



A Comparative Study of Post-Marriage Nationality of Women in Legal Systems of Different Countries

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Received 11 February 2015; accepted 14 March 2015
Published online 1 April 2015

Abstract

In the nineteenth century a school known as “The Unity System of Couples Nationality” stated the idea that women should acquire the nationality of their husbands after marriage. In other words, the nationality of men should be imposed on women. However, in the 20th century, a movement known as feminism emerged which led to the formation of a school named “System of Nationality Independence”. This school advocated the separation of marriage and nationality and believed that women’s nationality should not change following marriage. The aforementioned legal schools have had different manifestations in the positive laws of different countries and sometimes it is hard to classify them into a single legal school. The legal systems of countries can be classified into two groups: legal systems advocating the imposition of husbands’ nationality on wives; legal systems opposing the imposition of husbands’ nationality on wives.

Keywords: Nationality, Marriage, Legal systems

Introduction

The emphasis on the notion of nationality started when borderlines introduced the notion of independent government to the world. Since then governments have tried to introduce their nationals so as to reinforce their sense of dominance. Nationality is a combination of political, legal and spiritual relations that create a link between a person and a government. The nationality with which a child is born is called “primary nationality”. Primary nationality continues over the person’s life unless it is changed intentionally or unintentionally. As a man and woman with the same nationality might marry each other, a woman and a man with two different nationalities may also enter into marriage. The issue of marriage between a man and a woman with two different nationalities has always led to the question that whether it is necessary to impose the nationality of one on another or whether they are free to live together with different nationalities. Another question is: if the married life calls for the unity of nationality, is it necessary to provide legal facilities so that one can acquire the nationality of another government by asking for the nationality of that desired government? Some scholars believe that family is a single unit and therefore in order to ensure the unity of family the couples involved in it have to have a single nationality. Hence, they impose husband’s nationality to the wife. On the other hand,

feminists oppose the imposition of men's nationality on women and stress the equality of rights for men and women. As a result, it is very important to study the nationality of a woman who marries a foreign man because the national legislation of the destination country might impose man's nationality on the woman or it might give the woman the right to choose her husband's nationality. It might also believe in the independence of nationality of women and men. There are different viewpoints on this issue and different legislations have approached it with different rules and regulations. These differences are addressed in the following.

1. Legal Systems Advocating the Imposition of Husband's Nationality on the Wife

Prior to the 20th century and since the beginning of the 21st century, jurists have always stressed the issue of nationality and have stated that marital relationships cannot be ruled by more than one national law. Hence, it is necessary to ensure unity of nationality by any possible means. However, this rule applies to a country that applies the national couples law to personal affairs. Therefore, in countries that apply the residence rule to the personal affairs, unity of nationality has no practical use (Azimzadeh & Khosravi, 2009).

The advantage of unity of nationality is that the rights and duties of couples are defined and interpreted in one legal system because in many countries, personal affairs are under the influence of national law and therefore if the husband and wife are under the influence of two different rules contradictory obligations are imposed on them and the whole family is troubled. It can even ruin the married life of these couples. In spite of this advantage, there are different disadvantages to this system.

Firstly, following marriage, the woman is not free to select her new nationality and the new

nationality is imposed on her sometimes without her consent. As a result, the woman might refuse to marry a foreign person or enters into an informal relationship with the man. Secondly, from the demographic policies point of view, this theory leaves a negative effect on the population of nationals of a country especially in countries with negative population growth. The reason is that when the nationality of a foreign man is imposed on a woman, the population of women and their children in the country declines. However, the rate of marriage of national men with foreign women is very low because men immigrate more than women. Therefore, the probability of marriage of foreign men with national women is higher than marriage of foreign women with national men. Thirdly, when the government admits the nationality of foreigners who request the nationality of a country because of their love for their mates, but do not have any interest in the destination country, it is considered a national threat to the security of the country. The same also applies to women who lose their homeland nationality because of marriage (Badaqi, 2004).

There are different viewpoints on the legal source of the post-marriage change in women's nationality.

1. Women will can change the nationality: Advocates of this viewpoint believe that a woman accepts the nationality of her husband because she wants to do so. At the time of marriage the woman knows that her husband has the nationality of another country and therefore accepts the nationality of her husband with awareness and understanding. Hence, the primary nationality of the man is transferred to the woman and not the subsequent nationality of the man that might result from the marriage. The woman is also aware of the nationality at the time of marriage. There are

criticisms on this viewpoint as the critics believe that this reasoning is not strong. In fact, the opponents argue that if a woman accepts the nationality of her husband by her own will, she should have the privilege to deny it too. However, this is not true and a woman cannot deny the nationality by any means. Advocates of this theory argue that when a woman accepts a man she is indirectly accepting his nationality too. Therefore, they believe an imaginary will is involved in this process. However, this reasoning can be opposed by saying that free will only exists when you can express it and therefore it cannot have an imaginary existence.

2. Change of woman's nationality due to the man's dominance: Advocates of this viewpoint believe that as man's dominance plays an important role in marital life and as the man is the head of the family, therefore the nationality of man is imposed on the woman because of man's priority. There are also numerous criticisms on this theory and the opponents believe that by talking about man's dominance over the woman or a lack of such dominance we are in fact entering the realm of private law, but nationality is one of the concepts of general law. Moreover, if the husband's dominance is the requirement, therefore his dominance should also apply to the changes made in his subsequent nationalities (Nazif, 2009). However, the change of nationality because of marriage occurs at the time of signing the marriage accord.
3. Change of woman's nationality as a result of marriage: Dr. Nasiri believes that the change in a woman's nationality is neither deliberate nor unintentional. It also does not result from the dominance

of her husband. He believes that the change of nationality is "the result of signing the marriage agreement". In other words, governments that require the change in the woman's nationality after marriage consider it a result of marriage. That is to say, when a woman gets married, she accepts the marriage institution as it is established in her husband's country. Evidently, a woman who gets married with her own consent is automatically accepting the natural or inevitable consequences of the marriage including the imposition of her husband's nationality on her. She in fact accepts all of the legal effects of the marriage. By accepting this reasoning the ineffectiveness of any subsequent changes to the husband's nationality is also explained (Arafnia, 2012).

4. Change of woman's nationality at the request of the legislator: In this theory, the husband's nationality is imposed on the wife because the legislator of the country dictates it to protect the political and national interests of the country. That is to say, the legislator of every country predicts and sets some conditions for marriage between foreigners and local nationals to protect the national interests of the country. The notions and topics of private law and marriage law cannot be extended to the issue of nationality. In order to protect political interests, every family should be ruled by one nationality. Without aiming to humiliate one of the mates or violate the equality of rights, the legislator decides to transfer the husband's nationality to the wife to protect the unity of nationality in families (Madani, 2008). Hence, in this view, nationality is a concept that is independent of the notion of marriage

and its imposition or lack of imposition is determined by governments. As a result, a government might decide to impose the nationality of the husband of the wife, but another government might refuse to do it.

Legal systems that believe in the unity of nationality for couples, make a distinction between the case in which a foreigner woman wants to marry a man of local nationality and the case in which a woman of local nationality wants to marry a foreigner man. Concerning women's nationality, legal systems have provided four classifications that are discussed in the following.

A) In this legal system, which is known as the "relative independence system", when a foreign woman marries a local man, the husband's nationality is imposed on the wife regardless of the law in the woman's homeland. In other words, the foreign woman automatically earns the nationality of the local man. Moreover, after the husband's nationality is imposed on the woman (and even after the marriage agreement is terminated) the woman still has her former husband's nationality unless she asks for cancellation of the nationality and revival of her primary nationality after termination of the marriage within the appropriate legal framework.

However, when a local woman marries a foreign man the rules governing the husband's country are applied. Hence, if the law ruling the husband's country imposes husband's nationality on the woman, the woman loses her primary nationality (Nasiri, 2007). In other words, when a local woman marries a foreigner man, loses her primary nationality only on the condition that she earns the nationality of her husband. Such a woman will continue to live with the

nationality of her husband and can only acquire her primary nationality after termination of the marriage. Therefore, such a system applies the "relative independence of nationality" principle to its local women.

B) In this legal system, at the time of imposing nationality the rule governing the woman's homeland is applied and at the time of revoking the nationality the rule governing the man's homeland is applied. That is to say, when a foreign woman marries a local man, she only earns her husband's nationality on the condition that she gives up on her own nationality as a result of their marriage. In that case, the woman earns the nationality of her husband, and as she lets go of her own primary nationality the nationality of her husband is imposed on her. In the legal systems that follow this principle, the husband's nationality is imposed on the wife only if the woman loses her primary nationality because of the marriage. In other words, in this group of legal systems, the rule governing the woman's country is implemented when it is necessary to impose the husband's nationality on the woman.

The main philosophy behind this method is to prevent statelessness of the woman. That is to say, if a woman loses her primary nationality due to the marriage and she also fails to earn the nationality of her husband, she remains stateless. Another philosophy behind this principle is to prevent "dual nationality" as a result of positive contradiction of laws because if the husband's nationality is imposed on the wife and the woman's homeland also still considers her among its nationals, then the woman has dual nationality.

In such systems, when a national woman marries a foreigner man, she only loses her

nationality on the condition that she earns the nationality of her husband and informs the government of her homeland of the change in her nationality through legal formal procedures (Hemmat, 2011).

C) In this legal system, the rules governing the woman's homeland are used to impose nationality. When a foreign woman marries a local man, she earns the nationality of her husband provided that she gives up on her primary nationality as a result of her marriage.

This legal system is basically and principally similar to the system explained in paragraph (B) in this assumption. However, the difference between this legal system and the one explained in paragraph (B) is that in the system explained in paragraph (B) when a foreign woman marries a local man but keeps her nationality, she is able to earn the nationality of her husband after marriage and on some specific condition. However, in the legal systems explained in paragraph (C) there is no law on this situation and the woman keeps her primary nationality. The reason is that these legal systems do not recognize dual nationality by which the woman keeps her primary nationality and also earns her husband's nationality at the same time.

However, when a local woman marries a foreign man she has the right to reject her primary nationality. A local woman who marries a foreign man keeps her primary nationality unless she wants to terminate it. The woman is granted with the unconditional right to reject her primary nationality and if a woman decides to this she has to inform her homeland government through legal formal procedures. In this type of legal systems, when a local woman marries a foreign man, the woman is still

considered a national by her homeland country regardless of the rules governing the man's country. Therefore, the only factor that can deprive the woman of her primary nationality is her own rejection of her nationality and her request for asking her husband's nationality. This group of legal systems does not apply the principle of "unity of nationality in family" when the woman is a national and the man is a foreigner (Ibid).

D) In these legal systems the foreign woman earns the nationality of the man's country only if she meets the residence condition or their marriage agreement lasts for a specific period of time. In such systems, when a local woman marries a foreign man, she can give up on her nationality if she resides in another country. In other words, this woman is granted the "right to reject her primary nationality" by only on the condition that the couple live in a foreign country together (Raeesi, 2011).

2. Legal Systems Opposing the Imposition of Husband's Nationality on the Wife

In the discussions of women's rights the most prominent school that advocates revival of women's rights is the "feminism school". Feminism is a word that refers to "the cult of spreading women's rights and roles in the society". In general, it can be said that theories of feminism result from a series of studies on women which implicitly or explicitly propose a general widespread intellectual system of the fundamental characteristics of women's social life. These theories have critical and active approaches that benefit women and try to make a better world for women. These theories hold that a better world for women makes a better world for the whole humanity.

Analysis of different manifestations of “discrimination by gender” reveals that one of the most important examples of this form of discrimination is “discrimination on the grounds of nationality”. Discrimination on the grounds of nationality is an explicit form of discrimination that explicitly grants privileges to men that are not granted to women and deprives women of those benefits. With the advancements of this school and the intellectual attempts made in different societies, the issue of women’s independence has attracted widespread attention since the early 20th century. Consequently, due to the numerous efforts and requests by women and movements advocating women’s rights a number of governments gave complete freedom to women and granted them equal rights as men. Therefore, they also made changes to their laws on family and couples nationality (Ebadi, 2006).

According to this theory, a woman can marry a man with a nationality different than hers without having to accept the man’s nationality after the marriage. Hence, it is said that at the time of marriage the woman only falls in love with the man and not his nationality. As a result, the marriage has no effect on the couple’s nationality and especially the woman’s nationality. Therefore, the woman’s nationality is not changed automatically by the marriage. However, in order to support family and unity of family, facilities are provided to the couple so that each of them can choose the nationality of the other mate voluntarily.

The advantage of the absolute independence system is that it allows women marry foreign men without having worries about the imposition of the husband’s nationality on them. Moreover, marriage of a local with a foreigner does not make any changes to the country’s population too. However, in spite of the aforementioned advantages, this system also has disadvantages. For example, in this system a single legal system does not rule the family and

the family’s order might be disturbed at any time. Moreover, the probability of dual nationality for the children intensifies if the children’s nationality system is affected by their maternal or paternal side or both sides. In addition, when the relations between two countries reach a critical point or a war starts, limitations are imposed on foreign residents in the involved countries. The constraints can undermine the unity of families and considerably increase the chances of disagreement on the rules and regulations affecting couples (Mehrpour, 2011).

Although the similarity between all these legal systems lies in the fact that they do not impose the husband’s nationality on the wife, they can be classified into three major groups.

- A) In this group of legal systems which are known as the “absolute independence of nationality” systems, when a foreign woman marries a local man, she does not acquire the nationality of her husband. In addition, when a local woman marries a foreign man, she does not lose her primary nationality¹. In this approach, feminism calls for equality of men and women concerning the issue of nationality. Therefore, it completely separates marriage from nationality and as a result marriage has no effect on nationality of people. This approach leads to the negation of unity of nationality of couples. As a result, each of the mates enters into the marriage and lives with his/her mate with their own primary nationality.
- B) In this legal system, when a foreign woman marries a local man, she does

¹ Department of Economic and Social Affairs of United Nations, "Nationality of Married Women", New York, United Nations Publication, 2006., p.14

not automatically acquire her husband's nationality but she can earn through a requestor through brief paperwork (Imani Naeeni et al, 2011). Moreover, when a local woman marries a foreign man, she only loses her primary nationality on the condition that she rejects it.

In these absolute legal systems, the teachings and principles of feminism as well as the idea of equal rights for men and women govern the concept of nationality. Accordingly, any effect of marriage on nationality is rejected and the key factor in this process is the will and determination of women to select their nationality without having to accept a nationality that is imposed on them through marriage. In this group of legal systems, in the case of mixed marriage, which does not require unity of nationality for couples, the woman (either local or foreigner) is allowed to keep her primary nationality. This applies to a foreign woman who marries a local man and a local woman who marries a foreign man.

C) In this legal system, a special and privileged procedure for acquiring nationality is used. The "special and privileged procedure" for acquiring nationality is a procedure in which a foreign woman who marries a local from a country running these legal systems has to meet some criteria similar to the criteria for other foreigners (e.g. residing in the destination country) to be able to earn the nationality of her husband. In other words, she should reside in the target country for a while after earning her husband's nationality. She also has to

meet other criteria that are explained in details and fully with the nationality laws of these legal systems.

The third system is also classified into four different sub-categories.

1. When some of the criteria for acquiring nationality are applied to the person and the residence time is also reduced

In some countries that run this legal system, the foreign woman who wants to marry a local man should meet some criteria such as the criteria for other foreigners to be able to acquire the nationality. However, some criteria and conditions including the residence condition are exceptions and the residence period is reduced for the woman (Al Kajbaf, 2010).

2. When all of the criteria for acquiring nationality are applied to the person and the residence time is also reduced

In some countries that run this legal system, a foreign woman who wants to marry a local man should meet all of the conditions such as the conditions for other foreigners to be able to acquire the nationality. The only exception is the residence period, which is reduced for this woman.

3. When the person is obliged to meet the residence criterion and have an understanding of the destination country's official language

In countries following this principle, a foreign woman that marries a local man should meet the residence criterion and have good knowledge of the destination country's official language in order to be able to acquire the desired nationality (Saljuqi, 2009).

4. When the person is obliged to meet the residence criterion to earn the nationality

In some countries, a foreign woman who wants to marry a local man should only meet the residence criterion to be able to acquire her husband's nationality (Kar, 1999).

Conclusion

Among the aforementioned legal systems, the fairest system that complies with the fundamentals and basics of human rights is the legal system in which the husband's nationality is not imposed on the woman if a foreign woman marries a local man. In this system, the woman can acquire the nationality of her husband by making a request or going through brief paperwork. Moreover, in this system, if a local woman marries a foreign man, the woman is granted with the right to reject her primary nationality. This system not only stresses the independence of marriage from nationality and rejects any gender discrimination between women and men, but also preserves the woman's nationality after her marriage to a foreign man. In addition, in order to protect the unity of family, this system grants the woman the right to reject her primary nationality and acquire her husband's nationality.

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