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ALISON SYMINGTON

for

Dual Citizenship and Forced Marriages

DUAL CITIZENSHIP AND FORCED MARRIAGES

ALISON SYMINGTON

ABSTRACT

This paper examines the phenomenon of forced marriage and how the international law on diplomatic protection and domestic citizenship laws interact to prevent young women from receiving help because of their status as dual nationals. The evolution of international law and the rise of human rights are considered, the author contesting international rules preventing the United Kingdom from attempting to assist its nationals who are abducted to South Asia for the purposes of forced marriage. This paper demonstrates how in complex situations involving power, gender, culture and politics, law is better understood as a struggle over meaning than as a stated rule of practice.

I. INTRODUCTION

Citizenship is frequently approached as a theoretical or philosophical topic. Membership criteria and community boundaries are debated and revised with much enthusiasm. Citizenship, however, can have many tangible implications for individuals. In the most extreme situations, the physical and material well-being of people can depend on their citizenship status and the interactions between immigration and citizenship laws. In such circumstances, the theory of citizenship becomes critically important in a practical sense.

This paper presents one such situation, where the liberty and security of individuals is threatened but the interaction of citizenship laws and nationality rules prevents them from receiving help. Young women are abducted and forced into marriages while their status as dual nationals prevents authorities from helping them escape. This paper will connect the international law on diplomatic protection with domestic citizenship provisions in a way that accords with contemporary notions of justice and human rights in an attempt to problematize "rules" and develop an appreciation for the lived reality of legal theory.

In the first section of the paper, the problem of forced marriages within the British-Asian community will be discussed, as reported in the work of three non-governmental organizations active in women's rights protection. Section two will canvass the evolving treatment of dual citizenship and section three will discuss diplomatic protection of dual nationals. Four arguments regarding the international rules of diplomatic protection for dual nationals will be presented and an argument will be made for a reconceptualization of the meaning of citizenship and protection in accordance with contemporary values of individual human rights. Ultimately, the paper highlights the interactions of citizenship and nationality domestically and internationally, demonstrating the complexity and inadequacy of legal rules in the face of real life crises.

II. FORCED MARRIAGES

To explore issues of dual nationality, membership and protection, I will be using as a backdrop the abduction of women for the purpose of forced marriage, a situation of recent concern in Britain and South Asia. The British Home Office Minister for Community Relations, Mike O'Brien, has established a working group to investigate and make recommendations to tackle the issue. Much of the description presented in this paper is based on a submission made to the working group on behalf of INTERIGHTS (an international human rights law centre based in London, England), Ain o Salish Kendra [ASK] (a legal aid and human rights centre based in Dhaka, Bangladesh), Shirkat Gah (a women's resource centre based in Lahore, Pakistan) and research conducted by others in support of the work of these three Non Governmental Organisations. This example provides a challenging situation against which to test theoretical presumptions and to demonstrate the interplay of domestic policy and international law relating to citizenship and/or nationality. I will not be addressing constitutional, human rights, immigration, criminal or civil liability issues involved in this situation.

The term 'forced marriage' refers to any marriage conducted without the valid consent of both parties. Arranged marriages, on the other hand may be freely consented to by both parties and are not the subject of this paper. Forced marriage occurs within diverse cultures, traditions, nationalities and religions. Their incidence in the United Kingdom (U.K.) is highest amongst Hindu, Muslim and Sikh women in the Bangladeshi, Indian and Pakistani communities. It may involve coercion, mental abuse, intense family or social pressure, even physical violence, abduction, detention or murder. Although the victims can be either men or women, most reported cases involve young women or girls, and the woman's immediate family members (father, mother, or siblings) are usually directly responsible.

As explained in the submission to the working group, each situation is unique but typically a young woman or girl is induced by her immediate family to travel to South Asia, ostensibly for a holiday or to visit an ailing relative. She then fails to return to the U.K. as scheduled and loses contact with her friends, classmates or colleagues. On arrival in the receiving country, she is taken to her family's home, usually in a remote rural and often highly conservative area. Shortly thereafter she becomes aware that arrangements are being made for her marriage.

Frequently, the woman is held in effective detention; she may be prevented from leaving the home unescorted, have little access to any means of external communication, and her passport may be taken from her. Even if she were able to leave the house, her presence outside, areas where women rarely travel alone, would be highly conspicuous and entail a serious risk of violence; her lack of familiarity with the local language and society further impedes her independence. In extreme cases, she may be subjected to physical and/or mental abuse.

The woman may be able to smuggle out a message for help, to a friend, fianc_ or boyfriend in the U.K. This person may then contact the U.K. authorities (e.g. the Foreign and Commonwealth Office, Members of Parliament, police, a teacher) or U.K.-based voluntary organizations for assistance. They may then be referred to the British High Commission in Bangladesh or Pakistan, and in turn, to local human rights or women's organizations, or lawyers.⁷

The organizations that intervene may try to locate the woman, contact her, and arrange for her to reach the British High Commission. If the woman is able to reach the High Commission, she may receive help from the consular officials. She may be interviewed separately from her family, advised of her rights, and provided with access to a lawyer and may also be provided with shelter, emergency travel documents and a safe escort to the airport.

British newspapers and magazines have reported numerous personal accounts in recent years of British teenagers who have been deceived by their families, taken away from their homes and their friends and held against their wishes. Sometimes these women have suffered physical and mental violence including rape, and have been forced into marriage relationships without their consent. These stories may include heroic rescues, tales of murder or tell of young couples on the run from private detectives hired by their families. It is estimated that at least 1,000 young British-Asian women a year are forced into marriages against their wishes in the British Asian community of approximately one-million. Moreover, the British Foreign Office reports that it deals with "around two people forced into marriage every week." Lawyers, activists, women's groups, and government officials are attempting to find solutions.

How does this scenario provide a useful means to explore the meaning of membership and protection in

modern society? In particular, what does the practice of forced marriages tell us about dual citizenship? Many of the women abducted from Britain and forced into marriages have dual citizenship or nationality; they are considered to be both British citizens and citizens of the ancestral country of their family. Since they are British citizens, many of these women and the people trying to help them escape from their ordeal turn to the British authorities for assistance. Under international human rights law, Britain has an obligation to protect these women. In addition, under public international law, states have the right to the diplomatic protection of their nationals abroad. As mentioned above, the British High Commission has helped victims in various ways. The British government, however, has made it clear that there are limits to the consular protection that dual nationals enjoy while in the state of their second nationality and that the British Government cannot intervene officially in the event of a dispute. This inability or refusal to intervene is the "plot-twist" which will be explored in the remainder of this paper.

III. THE MEANING OF CITIZENSHIP: ONE'S LINK WITH THE STATE

Citizenship and nationality are closely connected legal concepts and although they are frequently used interchangeably, they refer to two different aspects of membership in a state. Nationality signifies membership in a state vis-a-vis other states and stresses the international protections afforded by membership. Citizenship, on the other hand, refers to full membership within the state, especially the possession of full political rights. One of the themes underlying the abduction of British-Asian women is the interrelationship of citizenship and nationality and the domestic and the international aspects of membership and protection. In this section, citizenship and nationality will be discussed as two expressions of the same status.

A common motif of the models and theories of citizenship and nationality is a bond of mutual loyalty between the citizen and the state or community. This bond has different dimensions. First, citizenship or nationality is the legal status of an individual's formal membership in a state. This membership is acquired and lost according to the state's rules and serves as the basis for the member's rights and duties. Second, citizenship is a crucial political status. In the modern international political system, geographic borders delimit territory and citizenship or nationality laws delimit people. In this world configuration, citizenship has significance far beyond formal legal membership; it involves loyalty to the state, its principles of government and its basic values. Third, citizenship imports a social and cultural meaning of membership in a national or cultural group. Finally, the psychological dimension of citizenship and nationality expresses a personal sense of belonging to the larger community or individual identification. Thus, the bond of citizenship can be complex and can have different meanings.

The link of an individual with a state is generally conceived of as a mutual relationship which confers rights and imposes obligations. Domestically, for example, citizenship allows a citizen to enjoy the protection of national laws and the benefits of state-funded social services. Citizens also have rights of political participation, such as voting. The citizen is subject to domestic laws and regulations, and may have duties to the state such as a duty to perform military service.

At the international level, nationality also delineates rights and obligations by linking individuals with states. For example, customary international law prohibits a state from excluding or deporting its nationals. States also issue passports to their nationals to facilitate foreign travel. In addition, states have a duty to admit their nationals and allow them to reside within their territory. This may include a duty to perform military service. The individual is also subject to the jurisdiction of their national state for criminal acts committed abroad.

Traditionally states are the subjects of public international law and individuals are protected under international law only by their link to a state through nationality. Nationality thereby grants the state standing to make a diplomatic claim of harm to one of its nationals. Thus diplomatic protection is a means to demand a remedy at international law when international standards for the treatment of foreign nationals have been violated. However, unlike human rights law, there is no obligation for a state to act - it protects its own interests entirely at its discretion.

These discretionary diplomatic protections and consular functions are governed by the common law, customary international law and several international treaties. As mentioned above, the state has a discretionary right to protect its citizens. The citizen, however, does not have a right to protection. The most fundamental aspect of diplomatic protection at the international level is the right for a state to bring a

claim to an international tribunal on behalf of one of its nationals whose rights have been violated by another state. Consular officials can also offer very important assistance to citizens abroad, such as contacting family and friends for assistance; arranging medical help; providing comfort and assisting victims of violence; providing assistance in dealing with a criminal justice system; assisting in the location of missing persons; helping locate abducted children and reuniting them with custodial parents; replacing passports; and legalizing documents.

The protection that a state can offer to its nationals is very important to British women who are abducted for the purposes of forced marriages. Without assistance in obtaining emergency travel documents, speaking to lawyers and non-governmental organizations, communicating with friends or family in Britain, as well as guidance on local practices and assistance in getting to the airport, these women may not be able to escape and return to Britain. Diplomatic and consular services are therefore critical to abducted women. This aspect of international protection provided by nationality may be limited for those who are considered nationals of more than one state, which can be both devastating and dangerous.

IV. MULTIPLE STATUSES

If citizenship and nationality imply full membership within a community and a special link to a state, what is dual or multiple nationality? Is the significance of this relationship undermined if it is not exclusive? How can the rights and duties associated with citizenship be implemented if they are owed to more than one state? Multiple citizenship has traditionally been strongly resisted and seen as antithetical to a sovereign state's interests. In recent years, however, there has been a growing tolerance of dual nationality and even, in some instances, a recognition that multiple citizenship can be consistent with state and individual interests. In this section I will examine the phenomenon of dual citizenship, briefly review the resistance of some states to dual nationality, and provide evidence of a growing tolerance towards multiple nationalities in the globalizing, post-national world of human rights where national boundaries are of diminishing importance and the rights of individuals, groups and transnational organizations are increasingly powerful.

Dual nationality arises when circumstances place an individual within the scope of the nationality law of two or more states. There are three primary situations in which individuals acquire more than one nationality:

- a) many gender-neutral citizenship laws permit the transmission of citizenship through both maternal and paternal filiations, thus children of mixed-nationality marriages may inherit both the mother's and the father's citizenship;
- b) children born to foreign parents *in jus soli* countries will have one citizenship attributed to them by *jus soli* and another *jus sanguinis*; and
- c) whenever the acquisition of a new citizenship (e.g. through naturalization) is not accompanied by renunciation or automatic expatriation of the original citizenship, the individual will have more than one citizenship.

Despite efforts to limit multiple nationalities, recent changes in nationality laws such as eliminating gender discrimination and removing requirements to renounce former citizenship when one naturalizes have increased the number of people of multiple nationalities. In the British-Asian forced marriage example, the dual citizenship status results from *jus soli* and *jus sanguinis* principles which each assign a different citizenship to the victim.

The outcome of each of these three situations is dictated by the nation's laws, which include principles of *jus soli* or *jus sanguinis* and naturalization procedures, which are affected by principles of international law such as equality and rules of nationality and state succession only indirectly. Thus citizenship is governed by national rules of the sovereign state and not dictated by international law. These national laws, however, interact with one another and have ramifications on the international plane.

The tribunal decisions and international conventions that will be discussed in the following sections address the international implications of nationality and do not evaluate domestic rules. The distinctions between

nationality and citizenship, international recognition and domestic status blur and in most instances one's nationality coincides with their citizenship. The interplay between citizenship and nationality is often overlooked. It should be acknowledged, however, that this interaction is the source of much of the complication and conflict associated with nationality and citizenship, particularly when individuals with dual or multiple statuses are involved.

1. Resistance to Multiple Nationalities

In his extensive 1961 work on dual nationality, Bar-Yaacov states that "[i]t is a widely held opinion that dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of individuals concerned." Indeed, the widely held antipathy to multiple citizenships or nationalities was evident in both

domestic legislation and international agreements. According to Canadian law in effect until 1977, for example, a Canadian citizen who acquired a foreign nationality automatically lost his or her Canadian citizenship instead of becoming a dual national. Similarly, the First Conference for Codification of International Law, held at The Hague in 1930, devoted a committee to issues of nationality whose purpose in codifying the law of nationality was to reduce, if not abolish, statelessness and multiple nationality.

As Bar-Yaacov suggests, the general aversion towards dual citizenship was rooted in a concern for preventing disputes between nations and avoiding a perception of conflicting loyalties. First, by invoking the protection of one state against the other, the dual national would prompt disputes between two nations. This possibility was seen as both an embarrassment to the state and as posing a danger to the international community as a whole. Second, multiple allegiances were seen as an impossibility. A dual national would have difficulty fulfilling his or her duties owed to two different states (e.g. military service) Thus it was feared that citizens would not fulfill their obligations at all. Furthermore, on a conceptual level, the idea that a person could have more than one nationality threatened the integrity of the principle of citizenship and state sovereignty. Multiple allegiances were also perceived as causing a psychological dilemma and hardship for the dual national themselves. Given the numerous aspects of citizenship, discussed above, it was inconceivable that an individual could have that close bond with more than one state, particularly in a world perpetually poised on the verge of war.

2. A Growing Tolerance

The aversion to dual nationality remains, but there is abundant evidence that it is becoming more acceptable. The international context has changed so that dual nationals are not perceived as posing a threat. The problem of dual nationality is now seen more as one of coordination. The opponents of dual nationality often exaggerate the complications of dual nationality, relying on a conception of a well-ordered international world which does not exist. Specific problems such as conflicting military obligations have been addressed by international agreements and bilateral treaties have been negotiated to resolve conflicts between states. Furthermore, it is increasingly recognized that multiple loyalties are neither unusual nor improper. Dual citizenship corresponds well with the multiple social and cultural identifications of many immigrants, internationally mobile persons and families of migrant ancestry. Dual citizenship provides formal recognition of the social fact of dual identification that is experienced by many citizens and accepting multiple nationalities is therefore seen as a positive development by some commentators.

The changing attitude can be found, for example, in European conventions relating to nationality. The 1963 *Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, as the name implies, sets out criteria to limit individuals to single nationalities in most situations, noting in the preamble that "cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe." The 1993 *Second Protocol* amending the Convention, however, is more accommodating of multiple citizenship. The preamble states:

Considering the large number of migrants who have settled permanently in the member States of the Council of Europe and the need to complete their integration, particularly in the case of second-generation migrants, in the host State, through the acquisition of the nationality of that State;

Considering the large number of mixed marriages in member States

and the need to facilitate acquisition by one spouse of the nationality of the other spouse and the acquisition by their children of the nationality of both parents, in order to encourage unity of nationality within the same family;

Considering that conservation of nationality of origin is an important factor in achieving these objectives, _

The Protocol then amends the provisions of the Convention to allow individuals to maintain more than one citizenship.

Finally, the 1997 *European Convention on Nationality* acknowledges the varied approaches of States to questions of multiple nationality and the desirability of finding appropriate solutions to the problems of coordination that result. Chapter V of the Convention explicitly permits multiple nationality and provides full rights to dual nationals. These successive conventions illustrate the general changing attitude towards dual and multiple citizenship. While for the most part each state's policy is considered an internal matter, increasingly multiple citizenship is being treated as a problem of international coordination which can be addressed without requiring the renunciation of other nationalities, as illustrated by recent European trends.

It is worth noting that the right to a nationality is now recognized as an international human right. It is considered both a basic right and a precursor to the exercise of other rights. While there is no human right to dual nationality nor even a human right to the nationality of one's choice, I argue that as the content of the right to a nationality is developed, the tolerance of multiple statuses will increase. For example, as international human rights law grows to protect an individual's interest in their attachment to a state and the rights inherent in this attachment, states will be less able to convincingly argue that divided loyalties or the inconveniences of coordinating multiples statuses are sufficient reason to deny someone citizenship, even if they are already a citizen of another state. In this way, the rise of international human rights principles is influencing both principles of public international law and traditional areas of sovereign state authority.

Ironically perhaps, the growing tolerance towards multiple nationalities which is seen as an advancement in a rights-based, globalized world, is used as a reason by the U.K. authorities to deny protection to British-Asian women. The tensions created by the increasing acceptance of dual nationalities, its importance for women forced into marriage and the uncertainty surrounding the "rules" of dual citizenship leads to a legal lacuna.

V. DIPLOMATIC PROTECTION

As mentioned above, diplomatic protection has long been considered a hallmark of nationality status and it has proved critical in rescuing women and girls abducted for the purposes of forcing them into marriages. Diplomatic protection also poses one of the key challenges to dual nationality - by invoking the protection of one state against the other, the dual national can cause embarrassment and conflicts between the two states. One solution to this conflict is to categorically refuse protection to nationals from events in a state in which they also hold nationality. This is the "rule" which the United Kingdom has referred to when pressed to aid British-Asia women abducted to Bangladesh and Pakistan for forced marriages. In a recent statement, the Under-Secretary of State for Foreign Affairs stated that the U.K. Government's position in such cases is based on international law, not domestic policy:

Dual nationality is not a policy of the British Government. It is not anything over which we even have any control. Under international law, we do not have any formal right of consular protection over people who have both British and another nationality in the country of their second nationality.

The rule of international law referred to in this statement is articulated in Article 4 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, which provides that: "A state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses."

This rule, however, is not universally applicable and its enforcement has led to two divergent schools of

thought on diplomatic protection and dual nationals. In this section I will discuss the legal basis and reasoning of each school of thought, demonstrating that the rule to which the Under-Secretary refers may not actually govern Britain's ability to intervene on behalf of abducted British-Asian citizens.

Article 4 of the *Nationality Convention* is referred to as "the rule of sovereign equality" or "the rule of state non-responsibility". It is based on the idea that the ordering of persons and assets is an aspect of the domestic jurisdiction of a state and integral to sovereignty and independence. Thus a second state interferes in the first state's domestic affairs if it offers diplomatic protection to a citizen of that state. Therefore, while a dual national is in one of their states of nationality, that nationality operates as if it was their only nationality. Furthermore, it is reasoned that if both nationalities are valid, to permit one state to represent the individual against the other state would give greater effect to the nationality of the claimant state, thus denying sovereign equality.

Article 4 of the *Nationality Convention* was believed to be a declaration of existing international law and a reflection of state practice, thus forming a rule of customary international law. The rule is reflected in case law, including *United States v. Great Britain* (the *Alexander* case) brought before the United States-British Claims Commission, and *United States v. Egypt* (the *Salem* case) brought under a 1931 special agreement between the two countries. The *Alexander* case was a claim for damages due to the occupation and injury of real property by United States Yankee forces during the American Civil War. Mr. Alexander was born in Kentucky of a Scottish father. The tribunal held that it had no jurisdiction to hear the claim, resting its opinion on the proposition that since he was a national of both countries, neither could represent him in a claim against the other. The court reasoned that to permit a different outcome in such cases would inevitably lead to international friction.

In the *Salem* case, the United States brought a claim for compensation for the treatment of Salem by the Egyptian authorities. Mr. Salem was born in Egypt and was later naturalized in the United States. In this case the tribunal also endorsed the principle of sovereign equality, noting that the practice of several governments is "that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such a person"

The second approach to diplomatic protection and dual nationals is that of dominant and effective nationality. The *Canevaro* case (*Italy v. Peru*) brought before the Permanent Court of Arbitration in 1912, is frequently cited as the leading case on this approach. The case involved a claim arising out of the Peruvian Government's non-payment of a number of cheques issued by it in 1800 to the firm of Jose Canevaro and Sons. The Tribunal held that although Rafael Canevaro was both a national of Italy and Peru by operation of their respective nationality laws, he was not entitled to an award. The panel investigated which nationality he actually used, giving effect to his Peruvian nationality for the purposes of diplomatic protection because that was his dominant nationality, particularly since he had run for Senate in Peru and had accepted the office of Consul General for the Netherlands. Accordingly, the tribunal concluded that the Peruvian Government was entitled to consider him a Peruvian national and therefore refused to recognize his Italian nationality for the purposes of having standing to bring a claim on his behalf. The international tribunal could not adjudicate the matter if Canevaro was a Peruvian national since the claim was then a matter internal to Peru. The dominant and effective approach to nationality then involves a contextual analysis and determination - the arbiter first accepts that by operation of domestic laws the individual has multiple nationalities and then privileges the dominant or effective nationality for the purposes of the state-to-state dispute.

Arbital tribunals and courts did not uniformly apply either principle in the earliest cases, but in the early 1900's the principle of state non-responsibility or sovereign equality became entrenched as a rule of international law. The 1955 decision of the International Court of Justice in *Nottebohm*, however, gave renewed vigour to the rule of dominant and effective nationality. In that case, Liechtenstein claimed, on behalf of Friedrich Nottebohm, that the Government of Guatemala acted in breach of their international obligations by arresting, detaining, expelling and refusing to readmit Nottebohm and in expropriating his property without compensation. These measures had been taken against him on the grounds that he was an enemy alien.

Nottebohm was a German national by birth who had moved to Guatemala where he carried on successful

business activities. During his years in Guatemala he went to Germany numerous times and also visited one of his brothers in Liechtenstein several times. In 1939, shortly after the outbreak of the Second World War, Nottebohm applied for naturalization by Liechtenstein, which was quickly granted after the residency requirements were waived. He then returned to Guatemala where he resumed his former business activities.

The International Court of Justice clearly endorsed the principle of effective nationality in its decision, which found Liechtenstein's claim on behalf of Nottebohm to be inadmissible:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on the stronger factual ties between the person concerned and one of the States whose nationality is involved.

In deciding whether Liechtenstein had standing to bring the claim, the Court asked the question, "[a]t the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?" The Court held that whereas Nottebohm had a long-standing and close connection with Guatemala, he had no such bond with Liechtenstein. For this reason, Guatemala was under no obligation at international law to recognize Liechtenstein's grant of nationality to Nottebohm or their claim on his behalf.

Subsequently, in the *Merg Claim*, decided by the United States-Italian Conciliation Commission in 1955, the Commission unanimously held that Mrs. Merge could not be considered to be dominantly a United States national because her family did not have its habitual residence or professional life established in the United States and rejected the petition of the Agent of the United States. The Commission reached its decision by reviewing the *Nationality Convention* and the decisions of international tribunals and legal literature, and concluding that there was no irreconcilable opposition between the principle of equality or state non-responsibility and that of dominant and effective nationality. The Commission suggested factual criteria for establishing effective nationality. In particular, they recognized that while habitual residence is an important criterion, the conduct of the individual in her economic, social, political, civic and family life are also indicative of her dominant and effective nationality.

Most recently, the Iran-United States Claims Tribunal endorsed the principle of dominant and effective nationality, relying heavily on the *Nottebohm* decision. The case of *Esphahanian v. Bank Tejarat* was brought by Nasser Esphahanian. He had Iranian nationality by birth but after attending college and serving in the military in the United States, became a naturalized U.S. citizen. Esphahanian's employment took him to the Middle-East in the 1970's at which time he conducted transactions at the Iranian's Bank. A cheque from the bank was dishonoured for insufficient funds and following efforts to receive payments from Iranian's Bank and its successor, Bank Tejarat, Esphahanian filed a claim before the Iran-United States Claims Tribunal. The Tribunal endorsed the principle of dominant and effective nationality.

The announcement of the decision was met with intense disapproval by the Iranian representatives at the Hague; Iran's representative on the panel refused to sign the opinion in *Esphahanian* and two companion cases.

The Tribunal dismissed the rule of state non-responsibility in *the Nationality Convention*, stressing both the age of the Convention and the limited number of signatories. They further reasoned that most disputes before the Tribunal involve private parties on one side and a government or government-controlled entity on the other side. Further, these disputes primarily address issues of municipal law and general principles of law. In such cases it is the rights of the claimant and not the nation that are at stake, thus the Tribunal concluded that "whatever the state of the law prior to 1945, the better rule at the time the Algiers Declarations were concluded and today is the rule of dominant and effective nationality." The Tribunal concluded its analysis with the following statement, clearly placing the issue of dual nationality within the modern context of individual rights:

The trend toward modification of the Hague Convention rule of non-responsibility by [a] search for the dominant and effective nationality is

scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals.

1. Diplomatic and Consular Assistance to Dual Nationals:

In the context of these decisions by international tribunals, was the Under-Secretary correct that Britain does not have an obligation at international law of consular protection for dual nationals who are in the country of their second nationality? In this section I will present four possible arguments regarding the status and applicability of this supposed rule. It is my contention that, given the cumulative effects of the evolving principles articulated in the arbitral precedents above, rules of public international law, and the rise of human rights in the contemporary world of declining state sovereignty, the United Kingdom has overstated the limitation they face as a result of the dual national status of these victims.

First, one could consider whether the rule exists in customary international law. The content of this rule could be either "if consular protection is sought by a person of dual nationality in the territory of the other State which regards him as its national, such protection may only be given either unofficially or in exceptional circumstances" or its formulation in Article 4 of the *Nationality Convention*. To establish an international custom, substantial uniformity of practice and *opinio juris* are required. State practice is the practice of the vast majority of states. *Opinio juris* is the demonstration by states that a practice is required by international law. A new norm cannot emerge without both practice and *opinio juris*; an existing norm does not die without the great majority of states engaging in both contrary practice and indicating they do not believe they are bound by the customary norm.

Although a survey of state practice is difficult to conduct, it is doubtful that sufficient uniform state practice exists to support the existence of a norm of customary international law that states cannot assist people who are dual nationals while they are in the state of their other nationality. While British practice suggests that the custom exists, United States and Canadian practice suggests that it does not. The Netherlands policy holds that Dutch diplomatic missions and consular posts may try to assist Dutch nationals who have also the nationality of the country where their interests have been damaged, although the second state will generally give precedence to its own nation's interests. Where such cases occur in the Netherlands, Dutch authorities will likewise give precedence to Dutch citizenship. Italy has extended assistance to individuals in other countries merely presumed to be dual nationals (e.g. through surnames typical of Italy or due to the parents' citizenship), citing human rights or humanitarian considerations as prompting their involvement.

Further, there is evidence of evolving state practice in special circumstances, such as child abduction, where states do offer diplomatic or consular assistance to their nationals in a country of second nationality. To this end, the Explanatory Report to the *European Convention on Nationality*, noting that the general rule is contained in Article 4 of the *Nationality Convention*, goes on to state:

...owing to the developments that have taken place in this area of public international law since 1930, in exceptional individual circumstances and while respecting the rules of international law, a State party may offer diplomatic or consular assistance or protection in favour of one of its nationals who simultaneously possesses another nationality, for example in cases of child abduction.

Abduction for the purposes of forced marriage, particularly in the case of girls or young women, is a situation arguably equivalent or analogous to child abduction and therefore this state practice is very relevant

Thus it is uncertain whether the rule that a state cannot offer protection to one of its citizens who is in the state of their second nationality has become customary international law. Furthermore, authors have suggested that while Article 4 of the *Nationality Convention* was believed to codify existing law at the time, there is reason to believe that it no longer represents the state of the law. Paul Weis, for example, states that:

[Article 4 of the *Nationality Convention*] was considered as "well established" in customary international law some time ago. It is, however, doubtful whether this is still correct today in view of the

practice of international tribunals to apply the concept of "effective link", i.e., to assume jurisdiction where the link with the claimant State is considered as the more effective as exemplified by the jurisprudence of the Italian Conciliation Commissions. In assessing the practice of international tribunals a number of factors have, however, to be taken into account such as the terms of reference of the tribunal or whether it is entitled to decide *ex aequo et bono*. Moreover, there is a difference between protection by the institution of judicial or arbitral proceedings and more informal methods of diplomatic protection. [footnotes omitted]

A second approach to justifying the rule as binding on the U.K. is through international treaty law with respect to Article 4 of the *Nationality Convention*. Ian Brownlie, a prominent international publicist, referred to the *Nationality Convention* as "a Convention of some interest, though limited importance", thus suggesting its diminished importance as a source of international treaty law. This Convention is seventy years old, and much has changed in public international law and citizenship law in those intervening years. Furthermore, very few states ratified or acceded to this treaty. Unless the article represents customary international law, the Convention's provisions create international law that binds only the contracting states. Although Great Britain and Pakistan have each ratified or acceded to the Convention, other law would arguably govern Britain's relations with countries who are not parties to the Convention.

A third approach is to consider the underlying justifications for this "rule", of which there are three: avoidance of international conflict, recognition of sovereign equality, and presumption of local remedy. Arguably, all three justifications are somewhat anachronistic and oversimplifications of the complexity of international realities; whatever merit they do hold, none applies to the case of a British-Asian woman abducted for the purpose of a forced marriage.

First, as a result of a changed international system, the threat of friction posed by dual nationals has diminished. In the majority of cases, an individual will have a manifestly stronger link with one of the states than the other; it is therefore difficult to imagine substantial international friction arising if the dominant country were to assist their national. Moreover, the idea that a serious conflict would arise because someone helped an abducted woman return to her home seems improbable. Anecdotal evidence suggests that the governments of Bangladesh and Pakistan have not objected to interventions on behalf of women and girls abducted for the purposes of forced marriage and they have not expressed any pre-emptive opposition to formal interventions. If international conflicts did arise from interventions by the state of dominant nationality in cases of dual nationals whose human rights are being violated, then this threat might be a valid justification for a rule to limit such interventions. It is now generally accepted however - particularly in these forced marriage cases - that the issue here is one of practical coordination, not of international security.

Secondly, respect for sovereign equality has traditionally included the obligation to refrain from interfering in relations between another state and its nationals. Sovereignty, however, can no longer be viewed as an absolute concept, in particular given the rise of human rights and supranational institutions. It is suggested that such practices as the refusal to allow expatriation and the acceptance of *jus sanguinis* municipal laws which create dual nationality without regard for an individual's connection to the state, are inconsistent with modern notions of human rights and expressions of sovereignty.

In the forced marriage situation, respect for sovereign equality is ostensibly inapplicable as both states have stated their opposition to "honour crimes" and have assumed obligations under international human rights law to protect the rights of women (especially under the *Convention on the Elimination of All Forms of Discrimination Against Women*). Assisting a victim of forced marriage to escape is consistent with the human rights obligations of both countries and therefore consistent with contemporary notions of a sovereign state's responsibilities. Furthermore, there is a fundamental distinction to be drawn between interfering with a state's direct treatment of one of its nationals according to local law and custom, and protecting a person from abuse by a non-state actor. Article 4 addresses the former, where the intervention is against the other country of nationality. In this situation, the state may be responsible for not protecting the woman but it is not the state that is confining her or forcing her into the marriage. The sovereign equality justification of refraining from interference in the relations between a state and its national loses

much of its weight given that the abuses are committed by a private party and not officially condoned by the government; the intervention, therefore, is not against the state but an attempt to work with that state or in the place of that state where they are unwilling or unable to act.

Based on the apparent inapplicability of these two underlying justifications for the rule, it would seem that Article 5 of the *Nationality Convention* would be more relevant to the factual concerns in cases of forced marriage than is Article 4, referred to by the British authorities. Article 5 relates to the status in a third country of a person having more than one nationality, stating that the person should be treated as if they only had one. Notably, in a third state there is no concern for international friction and sovereign equality and therefore no need to restrict a foreign state from intervening on behalf of its national. The logic of Article 5 corresponds to the need for a practical ordering of responsibilities and privileges between states while protecting the rights and interests of persons who find themselves in difficult situations while outside their home country. I would argue, therefore, that if this rule limiting the ability of a state to assist its national while they are in their second country of nationality ever did apply in this type of situation, surely it no longer does. The reason for the rule no longer exists, other rules exist which more accurately reflect the underlying concerns in this situation, and moreover, the states have more recently adopted human rights obligations that are in opposition to the supposed rule.

Finally, the assumption of the local remedies doctrine, which presumes that the claimant has an opportunity for redress within his or her own country and should not have the protection of two countries, ignores the reality of the claims processes and the availability of domestic assistance in some countries. While both Pakistan and Bangladesh have constitutional, human rights, criminal and civil law remedies relevant to forced marriage cases, the lack of implementation of the domestic law is a major obstacle to effective redress. There appear to have been few if any prosecutions against those responsible for forced or threatened forced marriages. In fact, some of the victims' families have filed false charges of kidnapping, abduction and even rape in the event of marriages genuinely consented to by these same women, evidently to prevent them from marrying the people they truly want to marry rather than those their families want them to marry. This demonstrates that the legal system has been used to further victimize rather than provide a remedy for the violence that these women have suffered. Women's access to justice, the incapacity of the law enforcement machinery, discriminatory personal laws, gender biases in judicial decision-making and resource limitations all severely limit the availability of local remedies to British-Asian abductees, making the assumption of a local remedy erroneous.

The presumption of a local remedy seems particularly inappropriate in the situation of abductions and forced marriages. If the United Kingdom cannot or will not assist the abducted women, and if the authorities in Pakistan or Bangladesh do not assist as is generally the case, the women are effectively left without any formal remedy. As discussed above, protection is a hallmark of citizenship. Refusing consular assistance is comparable to denying their British citizenship, designating them as non-citizens outside the circle of British membership. If the country in which they are physically present (their other country of nationality) does not help them either, the result is comparable to being stateless, a uniformly accepted undesirable status. The interaction of the domestic citizenship laws which create dual citizen status with the international law rules on diplomatic protection in effect convert them from members of two communities to "de facto stateless" people or members of no community. Surely this is not the result intended by international law.

Finally, in considering the ambiguous nature of the possible rule preventing the U.K. from actively intervening on behalf of abducted British-Asians, the values and conditions of the contemporary, post-national, human rights dominated international system are vital. The following comment from an article published in 1949 on the legal effects of dual nationality is telling:

If the time should come, through the operation of an International Bill of Rights or otherwise, that the right of fair treatment is regarded as the right of an individual and not merely the right of a state with which he is connected, the law as to dual nationality would undergo a striking change.

Arguably, this time has come. The rights of individuals are protected in national constitutions, domestic legislation, and regional and international human rights agreements. Individuals can bring their own claims

in order to vindicate their rights in both national courts and at the international level.

Once it is recognized that obligations are owed directly to individuals (rather than just to states) it is not possible to regard the treatment of a state's nationals as falling exclusively within domestic jurisdiction, rendering it unreviewable by the international community. Nationality and protection are no longer viewed as exclusively within the reserved state domain. Furthermore, protection is no longer merely a function of nationality. Rather, it falls under the umbrella of human rights, which requires that the international community protect the abused regardless of their nationality. The United Kingdom, Bangladesh and Pakistan have assumed obligations under law to protect women subjected to the threat or act of forced marriage. Furthermore, such cases implicate erga omnes obligations to uphold the rights to life, freedom from arbitrary detention and freedom from slavery, thus requiring the state to protect any person who is a victim of forced marriage.

The principle of dominant and effective nationality corresponds with modern principles of human rights since it ensures that a State can bring a claim on behalf of a national effectively connected with it, even if the claim is against a state of which the person is formally a national. This principle allows claims to be brought that would be barred by the sovereign equality principle.

Individuals who find themselves tied to two nations, often involuntarily, must not be deprived of their only opportunity for justice. Refusal to extend protection to these dual nationals is inconsistent with contemporary attempts to provide a minimum standard of protection for the human rights of individuals, irrespective of nationality.

It should be emphasized that the principle of effective nationality need not apply only to standing before international courts and arbitration tribunals, but also to the provision of basic consular and diplomatic assistance. States could use the effective nationality principle to decide whether to intervene on behalf of a dual national. If the individual has stronger ties to the other state then intervention may not be justified. When approached by friends of an abducted dual national for assistance, rather than immediately cautioning that officially the U.K. cannot intervene, the British officials should engage in a factual review of the woman's connection to Britain and to the country where she is being held (e.g. her residence, friends, school, work, language, etc.) in order to determine whether intervention is warranted based on her active or dominant nationality.

The growing acceptance of dual nationality and the rise of human rights is contributing to a redefinition of citizenship itself. The traditional dichotomy between citizens and aliens, whereby citizens are seen as having all rights of membership while non-citizens have none, no longer represents reality. Human rights do not depend on nationality and can therefore be perceived of as challenging state sovereignty and devaluing or redefining citizenship in the process. These trends suggest that notions of exclusivity in citizenship are declining, while citizenship is being reconceptualized as "a vehicle to facilitate civic participation and layered community identifications rather than an indication of jealous fealties."

VI. SOME OBSERVATIONS

When I began researching this issue, I was struck by the fact that while domestic laws, international rules of diplomatic intervention and international human rights law were implicated in any legal solution to this problem, the interactions between these bodies of law seemed to be poorly understood. I was unable to find any authorities on the order of priority when these bodies conflicted or analysis of how these bodies of law should be interpreted and applied with respect to their interrelationship. It seemed that each existed on an independent plane. However when faced with the facts of a specific girl or woman who had been abducted, taken to a foreign country, held against her will, emotionally and maybe physically or sexually abused, possibly forced into physical labour, forced into a marriage to which she did not consent and desperately attempting to get back to her home in the United Kingdom it was clear to me that these bodies of law did not exist independent of each other but were intimately related. Their interaction was in fact causing a tragic legal bottle-neck, where women who so obviously deserved assistance were suffering. Because of their legally defined membership in two communities these women found themselves without the protection or assistance of any community.

I was also struck by the tensions and uncertainty inherent in our rapidly globalizing world. The U.K. referred to rules of international law articulated in a different era, yet the international legal tradition gave some credence to these counter-intuitive principles. While human rights principles are at the forefront of international law and international relations, state sovereignty remains the bedrock principle of the rules organizing interactions between states. I could see the complexity of this evolution in the scholarly writings that I consulted and in the seemingly unresolvable conflicting imperatives.

I was also intrigued at how an international legal order based on sovereign equality and one based on an individual rights regime could be seen as complementary rather than in complete opposition to one another and how different bodies of law were in fact influencing each other and evolving together. The doctrine of dominant and effective nationality in international claims, for example, is constructing our understanding of citizenship while also complementing the evolving human rights jurisprudence on nationality. The international abduction and forced marriage scenario is interesting as a legal study specifically because the dilemma is situated at the cusp of these complex, interacting forces.

It should be clear from my legal analysis that I believe, as the Working Group argued, that the United Kingdom is not restricted by international rules from attempting to formally assist abducted women. The U.K. is under a duty to at least attempt, in cooperation with South Asian governments, to prevent abductions and forced marriages. When they do occur, the U.K. must offer whatever assistance is possible to the victim. I would caution, however, that this is one small piece in a complex puzzle and that the "solution" certainly does not end here. The rise of forced marriages brings to the fore questions of international and inter-community relations, gender and power, consent and family roles. Addressing forced marriage implicates issues much broader than diplomatic assistance, as discussed in this paper, although diplomatic assistance is essential in desperate cases and is in many ways a starting-point for developing a comprehensive approach to the problem.

Finally, I feel it is very important in a study such as this to address the cultural aspects of the issues raised and the politics of cross-cultural cooperation and intervention. As stated at the outset of this paper, the issue is abduction and forced marriage, not arranged marriage. As such, criticisms of cultural insensitivity are less applicable. Few South Asian or British-South Asian women would assert that abduction and forced marriage are an integral part of their culture. In fact the impetus behind the U.K. action to examine the issue of forced marriages by striking the working group came from within the British-South Asian community. That, however, does not mean that culture is not central to this question since undoubtedly concerns about offending the British-Asian community fueled the British government's reluctance to get involved in this issue. Further, misunderstandings about cultural practices and the distinction between arranged and forced marriages have probably increased this reluctance. In addition, anecdotal evidence suggests that community leaders and abductors when accused of violating basic human rights have used cultural misunderstanding as a defense. Culture and human rights, particularly in the context of Asia, are "hot topics" and must be central to any strategies adopted by the British government.

In her paper "Culture and Human Rights: The Asian Values Debate in Context", Karen Engles discusses the many uses of the word "culture" in human rights debates. She explains how "Asian values" proponents use culture both to assert an exception or opposition to a certain type of human rights and to argue that human rights should protect their culture. In the forced marriage context, such an argument would state, first, that freedom to consent to marriage, the right to personal security and the other implicated human rights discussed above, do not apply or should be interpreted differently with respect to South Asian culture. Second, it could state that human rights law should protect Asian culture, assimilating forced marriages with arranged marriages as expressions of Asian culture. It is beyond the scope of this paper to enter into the "Asian values" debate or cultural relativism versus universalism, but I believe it is fair to state that providing basic consular services to abducted women seeking such services can be examined without entering into these important debates.

VII. CONCLUSION

Citizenship is not a theoretical interest; as an abducted girl or woman desperately attempts to escape detention in a foreign land where she is threatened with an unwanted (and often surprise) marriage, her national membership has very palpable personal meaning. Her status as a dual national, which she may not

have chosen or of which she may not have even been aware, can assume critical importance in her life.

In this paper I have reviewed dual nationality: why it occurs, how it is perceived, and how it can be a desirable phenomenon, reflecting contemporary meanings of citizenship and the layered identities of an increasing number of immigrants and internationally mobile persons. I have explored the international rule preventing a state from intervening on behalf of one of its nationals against a state of which he or she is also a national. Arbitral decisions, state practice, and transformed conceptions of sovereignty and human rights all point to the need to modify this rule, if it in fact still exists and applies to this situation. When considered as a whole, what becomes clear is that the meaning of citizenship, the idea of rights, domestic legislation and international custom interact and evolve together.

INTERIGHTS, ASK and Shirkat Gah submitted their report and recommendations to the Home Office Working Group on Forced Marriages and continue to work on finding solutions. Based on its public consultations, the Working Group produced a report entitled "A Choice By Right" in June 2000 which gives an overview of forced marriages in the U.K. and sets out a framework for tackling the issue. The Foreign and Commonwealth Office (FCO) and Home Office responded with a "Joint Action Plan" in August 2000, which adopts, at least in part, some of the recommendations put forward in the submission and reflects some of the arguments put forth in this paper. The process of consultation, legal argumentation and creative vision continues. Communities in Canada and around the world struggling with similar situations will be able to learn from the experience of the British initiative. Hopefully the state of the law on the subject will be both clarified and advanced by the efforts of the Working Group, and the lawyers, community leaders and activists who have united to address this issue.

This study demonstrates that law can not be understood as a set of rules, cordoned off into categories and providing us with standards of action. Law is contested, it is contradictory and it is in flux. Bodies of law interact and conflict. Through legal theory and practice we challenge our understanding of what we do on a daily basis and what goes on in the world around us. We struggle with meaning, constructing and reconstructing the social sphere. The problem of forced marriages is very real and cannot be addressed by simply stating the correct rule. It is a complex situation involving power and gender, culture and politics. As such, the law and theory of citizenship and diplomatic protection are best understood as sites of a struggle over meaning, and as endeavors to understand and redefine international relations and human rights.