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Women, nationality and citizenship

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Introduction

This issue of *Women2000 and Beyond* considers discrimination against women in nationality laws. It examines laws that differentiate between women and men in the acquisition and retention of nationality, as well as in relation to the nationality of their children, highlighting the legal and practical disadvantages such laws cause.

As the section on "Nationals, citizens, stateless persons and refugees" makes clear, it is the sovereign right of States to devise their own nationality laws and immigration requirements. This section indicates that such laws assign different legal statuses to persons within a State. People may be nationals (citizens); legal aliens (foreigners legally in the State under its immigration laws); illegal aliens; stateless persons (with no state of nationality); asylum-seekers; and refugees. Some of the people in these categories may have more than one nationality. The full advantages of citizenship, including unqualified rights of entry and residency in the State, as well as access to the full range of public benefits and services, are usually accorded only to nationals/citizens.

The next section, "Nationality of married women", describes the way that gender-based discrimination in nationality laws typically operates. Where a couple has different nationalities prior to marriage, the husband's nationality may be automatically imposed on his wife upon marriage. Nationality laws can deny a wife's nationality to her husband, or a husband's nationality to his wife, unless stipulated conditions are complied with. Where parents have different nationalities, laws can bestow the nationality of the father upon a child, but deny the child her mother's nationality.

"Addressing discriminatory nationality laws" considers the ways in which international law has been used to address the consequences of the application of discriminatory nationality laws. It outlines the relevant provisions of international instruments, including those relating specifically to the nationality of married women, and pertinent provisions in the human rights treaties. It gives greatest attention to the Convention on the Elimination of All Forms of Discrimination against Women, 1979.

This section also surveys national and international case law on discrimination in nationality laws. It considers how human rights norms relating to freedom of movement, freedom of information, family rights and other rights have been increasingly applied to ensure the rights of family members to reside and work in the same State, regardless of their different nationalities. These cases can be drawn on in litigation in other jurisdictions to strengthen legal arguments against discrimination in nationality laws.

The section on "Alternative visions" puts forward approaches being adopted by States to avoid gender-based discrimination in the context of nationality. One approach is to avoid the problems caused by family members having different nationalities by making the acquisition of dual nationality easier. Here attention is drawn to the emerging approach in the European Union.

The final section outlines some of the obstacles to the effective application of international human rights law where nationality issues are concerned. It recommends measures for States and non-governmental organizations to ensure compliance with human rights standards, so that individuals do not suffer adverse consequences as a result of nationality laws that discriminate between women and men.

Nationals, citizens, stateless persons and refugees

Nationality signifies the legal relationship between an individual and a State. It not only provides individuals with a sense of belonging and security, but also creates a legal link between the individual and her State. Nationals are entitled to the protection of their State—which is of increasing significance in the globalizing world with its large-scale movements of people. International law makes clear that a State may provide its protection to a national who has suffered an international wrong while abroad. Thus, a State is entitled to provide its nationals abroad with consular assistance, and make a diplomatic claim for harm caused to its nationals which constitutes violations of international law. A State has a duty, in international law, to admit its nationals and allow them to reside in its territory. The unqualified right to hold the passport of the State is also a function of nationality.

In many cases, nationality is the legal basis for the exercise of citizenship. Although frequently used interchangeably with nationality, the term citizenship has a wider meaning, and

denotes a status bestowed on full members of a community.[1] In many countries, the full exercise of civil, political, economic, social and cultural rights is predicated on nationality. Nationality frequently determines whether individuals are entitled to participate fully in the political process, including through voting, and to exercise the right to work, the right to education and the right to health. The right to own land may also be contingent on nationality. It may also determine whether individuals may hold public office, or have access to the judicial system or public services, such as legal aid. As the Committee on the Elimination of Discrimination against Women noted in its General Recommendation 21 on Equality in Marriage and Family Relations, "nationality is critical to full participation in society".[2]

Those who lack the nationality of the State in which they reside are regarded as aliens. Aliens may incur a range of legal consequences which have practical and personal disadvantages. The right of non-nationals to reside in the State in which they live is not absolute, but conditional. Non-nationals may also have limited access to the full range of citizenship rights. They may be denied the right to vote and to exercise other aspects of the right to political participation. They may have limited access to public office or the judicial system. Their enjoyment of the rights to work, freedom of movement or the full range of education, health, housing and social security rights and benefits may be more limited than that of nationals.[3]

Bestowal of nationality is an attribute of State sovereignty and, within some constraints imposed by international law, each State is entitled to lay down its own rules governing the grant of its nationality, with the International Court of Justice stating in 1955 that "international law leaves it to each State to lay down the rules governing the grant of its own nationality".[4] Nationality laws are rarely simple or comprehensive, and their technical nature makes them inaccessible to many people. Moreover, movements of peoples across international borders frequently make the laws of more than one State applicable in the determination of a person's nationality. Inconsistency between, and lack of coordination of, nationality laws between and among States means that nationality may be uncertain or contested, causing hardship to the individuals concerned.

The determination of its nationals defines the State's self-identification, for example, as a homogeneous political entity, or as a State committed to multiculturalism. Ethnic conflicts over the last decade have demonstrated the violence, regional instability and personal insecurity that can be generated by claims for independent statehood defined by nationality in some sub-State entities.

Sovereign States closely guard their right under international law to determine the construction of their populations through their nationality laws, as well as through laws and policies on immigration which are closely connected to nationality laws. Just as there is no uniformity in nationality laws, the principles on which States base their criteria for immigration are also diverse. Exclusive nationality regimes, coupled with restrictive immigration laws and policies, which have been adopted by many States, make issues relating to nationality especially pertinent for the twenty-first century.

Individuals within States are categorized as nationals or non-nationals. Non-nationals within a State fall into subcategories, which include legal and illegal aliens, stateless persons, asylum-seekers and refugees. Important social and legal consequences flow from the location of a person in one of these categories, which are described below.

Nationals

International law requires only that there is a "genuine connection" between a person and the State for the bestowal of nationality. Although the criteria for such a "genuine connection" differ from country to country, the most commonly recognized are birth in the territory of the State, irrespective of the nationality of the parents (*jus soli*), or descent by birth to a national of the State or through ancestral claims (*jus sanguinis*). Some States favour one of these positions; most adopt a combination of the two.

Nationality of a State can also be acquired through naturalization. This is generally claimed through some link created subsequent to birth, such as residence in the State for a specified period of time, or the establishment of a permanent domicile in the State. In its *Advisory Opinion on Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* the Inter-American Court of Human Rights stated that naturalization is based on a "voluntary act aimed at establishing a relationship with any given political society, its culture, its way of life and its values".[5] The possibility of acquiring nationality through naturalization highlights the close relationship of the laws on nationality with those on immigration—with the rules on who will be granted entry into a State usually controlling who will be entitled to apply for, and ultimately attain, that State's nationality.

Multiple nationality

An individual may have dual nationality or even multiple nationalities. She may be a national by birth in a State which accords nationality to children born within its territory. At the same time she may hold the nationality of the State or States of her parents through descent. Dual nationality can be sought deliberately by individuals who seek to satisfy residency and other requirements for naturalization in a State, while, at the same time, retaining their nationality acquired through birth or by descent. Dual or multiple nationality has traditionally been viewed as

problematic by States because of the perceived potential for generating conflicting political loyalties.

Aliens/non-nationals

An alien is a person residing in a State other than that of her nationality. A legal alien has complied with all immigration requirements, with the appropriate documentation, while an illegal alien has not.

Stateless persons

Despite the legal vacuum to which a person without a nationality is consigned, it is possible to be born stateless. This may occur when a child is born to stateless parents, asylum-seekers or refugees. A person may be stateless if she is born outside the State or States of her parents' nationality where those States confer nationality on the basis of birth within their territory, or in a State which solely accords nationality by descent. A person may also become stateless by renouncing her own nationality by mistake, or even deliberately, in the hope, for example, that it will enhance her prospects of receiving asylum, or perhaps to avoid a criminal charge.

Large numbers of people may become stateless as a result of deliberate government action rescinding the nationality of a section of the population. This may be because of a policy to rid the State of peoples perceived to be undesirable. In some cases, States have rescinded the nationality of an entire ethnic group. Denationalized persons may be forced to leave, sometimes violently. For example, the removal of Zairian nationality from ethnic Tutsis in Zaire (now the Democratic Republic of the Congo) in 1996 contributed to internal conflict and wider warfare in the African Great Lakes region.

Statelessness may also be the consequence of the creation of a new State, or the dissolution of a State. For example, the creation of the State of Israel in 1948 rendered large numbers of Palestinians stateless. Indeed, in 1998, the United Nations High Commissioner for Refugees estimated that there were three million Palestinians who lacked effective nationality.[6] The dissolution of the Soviet Union brought Soviet citizenship to an end, and left some 287 million individuals with, or in need of, a new nationality.[7] Among the first tasks of the 15 successor States of the Soviet Union were the precise definition of their nationals and the development of new rules for the granting of nationality.

Not all persons living in the territory of a newly created State will be accorded the right to its nationality under its new laws. This is particularly the case where nationalism has been a factor in the break-up of the previous State. Thus, recent ethnic conflicts and communal violence resulting in the recognition of new States have created statelessness, or disputed citizenship for large numbers of people.

Mass expulsions of displaced persons who have not acquired the nationality of their State of residence also cause statelessness. Such people may have resided for many years as displaced persons, without acquiring the nationality of their State of residence. The instability generated by the presence of large numbers of residents without nationality and citizenship rights can also be a cause of conflict within a State. Even if non-national stateless persons are allowed to stay in their country of residence, denial of the other rights of citizenship may lower their quality of life and generate feelings of insecurity. Depending upon the nationality and immigration laws of other States, expelled people may have no right of entry or abode elsewhere.

Some people lack effective nationality and, despite being entitled to the nationality of a particular State, suffer the consequences of statelessness. Documentation, such as a passport, a birth certificate or a certificate of nationality by descent, is required to prove nationality. People whose births are not registered may be unable to document their nationality. Similarly, people whose documents have been lost or destroyed during war or in flight may be unable to demonstrate their nationality and be regarded by State authorities as illegal aliens or stateless. Documentation may be deliberately appropriated or destroyed as a means of control. For example, trafficked women typically have their passports and other documentation confiscated by unscrupulous pimps or employers. A national with a foreign wife may take possession of or destroy her documentation to assert control.

A stateless person falls outside the system that links an individual to State protection, and does not enjoy the security associated with nationality and citizenship. She lacks the documentation which allows her to cross international borders legally,[8] has no automatic right of residency in any State and has no access to the services provided by the State to its nationals.

Refugees

People who are outside their State of nationality may be able to claim refugee status under the United Nations Convention relating to the Status of Refugees, 1951 (Refugee Convention), and its 1967 Protocol.

A refugee is a person who cannot return to her own State because of a "well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion".[9] Refugee status invests an individual with the rights accorded by the Refugee Convention, but does not confer the nationality of the State of refuge on her. Refugees may live for many years in their State of refuge without acquiring its nationality. Legal determination of whether an individual meets the legal definition of refugee is frequently

a long and difficult process. Pending that determination, those claiming refugee status are relegated to the limbo status of asylum-seekers.

The nationality of married women

Because of its consequences in national and international law, nationality is critical for the full enjoyment of personal security. However, the nationality laws of many States disadvantage women. This chapter surveys three legal approaches which have posed particular problems in this context.

Married women's dependent nationality

Historically, many States adopted the patriarchal position that a woman's legal status is acquired through her relationship to a man—first her father and then her husband. Although the laws of most States provide that nationality is conferred through birth or descent, or a combination of these, a widely accepted principle—law in most States at the beginning of the twentieth century[10]—was that of dependent nationality, or the unity of nationality of spouses. The result of the application of this principle was that a woman who married a foreigner automatically acquired the nationality of her husband upon marriage. Usually this was accompanied by the loss of her own nationality. The rationale for the principle of dependent nationality derived from two assumptions: first, that all members of a family should have the same nationality and, secondly, that important decisions affecting the family would be made by the husband.

The assumption that all members of a family should have the same nationality was based on the view that nationality entailed loyalty to one's State of nationality. It was believed that if a married woman were to have a nationality different from that of her husband, her loyalties would be divided, and she might be placed in a conflictual and intolerable situation. This assumption was also linked to the idea of citizenship, which relates to a person's public identity: the relationship between an individual and the State. Loyalty to the State is the counterpart of the State's duty to protect its citizens. In many States, the assumption that a married woman's primary location is in the private sphere, within the home, and under the protection of her husband, has prevailed. Accordingly, her need for a separate public identity and legal relationship with a State is not taken into account.

In States where one of the primary obligations of citizenship is military service, a male definition of citizenship is reinforced. In an international order in which conflict between States was deemed inevitable, permitting spouses to maintain separate nationalities was regarded as unacceptable since conflict between the couple's different States would cause divided loyalties within the household. Potential for familial disruption on these grounds was resolved in favour of family unity, with the wife being required to assume her husband's nationality. Allowing her to hold dual nationality, predicating that loyalty was owed by her to her State of nationality, as well as that of her husband, was not regarded as a viable option. Where the assumption that important family decisions would be made by the husband was concerned, the prevailing view was that the choice of the couple's place of abode would be made by the husband. Generally, this would be in his State of nationality.

The consequences of the application of the principle of dependent nationality can be extreme. By virtue of its application, a woman who marries a foreigner, but who chooses to remain in her own country, will be deprived of her nationality of origin, as well as access to the civil, political, economic, social and cultural rights which depend on that nationality. She will become an alien in the place where she has always resided, and lose all the privileges of citizenship. Where citizenship is restricted for national women (for example where they lack legal capacity to hold or inherit land), the position of the now non-national married woman is one of total dependence upon her (foreign) spouse. Her identity and sense of belonging to her State of origin, and of being important to that State, are compromised and disregarded because of her reduced status within the place she has always called home. Moreover, the State's lack of interest in her potential contribution to its well-being is indicated by its willingness to make her assume a new nationality.

The application of the principle of dependent nationality also means that if the husband acquires a new nationality, for example, through naturalization, a decision that his wife may not have been involved in, or consulted about, her nationality will change with his. Similarly, if the husband loses his nationality, so does the wife. In addition, if the laws of the husband's State of nationality stipulate that a wife retains his nationality during the marriage only, its termination, through death or divorce, will end her entitlement to her husband's nationality and the protection that it may provide. A woman in these circumstances will be able to revert to her nationality of origin only if the laws of that State so allow. If they do not, she will be stateless, and may find that she is unable to return to her own country to live. Even if she is able to do so, she may find herself without the rights which flow from nationality.

Laws that entrench the principle of dependent nationality disempower married women by depriving them of any choice about their nationality. As such, these laws, and married women's nationality in general, have long attracted the attention of feminist activists. They were among one of the first issues that women sought to place

Convention on the Nationality of Married Women, 1957

3 (1): Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.

(2): Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

on the international legal agenda, alongside other issues of social and political inequality affecting women, including the right to vote. In their recent article, "Remembering Chrystal MacMillan: Women's equality and nationality in international law", Karen Knop and Christine Chinkin describe how Chrystal MacMillan chaired a women's demonstration on married women's nationality at The Hague in the Netherlands, and led a deputation from that demonstration to the Hague Codification Conference held there in 1930.[11]

The establishment of the League of Nations after the First World War provided an arena at the international level in which to seek change. Much as a result of women's dissatisfaction with the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law which was formulated at the Codification Conference, an intensive campaign was mounted within the League for the elaboration of an international treaty on nationality law that would give married women the same rights as men to retain and change their nationality.[12] The campaign involved coordinated protests, including a worldwide telegram campaign, and submissions to League bodies. Within the League, a Consultative Committee on Nationality was created, but no treaty on women's nationality was adopted.

The Inter-American Commission on Women, created in 1928, had greater success in this context. Charged by the resolution which created it with "the preparation of juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political quality of women" in the Americas, the Commission presented a draft convention on nationality to that Conference.[13] This draft became the 1933 Montevideo Convention on Nationality of Women, which provides that there should be no distinction based on sex with respect to nationality. The work of that Commission also led to the inclusion in the Montevideo Convention on Nationality, also of 1933, of the principle that neither matrimony nor its dissolution should affect the nationality of the husband, the wife or their children.

The creation of the United Nations provided another forum in which to address the issue of women's nationality. The United Nations Commission on the Status of Women, established in 1946 to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, civil and educational fields and to make recommendations on urgent problems requiring immediate attention in the field of human rights,[14] identified this area as one of its priority concerns. Responses to the annual Questionnaire on the Legal Status and Treatment of Women circulated by the Commission revealed that in most countries laws were based on the principle of dependent nationality and the assumption that married women would automatically take their husband's nationality. A series of reports, prepared by the Commission's Secretariat based on these responses, also showed that discrimination against women was frequently a consequence of conflicts between laws relating to nationality, marriage and divorce. Inspired by the 1948 Universal Declaration of Human Rights, which proclaims both the idea of non-discrimination and the right to a nationality, the Commission elaborated the Convention on the Nationality of Married Women. Adopted in 1957, this Convention establishes the independent nationality of a married woman.

Activities within the League of Nations, as well as the adoption of the Inter-American and United Nations Conventions on women's nationality, led many States to change their laws so that women had some autonomy in this area. However, not all States changed their laws, and some newly independent States maintained the limitations upon the retention of a separate nationality by married women that had existed under colonial laws. These laws had

Montevideo Convention on the Nationality of Women, 1933

There shall be no distinction based on sex as regards nationality, in their legislation or in their practice.

Montevideo Convention on Nationality, 1933

Neither matrimony nor its dissolution affects the nationality of the husband or wife or of their children.

been introduced originally by colonial Powers with common law systems (such as the United Kingdom) and by those with civil law systems (such as Belgium and France). Despite their origins, amendment of these laws was resisted, frequently reflecting the national or cultural subordination of women. Indeed, the laws of a number of States still preclude married women from retaining their nationality, and maintaining a separate nationality from that of their husbands.

Retention of a separate nationality by married women

Reforms that entitle married women to retain their independent nationality do not resolve all disadvantages which women who marry foreigners face. Such reforms do not address immigration and residency rights for foreign spouses, issues relating to the nationality of children and legal restrictions imposed on alien spouses, such as limitations on the right to work, access to credit and land ownership.

Entitling married women to retain their own nationality means that it is possible for different members of a family to hold different nationalities and thereby enjoy differing rights of entry into and residency in States, as well as varying access to State services and benefits.

Increasingly, States have restricted entry to foreigners through stringent immigration controls and visa requirements. In many cases, these restrictions have created legal obstacles for women married to foreigners who wish to live with their husbands in their State of nationality, and for women married to foreigners who wish to live in their husband's State. There may be even greater complications if the couple wishes to live in a State where neither of them has nationality, such as the State in which both or either are migrant workers.

In some States, the foreign spouse of a national can acquire the latter's nationality only through naturalization, usually after a specified period of residence. Other conditions such as language proficiency and proof of commitment to the State may also be imposed.

Women who marry foreign men and who do not acquire their husband's nationality may be especially vulnerable to abuse because of the inherent powerlessness of their position. For example, a woman may have entered the State at the request of her husband for the very purpose of marriage, perhaps as a "mail-order bride". This growing phenomenon leads hundreds of thousands of women to leave their countries each year to marry men with whom they have made contact through international matchmaking services, more and more via the Internet.[15] Women who have entered as low-paid, temporary migrant workers, typically domestic servants dependent upon their employers, women seeking asylum and those who have been trafficked, may also marry men in their country of residence and be unaware that marriage does not automatically grant nationality or unqualified residency rights in their husbands' States. Problems may arise where a young girl, whose family has emigrated, is sent back to her family's country of origin for the purpose of marriage. She may be below the legal age for marriage in the country in which she has grown up, have no knowledge of the intended spouse, his family or their country, and no independent means of economic support.

Such marriages can be successful, but the opposite can also be true. Women who have married in these scenarios tend to be without resources and, accordingly, totally dependent upon their husbands—economically, socially and sometimes linguistically. The husband may look down on the wife because she is a foreigner, despise her for her dependence upon him and seek to humiliate her in a variety of ways. The husband may also have assumed responsibility for the legal requirements for her residency and, ultimately, acquisition of nationality, but in fact may have failed to do so. The barriers he is able to create between his foreign wife and the outside world can isolate her and subject her to his control.

Women, who have no unconditional right to stay in a country if they leave their marriage to a national before satisfying the requirements for permanent residency or naturalization, are dependent upon the marital relationship and can be vulnerable to violence and exploitation. They may be wary of reporting domestic violence or other abuse to the authorities for fear of deportation. This will be particularly so if they lack documentation or their documents are no longer in their possession. Seeking assistance may expose such women to abuse or contempt from the authorities. Authorities may also be reluctant to offer assistance since the marital relationship is regarded as private and consensual. Another risk is of the husband terminating the marriage (for example if his economic situation worsens and he sees his wife as a financial burden, or in the case of a mail-order bride perhaps intending to acquire a new bride through the same means) before a wife has gained her right of residency.

In all these situations, whether the woman's own State of nationality will accord her legal or practical assistance depends upon many factors. These include whether she has retained that nationality and has the documents in her possession testifying to that nationality; whether the State regards marriage (even to a foreigner) as a private matter that does not warrant intervention even when it is needed; and the relations between the States in question.

Problems can also occur where a married couple of different nationalities lives, or seeks to live, in the State of the wife's nationality. The laws of a number of countries impose longer residency requirements on a husband

who wishes to acquire the nationality of his wife than on a wife to acquire that of her husband. Indeed, the laws of some countries make it impossible for the husband to become a national of his wife's State. Many States also maintain laws which make it harder for the spouses or fiancés of women nationals than the spouses or fiancées of male nationals to enter and reside in the country. In these cases although the legal impact falls upon the foreign man, the restrictions are based on discriminatory attitudes based on stereotypical expectations—that a wife should follow her husband and that a married couple should live together in the husband's State of nationality.

The couple may choose to live together in the wife's State of nationality. However, if a non-national husband is subsequently deported for some wrongdoing, his wife faces such dilemmas as going with him to a country of which she is not a national, separation or family break-up. Authorities within her own State may be unsympathetic to requests to allow her husband to remain, deeming it to be her marital duty to follow him to his State, regardless of whether she has any ties there, can speak the language, or of the dislocation to her life that such a move inevitably entails.

In many of these situations, gender-based discrimination interlocks with other forms of discrimination including that based on race, ethnicity, caste and

Example of reservation to article 9: Algeria

The Government of the People's Democratic Republic of Algeria wishes to express its reservations concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality Code and the Algerian Family Code. The Algerian Nationality Code allows a child to take the nationality of the mother only when:

—The father is either unknown or stateless;

—The child is born in Algeria to an Algerian mother and a foreign father who was born in Algeria;

—The child is born in Algeria to an Algerian mother and a foreign father who was not born on Algerian territory, under article 26 of the Algerian Nationality Code, providing the Ministry of Justice does not object.

It is frequently assumed that male immigrants will seek work in the paid workforce, and may thereby increase local unemployment by taking the available jobs, or become a burden upon the State if unemployed. At the same time, there may be a notion that it is men who should determine the proper constitution of the public realm—the workforce, the market, religious congregations and the security forces—and that the entry of foreign men to join their wives will dilute the national identity and may subvert the national interest. These assumptions often lead to a reluctance to allow such men to immigrate or acquire nationality.

In contrast, a foreign woman entering a State to marry a male national

Nationality of children

Although the laws of most States now entitle a woman to maintain her independent nationality upon marriage, many States retain laws that discriminate between women and men with respect to the nationality of their children, particularly in the area of acquisition of nationality by descent. Most legal regimes that provide for nationality by descent accord the nationality of the father on his children, irrespective of the nationality of his spouse. It is less usual for such regimes to devolve the nationality of a woman married to a foreigner on her children automatically. In many States, nationality through descent from