UNIFORMITY OF LAW IN RESPECT TO NATIONALITY

The Commission of Jurists appointed by the Council of the League of Nations in December last to prepare a list of matters upon which international agreement is urgently desirable and to report the same to the Council, with suggested plans of procedure by which such agreement can be secured in the most effective and practicable manner, is reported to have agreed upon a brief list of subjects at its recent meeting at Geneva, and that among these are the subjects of double nationality and no nationality. The selection of these subjects as among the first to be taken up in the task of international "codification," the pursuit of which may now be said to have been entered upon by the League of Nations, is most appropriate, for it may be doubted whether there is any matter upon which uniformity of legislation and practice among the different states of the world is more needed at the present time.

As is well known, the acquisition and loss of nationality are matters which are hardly regulated at all by international law,[1] at least there are no general international conventions dealing with the subject, although under modern conditions it has become one of increasing international importance. With a few exceptions, such as are found in the recent so-called minorities treaties between the Allied and Associated Powers, on the one hand, and certain states whose populations contain important racial or linguistic minorities, on the other,[2] the whole matter is regulated by the municipal legislation of the different states. In consequence, there has been conflicting legislation and practice, frequently resulting in the anomalous situation in which some individuals find themselves "doubly blessed" with the nationality of two states, and, indeed, cases are not inconceivable where an individual may find himself in possession of three or four nationalities.[3] Others, less fortunate, find themselves *heimathlos—sans patrie*—without any nationality at all, and therefore without allegiance or protection, and this through no crime or fault of their own. How these anomalous and regrettable situations are created in practice is well known to students of international law and it is not necessary to explain them here.[4] They have frequently been produc-

[1] Compare in this connection the observations of the Permanent Court of International Justice in the case of the Tunisian and Moroccan Nationality decrees, Collection of Advisory Opinions, Series B, No. 4, at p. 24.

[2] As to these treaty provisions, see Fauchille, *Traité de Droit Int. Public.* t. I, pp. 864 ff. There are also a few bilateral treaties which contain prescriptions relative to the acquisition and loss of nationality. See, for example, the treaty of June 7, 1920, between Austria and Czecho-Slovakia with regard to citizenship and the protection of minorities. League of Nations Treaty Series, 1921, Vol. 3, No. 3, p. 210. [3] Willoughby, this JOURNAL, *1*: 924.

[4] They are discussed by Borchard, Diplomatic Protection of Citizens Abroad, Secs. 11, 253 ff. and 262; by Cockburn, Nationality, pp. 183 ff.; by Lehr, *La Nationalité dans les Principaux Etats du Globe* (see index); by Moore, Digest of Int. Law, III, 518 ff.; by Oppenheim, Int. Law, I, 481 ff. and by Weiss, *Droit International Privé*, I, Ch. 3, and in his report on *Le conflit de lois en Matière de Nationalité*, 13 *Annuaire de l'Institut de Droit International* (1894–95), pp. 162 ff. M. Weiss enumerates eight different ways by which an individual may, in consequence of the conflicting laws in force among different states, acquire double nationality. The number has been increased in late years by new legislation in various states.

tive of irritating diplomatic controversies, they have furnished puzzling and difficult questions for national and international tribunals [5] and, worse still, they have brought hardship and injustice to innocent persons who were in no way responsible for the unhappy situation to which they were reduced.

Naturally, the condition of the individual who possesses the nationality of two or more states is less likely to result in hardship and injustice than is that of the *heimathlos*, for while there is uncertainty as to which state is entitled to his allegiance, he is at least entitled to the protection of one of them, and usually the conflict is amicably resolved by mutual diplomatic concession. But the lot of the unfortunate who is left without any state whose protection he can invoke, is more distressing, and ordinarily he cannot be extricated from it by mutual concession through the diplomatic channel. His plight is worse than that of the alien enemy under the ancient law since the latter might possess rights under treaties between his country and that in which he was domiciled, but the *heimathlos*, being without a country, can have no rights under treaties, because treaties confer rights only upon the nationals of the contracting parties.

While it should be the aim of all modern legislation to avoid the possibility of such cases, the tendency of recent legislation has been rather to increase than to diminish them. Among examples of such legislation may be mentioned the so-called Delbrück law of Germany of 1913 under which Germans naturalized abroad, might, under certain conditions, retain their German nationality; [6] the American Act of 1907 under which naturalized American citizens who live abroad a certain number of years will be presumed to have lost their American citizenship; and, especially, the Act of September 22, 1922, which produces cases both of double nationality and of statelessness. Under the latter act American women who marry foreigners do not lose their American nationality unless they formally renounce it before a court having jurisdiction over the naturalization of aliens. But by the laws of many countries they would acquire the nationality of their husbands. They would therefore possess a double nationality.[7] But what is more serious, under the operation of the American law, many foreign women who marry American husbands will find themselves without any nationality at all. There are said to be twenty-four countries [8] whose laws provide that a woman who

[5] See the cases referred to by Borchard, *op. cit.*, p. 589. n. 1–2, and by Moore, International Arbitrations, Vol. III, Ch. LIV.

[6] English text in this JOURNAL, *8*: 217 ff. Comment on the same by Flournoy, 8 *ibid.*, 477 ff.; by Scott, 9 *ibid.*, 939, and by Hill, 12 *ibid.*, 356. By the Treaty of Versailles, the effect of the Delbrück law was nullified. By article 278 Germany undertook to recognize any new nationality which had been or might in the future be acquired by her nationals under the laws of the Allied and Associated Powers, and to regard such persons as having, in consequence, severed "in all respects" their allegiance to Germany.

[7] There are said to be more than thirty countries whose laws would produce this effect. Flournoy, "The New Married Women's Citizenship Law," 33 Yale Law Journal, p. 167.

[8] They are listed in 49 Clunet, *Journal du Droit Int.* (1922), pp. 618–619, in the *Revue de Droit International Privé* (Darras and de Lapradelle), Vol. 16 (1920), pp. 273–74, and by Cyril D. Hill, this JOURNAL, *18*: 728 (1924).

marries a foreigner shall lose her nationality and acquire that of her husband. But foreign women who marry American husbands do not under the Act of September 22, 1922, thereby acquire American citizenship. Consequently all such women would be stateless. Fortunately, the laws of a few countries safeguard their women against such consequences by providing that where they marry foreigners without acquiring the nationality of the husband they retain their original nationality, notwithstanding their marriage to aliens. Among such countries are Belgium, France, Italy, Japan, and about a dozen others. The writer happens to know of a number of instances in which French women who have married American husbands since September 22, 1922, have thus been saved from being reduced to the *heimathlos* status. But English women, as well as those of other countries than those referred to above, who have married Americans since that date have become stateless, and cases have not been lacking. The effect of such legislation as the Act of 1922 is to penalize international marriages by denationalizing the foreign spouse of an American husband and rendering it difficult for him to bring her to the United States under our present immigration laws. It can hardly be assumed that the American women who demanded the enactment of the law, intended that it should produce such result either upon the husband or the wife; on the contrary, it was their main idea that the nationality of women should not be affected by their marriage; that citizenship should neither be acquired nor lost by the mere fact of marriage, except in the case of American women who marry aliens ineligible to American citizenship, that is, aliens who do not belong to the African or white races. In the latter case they lose their American citizenship.

It thus happens that the effect of the law is not only to denationalize the women of many foreign countries who marry American husbands, but it equally denationalizes American women who marry husbands not belonging to one or the other of the two favored races, unless by the law of the husband's country they acquire his nationality. In any case, they lose their American nationality. This provision of the law is therefore discriminatory against American women who marry Hindu, Japanese, or Chinese husbands, and it is inconsistent with the avowed basic theory of the Act, namely, that the citizenship of a married woman should be separate and distinct from that of her husband. The point was also raised in Congress at the time of the discussion of the bill, whether consistency did not require a provision that an American man who married an alien woman ineligible to citizenship should not thereby lose his American citizenship.[9]

Whatever the merits or demerits of the general principle upon which the Act of 1922 is based, the effect will be to multiply the unfortunate cases of double nationality and of statelessness, by putting American legislation and practice into conflict with that of the rest of the world.

[9] Flournoy, 33 Yale Law Journal 163, citing the Cong. Record of 1922, pp. 9063, 9057 and 9064.

Foreign women marrying American citizens and who thereby become stateless are unable to obtain passports to accompany their husbands to the United States for the purpose of living with them or to fulfill the year's residence requirement in order to become naturalized. Furthermore, possible injustice will result to the alien wives of American citizens in those countries which have discriminatory laws against aliens in respect to the inheritance or holding of property. Thus the alien wife of an American citizen, who succeeds in gaining admission to the United States for the purpose of residing here with her husband, may find herself in an unfortunate situation as regards her property in case her husband should die before she becomes naturalized. In many countries the law dealing with property of spouses, as well as with their mutual rights and duties in other matters, is that of their nationality. If the nationality of the wife is different from that of the husband, confusion and possibly injustice will be inevitable.

The regrettable situation resulting from the diverse and conflicting legislation of states in respect to the acquisition and loss of nationality and the desirability of international agreement, with a view to securing uniformity of legislation and practice, has long occupied the attention of international jurists. As far back as 1880 the Institute of International Law, always the pioneer and leader in the movement for the advancement of international law, took up the matter at its session at Oxford that year, continued its consideration thereof at its sessions at Geneva in 1892, at Paris in 1894, at Cambridge in 1895, and finally at its meeting at Venice in 1896 it adopted a series of rules which were proposed as recommendations to the various governments of the world for their consideration in formulating domestic legislation and in concluding diplomatic conventions on the subject of nationality.[10] Had these recommendations been followed by the community of states and their legislation been altered to conform thereto, many of the sources of the present evils would have been removed. The proposed rules, however, did not deal with the situation of double nationality or of statelessness resulting from marriage. It should also be observed that the proposal of the Institute looked to the solution of the problem, not through international agreement, but through concurrent municipal legislation of the body of states.

In 1890 an Italian senator proposed the calling of an international conference to formulate a convention defining the modes by which nationality may be acquired and lost.[11] The further intensification of the evils of the situation by the enactment of the American law of September 22, 1922, has provoked a renewal of discussion and called forth additional proposals for the solution of the problem.

At the Conference of the International Law Association at Buenos Aires

[10] Text in 15 *Annuaire de l'Institut de Droit International*, 241 ff., and in Resolutions of the Institute of International Law, 133-135.

[11] De Lapradelle, *De la Nationalité d'Origine*, p. 390.

in 1922 a resolution was adopted affirming that "it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, so far as possible, the right to choose her own nationality." [12] This proposal dealt with only one aspect of the general problem, although it is the one upon which international agreement is most urgently needed. In the course of the discussion of the proposal, the desirability of a uniform rule, preferably in the form of an international convention, was emphasized by various speakers.[13]

At the conference of the same association at London the following year the proposal was again discussed by various jurists, notably by the late Dr. Ernest J. Schuster, who read a learned paper on "The Effect of Marriage on Nationality." While he favored the proposed change in the law relative to the nationality of married women, he thought the more desirable mode of procedure was for every state to introduce the change into its own law and then conclude conventions with other states embodying the rule thus adopted. To attempt a solution of the problem by means of a general convention, he asserted, would be "a hopeless undertaking." [14] Other speakers, however, did not share his view regarding the hopelessness of this procedure, but maintained that the problem was one which could be most effectively and expeditiously solved by means of a general convention.[15] At the same conference there was explained the draft of an international convention recently adopted by the International Woman Suffrage Alliance embodying certain basic principles relative to the effect of marriage on the nationality of women, and which was proposed for the consideration of the different governments of the world, as a means of preventing "the hardships arising from conflicts of law." [16] More recently still, a resolution was introduced in the United States House of Representatives by the author of the Act of September 22, 1922, authorizing the President to call a conference of the governments of the world to formulate and conclude a convention regulating the nationality of married women.[17]

These proposals indicate an increasing conviction as to the necessity of a uniform rule among the states of the world in respect to the acquisition and loss of nationality, and especially as to the effect of marriage upon the nationality of women. Two modes of procedure through which this uniformity may be achieved have been proposed. The first is through the separate concurrent municipal legislation of states; the second is through the conclusion of a general international convention, formulated either by a

[12] Report of the Thirty-first Conference, Vol. I, p. 257.

[13] See especially the remarks of Messrs. Le Grand, Kuhn, and Babinski (*ibid.*, pp. 244 ff.), and the address of Señor Garcia entitled: *El Problema de la Doble Nacionalidad* (*ibid.*, pp. 493 ff.).

[14] Report of the Thirty-second Conference (1923), p. 23.

[15] See especially the remarks of Mr. J. Arthur Barratt, K. C., *ibid.*, p. 35.

[16] Text *ibid.*, pp. 45–47, and this JOURNAL, *18*: 734.

[17] Cong. Record, March 17, 1924, p. 4520.

diplomatic conference or by a smaller commission of jurists and experts appointed for that specific purpose.

In our judgment, the first mode of procedure has little to commend it, and if attempted is likely to result in failure. The evils of the present situation, so far as they involve the double nationality or statelessness of women, are largely the result of the legislation of a single state which, by adopting a rule radically different from that followed in all other countries, has brought confusion and chaos into the law, and it is too much to expect that the rest of the world can be induced to alter its legislation to bring it into harmony with that of the United States. The effort in Great Britain to do so has already failed. The situation has acquired an international character and can be dealt with effectively only by international agreement through the diplomatic channel, or through Conference, and not through the independent concurrent municipal legislation of fifty or sixty states. Considering the great progress achieved through conventional agreement in recent years in the direction of uniformity of law in respect to various other matters, the contention that the attempt to reach an agreement on the subject of nationality through a diplomatic conference would be a "hopeless undertaking," hardly seems well-founded. It is to be hoped that the Commission of Jurists having now decided that the question of nationality is one of those concerning which international regulation is most desirable, will be able to propose a practicable and acceptable plan of procedure by which agreement can be most expeditiously arrived at.

Whatever differences of opinion there may be as to the proper procedure, there ought to be no dissent as to the desirability of agreement. As a Dutch jurist has justly remarked, the present situation in respect to the law of nationality is "incontestably serious" and that "it is unworthy of a community of civilized states that there should exist a condition in which, by the play of diverse laws, certain individuals should possess more than one nationality and others be left without any at all,"[18] and, he might have added, a condition for which the victims themselves are in no sense responsible. Modern law ought to insure that every man, woman, and child shall possess the nationality of some state (and but one), to which he shall owe allegiance and from which he shall be entitled to protection,[19] unless by his own negligent or criminal conduct he has forfeited the right thereto, and any state which deliberately enacts legislation the effect of which is to denationalize any

[18] Bles, "*Un Droit Uniforme sur la Nationalité*," 48 *Rev. de Droit Int. et de Lég. Comparée* (1921), p. 514. Compare also the remarks of Professor Valery regarding the "almost scandalous conditions" which were revealed during the late war, resulting from the diversity and conflicts of municipal legislation in respect to nationality. "*Des Influences probables de la Guerre Mondiale sur l'Avenir du Droit International Privé*," 15 *Rev. de Droit Int. Privé* (1919), pp. 1 ff.

[19] Compare in this sense Weiss, *Droit International Privé*, I, 20, and his article in 45 Clunet, p. 466.

class of its own or of foreign nationals, except as a punishment for their own misconduct, deprives them of one of the most fundamental rights which belongs to the individual in modern society.

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THE NEW COMMERCIAL TREATY WITH GERMANY

The Senate on February 10, 1925,[1] advised and consented to the ratification of the new Treaty of Friendship, Commerce and Consular Rights, which was signed at Washington, December 8, 1923. It expressly provides (Article XXX) that it shall not be construed to limit or restrict the rights, privileges and advantages granted to the nationals of either party under the Treaty of Berlin, concluded August 25, 1921.

The treaty is most comprehensive in character and its clauses have been elaborated with marked care and completeness, incorporating the latest commercial experience and the most recent legislative policies of both countries. It will, in all likelihood, serve as a model for similar treaties to be negotiated with other countries. Some of its clauses are novel in content, while others carry out familiar rules in more detailed and specific terms.

The treaty accords to the nationals of each of the high contracting parties not only rights of residence in the familiar terms of permission "to enter, travel and reside in the territories of the other," and to exercise liberty of conscience and freedom of worship, but also "to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference," and in connection therewith, to own and lease lands upon the same terms as nationals of the state of residence, subject to local laws (Article I). Equality between the nationals of both parties is also extended in the matter of payment of any internal charges or taxes, in addition to the usual clauses for freedom of access to the courts and of the enjoyment of protection and security for persons and property. The Senate, has, however, found it necessary to add a reservation to Article I, providing that the existing statutes of either country in relation to the immigration of aliens, or the right of either country to enact such statutes, shall not be affected.

In the provisions for the protection of real and personal property and the security of individual freedom from domiciliary visits and searches, we are on familiar ground. A national of one of the parties must within three years dispose of immovable property inherited within the territory of the other, if forbidden to hold land under provisions of local law, with a privilege of reasonably prolonging the period if circumstances demand (Article IV). This is, of course, intended to meet the rule still prevailing in some of our States, though the disability has been abolished in others (*e.g.*, New York).

[1] Cong. Record, 68th Cong., 2nd Sess., pp. 3482–3487. Ratifications had not been exchanged when the JOURNAL went to press.