

DUAL CITIZENSHIP IN ZAMBIA: NATIONALISM AS AGAINST EQUALITY AND NON-DISCRIMINATION.

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ABSTRACT

Zambia's Constitution guarantees rights and places duties upon the status of citizenship. Equality and non-discrimination are recognized as national values that can be used to interpret the Constitution and also in the enactment of law. Nevertheless, the Constitution seemingly discriminates against citizens with dual citizenship, from eligibility for public office such as the President, Vice President, National Assembly Speaker, and service under the Defense and National Security agencies. This demonstrates conflict of policy objectives underlying national values and the prohibitive clauses. For liberalists, this derogates from citizenship rights because, despite recognizing equality and non-discrimination, dual citizenship is a status viewed as challenging to communitarian notions of nationalism. Underpinned by a doctrinal approach, this study ascertains the extent of nationalism's impact on dual citizen's rights, and whether justifications exist in light of the principles of equality and non-discrimination. The study revealed that notions of nationalism limit citizenship rights relating to political participation and equality of opportunity. The loyalty justification for the restrictions remains questionable, because reviewed studies do not reveal consensus that loyalty to a specific political state is the precondition for office holders. Furthermore, legislative provision for the limitations does not make them justifiable in a democratic society, as discriminatory practices are challengeable, even when legal. Legislative reforms recommended to address loyalty concerns with narrower restrictions are; bilateral agreements confining military obligations to "countries of habitual residence", exempting professional armies from the limitations and requiring dual citizens in public office to declare conflict of interest.

Keywords: *Citizenship, Dual citizenship, nationalism, equality and non-discrimination.*

1.1 INTRODUCTION

This Article encompasses the study concerning an assessment of the impact of nationalism on dual citizens' rights under the Zambian Constitution, in light of the principles of equality and non-discrimination. The study is undertaken to ultimately determine how best Zambia can embark on legal reforms aimed at mitigating the effects of the limitations posed on the right of dual citizenship. In so doing, the first part of the study is an overview discussion of the concepts of equality and non-discrimination, citizenship, nationalism and dual citizenship. The results of the study are presented under the section discussing the impact of nationalism on dual citizens' rights in light of equality and non-discrimination, as well as the section interrogating the justifications advanced for this impact. Lastly, the study makes conclusions and recommendations.

1.1.1 Background

The right to dual citizenship is fairly a new concept in Zambia. Up until the enactment of the Constitution of Zambia (Amendment) Act,¹ a person ceased being a Zambian citizen in the event that they acquired citizenship of a country other than Zambia or did any act indicating that they intended to adopt or make use of any other citizenship.² This was most likely due to the widespread notion that dual citizenship contradicts the classic understanding of citizenship as single and exclusive affiliation to one state. The term citizenship³ has been defined as that which bestows upon individuals, membership in a national political community. Dual Citizenship⁴ on the other hand refers to a person's status as a citizen of two countries or, one country still recognizing a person as a citizen even though that person has acquired citizenship in another country. In 2012,⁵ dual citizenship was proposed in Zambia based on citizenship being a fundamental right. Through the Constitution (Amendment) Act,⁶ which necessitated the repeal of the Citizenship Act,⁷ dual citizenship was allowed.⁸

¹ Article 39(1), Act No. 2 of 2016.

² Article 9(1) a and b, of the Constitution of Zambia Chapter 1, of the Laws of Zambia, as amended by Act No. 18 of 1996.

³ Howard Morjé Marc (2009). *The Politics of Citizenship in Europe*. Cambridge, Cambridge University Press, p.3

⁴ Garner, Bryan A. (1999). *Black's Law Dictionary 7th Ed*: St Paul Minn, West Group, p.515.

⁵ The Technical Committee on Drafting the Zambian Constitution, First Draft Report of the Technical Committee on Drafting the Zambian Constitution, Government Complex Conference Centre, Lusaka Zambia (2012) p.20.

⁶ Article 39 of the Constitution (Amendment) Act No. 5, of 2016.

⁷ Chapter 124 of the laws of Zambia.

⁸ Section 25, the Citizenship Act, No. 33 of 2016.

Article 42 of the Constitution (Amendment) Act⁹ bestows rights and privileges on the status of citizenship as provided in the Constitution. Further, the national values and principles as set out in the constitution¹⁰ recognize equality and non-discrimination as part of the national values that are used in the interpretation of the Constitution as well as enactment of law.¹¹ Equality¹² denotes the quality or state of being equal. Correspondingly, non-discrimination is understood to be the converse of discriminatory¹³ which means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions, to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. It is noteworthy that, despite recognizing equality and non-discrimination, the Constitution seemingly discriminates against citizens with dual citizenship from eligibility for public office such as the President and Vice President,¹⁴ National Assembly Speaker,¹⁵ and service under the Defense Force and National Security Services.¹⁶ This demonstrates conflict of policy objectives underlying national values and the prohibitive clauses. For liberalists, this derogates from citizenship rights because, despite recognizing equality and non-discrimination, dual citizenship is a status viewed as challenging to Communitarian notions of nationalism which include national identity, loyalty and cohesion. Nationalism¹⁷ is a term generally used to describe the attitude that the members of a nation have when they care about their national identity, which is often defined in terms of common origin, ethnicity, or cultural ties, and specifically about whether an individual's membership in a nation should be regarded as non-voluntary or voluntary.

Underpinned by a doctrinal approach, this study seeks to ascertain the extent of nationalism's impact on dual citizen's rights, and whether justifications exist in light of the principles of equality and non-discrimination. The study further seeks to assess and recommend how best Zambia can mitigate the effects of the highlighted restrictions on the rights of dual citizens.

1.2 METHODOLOGY:

This study deploys qualitative methods of data collection since the data to be used is not numerical. The approach used is doctrinal mainly because this approach enables the

⁹ Act No. 2, of 2016.

¹⁰ Article 8(d), of Act No. 2, of 2016.

¹¹ Article 9 (a) and (b) of the Constitution (Amendment) Act No. 2 of 2016.

¹² Garner, Bryan A. (1999). Black's Law Dictionary 7th Ed: pp. 557-558.

¹³ Article 23(3) of Chapter 1 of the Laws of Zambia.

¹⁴ Under articles 100(2) (b), and 110(2) , of Act No. 2 of 2016 respectively.

¹⁵ Under Article 82(2), of Act No. 2 of 2016.

¹⁶ Under Article 194(a), of Act No. 2 of 2016.

¹⁷ Stanford Encyclopedia of Philosophy: First published Thu Nov 29, 2001; substantive revision Mon Dec 15, 2014, <http://plato.stanford.edu/entries/nationalism/>. (Accessed on 21st January 2017).

researcher to access the law on dual citizenship with a view to determine how it is applied and the consequences of its application. Desk research is used in reviewing of the relevant primary data, that is, legislation and law reports. Secondary data used includes international instruments, journals, and articles among others. The data will be analysed according to the research objectives using thematic analysis because this method enables relevant information and research objectives to be identified and thereafter conclusions to be drawn

1.3 RESULTS:

Findings revealed that notions of nationalism limit citizenship rights relating to political participation and equality of opportunity. The loyalty justification for the restrictions remains questionable, because reviewed studies do not reveal consensus that loyalty to a specific political state is the precondition for office holders. Furthermore, legislative provision for the limitations does not make them justifiable in a democratic society, as discriminatory practices are challengeable, even when legal.

1.4 DISCUSSION

1.4.1 In addressing the objectives of this study, this section discusses the following concepts:

i. The principle of equality and non- discrimination

Equality¹⁸ means the state of being equal. The equal protection principle is exclusively associated with written constitutions and embodies guarantees of equal treatment normally applied not only to procedural enforcement of laws. The case of **Andrews v. Law Society of British Columbia**¹⁹ held that the right to equality includes substantive rather than merely formal equality. Equality before the law applies to the enjoyment of civil, political, economic and social rights, without any distinction.²⁰ Any distinction that States make in the application of benefits need justification on grounds of legitimate interest of the State and society, “which cannot be satisfied by non-discriminatory means.”²¹

¹⁸ Garner, Bryan A. (1999). Black's Law Dictionary 7th Ed: pp. 557-558. That is, the equal protection of laws is invariably treated as a substantive constitutional principle; which demands that laws will only be legitimate if they can be described as just and equal.

¹⁹ Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143.

²⁰ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September, 2003. <http://www.refworld.org/docid/4f59d1352.html> (Accessed on 22nd February 2017). In international human rights law, non-discrimination enshrines equality between persons and imposes certain prohibitions on States.

²¹ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September, 2003.

ii. Citizenship, rights and obligations

The status of citizenship in liberal democracies, gives individuals the right to vote, run for office, participate freely in public activities, while also requiring the obligation of paying taxes and possibly serving in the military.²² Citizenship is not a single dimensional concept.²³ For Bosniak²⁴, citizenship characterizes modes of participation and governance, rights and duties, identities²⁵ and commitments, and statuses. Marshal,²⁶ divided citizenship rights into three categories: civil, political and social rights and argued that by guaranteeing these rights to all, the welfare state ensures that every member of society feels like a full member of society. Further, that where any of these rights are withheld or violated, people will be marginalized and unable to participate.²⁷ The Constitution²⁸ does not specifically outline rights as flowing from citizenship status aside from the right to a document of identification. The Bill of rights,²⁹ and the national values and principles³⁰ are among the other articles outlining individual rights. Whether these rights are exclusive to citizens, Bosniak,³¹ argues that despite a modicum “citizenship” by virtue of various rights enjoyed by aliens, when citizenship connotes formal legal membership, aliens remain outsiders to citizenship.³² Regarding citizens’ obligations, the Constitution outlines duties among which is to remain

²² Howard Morjé Marc (2009). The Politics of Citizenship in Europe. p.3.

²³ Jones Emma and Gaventa Johns, IDS Development Bibliography 19 Concepts of citizenship: A review, Institute of Development studies, Brighton, Sussex, England, February 2002. pp.4-5

<https://www.ids.ac.uk/files/dmfile/Db19.pdf>. (Accessed on 22nd January 2017). In the liberal thought, it connotes a status, which entitles individuals to a specific set of universal rights granted by the state. Republicans argue that basic resources are necessary to enable participation in community life, rather than conceiving them as basic rights *per se*. Communitarians emphasise on belonging. However, this study is influenced by the Liberal as supported by the Republican school of thought.

²⁴ Bosniak, Linda (2000) "Citizenship Denationalized (The State of Citizenship Symposium)," Indiana Journal of Global Legal Studies: Vol. 7: Is. 2, Article 2. p.450.

<http://www.repository.law.indiana.edu/ijgls/vol7/iss2/2>. (Accessed on 7th December 2016). To be a citizen is to "possess the legal status of a citizen." Here, citizenship refers to formal membership in an organized political community. As rights, the enjoyment of rights is the defining feature of societal membership: and those who possess the rights are usually presumed thereby to enjoy citizenship. As political activity, "citizenship" most commonly denotes active engagement in the life of the political community.

²⁵ Heater Derek Benjamin, (1990). Citizenship: the civic ideal in world history, politics, and education. Michigan, Longman, the University of Michigan. p184. Identities and commitments have to do with its psychological dimension; citizenship here evokes the quality of belonging, the felt aspects of community membership.

²⁶ Kymlicka Will and Norman Wayne . Return of the citizen: A survey of recent work on citizenship theory. Ethics 104(2) (January 1994):p354, <http://www.jstor.org/stable/2381582>. (Accessed on 27th January 2017).

²⁷ Kymlicka Will and Norman Wayne . Return of the citizen: A survey of recent work on citizenship theory, p354.

²⁸ Article 42, of the Constitution (Amendment) Act No. 2 of 2016.

²⁹ Part III of the Constitution, Chapter 1, of the laws of Zambia.

³⁰ Article 8(d), of Act No. 2 of 2016.

³¹ Bosniak, Linda (2000) "Citizenship Denationalized (The State of Citizenship Symposium). pp461-462.

³² An example is Article 22 (3)(b), of the Constitution, Chapter 1 of the laws of Zambia which allows the restriction on the freedom of movement for non-Zambian citizens. The case of Radebe v the Attorney General (1972) ZR, 237 also confirms this position.

patriotic,³³ and provide national, defence and military service when called upon.³⁴ Citizenship duties follow naturally from rights.³⁵ Hence, the complimentary nature of rights and duties.

iii. Nationalism

Nationalism is the view that a person's ultimate loyalty is to the nation.³⁶ It is tied to the state, either as a reality to be defended or as a dream to be realised. Citizenship defined in statist terms necessarily privileges a particular national identity and marginalizes all others.

National identity is one's identity or sense of belonging to one state or nation.³⁷ Under various social influences, people incorporate national identity into their personal identities by adopting beliefs, values, assumptions and expectations which align with one's national identity.³⁸ Psychologically, loyalty is basically an attachment to, a sense of identification with, and feelings toward a person, place, or thing.

iv. Dual Citizenship, advantages and disadvantages

Dual citizenship, is favoured by two of the three main conceptions of citizenship, that is, the liberalists,³⁹ and republicans⁴⁰ who argue that it opens up more rights and opportunities for political participation since dual nationals have those rights and opportunities in not just one country. Communitarians argue that membership of two communities at the same time is endangering loyalty and it endangers the integration into and the identification with a nation, and also solidarity among members of the national community. In Zambia, dual citizenship became recognised following amendment of the Constitution.⁴¹ Consequently, renunciation under the current Citizenship Act,⁴² only arises where a citizen by birth no longer wishes to

³³ Article 43(1)(a) of the Constitution (Amendment) Act No. 2 of 2016.

³⁴ Article 43(1)(e) of the Constitution (Amendment) Act No. 2 of 2016.

³⁵ Borer Cathcart Mary (1962). *Citizenship: its rights and responsibilities*, London, Museum press limited. p23.

³⁶ Hoffman John, (2004). *Citizenship beyond the state*, London, SAGE publications. P.49.

³⁷ Ashmore, Richard; Jussim, Lee; Wilder, David (2001). *Social Identity, Intergroup Conflict, and Conflict Reduction*. USA, Oxford. Oxford University Press. pp. 74–75.

³⁸ Bar-Tal, Daniel; Staub, Ervin (1997). *Patriotism in the Lives of Individuals and Nations*. Chicago: Nelson-Hall Publishers. pp.171–172.

³⁹ Cohen, J.L., (1999). Changing paradigms of citizenship and the exclusiveness of the demos. *International sociology*, 14 (3), 245–268. p258-259. <https://doi.org/10.1177/0268580999014003002> (Accessed on 7th December 2016). Who argue that since there is a clear trend to internationalise and universalise legal rights of individuals it seems adequate to also expand the scope of political rights beyond the confinements of a single nation state.

⁴⁰ Joachim Blatter (2011) Dual citizenship and theories of democracy, *Citizenship Studies*, 15:6-7, 769-798, DOI: 10.1080/13621025.2011.600090. <http://dx.doi.org/10.1080/13621025.2011.600090> (Accessed on 11th November 2016).

⁴¹ Act No. 5, of 2016.

⁴² The Citizenship Act, No. 33, of 2016.

hold dual citizenship,⁴³ or wishes to assume sole citizenship of another country.⁴⁴ Additionally, other African states have changed their rules to allow it or are in the process of considering such changes.⁴⁵ The advantages are that it is a source of foreign exchange, entrepreneurial capital,⁴⁶ rights of entry and residence, public benefits, and eligibility for employment.⁴⁷ Opponents argue that ‘one cannot serve two masters’ and are concerned that it undermines loyalty towards the state, national cohesion and democracy.⁴⁸ This latter opinion therefore forms the basis of the interrogations in this study, which seek to test the justifications for the view.

1.4.2 Nationalism’s impact on Dual Citizenship under the Zambian Constitution, in light of equality and non-discrimination.

The justifications typically advanced for the limitations in Zambia and other jurisdictions are interrogated below:

a. The nationalistic justification:

Despite the increase in dual citizenship, fears exist that dual status undermines loyalty towards the state, understood as identification with and political participation in the country of residence.⁴⁹ Based on nationalism, it is argued that loyalty to a specific political state is the central precondition for office holders and cannot be compromised.⁵⁰ In Zambia, the Mung’omba Constitution Review Commission⁵¹ observed that the rationale for the

⁴³ Section 32(2) (a), the Citizenship Act, No. 33 of 2016.

⁴⁴ Section 32(2)(b), The Citizenship Act, No. 33 of 2016.

⁴⁵ Manby Bronwen, (2010). *Citizenship Law in Africa: A Comparative Study*, A Comparative Study, New York Open Society Foundations. p7. Among those that have changed the rules in the last decade or so are Angola, Burundi, Djibouti, Gabon, Gambia, Ghana, Kenya, Mozambique, Rwanda, São Tomé and Príncipe, Sierra Leone, Sudan, and Uganda. Others, including Egypt, Eritrea, and South Africa, allow Dual Citizenship but only with the official permission of the government.

⁴⁶ Spiro J. Peter, Dual citizenship as human right. I • CON (2010), Vol. 8 No. 1, 111 – 130. p117. <https://academic.oup.com/icon/article-pdf/8/1/111/1992408/mop035.pdf>. (Accessed on 12th February 2017).

⁴⁷ Spiro J. Peter, Dual citizenship as human right. P117.

⁴⁸ Schlenker Andrea, Divided loyalty? Identification and political participation of dual citizens in Switzerland. *European Political Science Review / First View Article / June 2016*, p2. http://journals.cambridge.org/abstract_S1755773915000168. (Accessed on 19th June 2016).

⁴⁹ Schlenker Andrea, Divided loyalty? Identification and political participation of dual citizens in Switzerland. p1 – 30.

⁵⁰ Joachim Blatter (2011) *Dual citizenship and theories of democracy*, pp.780-81. Further that being a member of two communities at the same time is endangering loyalty to a specific community and its political institutions – it dissipates patriotism. That a community based on a shared history and a common culture is seen as a precondition to uphold solidarity and social rights for the members of that specific community. In exchange, it demands and stimulates citizens’ identification with and their loyalty to their nation.

⁵¹ The Report of the Mung’omba Constitution Review Commission, Secretariat Constitution Review

prohibition of dual citizenship may be that it could lead to conflict of allegiance. The First Draft Report of the Technical Committee⁵² does not provide much information on justifications for the limitations. This study adopts the understanding of loyalty advanced by Schlenker,⁵³ as being identification with and political participation in the country of residence.

Since dual citizenship is a new concept in Zambia and as such remains yet to be tested, this study relies on studies conducted in foreign jurisdictions which interrogated loyalty levels or differences between dual and mono citizens. Despite being foreign, the studies remain relevant to Zambia by providing factual data on the interrogations into the loyalty argument for the limitations on citizenship rights. Bassiri,⁵⁴ found that immigrants are extremely ambivalent about the United States and a number lack strong ties or loyalty to it. Another study,⁵⁵ found that dual citizens are significantly less likely to vote in comparison with mono US citizens. Staton,⁵⁶ also reports that not only are dual nationals associated with a lower level of civic duty, they are less likely to think of themselves as “American” and to consider the United States to be their homeland. The limitation of both studies by Staton and Cain and Doherty is that they use data on first-generation Latin Americans.⁵⁷ The disconnecting effect of dual citizenship did not hold beyond the first generation. Hence, one can argue that the sample was limited. Conversely, Ramakrishnan⁵⁸ found that dual nationality increases the likelihood of voting among immigrants (except for Cubans) in the United States. Evidence from Canada also revealed that dual citizenship does not diminish civic participation and the sense of belonging to Canada.⁵⁹ Also, in the Netherlands, Mügge,⁶⁰ concludes that ‘migrants

Commission, Lusaka, 29th December 2005. p102.

⁵² The First Draft Report of the Technical Committee on Drafting the Zambian Constitution. Government Complex Conference Centre, Lusaka Zambia (2012). p. 20.

⁵³ Schlenker Andrea, Divided loyalty? Identification and political participation of dual citizens in Switzerland. p1.

⁵⁴ Renshon A. Stanley, Dual Citizenship And American Democracy: Patriotism, National Attachment, and National Identity, Social Philosophy and Policy / Volume 21 / Issue 01 / January 2004, p118.

<https://doi.org/10.1017/S0265052504211050>. (Accessed on 19th June 2016). Another sample felt more allegiance to a foreign country than to the United States.

⁵⁵ Cain, B.E. and B.J. Doherty (2006), ‘The impact of dual nationality on political participation’, in L. Taeku, S.K. Ramakrishnan and R. Ricardo (eds), Transforming Politics, Transforming America: The Political and Civic Incorporation of Immigrants in the United States, Charlottesville/London: University of Virginia Press, pp. 89–105.

⁵⁶ Staton K Jeffrey, Jackson A Robert, Canache Damarys, Dual Nationality Among Latinos: What Are the Implications for Political Connectedness? The Journal of Politics, *Volume 69, Issue 2*, May 2007 pp. 479 – 480. <http://www.jstor.org/stable/10.101111/j.1468-2508.2007.00544.x>. (Accessed on 19th June 2016).

⁵⁷ Schlenker Andrea, Divided loyalty? Identification and political participation of dual citizens in Switzerland. European Political Science Review, European Political Science Review / First View Article / June 2016. p.5 http://journals.cambridge.org/abstract_S1755773915000168. (Accessed on 19th June 2016).

⁵⁸ Ramakrishnan, S.K. (2005). Democracy in Immigrant America: Changing Demographics and Political Participation, Stanford, CA: Stanford University Press. p.93–94.

⁵⁹ Wong, L., ‘Transnationalism, active citizenship, and belonging in Canada’, International Journal 63(1) (2008): p.87. <https://doi.org/10.1177/002070200806300106>. (Accessed on 19th June 2016).

⁶⁰ Mügge, L., ‘Dual nationality and transnational politics’, Journal of Ethnic and Migration Studies 38(1) (2012): p.15. <http://dx.doi.org/10.1080/1369183X.2012.640003>. (Accessed on 19th June 2016).

with dual nationality are more likely to participate in the host country's political life than those with only Dutch nationality. Additionally, Schlenker,⁶¹ argues that dual citizens are more loyal in many respects than foreign residents but, there are no significant differences between dual and mono citizens in their level of identification with Switzerland and political participation there. From this synopsis, the loyalty justification for the restrictions remains questionable, because reviewed studies do not reveal consensus that loyalty to a specific political state is the precondition for office holders

In recent years, many of the other difficulties created by dual nationality, such as conflicting military obligations' or passport and visa problems have been addressed by bilateral agreements, and coordinated state practice.⁶² For example, the European Convention on Nationality ("ECN")⁶³ provides that a dual national should only be required to fulfil his military obligations in relation to his "country of habitual residence". Further, formal citizenship no longer seems an important criterion for judging the loyalty of people in times of military conflict. Countries with professional armies, like the United States, accept dual nationals and even non-citizens in their military forces. Most countries are only a little more restrictive when it comes to officer positions.⁶⁴ For instance Legomsky,⁶⁵ found only one state in Mexico, explicitly disqualifying dual nationals from military service. Regarding limitations on taking up public offices, Spiro,⁶⁶ proposes that dual nationals might be barred from very sensitive positions or declare a conflict-of-interest in specific situations and stay absent from these specific tasks. Thus, the issue of conflicts of interests can be solved with much more limited restrictions. Following a survey conducted regarding restrictions on dual citizens when it comes to taking offices or political participation in both countries simultaneously, most countries in the sample were found to be more tolerant.⁶⁷ Whilst

⁶¹ Schlenker Andrea, Divided loyalty? Identification and political participation of dual citizens in Switzerland. P1. That dual citizens are even more likely than mono citizens to participate in serving its interests. Furthermore, there is no trade-off between these forms of loyalty to the country of residence and identification and political participation in the country of descent. Thus dual citizenship does not seem to diminish loyalty to the country of residence and countries therefore do not stand to lose anything by allowing it.

⁶² Murazumi Mie. Japan's Laws on Dual Nationality in the Context of a Globalized World. Pacific Rim Law & Policy Journal, Vol. 9 No. 2 (2000) pp.433-434. <https://digital.lib.washington.edu/dspace-law/bitstream/...1/.../9PacRimL.PolyJ415.pdf>. (Accessed on 18th October 2017).

⁶³ Council of Europe, European Convention on Nationality, art. 21, E.T.S. 166-1997 [hereinafter 1997 Convention].

⁶⁴ Joachim Blatter (2011) Dual citizenship and theories of democracy, p.780.

⁶⁵ Legomsky, S, 2003. Dual nationality and military service: strategy number two. In: D.A. Martin and K. Hailbronner, eds. Rights and duties of dual nationals: evolution and prospects. The Hague: Kluwer Law International, 86-87. as cited by Joachim Blatter (2011) Dual citizenship and theories of democracy, p.780 <http://dx.doi.org/10.1080/13621025.2011.600090> (Accessed on 11th November 2016).

⁶⁶ Spiro, P.J., 1997. Dual nationality and the meaning of citizenship. Emory law journal, 46 (4), 1411–1485. as cited in Joachim Blatter (2011) Dual Citizenship and theories of democracy, Citizenship Studies, 15:6-7, p.781. <http://dx.doi.org/10.1080/13621025.2011.600090> (Accessed on 11th November 2016).

⁶⁷ Blatter K. Joachim, Erdmann Stefanie and Schwanke Katja. Acceptance of Dual Citizenship: Empirical Data and Political Contexts, Working Paper Series. Global Governance and Democracy" Institute of Political

security concerns are reasonable, this study maintains that couching dual citizens' rights in such restrictive manner is unnecessary.

b. The legality justification:

The Constitution⁶⁸ provides that a citizen shall be entitled to rights and benefits of citizenship as provided for in the Constitution or as prescribed. National values and principles⁶⁹ recognize equality and non-discrimination as part of the values used in the interpretation of the Constitution and enactment of law.⁷⁰ Even so, the Constitution limits the rights of citizenship regarding political participation in taking up public office; and the right to equal opportunity to enlist in the defense force and national security agencies. In interrogating this justification, among the fundamental questions is whether there is discrimination in the treatment of citizens under the Zambian constitution. According to the case of *Wandsworth London British Council v Michalak*⁷¹ for there to be discrimination, persons must be similarly circumstanced but given different treatment. The question that begs is whether dual citizens and mono citizens are similarly circumstanced. Under the Constitution,⁷² the word "citizen" means a citizen of Zambia. The Constitution further provides that a citizen shall not lose citizenship by acquiring the citizenship of another country. Additionally, the Citizenship Act⁷³ defines a dual citizen as a citizen who has acquired the citizenship of another country. Accordingly, it becomes apparent that citizenship in Zambia is inclusive of both mono and dual citizenship as there are no distinctions provided in the definition of a citizen. Regarding the implication of citizenship, it has been argued that in the law, the concept of citizenship is used to refer to the rights necessary to achieve "full and equal membership".⁷⁴ It is on this premise that this study argues that dual citizens and mono citizens are similarly circumstances and as outlined above, the Constitution discriminates in its treatment of Zambian citizens, particularly regarding the highlighted restrictions on the rights of dual citizens. Secondly, it is important to ascertain whether this discrimination is justifiable. In addressing this question, it is noteworthy that recognizing equality before the law prohibits all discriminatory treatment.⁷⁵ Nonetheless, one may argue that this type of discrimination is

Science, University of Lucerne, February.(2009) p. 25 <https://doi.org/10.5281/zenodo.48763>. (Accessed on 11th November 2016). Only in Australia, Columbia and South Korea were dual citizens are not allowed to take political offices. Finland, Japan and Mexico were found to apply such a restriction only for higher-level political offices. All other countries allowed dual citizens to be political representatives and/or executives at all levels (However, for Israel and Sweden results were inconsistent).

⁶⁸ Article 42 of the Constitution (Amendment) Act No. 2 of 2016.

⁶⁹ Article 8(d), of Act No. 2 of 2016.

⁷⁰ Article 9 (a) and (b) of the Constitution (Amendment) Act No. 2 of 2016.

⁷¹ (2002) 4 ALL E.R. 1136.

⁷² Article 266 of of Act No. 2 of 2016.

⁷³ Section 2 of the Citizenship Act, No. 33 of 2016.

⁷⁴ Bosniak, Linda (2000) "Citizenship Denationalized (The State of Citizenship Symposium), p 464.

⁷⁵ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54. hrlibrary.umn.edu/iachr/b_11_4d.htm.. (Accessed on

justifiable based on article 23 (1) of the Constitution⁷⁶ providing that “Subject to clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect”.

This article should be understood with article 23(5)⁷⁷, which excuses discrimination if the relevant law makes reasonable provision with respect to qualifications for service as a public officer or member of a disciplined force. From article 23, one would argue that the limitations highlighted are justifiable because they are permissible by the Constitution. This notwithstanding, this study argues that the limitations set out under the Constitution, relating to dual citizens are contrary to the principles of equality and non-discrimination. The Inter-American Court of Human Rights⁷⁸ has indicated that discriminatory practices can be contested, even when they are legal. Non-discrimination, in international human rights law, enshrines equality between persons and imposes certain prohibitions on States. Aside from domestic legislation, various international instruments such as the Universal Declaration of Human Rights (“UDHR”),⁷⁹ International Covenant on Civil and Political Rights (“ICCPR”),⁸⁰ and the African Charter on Human and Peoples Rights (“ACHPR”) ⁸¹ provide for the principles of equality and non-discrimination, and also the right to participate in one’s government. However, some international treaty bodies lack jurisdiction in interpreting and applying domestic law. Instead such bodies may examine a state's compliance with the treaty. This was held in *Legal Resources Foundation v Zambia*⁸² in which Zambia was taken before the ACHPR⁸³ for alleged violation of articles 2, 3 and 19 of the Charter, in that the Constitution ⁸⁴ was discriminatory.⁸⁵ That Zambia had effected an amendment to the effect that anyone who wishes to contest the Office of President of Zambia had to prove that both parents were Zambian citizens by birth or descent. It was argued that the effect of this amendment was to prohibit a Zambian citizen, former president Dr Kenneth David Kaunda from contesting the elections having been duly nominated by a legitimate political party. It was further argued that the amendment had the effect of disenfranchising 35 per cent of the

18th October 2017).

⁷⁶ Chapter 1 of the Laws of Zambia.

⁷⁷ Chapter 1 of the Laws of Zambia.

⁷⁸ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September, 2003.

⁷⁹ Article 7 of the Universal Declaration of Human Rights. Adopted by the United Nations General Assembly on 10th December 1948. <http://www.un.org/en/universal-declaration-human-rights/> (Accessed on 1st February (2017)).

⁸⁰ Article 26 and 25(a) of the International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966

<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> (Accessed on 1st February 2017).

⁸¹ Articles 2, 3 and 13 of the African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981. Entered into Force October 21, 1986.

⁸² (2001) AHRLR 84 (ACHPR 2001).

⁸³ The African Commission on Human and Peoples' Rights.

⁸⁴ The Constitution (Amendment) Act of 1996.

⁸⁵ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

electorate of Zambia from standing for the highest office in the land, in future elections. The ACHPR noted that:

The Commission was not seeking to do what even Zambian courts could not do, but rather to examine the compatibility of domestic law and practice with the Charter. International treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations.

In finding Zambia to have violated the equality and non-discrimination principle, it was noted that:

The Charter abhors discrimination on the basis of any of the grounds set out, among them language ... national and social origin ... birth or other status.' The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of a person to enjoy many other rights.

Accordingly, on the basis of this case, this study supports the argument that the fact that discrimination is expressly provided for by law, does not make the discrimination fair. Thirdly, it is necessary to ascertain in what instances discrimination is permissible. The European Court of Human Rights⁸⁶, following “the principles which may be extracted from the legal practice of a large number of democratic States,” has held that a difference in treatment is only discriminatory when “it has no objective and reasonable justification. Likewise, the Inter-American Court⁸⁷ has established that:

No discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a

⁸⁶ Cf. Eur. Court H.R., Case of Willis v. The United Kingdom, Judgement of 11 June 2002, para. 39; Eur. Court H.R., Case of Wessels-Bergervoet v. The Netherlands, Judgement of 4 June 2002, para. 46; Eur. Court H.R., Case of Petrovic v. Austria, Judgment of 27 March 1998, Reports 1998-II, para. 30; Eur. Court H.R., Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, Judgment of 23 July 1968, Series A 1968, para. 10.

⁸⁷ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. para. 57.

reasonable relationship of proportionality between these differences and the aims of the legal rule under review.

As already argued, the status of citizenship in Zambia is enjoyed by both mono and dual citizens. However, whether the expressed concerns of divided loyalty or allegiance concerns are legitimate is another issue to be considered. This study argues that justification based on the argument of loyalty or allegiance remains questionable. This is on the basis that, the studies reviewed on the subject⁸⁸ do not show consensus on the conclusion that loyalty to a specific political community/state is the central precondition for office holders and cannot be compromised.⁸⁹ In addition, the said studies do not show consensus that being a member of two communities at the same time is endangering loyalty to a specific community and its political institutions – it dissipates patriotism.⁹⁰ A synopsis of some of these studies reveals the position postulated by this study. Therefore, lack of conclusive data on allegations of divided allegiances seems to lend more credence to the argument that couching the limitations in such restrictive terms is not reasonably justifiable. In addition, the case of *Harksen v Lane NO & Others*⁹¹ is instructive on the type of treatment that can be deemed discriminatory. The Court held in this case that the determining factor in establishing whether discrimination is unfair is the impact of such discrimination on the victims. In the case of *Legal Resources Foundation v Zambia*⁹² it was noted that:

The right to equality is important for a second reason. Equality or lack of it affects the capacity of a person to enjoy many other rights. For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life.

From this case, the basis for the limitations must not be such as to cause one to suffer indignity as a human being, and an equal and proud citizen. Citizenship itself guarantees civil, political and social rights. Therefore, this study is more inclined to argue that limiting the rights of dual citizens regarding political participation in taking up public office; and the right to equal opportunity to enlist in the defense force and national security agencies proves unfair as it places dual citizens in a less advantageous position in comparison to mono

⁸⁸ Under 1.4(v)(a).

⁸⁹ Joachim Blatter (2011) Dual citizenship and theories of democracy, p.781.

⁹⁰ Joachim Blatter (2011) Dual citizenship and theories of democracy, p.780.

⁹¹ 1998 (1) SA 300 (CC).

⁹² (2001) AHRLR 84 (ACHPR 2001).

citizens. Hence, lending credence to the conclusion that this in turn potentially invokes feelings of indignity among dual citizens as human beings and equal and proud citizens.

1.5 CONCLUSION

The study demonstrated citizenship as a status guaranteeing rights and imposing duties upon individuals. However, various countries have accepted dual citizenship, while limiting citizenship rights. Interrogations of these restrictions reveals that it is not conclusive that divided loyalty and national identity are warranted concerns against full citizenship participation by dual citizens. The basis of the limitations must not cause indignity to human beings, and equal and proud citizens. Therefore, it is argued that nationalism's impact on the rights of dual citizens in Zambia is not justified in light of the equality and non-discrimination principle. Consequently, the principle of equality of all citizens before the law remains, to a considerable extent, ineffective. Legislative reforms are recommended to address loyalty concerns with narrower restrictions through bilateral agreements confining military obligations to "countries of habitual residence", exempting professional armies from the limitations and requiring dual citizens in public office to declare conflict of interest.

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