CITIZENSHIP, ALIENAGE AND THE MODERN CONSTITUTIONAL STATE

To have a nationality is a human right. But between the nineteenth and mid-twentieth centuries, virtually every country in the world adopted laws that stripped citizenship from women who married foreign men. Despite the resulting hardships and even statelessness experienced by married women, it took until 1957 for the international community to condemn the practice, with the adoption of the United Nations Convention on the Nationality of Married Women. *Citizenship, Alienage, and the Modern Constitutional State* tells the important yet neglected story of marital denaturalisation from a comparative perspective. Examining denaturalisation laws and their impact on women around the world, with a focus on Australia, Britain, Canada, Ireland, New Zealand and the United States, it advances a concept of citizenship as profoundly personal and existential. In doing so, it sheds light on both a specific chapter of legal history and the theory of citizenship in general.

HELEN IRVING is Professor of Law in the Faculty of Law at The University of Sydney and a Fellow of the Academy of Social Sciences in Australia, and of the Australian Academy of Law. She has published widely on constitutional law, history, and citizenship, most recently with a particular focus on gender. Her 2008 book, *Gender and the Constitution*, was published by Cambridge University Press.

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A Gendered History

HELEN IRVING

CAMBRIDGE UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

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www.cambridge.org
Information on this title: www.cambridge.org/9781107065109

First published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data
Irving, Helen, author.
Citizenship, alienage, and the modern constitutional state : a gendered history / Helen Irving.
New York : Cambridge University Press, 2016.
LCCN 2015039218 ISBN 9781107065109 (hardback)
LCSH: Married women – Nationality. Citizenship. Women's rights. Women – Legal status, laws, etc. BISAC: LAW / Constitutional.
LCC K3230.W6 I78 2016
DDC 342.08/3082 – dc23
LC record available at http://lccn.loc.gov/2015039218

ISBN 978-1-107-06510-9 Hardback

CONTENTS

ACKNOWLEDGEMENTS

I have many acknowledgements to make and much gratitude to express. I was the fortunate recipient of an Australian Research Council Discovery Grant, which funded this research, including for travel to the national archives of a number of countries. At the project's beginning Katherine Fallah provided valuable research assistance. Kristin Macintosh then spent the following three years as my research assistant. I cannot imagine how the project would have progressed without Kristin's engagement, resourcefulness and energetic interest. As the project developed, I benefitted greatly from invitations to present my ideas in talks and seminars: at Colby College, at Indiana University Law School, Toronto Law School and Sydney Law School. For these invitations, I very warmly thank Professors Sandy Maisel, Susan Williams, Ran Hirschl and Kevin Walton. I have enjoyed and profited from discussions about the history, theory and law of citizenship and its loss with many people, including Elisa Arcioni, John Bannon, Linda Cardinal, Estelle Irving, Ian Lee, Megan McKenzie, Steve Ross, Rayner Thwaites, Anne Twomey, and John Williams. I thank Sydney Law School, and in particular the Research Office, for support and assistance. I also thank the constitutional and public law teaching team and my other colleagues on Level Six at Sydney Law School for their friendship, generosity and enjoyable lunches. I am, once again, enormously grateful to John Berger, Senior Editor at Cambridge University Press, and to Cambridge University Press, for their commitment to the book. My husband, Stephen Gaukroger, and our children, Cressida and Hugh, deserve, as ever, my deepest gratitude.

Finally, if it is possible posthumously to thank someone whom one has never met, I want to acknowledge Chrystal Macmillan (1872–1937), politician, barrister, mathematician, writer and activist, whose dedication to the goal of women's citizenship equality and remarkable life should be better known.

PREFACE

When virtually every country in the world does the same thing in the same era – something that requires political will and legislative action in each case and that reverses a long-standing legal practice or assumption – some explanation is needed. This study was driven by a single question: why, between the early-to-mid-nineteenth century and the interwar period or later in the twentieth century, did almost every country – countries with radically different legal systems, traditions and concepts of citizenship – have laws that made women's citizenship conditional upon the citizenship of their husband, and that reversed the historical principle of women's independent nationality? Why, in particular, did they strip citizenship from women who married foreign men? Why did this happen in an era when, in the developed world at least, democratic rights generally and women's rights specifically were beginning to emerge or expand? Why (as it turned out) did it take so long to reverse, even decades after the international community had recognised the problems to which it gave rise?

The evolution of modern citizenship has attracted numerous histories, but women's status as legal citizens seldom features, and even where it does, the specific status of married women's citizenship is rarely acknowledged. The loss of women's citizenship through marriage – a striking, puzzling, and, as it turns out, revealing phenomenon – has been astonishingly neglected. So, too, has the history of automatic marital naturalisation of alien wives. In working through this history, I have (for reasons that are explained in the Introduction) focused particularly on the first.

The question – *why did all countries strip citizenship from women who married foreign men, and why did this happen around the same time?* – would most convincingly be answered by a comprehensive account of the particular circumstances of each country at the relevant moment. Comparative country studies that attempt to explain commonalities, while remaining sensitive to differences, are, however, fiendishly difficult, and where the numbers are great, they are simply not feasible. The numbers,

here, are formidable. In 1900 (to take the more-or-less temporal midpoint of our history), there were eighty or so sovereign states in the world; all practised conditional marital nationality, and virtually all had specific marital denaturalisation laws. To give another relevant datum, in 1930, at a time when married women's nationality had become the subject of heightened international attention, there were fifty-eight member states of the League of Nations.[1] Most still practised marital denaturalisation, and virtually none was entirely neutral as to marriage in determining a woman's nationality. Keeping this world scene in view, I have focused on a smaller, but explanatorily powerful, number of states that offer both case studies and windows onto the larger landscape. My research has drawn on the histories of conditional marital citizenship in Australia, Britain, Canada, Ireland, New Zealand and the United States, as revealed primarily in government records (many previously unopened). The archives of these countries, however, do not exclusively record their own legal and administrative histories. Many discussions of and copies of records from other countries are included. One also finds detailed materials arising from international inquiries into married women's nationality, in particular on the part of League of Nations, which on several occasions in the interwar period requested reports from all member countries about their laws and policies governing women's citizenship, as well as reports on the progress of women's equality as measured in multiple other ways.

The accounts and publications of many contemporary international law organisations also include wide-ranging and comparative overviews of numerous countries' laws and practices. To these sources, I have added other primary material (relevant legislation, international instruments, contemporary scholarship, judicial decisions, expert commentary, newspaper reports) from my case study countries and a range of others.

I have also drawn on the insights and findings of those few outstanding historians who have taken women's marital citizenship in individual countries as their subject (see the Introduction). What I do differently, in recognising the subject as a worldwide practice, is to move beyond the specific national reasons for its adoption and apply a comparative focal lens to it. In the final chapter of this book, I turn to secondary sources – recent citizenship theories – to explain my own theory about the foundation and quality of citizenship, as revealed by the 'gendered history'.

[1] We must also count the United States, which did not join the League, but played a significant part in its story, including, as we will see, the vital Hague Nationality Convention of 1930.

In telling the story of the rise and fall of conditional marital citizenship, I do several things. I explain a particular history, I situate this history in a broader context – the emergence and evolution of modern international relations – and, through this, I explore our current dominant conceptualisations of citizenship. I then challenge these conceptualisations, drawing on the accounts of women who experienced, in particular, marital denaturalisation, as a means of understanding what I refer to as the 'existential' nature of citizenship. I offer an alternative conceptualisation: citizenship as a relationship of protection on the part of the state to the citizen.

When I first began thinking about citizenship, it was in 'cosmopolitan' terms, defending the view that state borders should be as open as functionally possible, and that legal citizenship should be de-emphasised with regard to territorial rights. Indeed, I gave relatively little weight to citizenship as a value in itself. In the course of further studying the history of citizenship law, I came to understand that citizenship and territorial abode are conceptually and legally interdependent.[2] I did not, at that point, think of citizenship as a particular quality in itself, as *existential*. It was the historical voices that revealed it in this light.

I still believe that state borders should be as open as possible, and that rights, benefits and all that constitutes the good in a person's life should not be arbitrarily distributed according to whether or not the recipient is a citizen. There is, however, one powerful exception: the right that citizenship brings to a territorial home. That this right gives foundational, existential meaning to citizenship became apparent in studying its historical denial to married women. Factoring in the mostly untold history of the law governing women's citizenship gave a new perspective on what it means to be a citizen. I have, as a consequence, become a defender of citizenship as a legal status, and of the right not to be excluded from a particular territory as legitimately belonging to the citizen and not the alien. This conclusion, I emphasise, does not, and need not, devalue aliens or imply that they are disentitled to equality with citizens in any other respect. It is, rather, a conclusion that arises from recognising the special (territorially protective) character of citizenship as a human need, indeed, a human right. (These conclusions are explained in the final chapter.)

Settling on useful and accurate terminology has been difficult. The broad modern practice in legal discourse is to speak of persons as 'citizens'

[2] Helen Irving, 'Still Call Australia Home: Citizenship and the Right of Abode' (2008) 30 *Sydney Law Review* 133.

in reference to their legal status within a state, and 'nationals' from the perspective of international law. There are, however, many other distinctions. We may add the specific use of 'citizen' to distinguish legal members of a republic from 'subjects', the term used in the past for members of a monarchy (such as Britain). We should also note, however, that British law in the past also commonly referred to British subjects as 'nationals'.[3] Even this is an over-simplification, as the following summary alone indicates. Regarding British Nationality Law, in the 1950s, Mervyn Jones explained that the word 'nationals' was used in modern treaties as equivalent to the French word *ressortissants*, a usage, at that time, 'fairly established'. The British word 'nationals', he wrote, comprehended British subjects as defined by the law in force in any part of the British Dominions, including British protected persons and corporations incorporated under the relevant law. 'Ressortissants' comprehended 'all those who look to the [French] State for protection, and are identified with it for the purpose of its external relations'. This included: 'citoyens', 'sujets français' (natives of certain colonial territories who do not possess full civil rights in metropolitan France) and 'protégés' (all persons who normally received French protection).[4] The relevant terms used in other national languages would, of course, greatly expand this list.

Some countries also distinguish specifically between 'nationals' (those who hold the legal status) and 'citizens' (those who hold the legal status and also enjoy political rights). This distinction, too, may be made in federal systems, where 'nationality' is or was used to refer to the legal status of a person in his or her relationship to the (national) state, and 'citizenship' to 'that part of the federation in which [the person] resides and performs the ordinary civic duties'.[5]

To apply the technical or linguistically correct term on each occasion would run the risk of cluttering the text and possibly confusing the narrative. I have, therefore, employed 'citizen', 'subject' and 'national' as appropriate and/or comfortable to the discussion, using 'citizenship' generically and loosely, but applying more precise terms where these are needed to

[3] Hudson notes that the distinction is generally 'immaterial' in international law, except where the state creates a class of nationals without rights and obligations, as the German Jews were classified under Reich citizenship law of 1935. Manley O. Hudson, *Report on Nationality, Including Statelessness* (International Law Commission, Yearbook, 1952, Vol II) 6–7.

[4] J. Mervyn Jones, *British Nationality Law* (Oxford, Clarendon Press, 1956) 5.

[5] Richard W. Flournoy, 'The New British Imperial Law of Nationality' (1915) 9 *The American Journal of International Law* 870, 873.

distinguish the national legal status under discussion from 'citizenship' in the technical sense. As my study is concerned with the acquisition, retention and loss of the legal status governing a person's membership of a territorial state, I have employed the term 'constitutional citizenship', where relevant, specifically to convey the quality of citizenship as legal status, rather than as entitlement to political participation (or 'political citizenship').

But, what term to use to describe the loss or deprivation of citizenship? As already indicated, I have adopted the term 'denaturalisation', and specifically 'marital denaturalisation', for citizenship deprivation arising from marriage. Several alternative candidates are in circulation. 'Expatriation' is common, but this, I think, most readily evokes expulsion from one's native country or country of former citizenship, or alternatively, the condition of being an 'expatriate' (living away from one's native country), whereas the majority of reported problems caused by loss of citizenship through marriage were experienced by women who remained (post-maritally reclassified as aliens) in their native country, having made it their conjugal home.

Another common alternative is 'denationalisation'. Audrey Macklin explains that '[d]enaturalization refers to the non-consensual deprivation of citizenship acquired by naturalization, while denationalization encompasses deprivation of citizenship, however acquired'.[6] In Patrick Weil's words, denationalisation 'denotes a loss of citizenship, whereas, in theory, a *denaturalized* person has never been a citizen'.[7] The distinction, however, is excessively technical and I find 'denationalisation' awkward as applied to people, in particular as it suffers from having a political homonym (common at least in British history) meaning the privatisation of national industry.

In recent discussions of citizenship-stripping, the alternative terms 'revocation' and 'deprivation' have become common. 'Revocation', however, tends to suggest the confiscation or reversal of something that has been granted, and seems more suited to citizenship acquired by

[6] Macklin adds: 'The classification only matters where the rules for citizenship revocation differ as between naturalized and birthright citizens'. Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40 *Queen's Law Journal* 2, fn 4. If this is correct, the choice of 'martial denaturalisation' to describe my subject is comfortable, as in most cases, the laws that stripped citizenship from women who married foreign men did not distinguish between naturalised and 'natural' citizens.

[7] Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (University of Pennsylvania Press, 2013) 2 (emphasis added).

naturalisation than by birth (which is the primary subject of this study). 'Deprivation' is a multi-purpose term, but it suffers from imprecision without the preposition and noun ('of citizenship') and 'marital deprivation' is a confusing expression, without more. The expression 'marital denaturalisation' describes both a policy and a process, and has the additional advantage of mirroring the uncontroversial term 'marital naturalisation' – the companion legal practice whereby foreign women who married citizen men were automatically treated as naturalised citizens of their husband's country. So, 'marital denaturalisation' and 'marital naturalisation' it is.

Finding a smooth, but useful noun to describe the subject or target of such practices was harder. I have tended to avoid such a noun, but where needed I have referred to the women affected as 'maritally denaturalised women' or 'maritally naturalised women'. Candice Bredbenner uses 'marital-expatriates' in reference to American women stripped of their citizenship for marrying foreign men (the subject of her exceptional history).[8] This is a very succinct and economical term, but it only works if one also refers to the practice of marital denaturalisation as 'expatriation'. Another neat alternative is 'statutory alien'. This, however, is insufficiently precise, since it may cover any case of legislative deprivation of citizenship; its companion, 'statutory citizen', is even broader, clearly embracing all those who are naturalised under the law. Since a significant part of my argument rests upon the difference between citizenship acquired by (ordinary) naturalisation and citizenship acquired by marital naturalisation, with the companion distinction between these two avenues of citizenship loss or denaturalisation, I have retained the more precise, albeit clunky, adjectival noun. These choices, I hope – notwithstanding what the foregoing may suggest – will help smooth the telling of a very complicated history (the complexity of which is, however, essential to the story).

A further terminological point. The general concept attached to the policy of tying women's citizenship to their marital status is commonly referred to in the literature (such as it is) as 'derivative marital nationality', and this was the term with which I first worked. However, it became clear (and important) that loss of citizenship applied, in most cases (at least until the 1930s), regardless of whether or not the woman acquired her foreign husband's nationality; that is to say, her citizenship was not necessarily 'derived' from his, although governments often assumed it to

[8] Candice Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (University of California Press, 1999).

be. To capture this important distinction, I have used the term 'conditional marital nationality': a woman's citizenship or lack of citizenship was conditioned upon whether and whom she married, regardless of other legal consequences.

A final decision needs to be explained. The archival records of governments contain numerous details about the circumstances of women who were affected by conditional marital nationality laws. Many of these identify the women by name; many of the details, indeed, are given by the women themselves in their letters or other entreaties to officials. These women did not intend their plight or their appeals to be made public. I have therefore chosen to identify them only by their first name and the first initial of their surname. Women who campaigned publicly, or whose circumstances were reported in open forums – in the courts, in parliamentary debate or in the press – can be assumed to have known that their identity was public, and in these cases, I have given the woman's full name. Since marital denaturalisation laws operated in many countries until the late 1940s, many women who were affected may still be alive, and certainly many were until recently (although this fact is not necessarily relevant to the protection of privacy), as was demonstrated in the Canadian 'war brides' controversy in the first decade of the twenty-first century (considered later in the book).[9]

There is another, vastly important dimension to the history of married women's citizenship – the ability to transmit citizenship to children. Historically (with a few exceptions), there was a single transmission rule: in a marriage, the husband's citizenship alone determined the citizenship of the children. This rule of paternal citizenship was in force in most countries in the past, and endured longer than conditional marital citizenship for wives. It is still practised in some countries, but has been displaced in many. The citizenship of both the father and the mother, whether married or not, can now commonly be transmitted to their children. This shift to gender-neutral transmission embraced principles of gender equality, but it also required the surmounting of certain complex legal hurdles, in particular, the long-standing objection on the part of the international community to dual nationality (which arises, among other ways, if the different nationalities of both parents are transmitted). It also required rules for special situations, for example, where the parents have different nationalities and are unmarried and/or live in different countries. But,

[9] Sidney Eve Matrix, 'Mediated Citizenship and Contested Belongings: Canadian War Brides and the Fictions of Naturalization' (2007) no. 17 *Topia* 68.

at its foundation, the transmission rule shift could not have occurred without the abandonment of the view that a married woman could not hold citizenship in her own right.

This book is a study of that once-intractable view and its ultimate relinquishment. It is an exploration of citizenship through the history of conditional marital nationality, of how it happened, and why.