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Nationality and Territorial Change: In Search of the State of the Law

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Introduction

Decolonization and the emergence of norms of human rights have had a tremendous impact on the international legal order. On the one hand, because the traditional international legal order was closely connected with the colonial system, the validity of many traditional rules and principles has come to be questioned. Emerging norms of human rights, on the other hand, have been establishing a new framework within which decision-makers must deal with international problems.

The problem of nationality¹ upon attainment of independence and transfer of territory is one of the areas where the validity of traditional principles is now being questioned.² Traditionally, the principle of automatic change of nationality as a consequence of territorial change governed the relationship between nationality and territorial change. The main feature of this principle is that when the territory of a state is acquired by another state, the nationals of the first state who continue

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1. In this article, "nationality" is used to designate the legal status of being a member of a state. Nationality in this sense should, according to modern politico-legal thought, include political rights, and thus, coincide with the concept of citizenship. As discussed later, this was not the case for colonial peoples. Nevertheless, the prevailing terminology in international law has not questioned the gap between the voluntary and autonomous character of nationality and its realities.

2. This problem can be understood as one concerning the law of state succession. *See, e.g., Zemanek, State Succession after Decolonization*, 116 RECUEIL DES COURS 187 (1965); D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW*, pt. 4 (1967); G. BREUNIG, *STAATSANGEHÖRIGKEIT UND ENTKOLONISIERUNG* (1974).

their habitual residence there ("domicile principle")³ *ipso facto* lose the former nationality and become nationals of the successor state. This principle was followed consistently from the seventeenth to the early twentieth century and was also expressed in international documents.⁴ Many influential scholars have regarded this principle as governing the relationship between nationality and territorial change.⁵

There has been, however, a minority view in opposition to this majority view. The minority view stresses the fundamental principle of international law that questions of nationality are within the domestic jurisdiction of a state.⁶ International practice since World War I indicates that problems of nationality accompanying territorial change have not always been settled with reference to the principle of automatic change. In addition, it is no longer possible to find a straightforward expression of this principle in contemporary international instruments.⁷ Thus, many scholars who recently have undertaken detailed research on this problem have expressed doubts about this principle, and argue that nationality problems can be settled only by the domestic laws of the states involved in the territorial change.⁸

The above conflict cannot be resolved merely by committing oneself to one of these views, but rather by clarifying: (1) the substantive and ideological factors which supported the traditional principle of automatic change;⁹ (2) the subsequent change in these factors;¹⁰ and, conse-

3. The term "domicile principle" traditionally has been adopted by scholars to express this criterion, although domicile does not necessarily coincide with habitual residence.

4. See, e.g., *Harvard Research Draft on Nationality*, art. 18, 23 AM. J. INT'L L. SUPP. 15 (1929).

5. See, e.g., 1 & 2 J. KUNZ, *DIE VÖLKERRECHTLICHE OPTION* (1925); I L. OPPENHEIM, *INTERNATIONAL LAW* 551 (8th ed. 1955); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 638 (2d ed. 1973). For further arguments, see H. JELLINEK, *DER AUTOMATISCHE ERWERB UND VERLUST DER STAATSANGEHÖRIGKEIT DURCH VÖLKERRECHTLICHE VORGÄNGE, ZUGLEICH IM BEITRAG ZUR LEHRE VON DER STAATEN-SUKZESSION* 50-59 (1951); G. BREUNIG, *supra* note 2, at 83-86.

6. See *Convention on Certain Questions Relating to the Conflict of Nationality Law*, Apr. 12, 1930, art. 1, 179 L.N.T.S. 89 [hereinafter cited as the Hague Convention]; *Advisory Opinion on the Tunis and Morocco Nationality Decrees Case*, 1923 P.C.I.J., ser. B, No. 4, at 24.

7. See, e.g., the very cautious attitude as respects this principle in the reports of M. Hudson and R. Cordova to the I.L.C. on "Nationality, including Statelessness." Y.B. INT'L L. COMM'N 61, U.N. Doc. A/CN. 4/84 (1954).

8. P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 149, 243-44 (1956); 1 D. O'CONNELL, *supra* note 2, at 497-528; R. DECOTTIGNIES & M. DE BIEVILLE, *LES NATIONALITES AFRICAINES* 44 (1963); J. DE BURLET, *NATIONALITÉ DES PERSONNES PHYSIQUES ET DÉCOLONISATION* (1975). See, however, a recent attempt to prolong the life of the principle by *formalizing* the concept. G. BREUNIG, *supra* note 2, at 69-73, 101-23.

9. Before World War I, there were two basic factors supporting this principle. First, the principle was established in the context of *cession of territory* among Western European nations which had a *relatively* high degree of homogeneity within their territories and could generally define their nationals in terms of territoriality. Second, the concept of individuals

Nationality Change

quently, (3) the emergency of a new framework¹¹ governing nationality problems that accompany territorial change.

One of the elements of this new framework is the concept of national self-determination. Because this concept has gained great significance in the twentieth century, nationality problems have come to be settled by reference to the criteria for self-determination of a people. Newly independent countries applied not only the domicile principle, but also various other criteria in determining who were to be their nationals according to their own conceptions of the essence of their nations. These determinations of nationality by the domestic laws of newly independent countries were basically recognized by former metropolitan states. Although the principle of automatic change is still important as a presumptive rule, its underlying rationale differs greatly from that of the earlier period. The free and voluntary will of individuals who are to participate in the body politic of the territory should be considered most important for settling nationality problems.¹²

Another important element of the new framework is the concept of human rights. Although human rights law has developed in a somewhat different context from that of nationality, it has been implicitly taken into consideration in settling nationality problems accompanying territorial change. Prevention of statelessness and respect for the desires and actual lives of those whose status is affected by the change of territory or nationality exemplify this concern for human rights.¹³ In addition, the development of human rights law in general, and the emerging norms of non-discrimination in particular, have gradually modified the traditional dualistic regime of protection of rights based

as an appurtenance of territory was not questioned during this period. *See infra* text accompanying notes 15-25.

10. Many non-Western European nations that attained independence after World War II do not have as high a degree of homogeneity as Western European nations had. Thus, they have had to adopt various criteria other than territorial residence to define their nationals. In addition, since World War I, and especially since World War II, politico-legal doctrines have emphasized the fate of individuals rather than that of territory. Furthermore, the relationship between nationality and territorial change has shifted from a situation in which nationality is influenced by cession of territory to one in which nationality is influenced by independence. Thus, the implicit framework, *see infra* note 11, treating individuals as an appurtenance of territory has been rejected. *See infra* pp. 22-25.

11. In this article, "frame of reference" or "framework" (terms used interchangeably) signifies a set of criteria, beliefs, and assumptions governing perception, value judgment, and behavioral decision. A problem is approached, referred to, prescribed, and settled through and within such a frame of reference. Although frameworks are not, in themselves, rules or principles of law, they introduce or apply rules or principles, including those of law, which are required by or relevant to them in the process of dealing with a concrete problem.

12. *See infra* pp. 25-26.

13. *See infra* pp. 27-29.

on the distinction between the concepts of nationals and aliens.¹⁴ Therefore, even when individuals who are affected by territorial change are not given the nationality of the state in which they live, their rights as resident aliens should be fully respected.

After describing the development of the traditional principle, this Article examines the emergence of this new framework through the prism of nationality settlements following the decolonization of British and French colonies and other post-war events. Finally, the new framework is described, with emphasis on its two principal components—principles of self-determination and human rights.

I. Historical Analysis of the Principle of Automatic Change of Nationality

A. *Era of "Change of Nationality as a Consequence of Cession of Territory"*

The predominant idea of the relationship between nationality and territorial change in the European absolutist era was expressed in the *règle de Pothier*: "when a province is united to the union of the state [and] when a province is severed from the state; . . . the domination of the inhabitants changes."¹⁵ This concept was influenced by the European medieval conception that regarded inhabitants as an appurtenance of territory (*Pertinenztheorie*). When a territory ruled by a feudal lord was sold, exchanged or devised, according to this appurtenance theory, the inhabitants were deemed to be disposed of together with the territory.¹⁶

Subsequently, diverse and isolated medieval communities were gradually integrated into economically and culturally more homogeneous national communities under the rule of absolutist monarchs. Because of the long-lasting and gradual character of the assimilation process and the predominant power of the monarchs, the national communities established in this era achieved a relatively high degree of homogeneity within the territorial unit.¹⁷ Therefore, territorial residence could be

14. See *infra* pp. 29-34.

15. POTHIER, *Traité des Personnes et des Choses* 18, 9 *Oeuvres de Pothier* (M. Bugnet ed. 1861). (This and subsequent translations are those of the author, except as indicated).

16. I J. KUNZ, *supra* note 5, at 31-32; E. SZLECHTER, *Les Options Conventionnelles de Nationalité à la Suite de Cessions de Territoires*, ch. 1 (1948); Onuma, *Zainichi-Chosenjin no Hoteki Chii ni Kansuru Ichikosatsu (Legal Status of Koreans in Japan)* 96 *Hogakukyokai Zasshi* 529, 531-32 (1979).

17. The separation of "politics" from "religion" (consider the historical significance of Machiavelli's *The Prince*, and the logic of politics (symbolized by the famous remark of

Nationality Change

used as *the* criterion in determining the fate of individuals affected by territorial change. Thus, the principle of automatic change of subjecthood of the inhabitants accompanying territorial change prevailed.¹⁸

The predominance of the territorial criterion in determining the fate of individuals remained even after the era of bourgeois revolution. With the development of thought stressing the free and autonomous character of individuals, however, the appurtenance theory began to be replaced by the doctrines of “plebiscite” and “option of nationality.”¹⁹ An option clause was adopted in most treaties of cession and annexation both in times of peace and as peace settlements.²⁰

The prevalence of option clauses in the treaties did not affect the principle of automatic change, but rather confirmed it. Because automatic change was deemed axiomatic, it was not necessary to stipulate as such in the treaties of cession. Only when it was necessary to avoid its application did treaties explicitly provide otherwise.

The axiomatic nature of the principle of automatic change can easily be demonstrated. First, most treaties adopted the domicile principle in determining who would be eligible for the option. They generally granted the right to *retain* or to *recover* the nationality of the ceding state to the nationals of the ceding state residing in the ceded territory,

Henry IV that “*Paris vaut bien une messe*,” supported by the realistic demands of the growing bourgeoisie, finally transcended the prevailing religious heterogeneity. Deutsch emphasizes the unique character of the homogeneity of Western European nations as “the patchwork world of national assimilation.” K. DEUTSCH, NATIONALISM AND ITS ALTERNATIVES 38 (1969). On the other hand, this homogeneity should not be overemphasized: the contemporary emergence of separatist movements and active claims of rights of minorities reveal the mythical character of homogeneity in many Western European nations. However, it cannot be denied that they have had a *relatively* high degree of homogeneity compared with other areas such as Eastern Europe or Africa. In addition, the existence of a general *belief* in homogeneity made possible, to a certain degree, settlement based on territoriality. See Onuma, *supra* note 16, at 543.

18. With the establishment of the principle of automatic change of subjecthood pursuant to territorial change, the predecessor of the “option of nationality” appeared in the form of a provision which allowed the inhabitants to emigrate. This *beneficium emigrandi* clause first appeared in the Capitulation Treaty of the City of Arras of 1640 and was followed by many treaties of peace, cession, and annexation through the early nineteenth century. See 1 J. KUNZ, *supra* note 5, at 30-47; E. SZLECHTER, *supra* note 16, at 87-101; H. JELLINEK, *supra* note 5, at 11-25.

19. After a series of bourgeois revolutions from the eighteenth to nineteenth century, nation states founded their legitimacy on the will of the people within the territorial unit. Under the influence of the social contract theory, individuals were deemed to have inherent freedom and equality and to acquire the status of voluntary and autonomous members of a nation state. In the nineteenth century, the concept of citizen, which implied participation in the political process of a nation state, gradually became widespread. Onuma, *supra* note 16, at 533, 547. See also A.N. MAKAROV, ALLGEMEINE LEHREN DES STAATS-ANGEHÖRIGKEITSRECHTS, at 8-9 (1962).

20. See note 18 *supra*.

without stipulating the effect of the cession of territory on their nationality.²¹ In addition, of the few treaties which provided the right to opt for the new nationality, most of them granted the right only to those who had been born in the territory but no longer resided there. This was intended to provide an opportunity to acquire the nationality of the successor state to those who, although non-resident, had a certain link with the territory. Furthermore, the exceptional treaties which granted the right to opt for the new nationality to the inhabitants of the ceded territory explicitly provided that they would retain the former nationality if they did not exercise the right.²²

These features apparently presupposed the principle of automatic change of nationality of the nationals of the ceding state residing in the ceded territory. The predominance of this principle was supported not only by the interpretation of the treaties of cession, but also by the proclamations and declarations of states, writings of authors, decisions of arbitral tribunals, and judgments of domestic courts in the nineteenth and early twentieth centuries.²³

This principle was also valid in cases involving territorial change other than those of "cession of territory." It was taken for granted that cases of complete annexation were settled in accordance with this principle. Attainment of independence by European nations in this era had little impact on the traditional framework.²⁴ When Western Hemispheric nations achieved independence in the eighteenth and nineteenth centuries, their nationals were also determined by the criterion of residence.²⁵

In this era, the essential meaning of independence, *i.e.*, the self-deter-

21. "The one who opts does not choose between two nationalities, but only has the right to retain one's old nationality." 1 J. KUNZ, *supra* note 5, at 83.

22. Logically, it is possible to interpret the rare provisions providing for the *retention* of the former nationality when the inhabitants do not exercise the right of option as being declaratory of the general principle. Upon taking all considerations into account, however, this interpretation cannot prevail.

23. *See, e.g.*, E. SZLECHTER, *supra* note 16, at 88-89 n.83; *id.* at 97 n.102; *id.* at 136 n.43 & *passim*; H. JELLINEK, *supra* note 5, at 50-59; J.M. JONES, *BRITISH NATIONALITY LAW AND PRACTICE* 39-56 (1947).

24. *See, e.g.*, arguments cited in H. JELLINEK, *supra* note 5, at 9-25.

25. When the United States gained independence from Great Britain, judgments of both states unanimously regarded residence in the United States as the requirement for the acquisition of U.S. nationality, although they differed in reasoning and in determining the critical date for the change of nationality. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246-47 (1830); *Boyd v. Thayer*, 143 U.S. 135, 162 (1892); *Doe v. Acklam*, 2 B. & C. 779, 792-93 (1824). Latin American countries also determined who were to be their nationals on the basis of territoriality. *See* 1 E.S. ZEBALLOS, *NATIONALITÉ AU POINT DE VUE DE LA LEGISLATION COMPARÉE ET DU DROIT PRIVÉ HUMAIN* 630-88 (1914); 2 *id.* 85-156 (1919); J. DE BURLET, *supra* note 8, at 139-75.

Nationality Change

mination of a people, was not fully appreciated when the relationship between nationality and territorial change was considered. It was the change of nationality as a consequence of cession (or annexation) of territory that was deemed the typical form of this relationship. According to the logic of this idea, territorial change was deemed to take precedence; pursuant to this the change of nationality of those who had a certain link with the territory (usually residence) was recognized. The aforementioned appurtenance theory, although rejected as an explicit doctrine, still survived as an implicit frame of reference as expressed in such terms as “change of nationality pursuant to territorial change” or “effect of territorial change on the nationality.”²⁶ Thus, between the era of absolutism and World War I, nationality problems accompanying territorial change were settled by means of treaties which presupposed the principle of automatic change.

B. *Gradual Change of the Status of the Domicile Principle*

The stable international practice described above changed considerably after World War I. It is true that the Peace Treaties and Minority Treaties explicitly provided that inhabitants of the newly independent states as well as those in territories transferred from one state to another would *ipso facto* obtain the new nationality and lose their former nationality.²⁷ In this respect the principle of automatic change remains basic. The meaning of the principle, however, changed considerably.

First, the validity of the traditional principle was restricted in that a certain category of nationals residing in the territory could not acquire the new nationality.²⁸ For example, the inhabitants of territories transferred from Germany to Poland who had not resided there long enough could not acquire the new nationality but retained their former nationality. This was to prevent those inhabitants which composed the van-

26. However, the framework of nationality change as a consequence of territorial change cannot be explained by *merely* a feudalistic concept of appurtenance. As later discussed, territorial residence is important, even within the contemporary framework, in presuming the will of individuals to participate in the body politic of the territory.

27. Treaty of Versailles, art. 84, 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 at 1325 (F. Israel ed. 1967) [hereinafter cited as PEACE TREATIES]; *id.* art. 91, 2 PEACE TREATIES, *supra*, at 1332; *id.* art. 105, 2 PEACE TREATIES, *supra*, at 1341. Treaty of St. Germain, art. 70, 3 PEACE TREATIES, *supra*, at 1562-63; Treaty of Trianon, art. 61, *id.* at 1888; Treaty of Neuilly, art. 39, *id.* at 1739. The Treaties of St. Germain and Trianon, however, adopted “*pertinenza*” (*indigènat*), which did not necessarily coincide with territorial residence, as a criterion for determining nationality.

28. Treaty of Versailles, art. 91, 2 PEACE TREATIES, *supra* note 27, at 1332; Treaty of St. Germain, art. 76, 3 PEACE TREATIES, *supra* note 27, at 1564; Treaty of Trianon, art. 62, *id.* at 1888; Treaty of Neuilly, art. 39, *id.* at 1739.

guard of the settlement policy of the Central Powers from acquiring the nationality of the newly independent states.

Second, not only resident but non-resident individuals involved in the independence or transfer of territory *ipso facto* acquired a new nationality, or were given the right to opt for it. This group of non-residents was not limited to those who were born in the territory concerned,²⁹ but included those who belonged to the same nation in the ethnic sense, or the same racial or linguistic population.³⁰

Third, plebiscites were held in certain districts. Those in Schleswig and Klagenfurt were decisive in the disposition of the territory itself, while others were consultative.³¹

Fourth, the nationality settlement as respects inhabitants of Alsace-Lorraine was based not on change of nationality corresponding to territorial change, but on independent criteria. The restoration of Alsace-Lorraine to France as of November 11, 1918 did not have an immediate effect on the nationality of the inhabitants. The inhabitants were divided according to each individual's relationship to the German domination over Alsace-Lorraine that lasted from 1871 to 1918. For example, while persons who became German nationals by the application of the Frankfurt Treaty of 1871 were "*ipso facto* reinstated in French nationality," German residents who migrated to Alsace-Lorraine during the period of German domination could not acquire French nationality.³² This settlement was based on a negative assessment of the German rule of Alsace-Lorraine, which had been "sepa-

29. Treaty Regarding the Independence of Poland and the Protection of Minorities, June 28, 1919, art. 4, 13 Martens Nouveau Recueil (3d ser.) 505; Treaty Regarding the Independence of Czechoslovakia and the Protection of Minorities, Sept. 10, 1919, art. 4, *id.* at 515; Treaty to Settle Certain Questions Raised by the Formation of the Kingdom of Serbians, Croats, and Slovaks, Sept. 10, 1919, art. 4, *id.* at 524; Peace Treaty, July 12, 1920, U.S.S.R.-Lithuania, art. 6, 11 Martens Nouveau Recueil (3d ser.) 881-82; Peace Treaty, Aug. 11, 1920, Russia-Lettonia, art. 8, *id.* at 893-94.

30. Treaty of Versailles, art. 85, 2 PEACE TREATIES, *supra* note 27, at 1325; *id.*, art. 91, 2 PEACE TREATIES, *supra* note 27, at 1332; Treaty of Neuilly, art. 40, 3 PEACE TREATIES, *supra* note 27, at 1740; Treaty of St. Germain, art. 80, *id.* at 1565; Treaty of Trianon, art. 64, *id.* at 1889; Treaty of Lausanne, art. 32, 4 PEACE TREATIES, *supra* note 27, at 2315. Language was adopted as a criterion in granting new nationality or the right of option not only in the treaty provisions, but also as a means of designating the members of a state in domestic laws. For example, Czechoslovakia and Italy adopted their respective languages as the criterion in determining whether one belonged to their nation. E. SZLECHTER, *supra* note 12, at 290-92.

31. Treaty of Versailles, art. 109, 2 PEACE TREATIES, *supra* note 27, at 1342-44; Treaty of St. Germain, art. 50, 3 PEACE TREATIES, *supra* note 27, at 1555-57; Treaty of Versailles, art. 34, pt. 3, § 8, Annex 5, 6, 2 PEACE TREATIES, *supra* note 27, at 1293-94; *id.* art. 95, 2 PEACE TREATIES, *supra* note 27, at 1330-31; *id.* art. 97, 2 PEACE TREATIES, *supra* note 27, at 1334-37.

32. Treaty of Versailles, pt. 3, § 5, Annex 1, 2, 3, 2 PEACE TREATIES, *supra* note 27, at 1321-23.

Nationality Change

rated . . . in spite of the solemn protest” from France by “the wrong done by Germany in 1871.”³³ Thus, the legality of the forty-seven year German domination was totally denied, and the *status quo ante* was restored.

Finally, there was no place for “cession of territory” in the Peace Treaties. Terms such as “*céder*,” “*État cédant*” or “*État cessionnaire*,” often used in the nineteenth century, were seldom used, but terms “*renoncer*,” “*transférer*,” “*attribuer à*” or “*État exerçant la souveraineté sur ledit territoire*” were adopted.³⁴

The adoption of these various criteria in determining who were subject to nationality change reflected the fact that members of ethnic populations, which may be said to constitute “ethnic nations,” were more geographically dispersed in Eastern Europe than in Western Europe. In addition, the principle of national self-determination was claimed much more strongly than before. Consequently, the framework subordinating the fate of individuals to territory could hardly be maintained. Cession of territory, which implies disposability of both territory and people as property, was no longer invoked. Furthermore, the nineteenth century doctrine of international law, which regarded war as a meta-legal phenomenon, began to be replaced by the concept of the illegality of war. Thus, the negative legal assessment of the wars Germany waged in 1870 and 1914 had an impact on the nationality settlement of the inhabitants of Alsace-Lorraine and other areas settled by nationals of the Central Powers. Finally, since the abolition of autocratic rule was proclaimed as one of the war aims of the Allied Powers, the peace settlement was expected to respect the rights and freedom of individuals as much as possible. Even if ethnic nations were geographically dispersed, the forceful exchange of inhabitants was out of the question. Rights of minorities, including the right to the nationality of the states to which they ethnically belonged, were to be respected.

These factors affected the principle of automatic change. Although the Peace Treaties still adopted this principle as basic, it now became necessary to *explicitly* stipulate it. Without such explicit provisions, there would have been confusion as to what the basic principle was, because the Treaties adopted various criteria other than residence. Because previously this principle was taken for granted and did not need to be explicitly articulated, this fact indicates the relative decline of the

33. Treaty of Versailles, pt. 3, § 5, Preamble, *id.* at 1311.

34. But see the case of Alsace-Lorraine, where the Treaty provided for “the territories which were ceded to Germany . . .” Treaty of Versailles, art. 51, *id.* This provision, however, referred to a past event, the Franco-Prussian War of 1870.

traditional framework.³⁵ On the other hand, the domicile principle was utilized as a supplementary rule to avoid statelessness, and every effort was made to provide the right of option for those who were subject to nationality change. Thus, ideas of national self-determination and human rights played a significant role in framing the nationality problems related to territorial change in the peace settlements following World War I.

This tendency was confirmed by judgments of courts during the inter-war period. During this period, cases concerning changes of nationality accompanying territorial change were not settled uniformly by the principle of automatic change. Many judgments did not invoke this principle. In addition, because the treaties and domestic legal systems adopted the various criteria described above, court decisions naturally invoked them. In many cases, the courts affirmed the change of nationality of *non-residents* of the territories concerned. Furthermore, even when the courts adopted the domicile principle, they did not rely on the simple fact of residence, but rather tried to base it on the free will of the individuals and the territorial effect of the domestic law. Thus the underlying rationale of the domicile principle came to differ from the traditional one.

In *Schwarzkopf v. Uhl*,³⁶ where the nationality of Austrians residing in the United States was in question, a U.S. circuit court of appeals denied the effect of the imposition of German nationality on non-resident Austrian nationals on the grounds that: (1) under international law, an invader cannot impose its nationality upon non-residents of the subjugated country *without their consent*; (2) the word 'citizen' as used in the *statute concerned* must be construed in the light of *the accepted right of election*.³⁷ On the other hand, in many cases, such as *Wildermann v. Stinnes*,³⁸ *Romano v. Comma*,³⁹ and *Pini v. Pini*⁴⁰ courts simply rejected the domicile principle.

The principle of automatic change as a principle of international law

35. Engeström claimed as early as the beginning of the 1920's that "[L]a dénationalisation n'est plus une suite de la cession. La cession est au contraire la conséquence de la nationalité." E. ENGESTRÖM, LES CHANGEMENTS DE NATIONALITÉ D'APRÈS LES TRAITÉS DE PAIX DE 1919-1920, at 19 (1923). Szlechter, having done an elaborate study on treaties from the eighteenth century to after World War I, also asserted that "[t]ous les habitants domiciliés sur le territoire cédé ne sauraient pas changer de nationalité en vertu d'un principe de droit international; changent seulement de nationalité ceux qui sont explicitement visés par les traités." E. SZLECHTER, *supra* note 6, at 102.

36. [1943-1945] Ann. Dig. 188, 137 F.2d 898 (2d Cir. 1943).

37. *Id.* at 194, 137 F.2d at 903.

38. [1923-1924] Ann. Dig. 224.

39. [1925-1926] Ann. Dig. 265.

40. *Id.* at 266.

Nationality Change

in that period can be seen in *Peinitsch v. Germany*,⁴¹ one of the most famous cases in this area. In the judgment, the Germano-Yugoslav Mixed Arbitral Tribunal said “ ‘It is a rule of international law that when a territory [in question] passes to a new sovereign, it must, in case of doubt, be assumed that those inhabitants of the territory in question who are not domiciled (*domiciliés*) there do not acquire the new nationality.’ ”⁴² Here, the principle of automatic change was referred to only in a restrained and indirect manner. It was still considered basic, to be utilized when no concrete provisions were controlling, but was not taken for granted.

In place of the traditional domicile principle, the free and voluntary will of individuals came to be a major criterion in determining nationality accompanying territorial change. Although the voluntary character of nationality had always been deemed important in nationality, it had not been considered in determining nationality itself, except in the form of option clauses. In contrast, it was considered in the judgments of this era to be one of the most important factors in determining nationality, even in the absence of the option clause. This trend would become even more clear after World War II, when African and Asian nations achieved independence at an explosive rate.

II. Nationality Settlement Related to Territorial Change in the Contemporary World

A. *Nationality Settlements As a Consequence of Decolonization*

Most of the nationality settlements relating to territorial change after World War II occurred either as a consequence of decolonization or as a peace settlement pertaining directly to the war.⁴³ Among the former cases, those involving the United Kingdom and France are the overwhelming majority. To grasp the general features of nationality settlement as a consequence of decolonization, it is important to examine how nationality problems were settled when colonies became independent from those two countries.

41. [1923-1924] Ann. Dig. 227.

42. *Id.* at 228, citing WEISS, *MANUEL DE DROIT INTERNATIONAL PRIVÉ* 162 (6th ed. 1909).

43. For a more extensive survey, see J. DE BURLET, *supra* note 8; G. BREUNIG, *supra* note 2; R. DECOTTIGNIES & M. DE BIEVILLE, *supra* note 8; Onuma, *supra* note 16, at 529-96, 911-80.

1. *Nationality Settlements Accompanying Independence From the United Kingdom*

World War II marked a turning point in the nationality status of the former British subjects.⁴⁴ Immediately after the war, the Dominion states led by Canada and the newly independent states of India, Pakistan and Ceylon sought to define their own nationality. Nationality problems between these countries and the United Kingdom were not settled by international agreements, but rather by a combination of the domestic laws of the United Kingdom and of each newly independent state.

From 1946 to 1955, each Commonwealth country enacted its nationality law and determined its nationals according to its own conception of its nation. For example, Canada, Australia, and New Zealand adopted a qualified form of *jus soli* as the basic principle governing the acquisition of nationality, using *jus sanguinis* as a supplementary rule. India and Pakistan, which had serious disputes regarding the allocation of territory and people, enacted complex nationality laws combining the principles of domicile and birth with other supplementary provisions. To determine who would be their original nationals, some countries provided transitional provisions, such as the domicile principle or the birth principle, whereas others simply applied permanent provisions regarding the acquisition of nationality by birth, such as *jus soli* and *jus sanguinis*.⁴⁵

When the United Kingdom enacted the Nationality Act of 1948,⁴⁶ Canada had already enacted its Citizenship Act. Others were either in the process of enacting their own acts or were expected to do so. It was not expected that these states would adopt a uniform criterion, *e.g.*, the domicile principle, to determine their nationals.⁴⁷ Had the United Kingdom adopted some positive requirement, *e.g.*, residence in the United Kingdom, some of the former British subjects could have had neither the nationality of a newly independent state nor that of the United Kingdom. The 1948 Act prevented such a result. Although it

44. See C. PARRY, NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND (1957); J.M. JONES, *supra* note 23, at 27-73; Clute, *Nationality and Citizenship*, in THE INTERNATIONAL LAW STANDARD AND COMMONWEALTH DEVELOPMENTS 100-36 (R. Wilson ed. 1966).

45. Logically speaking, it is necessary for all countries to enact transitional provisions for determining who are their nationals at the moment of the country's creation. Permanent provisions, which should be applied only to the children of those who acquired nationality under transitional provisions were, however, applied by some countries to determine who would be their original nationals.

46. British Nationality Act, 1948, 11 & 12 Geo. 6, ch. 56.

47. As to the variety of the principles actually adopted by each country, see C. PARRY, *supra* note 44, at 467-68, 475-78, 582-87, 640-44, 698-704, 791-97, 798-802, 848-50, 858-60, 887, 890-93; J. DE BURLET, *supra* note 8, at 146-60.

Nationality Change

recognized British nationality based on certain prerequisites, such as birth in the United Kingdom and its colonies, it also recognized as British subjects those who neither satisfied such prerequisites nor were actual or potential citizens of any of the Commonwealth countries or Eire.⁴⁸ In this way, the United Kingdom, assuming that the determination of the nationals of the Commonwealth countries would be primarily left to those countries, recognized as British subjects those who would otherwise have been stateless.

Because all the Commonwealth countries, to a greater or lesser degree, recognized non-residents who had a certain link with them as their nationals, a considerable number of those residing abroad (including in the United Kingdom) acquired the nationality of those countries. They were given the status of "citizens of the Commonwealth" by virtue of being citizens of a Commonwealth country,⁴⁹ and enjoyed certain privileges, such as rights to enter and reside in the United Kingdom, although they were not British nationals. While these privileges have been gradually restricted by recent British immigration legislation, Commonwealth citizens still enjoy certain privileges, especially if settled in the United Kingdom.⁵⁰ This indicates, though to a limited degree, the concern for the protection of the lives of individuals affected by the attainment of independence.

It was when Ghana gained independence that a new formulation of nationality settlements became necessary. The Ghana Independence Act did not include general provisions on nationality settlement. Ghana enacted its own nationality law upon independence and determined its nationals primarily by the criterion of birth.⁵¹ On the other hand, the United Kingdom regarded the Ghanian people as having both Ghanian and British nationality.⁵² In order to settle their "dual" status, the United Kingdom enacted the Nationality Act of 1958, which contained the following features: (1) Any person who was a British subject would cease to be so if: (a) he was then a citizen of Ghana; and, (b) he, his father or his father's father was born in Ghana. (2) A person would not cease to be a British subject, however, if he, his father or his father's father satisfied certain requirements such as birth or naturalization in the United Kingdom. (3) A wife of a British subject would not lose British nationality unless her husband did so.⁵³

48. British Nationality Act, 1948, § 12(1)-(4), 1 HALSBURY'S STAT. OF ENGLAND 871-72 (3d ed. 1968).

49. *Id.* § 1, at 862-63.

50. *See infra* note 121 and accompanying text.

51. Nationality and Citizenship Act (Ghana), 1957, § 4-6, U.N. LEG. S. SUPPLEMENT TO THE LAWS CONCERNING NATIONALITY, U.N. Doc. ST/LEG/SER.B/9, at 127 (1959).

52. 581 H.C. DEB. 283 (5th ser. 1958).

53. British Nationality Act, 1958, 6 & 7 Eliz. 2, ch. 10, § 2, 1 HALSBURY'S STAT. 895-96.

These features were incorporated thereafter in each Independence Act beginning with the independence of Nigeria (1960)⁵⁴ through that of Uganda (1962).⁵⁵ Furthermore, basically the same provisions have been incorporated in each subsequent Independence Act, beginning with the independence of Kenya (1963).⁵⁶ Thus, the above provisions have been the typical clauses in nationality settlements accompanying independence since 1958.⁵⁷

Nationality settlements under the 1948 Act, the 1958 Act and the subsequent Independence Acts have certain common characteristics. First, nationality problems were not settled by treaties, but by the domestic laws of both states concerned. In determining who should acquire the nationality of the newly independent states and who should retain the former nationality, priority was given to the domestic laws of the newly independent state. Although in many cases these new domestic laws were not in existence at the time British domestic legislation was enacted, the British laws presupposed this determination by the newly independent states, and only assumed the secondary and supplementary role of guaranteeing British nationality to certain former British subjects.

Second, wide variety exists in the nationality legislation of the newly independent states, especially in the criteria for determining who would be their nationals. Because they did not have a high degree of homogeneity within their territories, they had to adopt a variety of criteria.

Third, concern for human rights of those affected by independence prevails. Most apparent is the keen and continuous concern for avoiding statelessness: the United Kingdom feared that some former British subjects could not become nationals of the newly independent states, even if they resided there.⁵⁸ The United Kingdom also wanted a certain category of British subjects to retain British nationality irrespective of their acquisition of the new nationality. Furthermore, the United Kingdom guaranteed certain privileges which were not given to ordinary aliens to those who were no longer British nationals as a result of their new nationality.

Finally, a basic change can be seen in the status and meaning of the principle of automatic change. Neither the United Kingdom nor the

54. Nigeria Independence Act, 1960, 8 & 9 Eliz. 2, ch. 55, § 2, 4 HALSBURY'S STATUTES 401-02.

55. Uganda Independence Act, 1962, 10 & 11 Eliz. 2, ch. 57, § 2. *Id.* at 441.

56. Kenya Independence Act, 1963, ch. 54, § 2. *Id.* at 339.

57. As to the provisions of the subsequent Independence Acts, *see* 4 HALSBURY'S STAT. and THE PUBLIC GENERAL ACTS of the years following 1968.

58. See the parliamentary debates, *supra* note 52, at 279-312. *See also* Clute, *supra* note 44, at 118-19; Plender, *The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects*, 19 AM. J. INT'L L. 287, 293-94 (1971).

Nationality Change

newly independent states presumed that the inhabitants of the latter would *ipso facto* lose British nationality and acquire the nationality of the new states.⁵⁹ The newly independent states determined who would be their nationals utilizing a variety of criteria, as an essential process of self-determination. The United Kingdom presumed this unilateral determination, and tried to avoid undesirable results arising therefrom by enacting its own domestic law.

2. *Nationality Settlements Accompanying Independence from France*

The overwhelming majority of nationality problems accompanying independence from France were settled according to the Law of July 28, 1960,⁶⁰ and the provisions thereof incorporated in the radically amended Nationality Law of 1973.⁶¹ The principles for these settlements were originally adopted when twelve nations gained independence in 1960. Article 13 of the French Nationality Law of 1945, which would otherwise have applied, provided that if a treaty of cession did not contain provisions concerning nationality, "the persons having domicile in the ceded territories shall lose the French nationality."⁶² "Had this provision been applied in these cases, those who continued residing in the newly independent states would have lost French nationality, whatever link they might have had with France. Such a result would have been against the wishes of those who wanted to retain French nationality, and against the intention of the French government, which sought to retain many such people as French nationals."⁶³

On the other hand, the newly independent states did not want to solve problems raised by independence within the traditional framework of state succession.⁶⁴ They emphasized the essential character of national self-determination and tried to solve the problems within their domestic jurisdictions. Thus, they rejected settling nationality problems by means of treaties and determined who were to be their nationals according to their concepts of nationhood and their histories. Although some countries adopted the criterion of residence, most coun-

59. When Ghana became independent, the United Kingdom regarded the Ghanian people as having both Ghanian and British nationality, unless settled by the 1958 Act. Had the United Kingdom adhered to the principle of automatic change, such an argument would have been impossible. *See supra* note 52 and accompanying text.

60. Law No. 60-752, 1960 Dalloz Bulletin Législatif [D. Bull. Leg.] 566.

61. J. Off. (Fr.), Jan. 10, 1973.

62. J. Off. (Fr.), Oct. 20, 1945, at 6702.

63. *See* J. FOYER, TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ, 144-45 (1962), cited in Lagarde, *De quelques conséquences de la décolonisation sur le droit français de nationalité*, MELANGES OFFERTS À RENE SAVATIER 509, 513-14 (1965).

64. *See* R. DECOTTIGNIES & M. DE BIEVILLE, *supra* note 8, at 44; R. BILBAO, LE DROIT MALGACHE DE LA NATIONALITÉ 42-43 (1962).

tries employed other criteria, such as *jus soli*, *jus sanguinis* and race;⁶⁵ in many cases permanent provisions were applied on the acquisition of nationality. Even countries which adopted the domicile principle did not necessarily recognize all inhabitants as their nationals. Thus, the combination of Article 13 of the 1945 French Nationality Law and determination by the newly independent states of their nationals would have resulted in massive statelessness.

In order to avoid such a result, France enacted the Law of July 28, 1960, which contained the following features: (1) "*originaires, conjoints, veufs ou veuves d'originaires*" of France, as well as "*leurs descendants*" would retain French nationality even if they resided in newly independent states; (2) those who were not included in (1), but did not acquire another nationality by a general provision would also retain French nationality; and (3) those upon whom another nationality was conferred by a general provision "*peuvent se faire reconnaître*" French nationals by following certain procedures.⁶⁶

This formulation was incorporated in the totally revised Nationality Law of 1973. It contains in Chapter VII clauses essentially the same as those in the 1960 Law to determine "the effects on the French nationality of the attainment of independence of former overseas departments or territories of the French Republic."⁶⁷ The above characteristics show the general features of French laws which have purported to settle the nationality problems raised by the independence of former colonies.

The nationality settlement upon the independence of Algeria followed basically the same pattern. The Evian Agreements of 1962, which recognized the independence of Algeria, had no general provisions on nationality settlement, but assumed that the determination of Algerian nationality was to be left to Algerian domestic law.⁶⁸ Thus, this problem was also settled by a combination of domestic laws. France enacted the Order of July 21, 1962, that basically followed the scheme of the 1960 Law except for the criterion for dividing those affected by the independence. While the 1960 Law adopted the criterion of "origin," it adopted the "status," which had been utilized in Algeria for distinguishing the Islamic population and other minority populations. Thus, so far as French law was concerned, former French nationals having the "*statut civil de droit commun*" retained French

65. On the variety of criteria, see R. DECOTTIGNIES & M. DE BIEVILLE, *supra* note 8; G. BREUNIG, *supra* note 2, at 134-205; J. DE BURLET, *supra* note 8, at 144-80.

66. Law No. 60-752, 1960 D. Bull. Leg. 566.

67. Law No. 73-42 of Jan., 1973, Arts. 13, 20, J. Off. (Fr.), Jan. 10, 1973, at 467, 472.

68. Declarations Adopted on 19 March 1962 at the Close of the Evian Talks, 507 U.N.T.S. 29, 43-44 (1964).

Nationality Change

nationality. French nationals of Algerian origin having the “*statut civil de droit local*” were entitled “*se faire reconnaître*” French nationals. They retained French nationality if they were not accorded another nationality.⁶⁹ On the other hand, Algeria enacted its Nationality Law in 1963 and determined who were to be its nationals based on the combination of religion, *jus sanguinis* and qualified *jus soli*.⁷⁰ Thus, so far as Algerian law was concerned, Algerians defined in these terms acquired Algerian nationality irrespective of their residence.

The following features in the 1960 Law, shared by the 1962 Order, and incorporated as permanent provisions into the 1973 Law, characterize the nationality settlements accompanying the independence of France's former colonies. First, nationality problems were not settled by treaties, but rather by the domestic laws of both states.⁷¹ Second, nationality legislation, especially as respects the criteria employed in determining nationals, varied widely among the newly independent states. Third, France showed a deep concern for having people with certain ties to France, such as birth, residence or unity of family, retain French nationality. Newly independent states also manifested concern in this area by granting a right of option to those who did not *ipso facto* acquire their nationality, and in particular, to the spouses of their nationals.⁷² Finally, the traditional principle of automatic change was not sustained by either France or the newly independent states. When the nationality problems raised by the independence of former colonies were discussed, France did not believe that this principle would govern the relationship between France and the newly independent states. During the discussion of the 1960 Law in the National Assembly it was proposed that Article 13 of the 1945 Law be suspended, because it would take too long to pass the 1960 Law. The French government, however, strongly opposed the proposal, insisting that such a solution would produce dual nationality in every newly independent state.⁷³

69. Ordonnance No. 62-825, July 21, 1962, Arts. 1, 2, 1962 D. Bull. Leg. 465.

70. Law No. 63-96 of Mar. 27, 1963, Arts. 2, 5, 34, 43, J. Off. (Algeria), Apr. 2, 1963, at 306 and errata, Apr. 12, 1963.

71. There are a few cases in which the nationality problems were allegedly settled by treaties. In the case of Tunisia, however, Tunisian nationality had already existed before the treaty was concluded. The treaty did not allocate the nationality of people between France and Tunisia, but merely contained clarifying provisions. General Treaty, June 3, 1955, France-Tunisia, 1955 D. Bull. Leg. 909. The treaty between France and South Vietnam (J. Off. (Fr.), May 3, 1959, at 4767) did have general provisions on nationality, but it was not a definitive settlement, for it became null and void when Vietnam was unified. J. Off. (Fr.), Aug. 19, 1976, at 4987.

72. See, e.g., Ordonnance of Mar. 1, 1960 (*Code de la Nationalité Guinéenne*) art. 141, R. DECOTTIGNIES & M. DE BIEVILLE, *supra* note 8, at 173-74; Law of June 12, 1961 (*Code de la Nationalité Mauritanienne*) art. 71, *id.* at 267; Law of Dec. 1, 1961 (*Code de la Nationalité Voltaïque*) art. 122, *id.* at 380. See also *id.* at 30-34; J. DE BURLET, *supra* note 8, at 172-73.

73. J. Off. Deb. Parl., Sen. (Fr.), July 20, 1960, session, at 1024.

Had the French government adhered to the principle of automatic change, Article 13 would have been of a merely declaratory character, and the inhabitants of newly independent states would *ipso facto* have lost French nationality and would have acquired the new nationality. The "dual" nationality issue would never have arisen. The above argument demonstrates that France was not prepared to follow this principle.

The newly independent states likewise did not adhere to this principle. Most of them rejected dealing with problems raised by independence within the framework of state succession, and emphasized the sovereign and constitutive character of their own determination of nationality. In addition, because they did not have a high degree of homogeneity within their territories, they had to rely on a variety of criteria other than residence in determining who were to be their nationals. Thus, the traditional principle of automatic change was rejected by newly independent states on both ideological and substantive grounds.

B. *Nationality Settlements in the Peace Settlement Following World War II*

World War II ended with the defeat of the Axis Powers. Both the war they waged and their rule over foreign peoples were judged illegal. Thus, the Axis Powers' defeat meant the liberation of subjugated peoples. The self-determination of these people was to be the guiding principle for settling nationality and territorial problems.

1. *Independence and Transfer of Territory from Germany*

In the case of the independence of Austria, Austria enacted the Nationality Transfer Law of July 10, 1945, after the Declaration of Independence. It provided that those who had Austrian nationality on March 13, 1938, and those who would have acquired Austrian nationality if the Federal Law of July 30, 1925 on the Acquisition and Loss of Austrian Nationality had been valid, were Austrian nationals as of April 27, 1945, the date of the restoration of independence.⁷⁴ Thus, Austria determined who would be its nationals irrespective of the residence of the people concerned.

This Austrian settlement basically has been recognized by both Germanys. East Germany has regarded those who recovered Austrian nationality as having lost German nationality even if they were resid-

74. [1945] Staatsgesetzblatt (Aus.) item 59, § 1, at 81.

Nationality Change

ing in East Germany.⁷⁵ In West Germany, there has been a change in court judgments concerning the nationality of Austrians residing there. Earlier judgments tended to regard Austrians in West Germany as retaining German nationality.⁷⁶ However, in the judgment of November 9, 1955, the Federal Constitutional Court held that all Austrians including those residing in Germany lost their German nationality on the day Austria was re-established.⁷⁷

The Second Law on Questions of Nationality of May 17, 1956, finally settled this problem. It provided that German nationality according to the Orders of July 3, 1938, and of June 30, 1939, was extinguished as of April 26, 1945 (Article 1). However, those who lost German nationality were entitled to reacquire it if they had been continuously resident in Germany since April 26, 1945 (Article 3(1)). The right to reacquire German nationality was also granted to their wives and children (Article 3(2)).⁷⁸

This settlement was based on the view that the attainment of the independence of Austria entailed the restoration of the *status quo ante* before the illegal *Anschluss* and that West Germany should respect the unity of the Austrian nation.⁷⁹ On the other hand, the Law sought to respect the free and voluntary will of the Austrians in Germany, based on their residence and membership in German communities. Respect for this free will was not limited to Austrians in the ethnic sense, but also to those standing in a family relationship to them. Thus, the right of option was granted to this broader circle of people. In this way, West Germany settled nationality problems *vis-à-vis* Austria by reference to respect for national self-determination of Austria and for the will and life of individuals directly or indirectly affected.⁸⁰

75. This is evidenced by a combination of several facts: (1) East Germany has regarded the *Anschluss* as null and void under international law; (2) when East Germany was established in 1949, Germans, in the meaning of the German Nationality Law of 1913, who were residing in East Germany were deemed nationals of East Germany while Austrians, in principle, did not become East German nationals; (3) the East German Nationality Law of Feb. 20, 1967, reaffirmed point (2) above, [1967] Gesetzblatt der DDR [GBl.DDR], pt. 1 § 1, at 3; and (4) the Consular Treaty of 1957 between East Germany and Austria, which was intended to settle problems concerning nationality, was based on the assumption that Austrians residing in East Germany had, in principle, only Austrian nationality, [1975] Bundesgesetzblatt [BGBl] (Aus.) 2190.

76. *E.g.*, the decision of Oct. 30, 1954 of the Federal Administrative Court. [1955] Juristenzeitung 80.

77. [1956] Juristenzeitung 117, 118.

78. [1956] Bundesgesetzblatt (W. Ger.) 431.

79. In order to express the automatic result of the restoration of the *status quo ante*, the Law deliberately employed the terminology *Staatsangehörigkeit ist "erloschen"* rather than "*verloren*," which was employed in the Article 116 Basic Law of West Germany. In addition, it adopted April 26, 1945 as its critical date, in accordance with the critical date in the Austrian Law of July 10, 1945.

80. Prior to its resolution of the case of Austria, West Germany enacted the First Law on

There are also many cases in which both East and West Germany settled nationality problems accompanying the transfer of territory by treaties with the states which acquired or recovered these territories. These cases exhibit basically the same features as those described above. For example, according to the treaties of West Germany with Belgium and the Netherlands respectively, the former German nationals residing in the territories transferred to Belgium or the Netherlands retained German nationality. In spite of their retention of German nationality, they were guaranteed residence in the territories. They were also entitled to opt for Belgian or Netherlands nationality.⁸¹ East Germany also viewed Germans as retaining German nationality even if they resided in the territories transferred from Germany. This corresponded to the attitude of the states which acquired (or recovered) these territories. For example, while East Germany recognized the incorporation of Eastern Prussia into Poland by the Treaty of June 7, 1950, both states regarded Germans residing there, in principle, as having only German nationality.⁸²

2. *Independence and Transfer of Territory from Italy*

The Italian Peace Treaty of 1947 provided that Italian citizens domiciled on June 10, 1940, in the territory transferred from Italy to another state would acquire the new nationality.⁸³ This provision was also applied by the Italian Supreme Court to a nationality case upon the independence of Libya.⁸⁴ Although these solutions seem to follow the principle of automatic change, they also contain several features which must be reconsidered from new perspectives. First, the critical date which defined those who were subject to change was the date of declaration of war by Italy. Inhabitants who were settled after Italy declared war could not become nationals of the states acquiring those territories. This formulation derived from the negative assessment of the war that Italy waged. Second, the right of option was granted not to all inhabitants, but only to those whose customary language was Italian (Article 19(2)). Third, in the case in which the Supreme Court applied the

Questions of Nationality, [1955] BGBl 67, according to which, Germans ("*die deutschen Volkszugehörigen*") retained German nationality even if they resided in territories transferred from Germany, unless they declined it. Here also, decisive factors were the link with the nation in the ethnic sense and the respect for the will of individuals based on the fact of their participation in a specific territorial community.

81. Treaty, Sept. 24, 1956, Belgium-W. Germany, art. 3(2), 314 U.N.T.S. 201; Border Treaty, Apr. 8, 1960, Netherlands-W. Germany, art. 11 & art. 9(2), 10(2), 508 U.N.T.S. 31-35.

82. See H. SEELER, *DIE STAATSANGEHÖRIGKEIT DER VOLKSDEUTSCHEN* 48 (1960).

83. Art. 19(1), 4 PEACE TREATIES, *supra* note 27, at 2430.

84. Ministero dell'interno c. Rascid Kemali, Feb. 1, 1962, 85 Foro It. 190 (1962).

Nationality Change

above principle to the case of independence, the major issue was whether an Italian-Libyan in Italy was to be regarded an Italian national or a stateless person. It is not surprising from the perspective of human rights that the Court rendered the judgment which avoided statelessness.

Adoption of the new framework is all the more evident in the independence of Ethiopia and Somalia. After the Italian army was expelled in 1941, Ethiopia regarded all its former nationals as Ethiopian irrespective of their residence. When Italy formally recognized the sovereignty and independence of Ethiopia, Italy regarded all former Ethiopian nationals as Ethiopian, even if they resided in Italy or in third states.⁸⁵ Thus, respect for the self-determination of the Ethiopians, *i.e.*, the restoration of the independence of Ethiopia, was the decisive factor in settling the problem. In the case of Somalia, its nationals were determined by Somalia's domestic law, based on the combination of *jus sanguinis* and the nationality principle. Belonging to the nation in terms of origin, language or tradition was decisive in determining who were to be its nationals.⁸⁶ Italy, having already renounced all rights and titles to the former territorial possessions in Africa in the Peace Treaty, accepted the effect of the Somalian domestic law.

3. *Independence of Korea from Japan*

Korea regained independence under two separate governments. No treaty was concluded between Korea and Japan to settle nationality problems. Korean nationality was determined independently and differently by North and South Korea, but based on a common criterion. South Korea (R.O.K.) enacted its Nationality Act in 1948, and applied its permanent provisions to determine who were to be its nationals. The Korean people defined in terms of *jus sanguinis* were regarded South Korean nationals.⁸⁷ Thus, not only Koreans in South Korea, but also in North Korea as well as those residing abroad were deemed South Korean nationals. North Korea (D.P.R.K.) has maintained basically the same attitude. Measures concerning nationality taken by North Korean authorities after 1945 were based on the ethnic criterion of the nation. Those who ethnically belonged to foreign nations were not regarded as Korean nationals even if they resided in North Korea, whereas those outside North Korea were so regarded so long as they

85. The letter from the Foreign Ministry of Italy to Y. Onuma, Aug. 11, 1976, confirmed this position.

86. Citizenship Law of Dec. 22, 1962, art. 2, Off. Bull. (Somalia), Suppl. No. 4 to No. 12.

87. Nationality Act of Dec. 20, 1948, art. 2, LAWS OF THE REPUBLIC OF KOREA 18 (3d ed. Korean Legal Center 1975).

ethnically belonged to the Korean nation.⁸⁸ The Nationality Law of October 9, 1963 reaffirmed this position.⁸⁹

The Japanese government has regarded all Koreans registered in the Korean Family Registry, including those residing in Japan, as having lost Japanese nationality.⁹⁰ When Japan and South Korea concluded the agreement on the legal status of the R.O.K. nationals in Japan in 1965, both states assumed that Koreans in Japan had only Korean nationality. On this assumption, the Treaty provided for the special treatment of the R.O.K. nationals, taking into consideration that the R.O.K. nationals residing in Japan had come to have special relations with Japanese society.⁹¹ Although some writers criticize the measures taken by the Japanese government, they argue that the government did not go far enough to adhere to the framework of national self-determination and human rights, rather than that the principle of automatic change should have been applied.⁹²

III. Nationality Settlement Within the Framework of National Self-Determination and Human Rights

A. *Nationality Settlement Within The Framework of National Self-Determination*

As discussed in Section I, the principle of automatic change was established in Western Europe prior to World War I within the context of cession of territory. Two basic characteristics supported this principle. First, on the substantive level, there existed a relatively high degree of homogeneity within territorial units. Because nations could be well defined in terms of territoriality, no serious problem occurred if individuals followed the fate of territory. Second, on the ideological level, the concept of individuals as an appurtenance of territory dominated the period when this principle was prevalent. Since nationality problems were considered and settled primarily within the context of "cession of territory," which implied disposability of territory and inhabitants, this

88. See, e.g., Articles Concerning Divorce, Dissolution of Adoption and Restoration of Family Registry between Koreans and Japanese of May 14, 1946, 1 HISTORICAL COLLECTION OF LAWS AND REGULATIONS OF NORTH KOREA 695 (N.H. Ch'a & K.M. Chong eds. 1969).

89. CHOSEN MINSHU'SHUGI JINMIN KYOWAKOKU SHAKAISHUGI KENPO (*The Socialist Constitution of the D.P.R.K.*) (M. Fukushima ed. 1974), annex 230.

90. The Japanese government has taken basically the same attitude toward the nationality of the Formosans, who were Japanese nationals from 1895 to 1945. Minji-ko No. 438, Minjikyokucho Tsutatsu (Circular No. 438 of the Head of the Civil Affairs Office), Apr. 19, 1952.

91. 584 U.N.T.S. 3.

92. See Onuma, *supra* note 16.

Nationality Change

framework was not questioned. The attainment of independence by European and Western Hemispheric nations in this era did not threaten this framework because: (1) the essential meaning of national self-determination was not fully recognized; and (2) Western Hemispheric nations, which provided many cases of independence, were "nations of immigrants," the fact of migrating into a territory and having residence *there* was construed as participating in the establishment of an independent nation state.

Today, one can clearly see the decline of these characteristics. On the substantive level, territorial residence cannot always guarantee national integration, particularly in many areas of Africa and Asia where national self-determination has been realized since World War II. In Africa, political boundaries established by colonial powers were artificial, cutting across linguistic, ethnic, and religious lines. Colonial powers also discouraged economic development within boundaries, and often utilized the "divide and rule" policy to maintain their domination. Therefore, the development of national consciousness within each territory was extremely slow. Most of these "nations" became independent with a high degree of heterogeneity within their territories.⁹³ In addition, particularly in Islamic nations, the role of religion in the process of nation-building is much stronger than in European nations. Since nation-building is closely connected with religion, membership in a nation tends to be defined by reference to one's religious status rather than to territorial residence.⁹⁴ Furthermore, independence movements seek economic as well as political independence. Newly independent states often regard the non-indigenous population as an element of foreign domination, and attempt to liberate their economy from them. Thus, residence alone does not always constitute a sufficient basis for nationality.

On the ideological level, nationality settlements after World War II show a primary concern for the fate of people themselves. Two major factors require explication. First, since World War II an overwhelming majority of nationality changes have resulted from the attainment of independence by former colonies. According to the logic of nationality change upon independence, nationality does not change because it follows the territorial change. It changes because a people liberates itself from foreign rule and establishes a state composed of its own members.

93. See the words of Deutsch who said that "[i]t took centuries to make Englishmen and Frenchmen. How are variegated tribal groups to become Tanzanians, Zambians or Malavians in one generation?" K. DEUTSCH, *supra* note 17, at 73.

94. See, e.g., the case of Algeria discussed *supra* text accompanying notes 68-70.

Although the people who gained independence had been "nationals" of the colonial powers in terms of international law, their nationality was merely an empty one lacking the fundamental character of political rights. Thus, for those people, a change of nationality upon independence means almost the original acquisition of nationality, which has a constitutive significance.

When European nations first became subjects of international law, the determination of each nation's nationals was already a given, and international law merely confirmed it. To settle nationality problems arising from the independence of colonies by applying the principle of automatic change, therefore, would mean the interference by international law in a problem whose settlement was a presupposition, rather than a consequence, of international law in the European context. It is not surprising that newly independent nations rejected this approach. They emphasized the sovereign and domestic character of the determination of their own nationals on the attainment of independence.⁹⁵ Former colonial powers basically recognized this approach. In most nationality settlements accompanying independence, they did not insist on settlement by means of treaties, but recognized that the nationals of newly independent nations should be determined by the domestic law of these nations. Even when a problem was settled by means of a treaty, the unity of the newly independent nation was respected. Thus, the criterion of the nation as a basic unit of self-determination was utilized to assign nationals to each state concerned.⁹⁶

95. The emphasis upon the theory of *tabula rasa* by the newly independent states shows this general attitude. See Omuma, *supra* note 16, at 563-64.

96. In addition to the cases cited in Section II, the independence of the Philippines from the United States clearly shows the importance of the criterion of the nation as a basic unit of self-determination and the decline of the domicile principle.

The Treaty between the United States and the Philippines, 61 Stat. 1174 (1946), which recognized the latter's independence, did not include provisions to settle nationality problems. The settlement was left to the domestic measures of both countries. The Republic of the Philippines basically succeeded the "Commonwealth" regime. The Philippines under the Commonwealth regime enacted its own constitution and had its own citizenship, although this did not have international meaning. The Republic of the Philippines adopted this Commonwealth's constitution as the constitution of the Republic. Those who were citizens of the Philippines during the Commonwealth period automatically became nationals of the Republic of the Philippines irrespective of their residence. Rep. of the Phil. Const. art. IV, V.

The position of the United States is the same. After the Philippines became independent, U.S. court decisions unanimously treated the Filipinos residing in the United States as having lost U.S. nationality. In *Rabang v. Boyd*, the Supreme Court held that "persons . . . who were nationals of the United States, became aliens on July 4, 1946, regardless of permanent residence in the continental United States on that date." 353 U.S. 427, 430-31 (1957) (emphasis added).

Thus, neither the Philippines nor the United States followed the traditional principle of automatic change. Rather, the citizenship of the Philippines, which defined the membership

Nationality Change

Second, when the principle of automatic change was predominant, war was regarded as an extra-legal phenomenon and was limited mainly to battle of armies. Therefore, when a territory was transferred as a result of a war, the characterization of the war had little immediate effect on the territorial and nationality settlement. Wars in the twentieth century, by contrast, came to involve every class of nation. The notion of the illegality of war rapidly gained currency. World War II was characterized by the United Nations as a war of aggression and subjugation waged by the Axis Powers. The United Nations deemed the liberation of peoples subjugated by the Axis Powers as a major war aim. With the United Nations' victory, these people were liberated and were to determine their political fate by themselves. With this notion prevailing, it was inadequate to discuss nationality change *as a consequence of territorial change*. Although the domicile principle was adopted as one of the criteria, it was justified as a basis for the existence of a nation and also for the actual life of individuals. This was valid not only in cases of independence of subjugated peoples but also in those concerning the transfer of territory.

In this way the substantive and ideological bases sustaining the principle of automatic change in its traditional sense have been undermined. The majority view cannot be maintained so long as it continues to retain the framework premised on the appurtenance theory. International practice shown in Section II clearly indicates that nationality problems have been settled by reference to what kind of nationality settlement is most suitable for the self-determination of a people. This new framework of national self-determination can be described in the following way.

First, the right of a newly independent nation to determine who will be its nationals is an essential component of the right of self-determination. Because the constitutive character of determining one's original nationals, which European nations enjoyed at their birth as nation states, should also be recognized in the case of newly independent nations, their determination of their nationals should, in principle, be recognized as having an international effect *vis-à-vis* former ruling states. Actually, as shown earlier, most former colonial powers did recognize

of the Republic of the Philippines, was adopted in assigning nationals to each state. The United States also took certain measures to guarantee Filipinos residing in the United States the right to be naturalized. 60 Stat. 416-17 (1946). In this way, concern for the unity of Filipinos defined in terms of the unit for self-determination and respect for the free will of individuals who were affected by the independence were two major factors in settling the nationality problem.

the primary competence of the newly independent nation in determining who were to be its nationals.

Second, this does not mean, however, that only the domestic law of the newly independent state is decisive, as the minority view suggests. When the domestic jurisdiction in matters of nationality is discussed, it generally signifies that matters of nationality should be settled by the existing domestic law of a state. The voluntary and autonomous character of nationality is generally disregarded, for the acquisition or loss of nationality is disposed of as an application of the existing nationality law without considering the actual will of individuals. By contrast, as respects national self-determination, this voluntary will has a decisive meaning. It is the commitment of individuals to a certain body politic that transforms an amorphous nation into an institutionalized state. Therefore, the voluntary character should be all the more respected in determining nationality in the process of self-determination.

Third, territorial residence is still important today so long as it gives a significant substantive basis for the existence of a nation (or, according to the recent terminology in international law, a people), which is the basic unit of self-determination. The minority view fails to see this point. Residing in a territory *generally* can be construed as an expression of one's voluntary will to be a member of the body politic established therein. This presumptive function is a major *raison d'être* of the principle of automatic change today. In order to assume the existence of a state which is competent to determine its nationals, there must be a political entity which transforms itself from an amorphous nation into an institutionalized state. Because such a political entity cannot exist without people and territory, it follows that a people within the territory be presumed as a basic unit of the emerging state. The minority view cannot explain how a state, which is allegedly solely competent to determine its nationals by domestic laws, can exist without presupposing the existence of nationals, which is an essential component of a state. This pre-existence is possible only when the presumptive force of the principle of automatic change is recognized. Because this principle has such a presumptive force, it can also be characterized as a supplementary norm in the absence of concrete provisions, and as an interpretative principle when the interpretation of a provision is in question.

On the other hand, it is clear that the principle of automatic change is not of a peremptory, but of a dispositive character. Parties can settle a nationality problem in a different way (*e.g.*, inhabitants of the transferred territory will retain the former nationality) by means of a treaty. Even after World War II, there was still a considerable number of cases

Nationality Change

in which nationality problems accompanying territorial change were not settled by merely combining domestic nationality laws, but by treaties. These cases also were decided mainly by considering what settlement was most appropriate for the realization of the self-determination of the people concerned.⁹⁷

Thus, the concept of national self-determination constitutes the most important framework within which contemporary nationality problems accompanying territorial change has been approached, judged, and settled. Both the domestic nationality laws of the states involved in territorial change, stressed under the minority view, and the principle of automatic change, maintained under the majority view, should ultimately be understood and qualified within the framework of national self-determination.

B. *Nationality Settlement Within the Framework of Human Rights*

Nationality has been understood mainly as a link between an individual and a state, and has been traditionally considered in a different dimension from that of human rights. Because the acquisition of nationality by birth has been the basic form of acquiring nationality, the voluntary will has been inevitably fictitious in positive law. In many countries, the notion of nationality retained the concept of allegiance, a remnant of the allegiance to a monarch.

However, due to the growing emphasis on volition in the determination of nationality in general, and the continued emphasis on the right of expatriation by the United States in particular, the concept of allegiance has gradually declined. The Hague Convention and Protocols

97. The case of Indonesia's attaining independence from the Netherlands offers a good example. Indonesia declared independence in August 1945, and enacted the Nationality Law in 1946, Act No. 3 of Apr. 10, 1946, thereby defining the nationals of the Republic of Indonesia. The Netherlands recognized its independence in November 1949. They concluded the Treaty Concerning the Assignment of Citizens of 1949, 69 U.N.T.S. 206, to determine whether former Netherlands nationals were to be assigned Netherlands or Indonesian nationality. The major criterion adopted in the Treaty was an ethnic one. Former Netherlands subjects who were not Netherlanders would acquire Indonesian nationality, if they belonged to the indigenous population of Indonesia (article 4). Those who ethnically belonged to Netherlands would retain Netherlands nationality (article 3). Those who belonged to neither of the above would acquire Indonesian nationality if they had been born in Indonesia or had resided there (article 5).

This basic assignment was modified by the introduction of a right of option granted on the basis of birth and residence. For example, those belonging to the indigenous population could opt for Netherlands nationality if they were born and resided outside of Indonesia (article 4). Likewise, those belonging to the Netherlands and those belonging neither to the Netherlands nor the indigenous population were granted a right of option, provided they satisfied certain requirements concerning birth or residence (articles 3, 5, 6, 7). Thus, the demand for the unity of a nation in the ethnic sense, and the respect for the voluntary will of individuals are two decisive factors in the assignment of people among the states concerned.

and the Montevideo Conventions on Nationality, which were concluded in the inter-war period, included many provisions for the protection of human rights, such as the guarantee of nationality of wives and children, the respect for the will of wives in acquisition and loss of nationality, the equality of sex as regards nationality, and the prevention of dual nationality and dual military obligation.⁹⁸ These provisions, together with treaties protecting minorities and judgments of courts emphasizing the importance of the voluntary will and lives of individuals, reflect the general trend toward protection of human rights in the context of nationality during this period.

This trend is even more apparent after World War II. The Universal Declaration of Human Rights (1948) provides that everyone has a right to nationality (Article 15).⁹⁹ Similar provisions appear in Article 20 of the American Convention on Human Rights (1969),¹⁰⁰ and Article 24(3) of the International Covenant on Civil and Political Rights (1966).¹⁰¹ The Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961) have further promoted this trend.¹⁰²

Domestic legislation after World War II also indicates increased concern for human rights in matters of nationality. Symbolically, the United Kingdom, which had adhered to the doctrine of *nemo potest exuere patriam*, expressly recognized the right of expatriation in the 1948 Nationality Act. With the persistent insistence on the equality of sex by socialist countries and the development of the idea of non-discrimination, many countries have at least reduced the degree of inequality in their nationality legislation in favor of women.¹⁰³ Supplementary application of *jus soli* in many nationality laws based on *jus sanguinis*, as well as technical devices preventing the occurrence

98. See the Hague Convention, *supra* note 6, arts. 6, 8-10, 13-17, U.N. LEG. S.: LAWS CONCERNING NATIONALITY U.N. Doc. ST/LEG/SER.B/4 at 567-69; Protocol Relating to Military Obligations in Certain Cases of Dual Nationality of Apr. 12, 1930, art. 1, *id.* at 572; Protocol Relating to a Certain Case of Statelessness of Apr. 12, 1930, art. 1, *id.* at 575; Convention on the Nationality of Women of Dec. 26, 1933, art. 1, *id.* at 584; Convention on Nationality of Dec. 26, 1933, art. 1, 4-5, *id.* at 585.

99. BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 32 (L. Sohn & T. Buergenthal eds. 1973).

100. *Id.* at 217.

101. *Id.* at 53. The International Covenant on Civil and Political Rights [hereinafter cited as 1966 (B) Covenant] provides this idea in the form of the right of a child to acquire a nationality.

102. HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 66-75 (J. Joyce ed. 1978).

103. Many European countries which had a *jus sanguinis a patre* nationality law, such as France, West Germany, Switzerland, Denmark and Sweden have revised it, and have adopted *jus sanguinis* based on the equality of sex. Japan has just begun reviewing its nationality law in the same direction.

Nationality Change

of statelessness in cases of marriage in many contemporary nationality laws show the common concern to avoid statelessness.¹⁰⁴ These characteristics indicate that the concept of human rights offers a basic framework for approaching and settling the problem of nationality.

Measures taken by states concerning change of nationality related to territorial change exemplify the above trend. For example, as mentioned earlier, the United Kingdom and France took radical measures so that no one would become stateless. Most of those who had more than one possible link supporting their nationality were given a *de jure* or *de facto* right of option. Many cases of independence or transfer of territory from the United Kingdom, France, West Germany, the Netherlands and the United States show respect for the voluntary will of individuals and actual life in a territory. Although these settlements did not explicitly refer to "human rights," it is clear that they were implicitly guided by references to human rights, *inter alia*: (1) prevention of statelessness; (2) respect for equality of sex in acquiring and declining nationality; (3) respect for the free and voluntary will; and (4) respect for the actual life in a territory.

The above shows the concern for human rights which can be seen in nationality settlements since World War II. There is another human rights consideration which has a prescriptive meaning for nationality settlements related to territorial change, although it has developed independently from them. This is the concept of non-discrimination on the basis of nationality that has been rapidly emerging in international as well as domestic practice.

As shown in Section II, many countries adopted non-residential criteria such as race, birth, etc. for settling nationality problems accompanying territorial change. This resulted in a considerable alien population within a territory. Although the alien population differs from the majority of the population in nationality, it does not differ in its membership and participation in the community, nor in its societal obligations. Therefore, it is necessary to grasp the current situation of non-discrimination norms concerning nationality, although this aspect of human rights law has not been sufficiently considered in the nationality settlement relating to territorial change.¹⁰⁵

104. See Lagarde, *La rénovation du Code de la Nationalité par la loi du 9 janvier 1973*, 62 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 431 (1973); McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of Individual in External Areas*, 83 YALE L.J. 900, 965-76 (1974); Münch, *Development récents du droit de la nationalité*, in 2 STUDI IN ONORE DI MANLIO UDINA 1109, 1123, 1127-29, 1131-35 (1975).

105. The major reason for this insufficiency is the excessive emphasis on the concept of national self-determination on the part of the nations attaining independence. The concern

In the pre-World War II era, the protection of the rights of individuals was restricted by its national character in that: (1) protection was under a dualistic régime of rights of nationals and rights of aliens; (2) protection of rights of nationals was limited to local (domestic) remedies; and (3) protection of rights of aliens was, through the system of diplomatic protection, left to the discretion of the aliens' governments.¹⁰⁶

In contrast, the development of the international protection of human rights after World War II transcends the traditional dualistic regime in the following respects. First, the law of human rights defines rights of individuals basically as universal human rights. In concrete terms, international human rights instruments express the universality of the enjoyment of human rights by generally providing either: "Everyone has (or shall have) the right to . . ."; or "No one shall be . . ."; or, even more explicitly, "Everyone (or all individuals) within (or subject to) its jurisdiction."¹⁰⁷ When the term "everyone" is used in the exceptional sense of designating a national, it is made clear from the context of the sentence.¹⁰⁸

Second, certain instruments such as the European Convention on Human Rights and the International Labour Organization (I.L.O.) provide various measures to give effect to the universality of the enjoyment of human rights. The right to petition by individuals as well as contracting states in general, the competence of the European Commission of Human Rights to bring a case before the European Court of Human Rights, the right to challenge a governmental measure by representatives of workers or employers, and the various enforcement actions taken by the I.L.O. exemplify some of these measures.¹⁰⁹ Although the degree of enforcement varies widely, these measures attempt to overcome the dualistic regime in that: (1) an individuals can complain at the international level regarding the violation of his rights by his own government; (2) he can complain regarding the violation of his rights

for the protection of human rights of those who became aliens as a result of independence, if any, was almost exclusively seen in the former metropolitan states.

106. The diplomatic protection has been framed by its national character in that: (1) an individual can expect remedies only through the protection of his state of nationality; (2) the right of protection has been understood as a right of the state, not of the individual.

107. See, e.g., Universal Declaration of Human Rights, arts. 7-9, BASIC DOCUMENTS, *supra* note 99, at 30-34; European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950, arts. 1-5, *id.* at 125-40; 1966 (B) Covenant, *supra* note 101, arts. 7-9, *id.* at 44-62.

108. See, e.g., Universal Declaration of Human Rights, art. 21, *supra* note 107, at 33.

109. As to the activities and achievements of these human rights mechanisms, see E. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (1966); F.JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975).

Nationality Change

by a foreign state, without relying on the diplomatic protection of his own government; and (3) not only the state whose national's right is violated, but also the contracting states in general, as well as an international commission, can bring a violation of human rights by a certain state before an international tribunal.

Finally, emerging norms of non-discrimination¹¹⁰ produce a certain impact on the traditional dualistic regime. Although the norm against discrimination based on nationality is the least developed of non-discrimination norms, this does not mean that international law generally allows discrimination based on nationality. Theoretically, the universality of the enjoyment of human rights requires its *general* prohibition. Although many lists of prohibited grounds for discrimination in human rights instruments do not enumerate nationality, they are non-exclusive in nature, and are not intended to validate other forms of discrimination. When these instruments allow distinctions between nationals and aliens, they explicitly limit them to certain specified conditions, thereby indicating their exceptional character.¹¹¹

110. With the advent of decolonization, the notion of white supremacy as justification for racial discrimination has been effectively defeated. The norm of non-discrimination on the basis of race is being established in every political, economic, social, and cultural area. Led by this development, non-discrimination norms in various fields also are gradually being established.

On the international level, almost all international instruments of a general character such as the Universal Declaration of Human Rights, art. 2(1), the 1966 (A) Covenant, art. 2(2), and the 1966 (B) Covenant, art. 2(1), as well as regional instruments on human rights, such as the European Convention on Human Rights, art. 14, and the American Convention on Human Rights, art. 1, include a general principle of non-discrimination. In concrete areas, conventions such as the Equal Remuneration Convention of 1951 (art. 2), the Discrimination (Employment and Occupation) Convention of 1958 (arts. 1, 2) and the Convention against Discrimination in Education of 1960 (arts. 1, 3) prohibit discrimination on the various bases in their respective fields. Furthermore, conventions prohibiting discrimination based on certain particular grounds, such as the Convention on the Political Rights of Women of 1952, the Convention on the Nationality of Married Women, the Conventions on the Elimination of All Forms of Racial Discrimination of 1965 and that of Discrimination against Women of 1980 have been adopted and aid in the formation of more inclusive norms of non-discrimination. The accumulation of U.N. practice judging apartheid as illegal, and the continuing activities of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities have also contributed to the establishment of norms of non-discrimination.

111. This is evidenced by the entire terminology of the provisions, as well as the *travaux préparatoires*. For example, although the 1966 (A) Covenant does not enumerate nationality as one of the prohibited grounds, this does not mean that it generally allows discrimination based on nationality. Had the 1966 (A) Covenant allowed for discrimination, it would have been unnecessary to provide for Article 2(3), which allows *only* that "[d]eveloping countries . . . may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." 1966 (A) Covenant, art. 2(3). Nor would Western European states have been against the adoption of Article 2(3), claiming that it was contrary to the spirit of the universality and equality underlying the Covenant. Thus, the fact that Article 2(3) was inserted indicates the general prohibition against discrimination based on nationality and the exceptional allowance for certain limited areas. *See* U.N.

In this way, the significance of nationality as a criterion governing value distributions among individuals has been decreasing. Instead, residing in a certain territorial community and being subject to its territorial jurisdiction have become more and more significant, as shown in Article 2(1) of the 1966 (B) Covenant. Exemplary in this respect is the Declaration on the Protection of Human Rights of Resident Aliens drafted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹¹² The draft declaration, supported by many governments, emphasizes the rights of resident aliens. It limits its scope to the aliens who live for a certain period of time within a community, thereby guaranteeing not only political and civil rights but also economic, social, and cultural rights to them.¹¹³ Since the draft has been prepared on the basis of *existing* international provisions for the protection of human rights, this feature can be characterized as a reflection of current international norms of non-discrimination relating to nationality.

The same characteristic can be seen in recent domestic trends. Here again, although less developed than other norms of non-discrimination, a general prohibition of discrimination based on nationality is being established. Although the British Race Relations Act originally did not specify nationality as a basis for non-discrimination, it explicitly came to prohibit discrimination based on nationality in 1976.¹¹⁴ The report to the French National Assembly made it clear that the term "*nationalité*" enumerated as a basis for non-discrimination in the Anti-Racism Law included nationality in the legal sense.¹¹⁵ In the United States, the Supreme Court held in *Graham v. Richardson*¹¹⁶ that classifications

GAOR C.3 Annex (Agenda Item 43), U.N. Doc. A/C.3/SR.1181-85, 1202-07 (1962). See also McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432, 457 n. 100 (1976).

112. *Draft Declaration of the Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live* (Revised), U.N. Doc. E/CN.4/1336 (1978). See also, *The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live*, U.N. Doc. E/CN.4/Sub.2/335 (1973); *Report Prepared by Baroness Elles*, U.N. Doc. E/CN.4/Sub.2/L.628 & Add. 1-3 (1975).

113. *Revised Draft Declaration Prepared by Baroness Elles*, arts. 1, 4-10, U.N. Doc. E/CN.4/Sub.2/L.682 (1978); *Draft Declaration*, preamble and art. 1, *supra*, note 101 at 2. See also, *Questions of International Protection of the Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live: Comments Received from Governments*, E/CN.4/1354 (1979), Add. 1-5 (1979-1980).

114. The Race Relations Act, 1976, c. 74, § 1(I)(b)(ii), § 78(I), 46 HALSBURY'S STAT. 396, 455 (1976).

115. J. Off. Report No. 2357, Ass. Nat., Annex Oral Hearing of May 25, 1972 session, at 15. Cf. Law No. 72-546 regarding the fight against racism, J. Off. (Fr.) July 2, 1972, at 6803.

116. 403 U.S. 365 (1971).

Nationality Change

based on alienage are inherently suspect and subject to strict judicial scrutiny.¹¹⁷ Since then, it has held various state laws and regulations requiring citizenship or restricting eligibility of aliens to be unconstitutional, except in certain limited areas.¹¹⁸ In Japan, although Korean residents initially were not permitted to enter the Legal Training and Research Institute because of their alien status, finally they were admitted and now may practice law as resident alien advocates.¹¹⁹ Like the international trend, these domestic developments stress the significance of residence and membership in a community. In this regard, the U.S. Supreme Court properly pointed out the equality of the burdens and contributions of resident aliens and citizens in a society.¹²⁰ Even the British Immigration Act of 1971,¹²¹ that has been severely criticized for restricting coloured immigrants, provides for exemption from deportation for Commonwealth citizens who were ordinarily resident in the United Kingdom when the Act came into force.

It is, therefore, evident that territorial residence is still important in guaranteeing rights of individuals, even though its status as a basis for nationality related to territorial change has weakened. This can be explained in the following way. It has been believed that nationality should be based on the free and voluntary will of individuals. On the other hand, since acquisition by birth has been a major form of acquiring nationality, free and voluntary will has to be fictionalized. In order that the acquisition of nationality containing this fiction be generally accepted, a more substantive link between individuals and a state is necessary. Residing in a territorial community as a member of society thereof constitutes this substantive link. Because the overwhelming majority of people are brought up in and establish various concrete relations within the territorial community of a state, they acquire a natural consciousness of linkage to the state. Thus, it is not nationality, which is inherently fictitious in character, but the substantive facts of residence and societal life that actually support the link between individuals and a state. For the overwhelming majority of people, how-

117. *Id.* at 376.

118. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Exceptions—Foley v. Connelie*, 431 U.S. 291 (1978) (citizenship permissible qualification for state police employment); *Amback v. Norwick*, 441 U.S. 68 (1979) (citizenship permissible qualification for certification for public school teacher).

119. *Ex parte Kim Kyong-duk* (1977). See SHIHOSHUSHUSESI—BENGOSHI TO KOKUSEKI (Legal Apprentice—Advocate and Nationality) (S. Harago & H. Tanaka eds. 1977).

120. 403 U.S. at 376; *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973).

121. The Immigration Act, 1971, ch. 77, § 7, 41 HALSBURY'S STAT. 27-28 (1971).

ever, residing as members of a territorial community coincided with being nationals of a state governing the territory. Therefore, to limit sharing in the common values of the community to nationals of the state did not cause serious problems.

The contemporary world differs from the above. First, as was shown earlier, many newly independent states do not regard territorial residence as a sufficient basis for nationality. Second, with the constant increase of foreign immigrant laborers, the number of resident aliens has increased remarkably. Due to these factors, the gap between being a national and being an inhabitant is no longer negligible. Finally, the development of human rights weakens the traditional nationalistic framework for the protection of rights. Thus, the limitation based on nationality reveals its fictitious character. Although certain areas still remain where the limitation is permissible, it must be made clear that, in principle, everyone subject to territorial jurisdiction shall enjoy human rights, including economic, social, and cultural rights.

Conclusion

From the foregoing analysis—historical as well as theoretical—it is now evident that there has been a fundamental change in the framework governing the change of nationality accompanying territorial change. The principle of automatic change has now lost the axiomatic character that it once had. The overwhelming majority of post-war nationality problems accompanying territorial change were solved by the domestic laws of both the states involved, which did not necessarily assume the automatic change of the nationality of the inhabitants. Rather, it was assumed that the states involved, especially the newly independent states, were free to adopt legislative criteria which they deemed proper in determining who would be their nationals.

This does not, however, indicate the victory of the minority view, which merely emphasizes the importance of a domestic nationality law. Not only does the minority view disregard concern for human rights, but also it cannot escape the logical fallacy shown earlier. Thus, it is of utmost importance to recognize that post-war nationality problems were framed and settled by considering what type of settlement would be most appropriate for the realization of the self-determination of the people involved. The framework of national self-determination has been substituted for the framework of appurtenance theory, still implicitly surviving even after the era of bourgeois revolution.

Although the concept of national self-determination constitutes the basic framework for nationality settlements related to territorial

Nationality Change

change, it is not the only existing framework. One can see the bare beginning of an increasing concern for human rights in settling post-World War II nationality problems. First, by the very nature of the concept of self-determination, the free and voluntary will of individuals should be respected, and is respected in concrete post-war legislation and court decisions. Second, concern for avoiding statelessness and conferring of *de jure* and *de facto* options to those affected by nationality change after World War II indicates sincere attempts to protect individuals from excessive emphasis on national self-determination. Third, because contemporary human rights law has established non-discrimination norms in the field of nationality as well as in the fields of race, sex, etc., the rights of those residents who become aliens as a result of territorial change should be protected as much as possible. Although these concerns, especially the latter, have not been fully realized in post-World War II nationality settlements, a human rights framework that includes these concerns is emerging which guides and proscribes decision-makers in approaching and settling nationality problems. In this way, national self-determination and concern for human rights constitute the contemporary framework for settlement of nationality problems accompanying territorial change.