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**CITIZENSHIP AND BORDERS:  
IRISH NATIONALITY LAW AND  
NORTHERN IRELAND**

**Brian Ó Caoindealbháin**

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## ABSTRACT

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### **CITIZENSHIP AND BORDERS: IRISH NATIONALITY LAW AND NORTHERN IRELAND**

Depending on its underlying principles and scope of application, citizenship law can impact on territorial borders in varying ways, ranging from their reinforcement to their active subversion. In this paper I develop a schema of possible relationships between borders and four common principles of citizenship with the aim of assessing their compatibility. I then apply this schema to pre-1998 Irish citizenship law to illustrate an instance of subversion of a territorial border. While highly distinctive in Europe, the formerly irredentist nature of Irish citizenship law calls attention to the potential for conflict between certain citizenship criteria and territorial boundaries, a potential which has increased in recent decades with the reform of citizenship regimes in Central and Eastern Europe.

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## BIOGRAPHICAL INFORMATION

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# CITIZENSHIP AND BORDERS: IRISH NATIONALITY LAW AND NORTHERN IRELAND

Brian Ó Caoindealbháin

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## INTRODUCTION

A fixed territory and a permanent population are two of the defining characteristics of the modern state. Geopolitical boundaries delimit the extent of the former, while the latter is determined by the institution of citizenship, a legal boundary encompassing those not only lawfully resident but also authoritatively deemed to belong.<sup>1</sup> In contrast with its territorial borders, which are produced through interaction with external forces and, save for exceptional circumstances, held to be unalterable, the state has a relatively unrestricted right to regulate the composition of its citizenry. This is reflected in international law and practice which, while permitting states to determine their citizens, rarely tolerate territorial revision.

However, these two axioms, the immutability of international boundaries and the citizenship-regulating prerogative of the state, are not necessarily compatible. Depending on its underlying principles and scope of application, citizenship law can impact on territorial borders in varying ways, ranging from their reinforcement to their active subversion. The latter extreme is clearly illustrated by the pre-Good Friday Agreement application of Irish citizenship law to Northern Ireland. In extending Irish citizenship to all those born in Northern Ireland, conceived of as birth within the “national” territory, Irish law openly sought to subvert the post-1922 border. While highly distinctive in Europe, the irredentist nature of Irish citizenship law calls attention to the potential for conflict between certain citizenship criteria and territorial boundaries, a potential which has increased in recent decades with the reform of citizenship regimes in post-communist countries along very different lines from those commonly found in western Europe. In this paper I attempt to develop a schema of possible relationships between borders and selected principles of citizenship, with the aim of assessing their compatibility. I begin by clarifying my understanding of state citizenship, before outlining its international legal context. I proceed to define four common criteria for citizenship, drawn from contemporary international practice, before attempting to map out the implications of these principles, and their scope of application, for territorial boundaries, with reference to European examples. In the final section, I utilise this schema to assess pre-1998 Irish citizenship law, in order to highlight the underlying principles from which its irredentist nature derived. I conclude with some brief comments on how these territorial implications may have been altered by the Good Friday Agreement.

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<sup>1</sup> In this paper “border” and “boundary” are used interchangeably. For distinctions drawn in border studies, see Rankin and Schofield, 2004.



## CITIZENSHIP

### ***Citizenship as legal status***

Citizenship is a core political concept but its meaning is imprecise, comprising a bundle of contested understandings. Linda Bosniak distinguishes between four different sets of meanings: (a) a “formal status of membership in a political community”; (b) the possession and enjoyment of fundamental rights in a society; (c) “a state of active engagement in the life of a polity”; and (d) “an experience of identity and solidarity that a person maintains in a collective or public sense” (Bosniak, 2001: 240-241). Despite these differing understandings, it is commonly agreed that citizenship “designates community membership of some kind” (Bosniak, *op cit*). In this paper, citizenship is understood, in line with Bosniak’s first distinction, as a formal status of state membership. Citizenship as status (or “nationality” as it is commonly referred to) can be viewed as “a privileged relation which defined categories of people enjoy with a certain state” (O’Leary, 1996: 424). It implies a genuine connection between the individual and the state, based on “a social fact of attachment”, and entails “reciprocal rights and duties”.<sup>2</sup>

Traditionally, rights such as residence, voting and eligibility for social services, were, to varying degrees, restricted to citizens of the state, highlighting the inherently exclusionary nature of citizenship. As Síofra O’Leary points out, “an inevitable consequence of delimiting state membership or nationality is the determination of which persons do not belong to the state and therefore cannot enjoy the contingent benefits of membership” (O’Leary, *op cit*). While distinctions between citizens and non-citizens may have decreased, particularly within the European Union, citizenship still confers a privileged status in certain areas; for example, in Ireland, the right to vote in constitutional referenda is withheld from non-citizens. Moreover, citizenship remains a key focus of collective identity, with the criteria adopted setting the boundaries of the political community and signifying who “rightly” belongs—“as a consequence of their role in defining the political community, citizenship laws are both expressive and constitutive of the nature of the state” (Fowler, 2002: 12). This role of citizenship in linking individuals together by a common bond and determining the character of the state will be discussed further below.

### ***Citizenship in international law***

International law recognises the regulation of citizenship as falling within the rightful exercise of state sovereignty (O’Leary and Tiilikainen, 1998b). The 1930 Hague Convention on the Conflict of Nationality Laws sets out in article 1 that “it is for each state to determine under its own law who are its nationals” (O’Leary, 1996: 430). However, this right is not unqualified, with the Convention proceeding to stipulate that state law “shall be recognised by other states in so far as it is consistent with international conventions, international customs, and the principles of law generally

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<sup>2</sup> Liechtenstein v. Guatemala, International Court of Justice Reports, 1955, p. 23. This judgement, better known as the “Nottebohm case”, provides one of the key treatments of nationality in international law.

recognised with regard to nationality” (O’Leary, 1996: 430). From a human rights perspective, the overriding concern is the prevention of statelessness (Pejic, 1998: 171). Article 15 of the 1948 Universal Declaration of Human Rights provides that everyone has the right to a nationality (citizenship) and that no-one should be arbitrarily deprived of their nationality.

The other fundamental limitation on state sovereignty is that no state can legally seek to regulate the citizenship of another state (Hoffman, 1998: 7). Similarly, citizenship law must not seek to unilaterally exercise an “extra-territorial effect”—citizenship can only be conferred on individuals with no prior connection to the state outside its jurisdiction with the agreement of their state of residence.<sup>3</sup> (Aleinikoff and Klusmeyer, 2001: 65). This prohibition is related to the concern of states to avoid dual nationality, a reluctance which led many to make it a condition of naturalisation that any previous citizenship be renounced. As mentioned above citizenship entails both rights and duties, and it is this creation of legal duties to another state, with the attendant suspicion of divided loyalties, that arouses the fears of host states (Bloed, 1998: 45). While states have become more tolerant of plural nationalities in recent years, there remains a question mark over the commitment of dual citizens, particularly when they hold the citizenship of neighbouring states—at best, their allegiance may be seen as qualified; at worst, in situations of conflict, they may be viewed as a fifth column.

### ***Principles of citizenship***

Citizenship laws can be distinguished by reference to their underlying “principles” and their “scope”. By “principles”, I mean the criteria which determine whether an individual is entitled to a particular citizenship. By “scope”, I mean the extent to which they operate inside or outside the state’s territorial boundaries. The principles underlying state citizenship vary, but will, in general, include some of the following: *jus soli*; *jus sanguinis*; ethnicity; and a set of considerations which I will term “restitution”.<sup>4</sup> While I will discuss these individually below in order to highlight their distinctive features, it should be noted that, in practice, they occur together in varying combinations.

*Jus soli* is an inherently territorial principle of citizenship. Citizenship is conferred solely by the fact of birth within a specified territory without reference to the individual’s parentage or ethnic heritage. While the scope of *jus soli* is, clearly, understood to be confined within the jurisdiction of the state, its territorial basis, is, as will be shown, of crucial significance. Citizenship law goes to the core of the self-conception of the state, and the bond this implies between citizens. Basing citizenship on *jus soli* entails a civic conception of the “nation”, with citizens held to be united by a shared political and legal status, irrespective of their cultural back-

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<sup>3</sup> This does not, of course, apply to *jus sanguinis* citizenship laws, which, as will be discussed below, confer citizenship by descent from a citizen parent.

<sup>4</sup> Here I am chiefly concerned with principles conferring citizenship at birth or restoring such citizenship when it has been lost—I do not consider the principles underlying other routes to citizenship such as naturalisation or adoption.

ground. While this principle rarely operates in unmodified form, usually being made conditional on meeting additional criteria, the citizenship laws of the United States and France are generally taken as exemplars of *jus soli* regimes<sup>5</sup> (see Brubaker, 1992a).

The main alternative to the *jus soli* principle has traditionally been *jus sanguinis* citizenship. On this principle, citizenship is derived from birth to a citizen parent—parentage rather than place of birth being the crucial marker. It follows that the scope of *jus sanguinis* is not limited by territorial boundaries, at least not for the first generation (states generally set limits to the inheritability of citizenship in the case of foreign birth, with, for example, Irish law restricting it to the grandchildren of Irish-born citizens). It can be readily seen how the extra-territorial reach of *jus sanguinis*, and its interaction with the *jus soli* laws of other states, can lead to individuals holding multiple nationalities; however, this is compatible with international law, as descent is seen as a genuine link with the citizenship-conferring state. The bonds between citizens implied by *jus sanguinis* citizenship are considerably “thicker” than the civic ties described above, with citizens understood to be linked by a shared heritage and culture. At its strongest, this colouring of citizenship reflects the self-conception of the state as a *nation*-state, the state of and for a particular ethno-cultural nation.<sup>6</sup>

The degree to which such a state is inclusive of those not belonging to the “state-bearing nation” is determined, in part, by the extent to which ethnicity is a principle of its citizenship laws.<sup>7</sup> In contrast with *jus sanguinis*, where the explicit concern is with descent from a citizen parent rather than ethno-cultural membership, ethnicity, as a principle of citizenship, confers privileged access and status to members of a particular ethnic origin. Given that it is a much more ambiguous criterion than place of birth or descent, ethnicity is, potentially, boundless in its scope—at the extreme, an individual claiming ethnic fellowship, however assessed, anywhere in the world, could be eligible for citizenship (as in fact is the case in Croatia; see Pejic, 1998). While the utilisation of ethnicity as the main principle of citizenship is clearly dubious from a human rights perspective, it has actually increased in prominence in recent decades as the post-communist countries of eastern Europe have embarked on constitutional reform (see Dimitrijevic, 1993; Verdery, 1998).<sup>8</sup> The return of democratic politics led to mobilisation along ethnic lines and, in many states, the dominant ethnic group sought to “nationalise” the state in their image, “to promote the language, culture, demographic position, economic flourishing, and political hegemony

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<sup>5</sup> Prior to 2004, Irish citizenship law operated a particularly unrestricted *jus soli* regime. However, amid concerns that this “loophole” was being exploited by immigrants, this was qualified by the Irish Nationality and Citizenship Act 2004 which required that, from January 1, 2005, a non-citizen parent must have been lawfully resident for a period of three out of the preceding four years for their Irish-born child to be entitled to citizenship. This enactment was preceded by a referendum which circumscribed the constitutional right to citizenship for all born on the island of Ireland introduced under the Good Friday Agreement. See note 21.

<sup>6</sup> On the historic process by which citizenship came to be linked with ethno-cultural identity, see Heater, 1999.

<sup>7</sup> The term “state-bearing nation” is taken from Brubaker, 1995.

<sup>8</sup> While the utilisation of ethnicity as a central principle of citizenship law has, in the past, been comparatively rare, many states, including Ireland, facilitate the naturalisation of co-ethnics.

of the new state-bearing nation” (Brubaker, 1995: 205). The inscribing of ethnicity into citizenship law reflects the self-conception of the state as a “national” homeland, both implying a legitimate concern with co-ethnics beyond the state’s borders and casting doubt on the “rightful” belonging of citizens who do not share in the dominant ethnic identity.

The struggle over “ownership” and legitimate belonging is particularly acute in cases of state succession, when ethnically-derived citizenship laws can seek to exclude permanent residents of the territory comprising the new or restored state, as, for example, occurred in Croatia (with the attempt to exclude Serb residents) during the 1990s (see Pejic, 1998). However, more commonly, states take the “year zero” option, granting citizenship to all legally and habitually resident on the territory at the moment of statehood, a practice of fair treatment which is increasingly enshrined in international law (Pejic, 1998). This is also advantageous to the state, as by constituting the resident population as its citizenry “the new state extends its jurisdiction evenly throughout its territory” (Brubaker, 1992b: 278). While both new and restored states face a common challenge in determining their citizenry, there is an important distinction in that the restored state can, if it so wishes, make reference to a previous citizen body, as, for example, was attempted in post-Soviet Estonia.<sup>9</sup> In practice many restored states do seek to confer citizenship on former citizens and their descendants, seeing this as a rectification of past wrongs (this argument was common in the Baltic states following their re-emergence after the demise of the USSR).

This principle of citizenship, motivated by a desire to compensate former citizens for their previous involuntary loss, I will term “restitution”. Although the eligible individuals may be identified by birth, descent, or residence, the operative principle is restitution, a concern to make good the injustices of the past and restore former status. The scope of this principle is determined by a key consideration: is citizenship to be restored to former citizens and their descendants who now reside abroad? If it is, the question arises as to what implications this has for cases where the territorial basis of the state has changed, given that a restorative citizenship law may reach across the state’s present borders into former territories.

## **TERRITORIAL BOUNDARIES AND CITIZENSHIP: A SCHEMA**

The degree to which the above principles, and their scope of application, are compatible with existing territorial boundaries varies greatly. In table 1 I set out a schema of possible relations. From this it can be seen that principles of citizenship can impact on territorial boundaries in one of five ways: they can reinforce, respect, deny, challenge, and, at the extreme, subvert. I will now develop these possible relations in greater detail.

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<sup>9</sup> Following independence from the USSR attempts were made to limit citizenship to citizens of the interwar Estonian state and their descendants, an approach which threatened the exclusion of post-war ethnic Russian ‘immigrants’, see Brubaker, 1992b.

**Table 1. Impact of citizenship law on borders**

Principle of citizenship	Scope of citizenship law	
	<i>Internal</i>	<i>External</i>
<i>Jus soli</i>	Border reinforcing	Border subverting
<i>Jus sanguinis</i>	Border respecting	Border respecting
Ethnicity	Border respecting	Border denying
Restitution	Border reinforcing	Border challenging

***Border reinforcing***

The internal application of the principle of *jus soli* strongly reinforces the existing boundaries of the state. Given its inherently territorial basis, its limitation to within the current borders aids their institutionalisation and reproduction. By inscribing a civic conception of the state and national community into the citizenship law, *jus soli* acknowledges and legitimates the territorial jurisdiction of the state—all those born within, and only those born within, are deemed to have a claim of membership and to rightfully belong.

Similarly, restitution, as a principle of citizenship, reinforces existing borders when its application is restricted to within the state. By limiting eligibility to those former citizens resident within the present-day border, this principle underwrites the legitimacy of the state's current territorial jurisdiction. While not strictly a restorative law, the Moldovan citizenship law of 2000 provides an example of compensatory citizenship respecting current borders.<sup>10</sup>

***Border respecting***

Citizenship based on descent is, as outlined above, compatible with existing territorial boundaries in both its internal and external application. While *jus sanguinis* can be said to ignore state borders, in that its concern is with parentage rather than place of birth, by deriving entitlement from existing citizenship, and thereby demanding a genuine connection between the individual and the citizenship-conferring state, it endorses the status quo.

The principle of ethnicity can similarly be seen as ignoring state borders, making ethnic origin, rather than physical location, the qualifying mark of citizenship. However, if it is restricted to co-ethnics resident within the state, ethnically-derived citizenship can also be deemed to respect territorial boundaries—albeit with no great enthusiasm given that the state is valued only to the extent to which it provides a

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<sup>10</sup> Citizenship is made available to persons residing before 28/06/1940 in Besarabia, North Bucovina, Hertza region and the MASSR, or their descendents, provided they have “lawful and habitual residence” in the present-day Republic of Moldova (Law on Citizenship of the Republic of Moldova 2000, available at ).

homeland for the nation. The extent to which it would respect human rights is, of course, another matter.<sup>11</sup>

### ***Border denying***

Notwithstanding the above, the logic of ethnicity as a principle of citizenship is to deny the significance of territorial boundaries—its focus being on the ethnic origin of individuals, not their physical location. As discussed earlier, the privileging of ethnicity in citizenship law reflects the state’s self-conception as a national homeland, implying a duty and right to concern itself with the welfare of co-ethnics wherever they may be—“the wish to construct states “of and for” particular nations has yielded the notion that ... countries should have some sort of relationship with co-ethnics abroad” (Fowler, 2002: 22). This has led some states, particularly in central and eastern Europe, to adopt a “kin-state” role, whereby they seek to reach out to co-ethnics in neighbouring states.<sup>12</sup> The measures adopted range from constitutional declarations of support to legislative provisions for favourable treatment to, in the radical example of Croatia mentioned above, making citizenship available without any requirement of residence (for further details, see Venice Commission, 2001).

The extension of the scope of ethnically-derived citizenship beyond the kin-state’s borders arouses the fears of neighbouring states containing significant numbers of its co-ethnics among their own citizenry, creating simultaneous suspicions of territorial revisionism and divided loyalties.<sup>13</sup> “Especially where levels of trust are low and the host-state is felt to be insecure, dual citizenship can be regarded as a threat to the host-state’s ability to assume a commonality of identity, interest and loyalty with its citizens, and as an instrument through which the kin-state may undermine the host-state’s independence and integrity” (Fowler, 2002: 28). This can be seen in the tensions created by Hungary’s 2001 “Status Law” granting benefits to ethnic Hungarians in neighbouring countries (for background, see Fowler, 2002). While not conferring full citizenship, its territorial basis, and its reference to former citizens who had lost their Hungarian citizenship “for reasons other than voluntary renunciation”, led to accusations of Hungarian irredentism aimed at “symbolically constructing Greater Hungary” (Iordachi, 2004: 265). In particular, neighbouring countries resented the linking of the Status Law with the post-first world war Trianon settlement (Fowler, 2002: 37-38).

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<sup>11</sup> A pure ethnic citizenship regime would, in effect, be an apartheid state, with all those of different ethnic origin ascribed an “inferior” status. In practice, ethnicity is combined with other principles, so that while non-members may access citizenship, they do not enjoy the same privileges or official affirmation as the state-bearing nation. For an example of such an “ethnic model”, see Ghanem, 1998 on the status of Israeli-Arab citizens.

<sup>12</sup> The following countries all concern themselves, to varying degrees, with co-ethnics abroad: Hungary, Romania, Slovenia, Croatia, Ukraine, Poland, Slovakia, Russia, Bulgaria, and Italy (see Venice Commission, 2001).

<sup>13</sup> Rogers Brubaker describes a triadic relationship between kin-state, host-state, and ethnic minority which conditions the actions of all three actors; see Brubaker, 1996.

However, while clearly ambiguous as to their position on the legitimacy of current borders, such kin-state policies, up to and including making citizenship available to co-ethnics abroad, are better seen as border denying than border challenging. Such extension of citizenship is more likely to confer “a symbolic form of membership” (Iordachi, 2004: 266) than represent a questioning of the legitimacy of current boundaries. Similarly, the suspicion of divided loyalties may be overstated, with co-ethnics desiring their kin-state citizenship as an expression of identity rather than allegiance—“generally...lives are lived locally, and one’s second nationality is more an aspect of identity than practice” (Aleinikoff and Klusmeyer, 2001: 85). Indeed, Charles King and Neil Melvin argue that such concern for co-ethnics abroad, what they term “diaspora politics”, is, in accepting the permanent existence of co-ethnics outside the state’s borders, “more an antidote to irredentism than a catalyst for territorial conflict” (King and Melvin, 1999: 136).

### ***Border challenging***

The explicit linking of Hungary’s Status Law with the post-first world war Trianon settlement indicates the nature of the challenge which the external application of restorative citizenship laws poses for territorial boundaries. In seeking to extend the restoration of citizenship to former citizens and their descendents residing outside the state in territories which it formerly ruled, ostensibly in the interests of righting past wrongs, the state can be seen as revisiting previous territorial revisions and questioning their legitimacy. This is evident from the restorative provisions of the citizenship law introduced in Romania in 1991. Article 37 of this law provided that “former Romanian citizens who, before 22 December 1989, lost their Romanian citizenship for various reasons” can reacquire citizenship on request—even where they currently hold another citizenship and, crucially, continue to reside abroad (quoted in Iordachi, 2004: 246). By going on to allude to the “involuntary” loss of citizenship and to refer to former citizens, and their descendents, living in all territories previously under Romanian rule, the restorative nature of this law clearly implied the “illegality” of current borders (Iordachi, 2004: 268). Behind an avowed desire to restore Romanian citizenship to those forcefully deprived of it under Soviet rule, chiefly in the former territories of Northern Bukovina, Southern Bessarabia (both in present-day Ukraine), and Moldova, lay, with varying degrees of popular support, nationalist ambitions for the restoration of a Greater Romania.<sup>14</sup> Nationalist aims were most openly expressed in relation to Moldova, which, following its independence from the former USSR in 1991, Romania actively sought to incorporate—in this context, the restoration of citizenship to former citizens in Moldova can be seen as “a strategy of unifying ethnic Romanians into a single political community” as a “preparatory step” towards a future, possible, reunification (Iordachi, 2004: 247).<sup>15</sup> The external application of restorative citizenship laws, clearly, sits uneasily with the

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<sup>14</sup> On Ukrainian fears of Romanian citizenship provisions as a form of “creeping expansion”, see “Ukrainians apply for Romanian citizenship”, *Ukrainian Weekly*, available [www.ukrweekly.com/Archive/2001/010105.shtml](http://www.ukrweekly.com/Archive/2001/010105.shtml) [2006-01-09]

<sup>15</sup> Romanian nationalism has exacerbated national divisions within Moldova itself, with politics in the early 1990s dominated by questions of national identity (see King, 1994).

acceptance of current borders, implying, at least, their historic illegitimacy, and, at extremes, openly challenging their continuation.

### ***Border subverting***

As discussed above, the compensatory nature of restorative citizenship laws, when applied externally, calls into question the legitimacy of previous territorial settlements. However, in so far as it is directed at specific individuals, former citizens and their descendents, the restorative principle falls short of a territorial claim. In contrast, the extension of *jus soli* citizenship beyond the present borders of the state is explicitly irredentist. This can be understood from the inherently territorial basis of the *jus soli* principle—the qualifying mark is birth within a particular territory, not, as in the case of restorative citizenship, previous legal status or descent. In laying claim to all born in an external territory, not those of a particular parentage or ethnic origin, the state seeks to assert its sovereignty over the actual area, not a particular subset of inhabitants—birth in the defined territory is held to be the equivalent of birth within the boundaries of the state. Unlike the external application of principles of *jus sanguinis* and restitution, which can, to varying degrees, be reconciled with international law, the extension of *jus soli* beyond the state is clearly an attempt to regulate the citizenship of a foreign territory and, absent the agreement of the affected state, illegal. Far from being compatible with current territorial boundaries, the external application of *jus soli* citizenship openly seeks to subvert them. Given its explicit irredentism, it is not surprising that actual instances of the external application of the principle of *jus soli* are extremely rare—in modern European history the only example is to be found in the treatment of Northern Ireland in Irish citizenship law during the period 1956-1998.

## **IRISH CITIZENSHIP LAW AND NORTHERN IRELAND**

### ***Citizenship in the Irish Free State***

Irish citizenship law developed in the context of the constitutional struggle with the United Kingdom to expand the limited sovereignty bestowed by the Anglo-Irish Treaty of 1921, with the issue of nationality becoming “a medium through which the newly fledged state could assert its legal independence and its historical and political difference” (O’Leary, 1996: 426). From 1922 to 1935 citizenship was governed by article 3 of the 1922 Constitution, which provided that:

Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State.

Irish citizenship was, at the time, a novel development in the British Commonwealth, in that it was restricted primarily to persons of Irish birth or descent and, to the extent that it was bestowed on non-Irish residents, it made no distinction between Brit-



ish subjects and citizens of foreign states (Kohn, 1932: 121). However, it was clearly seen by the British drafters of the Treaty, on which the Constitution was based, as a subset of a wider British citizenship, with article 3 proceeding to stipulate that the privileges and obligations of Irish citizenship were to be enjoyed only within “the limits of the jurisdiction of the Irish Free State”—once outside the state Irish citizens were recognised only as British subjects.

This was to be a key issue for the nascent state, which refused to accept that Irish citizenship was merely a local variant of British subject status. As Patrick McGilligan, Minister for External Affairs, argued in 1930, the new state could not tolerate “the complete merging of our distinctive nationality implied in the use of the term ‘British subject’ as the sole recognised and effective description of our nationals when outside our borders” (quoted in Daly, 2001: 384). This dispute led to a protracted row in the 1920s over the question of how Irish citizens were to be described on Irish passports, with London insisting that such passports identify the holder as a British subject (see O’Grady, 1989).

One of the consequences of the ongoing struggle over the relationship between Irish citizenship and British subject status was the inordinate delay in introducing a law to regulate the “future acquisition and termination” of Irish citizenship as envisaged by article 3 of the 1922 Constitution. While proposals were circulated as early as October 1924, the passport dispute, coupled with the rapid and uncertain evolution in constitutional relations between the United Kingdom and the dominions initiated by the 1926 Balfour Declaration, generated a reluctance to legislate until these wider issues were resolved (Daly, 2001: 384). This resulted in the anomalous situation where, as it remained regulated by article 3, the number of Irish citizens was “rigidly fixed and hence subject to constant decrease” (Kohn, 1932: 119). The requirement of domicile on the date of the constitution coming into force led to the bizarre situation where children born to Irish-citizen parents after that date were not themselves citizens (Kohn, *op cit*). Further difficulties arose from the lack of provision for the acquisition of citizenship through marriage or naturalisation. The consequences of the above were potentially serious for the individual, given the linking of certain fundamental rights with citizenship in the constitution (Kohn, *op cit*).

This situation was not rectified until 1935 with the enactment of the Irish Nationality and Citizenship Act. The overriding concern in the drafting of this act was the assertion of sovereignty and the distinct nature of Irish citizenship, with section 33.1 repealing the British Nationality and Status of Aliens Act of 1914, “if and so far as they respectively are or ever were in force in Saorstát Eireann”, and, section 33.3 declaring that “the facts or events by reason of which a person is at any time a natural-born citizen of Saorstát Eireann shall not of themselves operate to confer on such person any other citizenship or nationality”. From an Irish perspective at least, there was to be no more ambiguity over the relations between Irish citizenship and British subject status.<sup>16</sup> Similarly, the 1935 Act asserted the universal validity of Irish citi-

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<sup>16</sup> The view from a British perspective was rather different, with London continuing to recognise Irish citizens as British subjects. This anomaly was not resolved until the passing of the 1949 Ireland Act, which recognised, as a distinct class of persons, “citizens of the Republic of Ireland” (see O’Leary, 1996).

zenship, stating that Irish citizens were citizens for “all purposes, municipal and international”.<sup>17</sup>

In keeping with its concern to promote the issue of independence over that of unity the Irish government appears not to have considered the implications of this assertion of independent citizenship for the prospects of reunification.<sup>18</sup> (on official attitudes towards unity, see O’Halloran, 1987). Similarly, in drafting the 1935 Act, little attention was paid to the position of residents of Northern Ireland (Daly, 2001: 391). Prior to 1935 the vast majority of inhabitants of Northern Ireland were, in Irish law, held to be citizens of the Irish Free State due to the “24 hour gap” theory (see Daly, *op cit*). This argument, advanced in a 1933 Circuit Court case, “re Logue”, rests on the provisions of the Treaty permitting Northern Ireland to opt out of the Irish Free State. Given that power over the entire island was devolved to Dublin on 6 December 1922, and Northern Ireland did not exercise its right of exclusion until the following day, the wording of article 3 of the 1922 constitution was deemed to apply to all those domiciled in the island on that date (needless to say, this argument was not recognised in Belfast or London).

However, given the narrow route to citizenship created by article 3, it followed that the number of people eligible for Irish citizenship in Northern Ireland was fixed and would, over time, decrease. The 1935 Citizenship Act extended eligibility, with section 2 providing for the acquisition of citizenship by a child born outside the state to a citizen father. However, this automatic entitlement was limited to the first generation, with the citizenship of subsequent generations requiring registration and the surrendering of any other citizenship held at the age of 21. The combination of the principles of birth and descent in the Act clearly respected the state’s territorial boundary, with residents of Northern Ireland treated “in an identical manner to persons of Irish birth or descent who resided in Britain or a foreign country” (Daly, *op cit*). This is reflected in what Osmonde Grattan Esmonde TD termed the “grotesque formality” of the initial proposal that Northern births would be registered in the foreign births register (*Dáil debates* 54: 1147). A review of the *Dáil* debates on the Act shows Esmonde as one of a handful of deputies to raise the issue, arguing that the people of Northern Ireland were being put in the same relation to the state as “Turks”:

[I]n future the young Turks of Tyrone and the dancing Dervishes of Derry will have to go on a pilgrimage to that Mecca of Irish nationality, Piccadilly Circus and, at the High Commissioner’s officer there, will have to have their names inscribed in order to obtain the benefits of Irish citizenship (*Dáil debates* 54: 402).

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<sup>17</sup> Article 3 of the constitution was also altered in 1935, with the removal of the offending phrase confining Irish citizenship to “within the limits of the jurisdiction of the Irish Free State” (Constitution (Amendment No. 26) Act, 1935).

<sup>18</sup> Combined with the Aliens Act, 1935, the Citizenship Act rendered British subjects “alien” in the Irish Free State. However, under ministerial order no. 108/35, British subjects were exempted from the operation of the Aliens Act.

Responding for his government, de Valera pointed out that the problem identified by Esmonde would not arise until the second generation, expressing the hope that “before that time is reached...the barriers between the two parts of this country will have disappeared” (*Dáil debates* 54: 405). However, the government conceded the point and the bill was amended to provide for Northern births to be recorded in a “Northern births register”.<sup>19</sup>

### ***The 1956 Act: citizenship and irredentism***

The 1935 Act was, evidently, compatible with the state’s existing borders, respecting and, in effect, reinforcing them. Given the irredentist nature of articles 2 and 3 of the new constitution, which was to be adopted only two years later, the conservatism of the Act’s drafters appears surprising. However, in the context of the “stepping stone” constitutional evolution the 1930s, it is clear that the Irish government sought to avoid jeopardising the expansion of its sovereignty. Its aim, in seeking the recognition of the independent status of Irish citizenship, was to “conform as closely as possible to British law”, hoping that this would encourage a generous response from London (Daly, 2001: 406). Indeed, notwithstanding the rhetorical claims of articles 2 and 3, the compatibility of Irish citizenship law with the state’s boundaries remained unaltered by the 1937 Constitution, with article 9.1.1 simply affirming that “any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland”. As Claire O’Halloran has noted, “despite the claim to jurisdiction over Northern Ireland, its inhabitants continued to be deprived of full citizenship rights, thus underlining their outsider status” (O’Halloran, 1987: 176).<sup>20</sup>

The treatment of Northern Ireland residents in Irish citizenship law was, however, to alter radically with the introduction of the Irish Nationality and Citizenship Act, 1956. The drafters of this act faced none of the restrictions imposed on their counterparts over 20 years previously. With the declaration of the Republic of Ireland in 1948, and the subsequent passage of the Ireland Act by the British government in 1949, the state’s constitutional independence was assured, facilitating the resolution of the unsatisfactory position from an Irish nationalist perspective whereby births in Northern Ireland were assimilated to “foreign” births. The Irish government was explicit in its aim to amend this situation, seeking to extend citizenship as widely as possible to Northern Ireland, as well as to Irish emigrants and their descendents abroad. James Everett, then Minister for Justice, outlined its determination that “our nationality law should not be framed to exclude persons born in any portion of the national territory or persons who are of Irish stock”. Recognising the deficiency of the 1935 Act, in requiring registration for the second and subsequent generations, he continued:

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<sup>19</sup> Mary Daly reports four entries in the Northern births register (Daly, 2001: 400).

<sup>20</sup> This “outsider” status was further reinforced by a series of legislative restrictions on residents of Northern Ireland carrying out economic activities within the southern state (see Daly, 2001).

But there are new generations growing up ... [t]hese generations are of Irish stock and this Bill provides for their Irish citizenship without the fulfilment of any artificial requirements on their part such as registration. Citizenship is, in our opinion, their birthright (*Dáil debates* 154: 999-1000).

In seeking to make Irish citizenship more widely available, the 1956 Act drew a crucial definitional distinction from its 1935 predecessor—for the purposes of section 6.1, which stipulated that “every person born in Ireland is an Irish citizen from birth”, “Ireland” was, in line with article 2 of the Constitution, to be understood as “the national territory” encompassing the “whole island of Ireland, its islands and the territorial seas”. While section 7.1 formally withheld *automatic* citizenship from those born in Northern Ireland, requiring registration “pending the re-integration of the national territory”, this was rendered irrelevant for the majority by the key phrase, “not otherwise an Irish citizen”. The vast majority of the Northern population fell under this clause by descent, with the combination of section 6.2 and section 6.4 providing, at the extreme, automatic citizenship for “every living person who is the grandchild of a person born in any part of the thirty-two counties prior to 6th December, 1922” (Kelly, 1994: 63).

The treatment of Northern Ireland residents in these sections had considerable significance for the state’s territorial boundaries, given that their “sensational effect ... was to confer, in the eyes of Irish law, citizenship on the vast majority of the Northern Ireland population” (Kelly, 1994: 62). Two principles underlay these provisions: descent (*jus sanguinis*) and birth (*jus soli*). The first, descent, respected the existing border to the extent that it derived citizenship through inheritance. However, in providing for the automatic transmission of citizenship, “in a never ending chain” to those born to a citizen-parent in Northern Ireland, in contrast with birth outside the island which, after the first generation, required registration, the 1956 law introduced a territorial element (quotation from Everett in *Dáil debates* 154: 1001). The compatibility of this innovation with international law is dubious, given its attempt to regulate the citizenship of an external territory. In terms of the above schema, the territorial element moves the descent principle from border respecting towards border subverting.

There is no ambiguity, however, about the significance of the extra-territorial extension of the *jus soli* principle in the provision made by section 7.1 for the citizenship of those born in Northern Ireland to non-citizen parents. The irredentist nature of this principle, in providing for the citizenship of all born in an external territory, regardless of parentage, is clearly expressed in Everett’s explanation of the motivation underlying section 7.1:

There will still remain a limited category born in the Six Counties since 1922 who are of entirely alien parentage without any racial ties, and for these, in recognition of their birth alone in the portion of the national territory which is for the time being outside our jurisdiction, we provide that on making a voluntary declaration their Irish citizenship operates from the date of their birth and is the citizenship of their children (*Dáil debates* 154: 1000).

In seeking to extend *jus soli* citizenship beyond the state's jurisdiction, the 1956 Act openly sought to subvert the territorial boundary between North and South. The implications of the Act were readily recognised in Northern Ireland, with Lord Brookeborough tabling a motion in the Northern Ireland Commons repudiating "the gratuitous attempt ... to inflict unwanted Irish Republican nationality upon the people of Northern Ireland" (quoted in Daly, 2001: 402).

### ***Citizenship after the Good Friday Agreement***

Despite minor modifications, Irish citizenship continued to be extended to the inhabitants of Northern Ireland for over 40 years, representing one of the few practical expressions of the Irish state's irredentism. However, with the concluding of the Good Friday Agreement in 1998, the territorial implications of Irish citizenship law altered significantly, if somewhat ambiguously. Two key provisions transformed the constitutional context for the extension of Irish citizenship to Northern Ireland. Firstly, the Irish government formally renounced its territorial claim, amending the constitution to make reunification contingent on the democratically expressed consent of a majority in both jurisdictions. Secondly, the Agreement recognised "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose", and went on to confirm that "their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland".<sup>21</sup>

Given that the latter provision was enshrined in a treaty between the Irish and British states, with the British government explicitly consenting to birth in Northern Ireland creating an entitlement to Irish citizenship, it would appear that the territorial implications of the 1956 Citizenship and Nationality Act were removed. As discussed above, it is the attempt to confer citizenship extraterritorially without the agreement of the state affected that represents a breach of international law, not the actual extension (rare as such agreement may be). However, the 1956 Act co-exists uneasily with the terms of the Agreement, and, by extension, the official acceptance by the Irish state of the current border. While the Agreement recognises that Irish citizenship is the birthright of those born in Northern Ireland, it makes clear that its acceptance is a matter of individual *choice*. In contrast, the 1956 Act continues to extend citizenship *automatically* in the majority of cases, thereby, in legal effect, conflicting with the agreed status of the border and the principle of consent.

Notwithstanding this vestigial irredentism, the Irish state clearly accepts that reunification will only come about with the consent of a majority of the people in Northern

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<sup>21</sup> The constitutional changes in the Republic of Ireland, which took effect in December 1999, included a revised Article 2 which proclaimed that "it is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation". This provision, the first time a specific principle of citizenship was enshrined in the Irish constitution, proved to be politically controversial in that it gave constitutional protection to the right of Irish-born children of immigrants to citizenship. As mentioned in note 5 above this was qualified in the 2004 citizenship referendum, which restricted automatic citizenship to persons with at least one parent who was, or was entitled to be, an Irish citizen at the time of their birth.

Ireland, and, as outlined above, has enshrined this principle in the constitution. Given this overriding constitutional context, how is the current relationship between the boundaries of Irish citizenship and territory best understood? While a full discussion of the implications of the Agreement for citizenship in Northern Ireland is beyond the scope of this paper, I conclude with two possible interpretations. Firstly, and in line with the schema developed above, in deriving both British and Irish citizenship from birth in Northern Ireland, the Agreement bases entitlement to citizenship on the principle of *jus soli*. The inherently territorial nature of this principle, and its close connection with the assertion of sovereignty, would suggest an “overlapping” of state borders and, theoretically, implies a sharing of sovereignty. However, as already highlighted, the Agreement specifies that citizenship, while a birthright, is fundamentally a matter of individual choice.

This suggests a second interpretation. In contrast with the modernist conception of statehood which has informed this analysis, with territory and citizenship closely bound to state sovereignty, it can be argued that these elements are becoming increasingly disaggregated (on the differences between “modern” and “post-modern” conceptions of statehood, see Fowler, 2002). This can be seen as leading to a “unbundling” of the various meanings of citizenship discussed above, with its different elements such as legal status, rights and duties, political practice, and focus of identity existing independently at different levels of political organisation, based on varying degrees of territoriality. In this “post-modern” conception, particularly in the European Union, the identificatory and expressive functions of state citizenship come more to the fore. The tension created by incongruence between cultural nationality and state citizenship lessens as the dislocation of citizenship and territory opens up possibilities of multiple citizenships without connotations of disloyalty or dissatisfaction with existing borders. In this context, the Agreement can be seen as conceiving citizenship in Northern Ireland as chiefly a matter of personal identity and cultural membership. To this extent, and particularly given the acceptance by the Irish government that the entitlement of those born in Northern Ireland to British citizenship would remain in the event of reunification, Irish citizenship is perhaps now best seen as transcending the border rather than subverting it.

## CONCLUSION

Citizenship laws combine a number of distinct principles in determining what individuals fall under their remit. In this paper, I have sought to isolate four principles commonly utilised in contemporary Europe, namely, birth, descent, ethnicity, and what I termed “restitution”, a concern for restoration and compensation. In examining these principles, and their scope of application, whether internal or external, I have attempted to show their differing implications for the maintenance of existing territorial boundaries. While the open subversion of borders, as instanced in Irish law in the period 1956 to 1999, is rare, understanding the varying impact of different principles of citizenship can help assess the likely effect of particular laws on interstate boundaries. This is of particular relevance in central and eastern Europe where a range of innovative border-transcending citizenship laws have been introduced in recent years. Given the ethnic diversity of the region, and its history of con-

flict and territorial revision, it is not surprising that many states view these new laws with suspicion—adding urgency to the achievement of a clearer understanding of the operative principles behind these laws.

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