.²²

Following the bloody conflict of World War II (which resulted in many refugees from across Europe and the current day territory of Slovenia), the international community came together to develop laws that would protect the people and their right to citizenship. This was no more evident than with the establishment of the 1948 Declaration of Human Rights. Article 15 states that '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. However, the Declaration and its articles are non-binding law. The international community would later adopt binding law, such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which ensures all children acquire nationality.²³ The next significant step undertaken by the international community was the development of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

The 1954 convention does not guarantee the right of citizenship to any person, but what it does do is provide security and dignity until their individual status is resolved. However, this does not mean that an individual's circumstances will result in the person obtaining citizenship of the state in which they are resident. More importantly, the 1954 convention protects the rights of individuals, such as the right of association and access to courts, and encourages states to allow stateless people to obtain employment and to ensure their general welfare (housing, schooling and health) is considered. The 1961 convention maintains that it is the sovereign right of states to manage nationality within their territory, and that states do so in accordance with

¹⁷ Jackson Minter, 'National Identity and Immigration: The Cases of Israel and Australia,' *Queensland Law Student Review*, Vol 4, No 1, 2011: pp. 1-9.

¹⁸ *ibid.*

¹⁹ Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State,' in Amy Guttman, *Multiculturalism: Examining the Politics of Recognition*, New Jersey: Princeton University Press, 1994, pp 107-115.

²⁰ Jürgen Habermas, 'The European Nation State. Its achievements and limitations. On the Past and Future of Sovereignty and Citizenship,' *Ratio Juris*, Vol 9. No 2, 1996: pp. 125-137.

²¹ *ibid.*

²² Hague Convention on Conflict of Nationality Laws, 1930, 179 LNTS 80; 1930 Can. T.S. No. 7.

²³ Article 23(3), International Covenant on Civil and Political Rights 1966, Articles 7(1) and 8(1) Convention on the Rights of the Child 1989.

international legal norms. Even though the convention does not guarantee anyone will obtain citizenship, it does, however, allow any person to apply for citizenship subject to the national laws of the state. Today, both Slovenia and Australia have ratified the United Nations Convention relating to the Status of Stateless Persons of 1954 and the 1961 Refugee Convention.²⁴

As the international community began working towards protecting people with no citizenship of any state, nation states across mainland Europe were also discussing how to improve unification among citizens and nations. The European Union considers human rights as one of the principal policy objectives to the ongoing integration and unification of member states and their citizens. Slovenia and its citizens are part of the European Union today.

The development of European law and European citizenship can be traced to the 1951 Treaty establishing the European Coal and Steel Community (ECSC)²⁵, which expired in 2002. The principal objective was to unite countries and their people and encourage cooperation. In 1957, the Treaty of Rome significantly extended the ECSC and introduced the right of “free movement of persons and services”.²⁶ The beginnings of European citizenship had been formed. Later, in 1968, Council Regulation 1612/68 was introduced to distinguish between free movement and mobility of labour (citizens).

The next major change to the European legal framework was the introduction of the Schengen Agreement, signed in 1985. The Schengen Agreement gave effect to the principle of free movement through the abolition of internal frontiers, and the introduction of common conditions for the entry of third country nationals into Schengen Zone of the European Union member states. In 1986, the Single European Act was implemented.²⁷ The Single European Act reinforced the 'internal market' concept by allowing European Union citizens to move, reside and work freely across the European Union, ensuring the area was without any internal frontiers.²⁸ The Single European Act also played a major role in establishing economic and social cohesion across member states by reducing the differences in the level of development across the region, and between a member state and their citizens. Member states in the West were far more advanced economically than other member states in central and eastern parts of the European Union. The Single European Act was a step forward in closing that gap. By closing the gap, the intention was for citizens across the European Union to become equal (economically and socially), encouraging unification and integration. However, to achieve full equality, unification and integration remains a work in progress that continues today.

²⁴ Akt o notifikaciji nasledstva glede konvencij organizacije združenih narodov in konvencij, sprejetih v mednarodni agenciji za atomsko energijo, Official Gazette of the Republic of Slovenia, No. 35/92. Official Gazette FLRY, MP, No. 17/67. Article 4, Constitutional Law implementing the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the republic of Slovenia, No. 1/91-I. The Conventions are also included into the Act notifying succession to conventions of the United Nations and conventions adopted by the International Atomic Energy Agency, Official Gazette of the Republic of Slovenia, No. 9/92.

²⁵ Treaty establishing the European Coal and Steel Community 1951, accessed 20 February 2014, <http://www.consilium.europa.eu/uedocs/cmsUpload/Community.pdf>

²⁶ Article 3 and Title III, The Treaty of Rome, 25 March 1957, accessed 20 February 2014, http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf

²⁷ Single European Act 1986, Official Journal of the European Communities L 169.

²⁸ *ibid*, section II, Article 13 EEC Treaty, Article 8a, accessed 4 May 2014, <http://www.eurotreaties.com/singleeuropeanact.pdf>

In 1992, the Treaty of the European Union, otherwise known as the Maastricht Treaty, was signed.²⁹ The Maastricht Treaty created the European Union itself, and thereby created European Union citizenship.³⁰ This is an important observation, because this article asserts that the Maastricht Treaty confirmed the legal status of Union citizen. Even so, the newfound legal status was very different to the legal status of a citizen under the national law of member states. European citizenship is not citizenship in the traditional sense of state based citizenship, because the European Union does not register individuals in the same way as member states do. The responsibility for registering and choosing citizens remains with member states. The Maastricht Treaty also provided the basis to progress towards a single European Union immigration and asylum framework through the new pillar of Co-operation in Justice and Home Affairs.³¹ In 1996, the International Law Commission developed 'draft' articles and a Declaration setting out the rules that deal with 'nationality of persons in relation to state succession'. The International Law Commission has attempted to expand these rules by obliging successor states to ensure nationality is granted to all people that are residing permanently within the new territory. Even so, this was post the Yugoslav conflict. By this time Slovenia had been independent and their citizenship laws were nearly five years old.

The Treaty of Amsterdam 1997 followed the Maastricht Treaty, and provided greater recognition of European Union citizenship, immigration, asylum and the inclusion of references to refugees. Citizens could use their language (Spanish, French, German etc.) when communicating with institutions of the European Union. In the same year, the European Union implemented the Convention on Nationality 1997. The convention addressed the issue of statelessness and state succession to provide the basis for the transition by states and to ensure the inhabitants within the territory would retain their nationality based on habitual residence.³² However, this convention was established post-1990 and was not relevant to the Yugoslav breakup. It is noteworthy that even today Slovenia has not yet ratified this European convention. Nevertheless, with the dissolution of states during the last century, the United Nations International Law Commission in 1999 adopted draft articles on Nationality of Natural Persons in Relation to Succession States and recommended that the declaration be made. Article 4 states that 'successor states shall take appropriate measures to prevent persons, on the date of the succession state from becoming stateless, provided they had nationality of the successor state'.³³ The complexity and question that arises when looking closely at the words of article 4 is at what stage does a state cease to exist, and, at what stage does a new state commence? In the Slovenian context, it could be argued that the state ceased to exist at the time of the introduction of the Plebiscite, and a new state was born with the introduction of the new Slovene constitution, national laws and laws on citizenship.

The Treaty of Nice followed the Treaty of Amsterdam in 2001.³⁴ It had little to say on citizenship and immigration (asylum and refugees), other than reinforcing the goal of

²⁹ Article A, Maastricht Treaty 1992, Official Journal of the European Union C 191.

³⁰ *ibid*, article 8, states citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. Accessed 20 April 2012, <http://www.eurotreaties.com/maastrichtec.pdf>

³¹ *ibid*, article B.

³² Articles 18 & 19, European Convention on Nationality, Strasbourg, 6.XI.1997.

³³ United Nations High Commission for Human Rights, International Covenant on Civil and Political Rights, 1966, accessed 18 April 2011, <http://www2.ohchr.org/english/law/ccpr.htm>

³⁴ Treaty of Nice 2001, Official Journal of the European Union C 80/1.

harmonisation and co-operation among European member states. The main point of the Treaty of Nice was to prepare the European Union for the accession of the Central and East European countries such as Slovenia, and reinforced the right to move and reside freely within the territory of any member states.³⁵ It was also notable for the adoption of the European Charter of Fundamental Rights 2000, but on a political rather than legally binding basis. The 2000 European Charter of Fundamental Rights would later become an important and binding legal document on all European member states. Even though the 2000 Charter did not specifically refer to citizenship as a right, the Charter reinforced the rights of all citizens of the European Union, including Slovenians. Importantly, the Charter placed the citizens of the Union front and center of its activities by strengthening the concept of European citizenship. Recently, the United Nations Commission on Human Rights reaffirmed in Resolution 2005/45 that the right to nationality is a fundamental right and that the arbitrary deprivation of nationality in racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms.

The Lisbon Treaty came into effect in 2009, incorporating many of the principles of the Constitutional Treaty. Article 2 of the Lisbon Treaty outline the common values for member states of the European Union that are based on pluralism,³⁶ and aims to create a closer union whereby decisions are inclusive of all citizens.³⁷ This then encourages citizens to take a greater role in developing and deciding on what and where the European Union should head in the future. However, much of the interest and development in European and internal law came after the disintegration of Yugoslavia.

People with no citizenship lose out in many ways. With the advancement of international and European law in this area, in situations involving state succession in the future, it will be interesting to watch whether this new law has any influence or impact on ensuring people are not made stateless. Hannah Arendt³⁸ argues that statelessness is closely associated with human rights. For Arendt, nationality (citizenship) “guarantees human rights, which include the right to have a place to reside and the protection of a government.” Arendt summarises statelessness in three ways. Firstly, the loss of an abode, which translates to the loss of the social texture into which an individual is born and has established themselves within the community. Secondly, the loss of government or state protection, receiving no protection from the law or services provided to other full citizens of the state. Thirdly, stateless people lose the mutual recognition necessary for a political life and thus their very right to have rights.³⁹ The right to nationality (citizenship) should be the most important right and an absolute guarantee which should be protected and, more importantly, enforced at an international level.⁴⁰ A person with no citizenship not only misses out on the potential for employment; their travel between states is inhibited and they must enter states illegally.

³⁵ *ibid*, article 18,

³⁶ Article 2, Treaty of Lisbon, Official Journal of the European Union, C 83/171, 2010.

³⁷ *ibid*, article 1.

³⁸ Arendt, 1951, pp. 266-298, in Tabb, 2006, pp. 40-52.

³⁹ *ibid*.

⁴⁰ Harvard Draft Convention on Nationality 1929, in Scott Leckie, *National Perspectives of Housing Rights*, Netherlands: Martinus Nijhoff Publishers, Kluwer Law International, 2003, pp. 25-50.

Case Study: *Slovenia*

The history of Slovenia can be traced to the Austrian-Hungarian Empire from the fourteenth to nineteenth century. Upon the disintegration of the Austrian-Hungarian Empire, Slovenians would find themselves part of the Kingdom of Serbs, Croats and Slovenes. From 1950 to 1990, Slovenians were citizens of the former Yugoslavia. In 1991, Slovenia was declared an independent state and established new citizenship laws.

In the early period of Slovenian independence, citizenship was socially complex in regards to former Yugoslav citizens. At the time of the 1990 Plebiscite, citizens from the former Yugoslavia who had not registered as permanent residents of the new Slovenian Republic were required to apply for citizenship. They did not automatically assume citizenship of the new country. Article 40 of the original citizenship laws stated that 'any citizen of another Yugoslav Republic who was on the day of the Plebiscite on the independence and sovereignty of the Republic of Slovenia, dated 23 December 1990, a registered permanent resident in the Republic of Slovenia, and who actually resides in the country, may acquire Republic of Slovenia citizenship, if he or she submits an application to the internal affairs administration body of the municipality where he or she is a permanent resident, within six months from the date of this Act coming into force'.⁴¹

At the time of Yugoslavia breaking up, it was thought that the Slovenian territory was populated with about 90% Slovenes, with the remaining 10% made up of Croats, Serbians, Bosnians and others.⁴² Many of the 10% of people who were not Slovene had only found themselves resident in Slovenia because under the former Yugoslav state, citizens were able to freely move and reside anywhere. The same can be seen today as Slovenians and citizens of the European Union member states can move freely throughout the Schengen area. According to Neza Salamon, there were approximately 200,000 people residing in the Slovenian territory that were from other Yugoslav Republics, and about 170,000 people (non -Slovenes) who obtained Slovenian citizenship upon application.⁴³ Yelka Zorn estimates that there were 18,305 people that were erased from the residency register. Even though there was a choice and the ability for people to apply for citizenship, Janja Zitnik argues many people did not know or in some cases chose not to apply.⁴⁴ This lack of knowledge and failure on the part of the then government to adequately inform people of the new citizenship laws was problematic. This was a controversial and difficult time for Slovenia and the Slovenian Constitutional Court. Throughout the 1990s, the case of the erased would be in and out of the Slovenian Constitutional Court on a number of occasions. The citizenship laws came under increasing scrutiny by lawyers, government and legal scholars.

The Slovenian Constitutional Court held that article 28 should be repealed in accordance with article 25 of the constitution to ensure everyone had the right of appeal against decisions of the state, including local authorities.⁴⁵ The court focused on the discretionary nature the authorities had in determining who would and who

⁴¹ U-I-89/99, Official Gazette of the Republic of Slovenia, No. 59/99.

⁴² Maarten Lak, 'The Involvement of the European Community in the Yugoslav Crisis during 1991,' *Yearbook of European Studies* Vol. 5, 1992: pp. 175-185.

⁴³ Neza. Kogovšek Salamon, 'Still Waiting: The Erased People of Slovenia,' in *Building and Open Society in Western Balkans*, Chuck Sudetic: Open Society Foundations, New York, 2001, pp. 27-29.

⁴⁴ Janja Žitnik, *Immigrants in Slovenia: Integration Aspects*, Ljubljana: Scientific Research Centre of the Slovenian Academy of Sciences and Arts, Institute of Emigration Studies, 2004.

⁴⁵ U-I-98/91, Constitutional Court, Official Gazette of the Republic of Slovenia, No. 1/91-I, 30/90-I and 38/92.

would not obtain citizenship in the new independent Slovenia. The discretionary power under article 41, afforded to the Ministry of Internal Affairs, was considered a problem, enabling officers to make decisions at their own discretion.⁴⁶ Article 41 of the Nationality Law stipulated that persons deprived of nationality of Slovenia and of the Federative People's Republic of Yugoslavia in accordance with the Act on Depriving Uncommissioned Officers and Officers of Former Yugoslav Army Who are not Willing to Return to their Fatherland, Members of Military Formations Having Collaborated with Occupational Forces and Having Fled Abroad, and the Persons Fleeing Abroad after the Liberation of Nationality,⁴⁷ and their children may acquire the nationality of the Republic of Slovenia if within two years from the passing of this Law. This section formed part of the first citizenship laws of Slovenia. The second section of the said article specified that the nationality of the Republic of Slovenia may be acquired by Slovenian emigrants who have ceased to be citizens of the People's Republic of Slovenia and the Federative People's Republic of Yugoslavia due to their absence. Decisions concerning the acquisition of nationality according to the first and second sections of Article 41 of this Law should be made by competent administrative authorities of internal affairs of the Republic of Slovenia (Article 42 of the Law) on the basis of their 'free discretion'. It was this free discretion that posed the greatest problem.

There was no clear oversight of individual decisions at the local officer level. The Slovenian Constitutional Court later reaffirmed its earlier position⁴⁸ that article 41 should be repealed. The Court considered that this did not conform with article 120 of the constitution.⁴⁹ Article 120 of the Slovenian constitution ensures the protection of rights of citizens is guaranteed against the actions and decisions of administrative bodies and their representatives. Thus, citizens are protected by the constitution from individual decision making within government institutions. Such was the importance of the infringement of individual rights that the Slovenian Constitutional Court also referred to article 8 of the 1948 Declaration of Human Rights and article 13 of the European Convention on Human Rights and Fundamental Freedoms 1950 (even though at the time Slovenia was not a signatory to the European Convention), which states that there is a 'right of remedy where it is found that a person has had their rights violated'.

When Slovenia was part of Yugoslavia, people effectively had two levels of citizenship; one at the individual Republic, such as Slovenia, Serbia or Croatia, as well as federal citizenship of Yugoslavia. Republic citizenship did not come with any legal status. Yugoslav citizenship was considered the legal citizenship of citizens of the former federal state, and was internationally recognised by other countries. The newly formed Slovene government used the earlier Republican legal framework to its advantage in creating the new Slovenian state. That is, allowing those that had citizenship of the Republic to automatically obtain citizenship in the new Slovene state. People that had migrated under the framework of the former Yugoslavian citizenship (under the principle of free movement and residency across the territory), were not required to take out Republican citizenship or obtain a resident permit. Thus, the erased found

⁴⁶ U-I-69/92 Nationality Law, Slovenian Constitutional, Official Gazette of the Republic of Slovenia, no. 61/92.

⁴⁷ Official Gazette of the Republic of Slovenia 86/46.

⁴⁸ U-I-69/92-03, Official Gazette of the Republic of Slovenia, 61/1992.

⁴⁹ *ibid.*

themselves illegally resident in the new state and with no rights to work or participate like any other citizen in the state.⁵⁰

In 1994, the Slovenian National Assembly established the Act on the Regulation of the Status of Citizens of Other Successor States to the Former Social Federal Republic of Yugoslavia that would allow those former citizens of the former Yugoslavia who had been removed by the register of permanent residence to obtain a valid residence permits.⁵¹ More importantly, the Court noted that adopting the Act Regulating the Status of Citizens of Other Successor States to the Former Social Federal Republic of Yugoslavia had in fact established the unconstitutionality of the statutory regulation, as it did not recognise permanent residence retroactively to those citizens of the former Yugoslavia. Additionally, the Act did not allow for regulating permanent residence. The National Assembly was given a six-months to remedy the anomaly however, this was not achieved. During the same year, the Slovenian Constitutional Court established the unconstitutionality of the statutory regulation in relation to the legal status of citizens of other Republics from the former Yugoslavia who were removed from the register of permanent residence.⁵² The Court asserted that treating former Yugoslavia citizens within Slovenia as unequal in comparison to other aliens who were considered citizens of other states caused those individuals to find themselves in a situation of legal uncertainty and was inconsistent with article 2 of the Slovenian constitution.⁵³ The court also established that the Act was not clear enough and stated, 'actual presence' was considered an undefined legal notion. Therefore, even with the implementation of the new legislation in 2002, the erased issue had not been dealt with in the eyes of some, who continued challenging the state.

In 1999, the Slovenian Constitutional Court considered the acquisition of citizenship in accordance with article 40.⁵⁴ The court ruled there was a statutory problem that required the third paragraph of article 40 to be repealed.⁵⁵ That is, applicants for citizenship would need to meet the public order test. The court ruled that the legislature did not have any basis to impose the public interest test because it was considered it would outweigh the protected trust in law. When the new citizenship laws of Slovenia came into force on 25 June 1991, the contentious article 40.3 allowed an application to be rejected where that individual was deemed to be a threat to public order, security or defence of the State. It appears that Slovenia could have used the public order test very broadly and rejected citizenship applications by people who may not have necessarily been a threat to the state, but may have been involved in the early and wider Yugoslav conflict.

A year later in 2010, the Slovenian Constitutional Court decided that unconstitutional consequences would occur due to the rejection of the amendments and modifications of the Act on the Regulation of the Status of Citizens Other Successor States to the Former Social Federal Republic of Yugoslavia at a referendum.⁵⁶ In 2010, the European Court of Human Rights (ECoHR) got involved as a result of individuals making an application to the court under article 34 of the Convention for the Protection

50 Jelka Zorn, *The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia*, Ljubljana University Faculty of Socialno, 2004, pp. 1-4.

51 U-I-246/02, Official Gazette of the Republic of Slovenia 36/2003.

52 U-I-248/94, Official Gazette of the Republic of Slovenia 14/99.

53 *ibid.*

54 U-I-89/99, Official Gazette of the Republic of Slovenia 59/99.

55 *ibid.*

56 U-II-1/10-26, Official Gazette of the Republic of Slovenia. No. 50/2010.

of Human Rights and Fundamental Freedoms 1950. The ECoHR⁵⁷ ruled that the Slovenian government had failed to issue residency permits and amend the legislation. In 2012, the ECoHR⁵⁸ further ruled Slovenia had violated articles 8 (the right to respect for private and family life) 13 (the right to an effective remedy) and 14 (the prohibition of discrimination) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. In 2014, the Grand Chamber of the European Court of Human Rights made the final judgment in relation to the erased by awarding about €250,000 to human rights protesters (the group who applied to the court) who lost their permanent residence upon Slovenia becoming independent.⁵⁹ It is worth noting that the decision of the ECoHR is final and there is no appeals process for either party. Thus, today the issue of the erased has been settled in Slovenia. Nevertheless, this does not mean that, should there be a further change in rule over the Slovenian territory and territorial boundary in the future, the new citizenship laws will exclude individuals and deny them citizenship.

The legal argument by the Slovenian Constitutional Court and European Court of Human Rights was very different. Neither court ruled on how Slovenia established and implemented the international legal norms to ensure the basic right of nationality was afforded to all residents in the territory. Rather, the Slovenian Constitutional Court focused on the implementation of the national laws and whether they were constitutionally valid, and the power of the executive arm of government's (officers implementing the law). The European Court of Human Rights, on the other hand, ruled on whether the rights of the individuals concerned had been infringed by the Slovenian state. The European Court of Human Rights did not rule on the right of nationality, but rather focused on the broader rights of family, remedy and discrimination.

Australia

Statelessness in the Australian context has not been evident in the same way as in Slovenia. The indigenous people had occupied the Australian territory for a long time before being colonised. However, the indigenous people were not considered to be stateless even prior to being recognised as citizens (British subjects) in 1949. During this transition from being a British subject to an Australian citizen, there was no recording of people becoming stateless, because people did not have to apply for citizenship.

The potential for statelessness to occur in the Australian context could have been realised when New Guinea became independent and Australia relinquished its sovereign right over the territory. In 1975, the Papua New Guinea Independence Act and the Papua New Guinea Independence (Australian Citizenship) Regulations were introduced. On 16 September of the same year, a person who was an Australian citizen that was born in and a resident of Papua New Guinea ceased to be an Australian citizen and automatically took up citizenship of Papua New Guinea.⁶⁰ Nonetheless, there are

⁵⁷ Kurić and Others v. Slovenia, European Court of Human Rights, 26828/06.

⁵⁸ *ibid.*

⁵⁹ Council of Europe, 'Human Rights Europe,' 12 March 2014, accessed 6 December 2014, <http://www.humanrightseurope.org/2014/03/slovenia-erased-people-human-rights-protest-leads-to-e250000-award>

⁶⁰ Regulation 4, Papua New Guinea Independence (Australian Citizenship) Regulation 1975, A person who immediately before independence day, was an Australian citizen within the meaning of the Act and on

no records that indicate any person became stateless through this transitional process. However, the case of Robert Jovicic (originally from Serbia) who was deported to Serbia by the Australian government in 2004 is a rare example of an Australian resident being made stateless. Jovicic was a non-citizen of Australia who had been living in Australia for thirty six years before being deported due to criminal convictions for drug use. To further complicate the matter, he was only granted a seven day visa in Serbia which did not allow him to work. Furthermore, he had not met the citizenship application requirements, and thus was declared stateless. He would later return to Australia after much publicity,⁶¹ and was granted a permanent residency visa in 2008 by the then Minister for Immigration and Citizenship.⁶² Today Mr Jovicic is still not a citizen of either Serbia or Australia. While the case did not specifically focus on statelessness, it did raise the question of who is “morally” a citizen of a state.

Slovenia & Australia Current Day Laws

Today, the national laws of Slovenia and Australia assist both countries to minimise incidents of statelessness. The national laws of both countries adopt the principles of international law on statelessness. In Slovenia, both the Aliens Act⁶³ (migration law) and the citizenship laws minimise the extent to which statelessness may apply. The *Citizenship Act 2007* and *Migration Act 1958* of Australia⁶⁴ provide the same. However, unlike the Aliens Act of Slovenia, the immigration legislation of Australia deals with statelessness where an individual has arrived in the state with no valid documentation. The citizenship laws of both states enable a person to obtain citizenship where it is proved they are stateless.⁶⁵ Furthermore, where the country of origin does not provide for termination of citizenship or voluntary acquisition of a foreign citizenship, the individual can apply of citizenship in Slovenia, because they would be deemed stateless.⁶⁶ Even so, these laws do not guarantee that people would not become stateless if there was a change in territorial boundary and rule, where new citizenship laws are established.

Conclusion

Citizenship is as important to a nation state as it is to an individual. Citizenship provides a sense of belonging to an individual. Nation states such as Slovenia and Australia use citizenship as a tool to assist in creating, enhancing and strengthening the national identity of the state. Citizenship is the right to have rights however, not everyone in the world holds citizenship of any state. Citizenship has also been used by different rulers over a territory to determine who will and will not be a citizen within the territory. This is evident when borders and territory are redrawn and new rulers take over a territory, imposing new citizenship laws on its inhabitants.

independence day becomes a citizen of the independent state of Papua and New Guinea ceases on that day to be an Australian citizen.

61 Julian Burnside QC, ‘Citizens’ Rights and the Rule of Law in Civil Society: Not Just Yet,’ 2008, accessed 31 March 2015, www.valuesineducation.org.au/pdf/burnside080310.pdf, pp. 1-12.

62 Chris Bowen, Minister for Immigration and Citizenship, Permanent Visa granted to Robert Jovicic, [tp://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm](http://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm), accessed 31 March 2015.

63 Aliens Act 2011, Official Gazette Republic of Slovenia, No 50/2011.

64 Citizenship Act 2007, s16.

65 *ibid*, article 10 (10).

66 Article 10 (10), Citizenship Act 2007, of the Republic of Slovenia, Official Gazette 24/2007.

Slovenia, unlike Australia, has had a turbulent past century. Slovenians and the current day territory of Slovenia have been subject to and experienced both world wars. Throughout this period, Slovenians and the Slovenian territory has been under the rule of an empire, kingdom, socialist republic, an independent state before attaining full membership of a supernational polity (the European Union). Australia was colonised by the British and established its first citizenship laws in 1948. Slovenia established its first citizenship laws in 1991. The most notable difference was that Australia in its transition from its inhabitants being originally declared British subjects did not exclude people from the new citizenship regime. Slovenia, on the other hand, in its transition from Yugoslavia to independence, did exclude a large number of former Yugoslav citizens. This was not only problematic to government, community and the judiciary: twenty years after independence the issue was still being discussed by the European Court of Human Rights. The erased issue was only finalised in 2014.

It is well documented that Slovenia used its new citizenship laws upon independence to exclude some former Yugoslav citizens. Australia, on the other hand, had a much smoother path to establishing its citizenship laws in 1948, with no recorded exclusions. There are lessons to be learned from this experience when citizenship laws are being established for the first time under new rule. Since 1990, both the international community and the European Union have gone to great efforts to establish legal norms that guide and assist states to ensure statelessness is minimised in situations of state succession. The challenge for the international community and European Union will be getting states, when territory and rulers change, to ensure people resident in the territory automatically assume citizenship of the new state.