

50 YEARS OF AUSTRALIAN CITIZENSHIP

THE UNITED NATIONS AND CITIZENSHIP

Citizenship is the principle that governs relations between the State and its members. In his 1949 monograph, "Citizenship and Social Class", T.H Marshall defined citizenship as "a status bestowed on full members of a community" and consisting of three elements - civil, political and social. For him, the civil element comprised the rights necessary for individual freedom - liberty of the person, freedom of speech, thought, the right to own property, to conclude valid contracts, and the right to justice. The political element incorporated the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. The social element tracked a spectrum from the right to share to the full in the social heritage to the right to live the life of a civilized being according to the standards prevailing in society.

Commentators since Marshall have expanded the notion of citizenship to include enjoyment of economic and cultural rights, as well as a set of practices that constitute individuals as competent members of a community. They have also posited that citizenship stands for the autonomy, self-legislation, and the sense of civic solidarity that members of a group extend to one another. As David Batstone and Eduardo Mendieta in their recent "The Good Citizen" state "[C]itizenship makes friends of enemies, compatriots of anonymous others".

In essence, citizenship is the idea of being a person, being able to participate and be involved in the various public institutions of the community. Those who do not have equal access to those institutions and enjoy fewer goods and resources are frequently dubbed "second class citizens". Amongst the groups who have fallen into this latter category are women. They have been denied many of the rights and privileges accorded to men. At the same time, they have been affected by the fact that the traditional conceptualization of citizenship excludes that which is stereotypically described as "female" - those activities and values often associated with women. In other words, they have argued that notions of citizenship accommodate only those persons who fulfil the attributes of "benchmark man" so aptly described by Margaret Thornton in her work.

It would be foolish to assert that, as we enter the 21st century, women enjoy full citizenship, particularly in light of examples such as Afghanistan, where women are treated

systematically as less than human, denied access to education, employment and health care and subjected to punishments on the basis of visibility. A survey of domestic laws worldwide will reveal that women are denied aspects of citizenship de jure, let alone de facto. In our country, for example, discrimination against women in connection with employment in the defence forces where combat duties are concerned remains lawful - it is of interest to reflect how frequently the capacity to fight for country is associated with full citizenship. However, the debates of last century concerning women's "personhood", or lack thereof, no longer take place. Through a process which started at the beginning of the twentieth century, gained momentum after the Second World War, and has steadily progressed since the beginning of the United Nations Decade for Women in 1975, women have gained access to various institutions in the public sphere which last century were exclusively the domain of men. Thus, nearly all States Members of the United Nations, and certainly most of the States parties to the Convention on the Elimination of All Forms of Discrimination against Women, have introduced legal provisions, in their constitutions or elsewhere, which grant women rights with regard to public life. In almost all countries which grant suffrage to their citizens, women now have the right to vote, while over two thirds of the States Members of the United Nations have granted women the right to be rewarded equally with men for their work outside the home. Women now occupy high level positions in international, regional, national and local decision-making bodies and they are now represented in the political class. Women's participation in education has increased, and where higher education is concerned, at a rate faster than men's.

A critical factor in this transformation has been the emergence of the idea of human rights, with its integral themes of non-discrimination and equality between women and men. Coupled with this has been the creation of intergovernmental organizations, particularly the United Nations, charged with the creation of international human rights standards and the oversight of their implementation. These standards, which are coined in a language understood by the powerful, have allowed the legitimate claims of women to be articulated with a moral, let alone legal, authority that other approaches lack. At the same time, these organizations have provided women's activists worldwide with a political "space" in which to claim rights to full citizenship.

The story of the international women's rights movement and its struggle for full citizenship for women through the space provided by international organizations is only now attracting attention. Carol Miller has documented the relationship of women to the League of Nations, while others, such as Georgina Ashworth, Nitza Berkovitch, Charlotte Bunch, Martha Chen, Felice Gaer, Johannes Morsink, and Sandra Whitworth have tracked their efforts to influence the United Nations and its related organizations. The

story has not finished, of course. Where this decade is concerned, the series of United Nations World Conferences, beginning with the 1992 Conference on Environment and Development, has expanded opportunities for the international women's movement to seek to transform citizenship to accommodate women's needs and demands. Results have been impressive and have included the acceptance of the need for gender sensitive justice at the international level, both within the framework of international crimes as outlined in the Statute of the International Criminal Court, and sex-discrimination at the national level, as revealed by the adoption by the Commission on the Status of Women of the optional protocol on the Convention on the Elimination of All Forms of Discrimination against Women in March this year.

Although not congruent with citizenship in its widest sense, nationality is one of its fundamental elements. Nationality not only provides individuals with a sense of belonging and security, but also entitles them to the protection of a state - which is of increasing importance in our globalizing world - and provides them with a legal basis for the exercise of many civil and political rights. Automatic residence is predicated on nationality, as is the right to a passport, and to benefit from diplomatic protection while abroad. In many cases, nationality governs the exercise of economic, social and cultural rights, including in regard to the right to work, the right to education or the right to health. It can also determine whether people can make use of public services, such as legal aid, participate in the political process, or exercise the right to political participation, and have access to the judicial system. As the Committee on the Elimination of Discrimination against Women notes in its General Recommendation 21 on Equality in Marriage and Family Relations, "[N]ationality is critical to full participation in society".

The quest for equality between women and men in regard to nationality has been an important focus of the international women's movement for almost a century. The International Law Association's Committee on Feminism and International Law has documented this quest in its 1998 preliminary report on "Women's Equality and Nationality in International Law". The end of World War I brought the issue to forefront, especially in the wake of the collapse of empires and the emergence of new states. Women's groups lobbied the League of Nations to include the principle of equality between husband and wife in its discussions of nationality in the framework of the 1930 Hague Conference for the Codification of International Law. The vibrant Latin American women's movement led to the establishment of the Interamerican Commission of Women (Comision de Interamericano Mujeres) in 1928, amongst the first order of business of which was the Montevideo Convention on the Nationality of Married Women, adopted in 1933, which provides that there should be no distinction based on sex in

relation to nationality.

Nationality was also amongst the first concerns of the United Nations Commission on the Status of Women, whose Questionnaire on the Legal Status and Treatment of Women revealed that in most countries nationality laws were based on the assumption that women who married would automatically take their husband's nationality. Inspired by the 1948 Universal Declaration of Human Rights, which proclaims both the right of non-discrimination and the right to a nationality, the Commission elaborated the 1957 Convention on the Nationality of Married Women, which proved controversial, with 47 votes in favour, 2 against, 24 absentions and many reservations. In essence, the rights conferred by this Convention are narrow, and limited to establishing the independent nationality of a married woman. The 1979 Convention on the Elimination of All Forms of Discrimination against Women, also prepared within the Commission on the Status of Women, goes much further in its article 9. This provides that States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure, in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband and that States parties shall grant women equal rights with men with respect to the nationality of their children.

163 States are now party to the Convention on the Elimination of All Forms of Discrimination against Women, and the wide acceptance of this treaty, as well as others, including the Convention on the Rights of the Child, which has attracted almost universal ratification, would suggest that questions relating to equality in nationality law are of historical interest only. However, the reservations and declarations lodged by States parties, including Algeria, Bahamas, Cyprus, Egypt, Fiji, France, Iraq, Jordan, Kuwait, Lebanon, Malaysia, Morocco, Tunisia and Turkey to article 9 of Convention on the Elimination of All Forms of Discrimination against Women, as well as the practices of those States which discriminate in the absence of reservations, testify to the fact that part of the future work of the United Nations must be the resolution of this important human problem.

The closing years of our millenium have witnessed large-scale population movements both within and between nation states. This has been a result of various factors, including threats to human security due to civil unrest, armed conflict, famine and environmental catastrophe. Legal, as well as illegal migration, including as a result of trafficking in women and children, has also been a factor. In addition, globalization, and the ease of modern travel, have provided a framework for human mobility. At the same time, during the last twenty years, several federal states have disintegrated, ethnic consciousness has risen, and

there has been increased communal conflict.

The movement of people and the profound changes in international relations that our world has experienced have again brought nationality to the forefront of international concern. In the 1997-98 "The State of the World's Refugees" the United Nations High Commissioner for Refugees highlighted the major situations of statelessness and disputed nationality world-wide, which she noted could be divided into two broad categories, those involving ethnic or minority groups which do not enjoy full or undisputed citizenship of the countries in which they live; and those associated with the dissolution of multinational or multi-ethnic federal states and the formulation of new political entities. Those affected include Russians resident in the Baltic States of Latvia and Estonia, the Roma of the Czech and Slovak Republics, the people of the Former Republic of Yugoslavia, the Crimean Tartars, the Kurds of Syria, the Palestinians, the Banyarwanda and Banyamulenge peoples of Eastern Zaire, the Rohingyas of Myanmar, ethnic Vietnamese and Chinese in Cambodia, ethnic Nepalis in Bhutan, the Biharis of Bangladesh, the Bidoons of Kuwait, and many others.

It is the right of the state to determine who are its citizens, but this right is subject to principles of international law, primary of which is the existence of a link between the individual and the state, which was explained by the International Court of Justice in 1955 in the Nottebohm Case as based on factors of birth, residency and descent. A stateless person does not necessarily meet the definition of a refugee, and thus may not benefit from the protection of the 1951 Convention relating to the Status of Refugees.

The 1954 and 1961 Conventions relating to the Status of Stateless Persons and on the Reduction of Statelessness provide some solutions for certain categories of stateless persons, with the former being designed to regulate the treatment of de jure stateless people not covered by the Refugee Convention, and the latter to reduce the number of stateless persons by addressing the problem at source. The 1961 Convention, thus, requires de jure stateless children to be granted nationality of the State party in which a parent had citizenship and attempts to avert cases of statelessness arising as a result of change of civil status, residence abroad or the voluntary renunciation of nationality. While not obliging them to grant nationality to any stateless persons who enter their territory, it also prohibits States parties from depriving people of nationality on racial, ethnic or religious or political grounds.

Commentators have pointed to the weaknesses in the international standards relating to statelessness, the very few States have accepted those Conventions and the absence of a body

to supervise or promote them. Recognizing the close connections between statelessness, human security, forced displacement and regional and international stability and security, the States Members of the United Nations encouraged UNHCR to adopt a more active role in this area in a General Assembly resolution in 1996.

As a result, UNHCR now trains its staff in this area, provides, in cooperation with other UN bodies, technical assistance to Governments, and has begun to collect information on the conditions of life and experiences of people who are stateless. At the same time, a text on nationality in relation to State succession, is being considered by the International Law Commission. The text is predicated on a human rights approach, emphasizing the right to nationality, non-discrimination and the goal of prevention, rather than reduction, of statelessness. Future work within the United Nations system generally is likely to be directed that statelessness is addressed at national level within the framework of human rights and humanitarian principles, the development of new legal standards, providing advice, technical assistance and training to governments, brokering bilateral agreements and reaffirming the principle of state responsibility in relation to citizenship rights.

Although all people can fall victim to statelessness, women have particular vulnerabilities in this regard, with these vulnerabilities increasingly evident with the feminization of labour migration . Nationality laws in numerous States still assume that a wife will acquire the nationality of her husband. A number provide for the withdrawal of her nationality, even in cases where she does not automatically acquire that of her husband. Several countries require the wife to relinquish her citizenship if she acquires that of her husband. Dissolution of marriage in these circumstances may leave her stateless. Nationality laws such as these also impact on children who may be rendered stateless if they lose their legal link with their mother's nationality. These laws are also in contradistinction to the Universal Declaration of Human Rights.

Discriminatory nationality laws such as these fall into what the ILA's Committee on Feminism and International Law has described as "the first generation equality issue of a woman's right to a nationality independent of her husband", a right traditionally postponed to the notion of the unity of spouses and the identification of the husband with that unity. While recognizing that difficulties still exist in this regard, this Committee suggests that concern has largely shifted to second generation issues, which affect a woman's capacity to pass nationality to her children or nationality or residency to her husband or provide for stricter treatment for those seeking nationality through their mothers. Litigation in countries as diverse as Botswana, Nepal, Canada, Bangladesh, Italy, Pakistan and Sri Lanka, Zambia and Zimbabwe has addressed the congruence of

provisions which limit the capacity of women, but not men, with constitutional provisions guaranteeing equality. Important in the resolution of these cases has been international legal instruments, including the Convention on the Elimination of All Forms of Discrimination against Women, and the work of international human rights treaty bodies, including CEDAW and the Human Rights Committee in explaining the meaning of non-discrimination in the enjoyment of the right to nationality.

In the landmark case of Unity Dow v the Attorney General of Botswana, Ms. Dow persuaded the Court of Appeal of Botswana that nationality laws which allowed only a father or an unmarried mother to pass Botswana citizenship to his or her children born in Botswana was in contravention to the Constitution which addressed non-discrimination and equality between women and men in its preamble. In 1997, however, Sayeeda Rahman Malkani was unsuccessful in her argument before the Bangladesh Supreme Court that a law preventing Bangladeshi women from passing citizenship to children of a marriage between such women and foreigners was in contradistinction to the constitutional guarantee of equality.

Both Unity Dow and Sayeeda Rahman Malkani married foreigners. In our modern world, this is no longer an unusual phenomenon, and it will no doubt become a commonplace in the next millenium. Indeed, we may be called upon to determine the rights and responsibilities of the "global" rather than national, citizen, a project which is being undertaken by UNESCO and which is accommodated in the rubric of "governance" by UNDP. For a significant number of States, however, the idea of women's full rights with regard to nationality - and through that to citizenship - remains an uncomfortable one. In their reservations and declarations to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, States parties speak of the "prejudicial" nature of the acquisition of more than one nationality, and the fact that it is "customary" for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality. It is of interest, of course, that the supposed "mischief" created by dual nationality is resolved at the expense of women's human rights and through the encouragement of a pattern of behaviour based on stereotypical gender roles.

Within the Council of Europe, the modern reality of multiple nationalities in families is being addressed both through the 1993 Second protocol to the 1963 Convention on the Reduction of Cases of Multiple Nationality and the 1997 European Convention on Nationality, but this is work which remains for the United Nations. Much of the domestic litigation relating to this area has been informed by the Convention on the Elimination of All Forms of Discrimination against Women and has frequently been as a result

of the activities of women's groups who have adopted the international human rights framework as part of their "citizenship". For example, I have known Unity Dow for almost fifteen years, and have worked with her at international level as she has sought to reclaim the language of rights for women. I saw Shirin Aumeeruddy-Cziffra, the complainant in the Mauritian Women's Case one of the earliest cases submitted to the UN Human Rights Committee, most recently in the negotiations which led to the adoption of the optional protocol to the Convention.

Over the last one hundred years, and particularly since the foundation of the United Nations, we have seen the transformation of woman into citizen. Much remains to be done, and particularly in the area of nationality, where discrimination has the potential to produce much personal anguish and compromise the enjoyment of citizenship in its widest sense. Within the context of the United Nations it is now time for this discrimination to be addressed comprehensively, be it within the framework of the Commissions on Human Rights or the Status of Women or the International Law Commission. Here we can expect intense scrutiny from civil society and results which may rival those of the Rome Conference on the ICC.

Jane Connors
Chief, Women's Rights Unit
Division for the Advancement of Women
United Nations, NY, NY.

NOTE: The views expressed are those of the author and do not necessarily represent those of the United Nations

