

Discriminatory or Non-Discriminatory Application of Jus Sanguinis

Sattar Azizi

Ph.D. of International Law, Assistant Professor

Department of law, Faculty of Literature & Humanities, Bu-Ali Sina University, Hamedan, Iran

E-mail: sattarazizi@yahoo.com

Bijan Hajiazizi

Ph.D. of Private Law, Assistant Professor

Department of law, Faculty of Literature & Humanities, Bu-Ali Sina University, Hamedan, Iran

E-mail: haji598@yahoo.com

Razieh Hassankhani (Corresponding author)

M.Sc. of Private law

Department of law, Faculty of Literature & Humanities, Bu-Ali Sina University, Hamedan, Iran

E-mail: rzhasankhani@gmail.com

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Abstract

Nationality is an important issue in governments' and their national's international connections. One aspect of Jus sanguinis is discriminatory or non-discriminatory application. We discussed the question that whether the mother and father have equal roles in passing nationality through jus sanguinis, or only the father has rights in this respect?, i. e. both father and mother are considered, or just the father has a role in passing nationality through jus sanguinis. The study is comparative, although in some legal systems due to some reasons, only father's nationality is important. That is prejudiced use of jus sanguinis. Finally we try express the term "origin Iranian" with emphasis on Mother Role on nationality transferring.

Keywords: Discriminatory, Jus sanguinis, Nationality, Non-discriminatory

1. Introduction

"Nationality is a political and intellectual relationship which defines the relationship between one person and a specific state." (Nasiri, 2001) the quality of belonging to a nation Personal naming practices exists in all human groups and is far from random. Rather, they continue to reflect social norms and ethno-cultural customs that have developed over generations (Mateos, 2011)

In this article, we try to notice that what the term "discriminatory or non-discriminatory application of jus sanguinis" means, and how it is applied in our intended legal systems, that is the legal systems in Iran, England, and France.

At first, it could be said that this term means whether in granting and passing of nationality through the jus sanguinis, the nationality of parents, i. e. both father and mother are considered, or just the father has a role in passing nationality through jus sanguinis.

Shortly, we can say that according to paragraph 2 of article 976 of the Civil Code, the legal system in Iran has a system in which in passing nationality through jus sanguinis, father have the superior role rather than mother.

While the legal systems in England and French, as it will be discussed later in the article, have applied a non-discriminatory system by giving equal chance for the parents in passing nationality through jus sanguinis.

2. The Role of Parents in Passing Nationality to the Child

The states which apply the jus sanguinis, have two practices in granting nationality through this principle; some systems such as the legal system in Iran considers the father as the only parent who can pass the nationality, while

other systems consider the equal role for both mother and father.

One of the important changes have occurred in nationality rules of the countries, is moving toward sexual equality concerned with passing of nationality by the spouses, and the legislator has provided this equality for both husband and wife to pass their nationality to their child, whether he/she is born within framework of the marriage relationship, or be an illegitimate child (Hart, 2006).

Sexual equality is one of the main reasons for current amendments in rule of nationality in EU member states; this equality includes both passing of nationality to the child, and to a spouse in marriage.

In following discussions, we study the viewpoints of the legal systems in Iran, England, and France in granting and passing nationality.

2.1 The Legal System in Iran

Our legislators which consider the *jus sanguinis*, and it appears that consider it superior than the *jus soli*, state in paragraph 2 of article 976 of the Civil Code "any person born, whether in Iran or in a foreign country, to a father of Iranian nationality" would have Iranian nationality. Then, for a child it is sufficient to have an Iranian father to be considered as Iranian, whether he/she is born in Iran or in a foreign country.

Being born to an Iranian father, which is a term of *jus sanguinis*, is stated in Iranian nationality rules in paragraph 2 of article 976 of the Civil Code. In this regard it would be better to refer to some points:

- We see apparently in this paragraph that just being born to an Iranian father is sufficient to grant the Iranian nationality to his child, and the legislator considers no role for the nationality of mother in passing the Iranian nationality.
- Regarding the father's nationality, it should be noted that his current nationality, whether primary or acquired, should be Iranian. And it is not required to determine where the child is born.

In Iranian law, according to paragraph 2 of article 976 of the Civil Code, if the child has an Iranian father, would be considered as Iranian. In other words, the nationality of the mother is not a basis for granting the Iranian nationality according to *jus sanguinis*, i. e. if an Iranian woman marry a foreign man, and the wife maintains her Iranian nationality and not be imposed by the foreign nationality of the husband, in this case according to article 976 of the Civil Code, the child born of this marriage, would not be considered as an Iranian for his/her mother's nationality.

For inserting the paragraph 2 of article 976 as presently is, there are some justifications as we mention below:

- 1) It is possible that the reason for this article (paragraph 2 of article 976) is that the legislator according to his/her inclination to the family's nationality unity, thinks it is required that the nationality of father, that the lineage and inheritance is measured according to his nationality, be the only criterion for passing and granting the nationality.
- 2) It also seems that the social traditions have long been prevalent among the nations, and according to them the child was known just for his/her patrilineal in the society, have had a decisive role in this regard. It should not be ignored that when our legislator has regulated the articles about the nationality rules, the nationality rules of the France were the same, and the discriminatory state of the *jus sanguinis* was the only way of passing the nationality to the child.
- 3) The reason might be possibly that according to paragraph 6 of article 976 of the Civil Code, any woman of foreign nationality marrying an Iranian husband is considered as an Iranian; i. e. if a foreign woman marries an Iranian husband, she would acquire the nationality of her husband, whether she wish or not, and so both parents of the child would be Iranian (Arfa'nia, 1991).
- 4) The fact that our legislator does not recognize the matrilineal is not to contempt the mother, as in the rules of most countries, including Iran, only the father has forced guardianship on his child, and can appoint an executor for the child, or do some legal actions on behalf of the child.

2.1.1 The Concept of "Iranian-origin"

The term "Iranian-origin" is mentioned in the text of Constitutional System's constitution, and the constitution of Islamic Republic of Iran. According to article 37 of Constitutional System's constitution, "the crown prince would be the eldest son of the king, whose mother is Iranian-origin." And article 58 of the same constitution states "no one can become a minister, unless he/she is Muslim and Iranian-origin, and has Iranian nationality"

The constitution of Islamic Republic of Iran in article 115 about the conditions for the presidential candidates states "The President must be elected from among religious and political personalities possessing the following qualifications: Iranian origin; Iranian nationality; administrative capacity and resourcefulness; a good past-record;

trustworthiness and piety; convinced belief in the fundamental principles of the Islamic Republic of Iran and the official religion of the country."

Despite the use of this term in the above cases, its definition is not clear enough, so it is worthy to try to make this term clear according to paragraph 2 of article 976 of the Civil Code.

As stated in part one, nationality can be primary or acquired. There is another difference other than the way of granting or passing between these two types of nationality. The holders of primary nationality have some rights that holders of acquired nationality do not. (Note 1) The most important rights and privileges are the right to be elected as presidents and ministers. The constitution has stated the condition of being "Iranian-origin" as necessary for presidency, which is further than having primary nationality, and obviously does not include Iranian nationals who have acquired their nationality. Also, it cannot be concluded that whoever is born in Iran, is Iranian-origin. There are some points about this term:

- 1) The constitution of Islamic Republic of Iran have assigned this condition necessary for the presidential candidates in order to undertake the heavy responsibility of political management, and safeguarding the religion, political system, independence, and territorial integrity of the country according to their national ties.
- 2) In the term "Iranian-origin", the primary nationality resulted from Iranian father seems implicit. In determining the nationality of a given person (the president), the characteristic of "being Iranian-origin" is used rather than having the primary nationality; so it seems that this characteristic (being Iranian-origin) is further than the primary nationality, i. e. in addition to the given person (the president), his/her father should have "primary nationality" (Hashemi, 2007).
- 3) The law and rules of other countries have also predicted such mechanisms in order to preserve their essential interests and safeguard their independence. For instance, the paragraph 1 of article 54 of the Finland's constitution states that only the "native borns" have the right to be elected as the country's president, and states "native born" is someone who is born from Finnish parents and in Finland's territory. Also, article 65 of the Iraq's constitution in the conditions for the country's president states: "should be born in Iraq and have Iraqi parents" (Azizi, 2009)
- 4) There are two possibilities about the Iranian nationality of the father: first, he has primary nationality, and second, he, or his father, or his grandfather has acquired nationality. Is someone whose father or grandfather has acquired nationality, an Iranian-origin? It seems that the legislator meant to require the father of the candidate to have primary nationality too (Saljougi, 1998).

It seems that having Iranian origin has two components or elements:

- 1) Exclusive nationality of Iran, i. e. the person who has dual nationality of Iran and a foreign country can not be considered to have Iranian originality. And the dual nationality is not limited to time of the birth, but the Iranian-origin should not have any other foreign nationality during his/her life.
- 2) Primary nationality of the parents (Ibid)

As we stated earlier, the term of "Iranian-origin" is used for the mother of crown prince in Constitutional System, and the president in Islamic Republic of Iran's constitution. Since these positions are really ultra-sensitive, the intended candidate should have inextricable ties with Iranian society.

2.2 French Legal System

In French law, the parents' nationalities have an equal role in determining the primary nationality. Therefore, the nationality of someone who is born from a French mother, just the same as born to a French father, regardless of the birth place, would be French. If the birth place is outside France, and the father has different nationality, and the father does not accept the French nationality till the child gain the right to apply the nationality, the right to choose the nationality is recognized for the child, and the child can reject the French nationality (articles 17 and 19 of the French Nationality Code) (Massimo La Torre, 1998).

2.2.1 History of the French Legal System in Passing Nationality

In French law, in the Napoleon Code, the prominence of father's nationality to mother's one in imposing the jus sanguinis was accepted, so a child born to French father, would have been considered French.

In 1945 Nationality Law, this prominence was recognized for the father, and place of birth, or mother's nationality did not have any role in determining the child's nationality (article 17-1). Consequent to the France's need to population increase and attraction of more people to the country, this difference was disappeared, so as according to 1973 Nationality Law, a legal or natural child, who is born in France and has at least a parent with French nationality, is considered a French national (Khammamizade, 2007).

While according to 1945 Nationality Law, if father had French nationality, his child would certainly be considered as French, without the right to reject this nationality.

According to 1973 Law, if either or both of the parents are French, the child will certainly acquire French nationality. But when one of the parents is French and the child is born outside France, the right to reject the French nationality would be predicted for the child since 6 months before reaching the legal age till 12 months after that, for this child would have fragile ties to the country of France (article 19). If the foreign parent acquires the French nationality before that the child reaches the legal age, his/her right would be void. Also in case the beneficiary is in military service, his/her right would be void (article 18-1 of the French Civil Code).

In this regard, the instruction dated 12 May 2000 (Note 2) considers being born to French parents as a case for granting French nationality. (Note 3)

It is necessary to have a look on Belgian Nationality Code: one of the most important initiatives in Belgian Nationality Code enacted in 1932 was the equality between men and women in nationality affairs. So it provides for both mother and father to pass their Belgian nationality to their child, and in this regard there is no difference between natural and legitimate child (Claire Foblets, 2006).

2.3 English Legal System

The 1981 Nationality Code of England in paragraph 1 of article 44 emphasizes on sexual equality and rejects all forms of Racial, Ethnic and so on discriminations (Hart, 2006).

In this code, the existing discrimination against women was removed and "the possibility for the women to pass their nationality to their children was provided."

In article 2 of the Code the equality in the influence of the parents' nationality on the child is explicitly stated.

Before the 1981 Code came into force, a variety of written rules let and enabled the English nationals to pass their nationality to their children born outside the English territory.

What is important is that both parents can pass this nationality, and they have equal roles in passing English nationality to their children.

Now new rules have replaced the former ones, which limit passing of nationality to the first generation born abroad. But these rules have some exceptions too. For instance, children born outside the English territory to parents serving in royal service have English nationality. What is worth noting is that the legislator has used the term "parents" which implies the equal role for both mother and father in passing their nationality to their children. So the equality between parents has also been maintained in new nationality rules (Dummett, 2006).

In the late 2004, a law concerning the nationality was ratified which stated any child born outside the English territory, would be considered as English, if one of his/her parents had English nationality.

Regarding illegitimate children, the English Nationality Code states only if the mother has the English nationality, the child would be English national. And the 1946 Law also knew the children born outside the England and has English parents, and illegitimate children who have English mothers as English nationals.

The Secretary of State also has the authority to consider the child whose parents have not married officially and legally as English nationals (Dummett, 2006).

2.4 Comparative Study of Some Other Legal Systems

To better understanding and desirable comparison of the problem, it would be useful to study some other legal systems in brief as following:

According to German Nationality Code dated 1999/2000, in *jus sanguinis*, the lineage would be passed to the child from both parents in an equal way; this method was the traditional way in granting or passing the nationality, which remained intact in that recent code. Also the illegitimate children, whose mothers are German, would be considered as German (Hailbronner, 2006).

Another instance is **Tunisian Nationality Code**, ratified in 28 February 1963. According to paragraph 1 of article 6, all children born to a Tunisian father are considered Tunisian, even if born outside the Tunisia. And according to paragraphs 2 and 3 of article 6, "whoever born to a Tunisian mother and an unknown father, or stateless father, or father with unknown nationality, and also whoever born to a Tunisian mother and foreign father, is considered Tunisian." And according to article 12 of the Tunisian Nationality Code, "whoever born to a Tunisian mother and foreign father outside Tunisia, would be considered Tunisian, provided that issue a declaration based on acceptance of this nationality, a year after reaching the legal age."

In Nationality Code of 29 March 1978, and article 584 of the 1984 **Danish Law**, the article 117 including the sexual equality in passing nationality to the legitimate child was amended (Ersboll, 2006).

The Luxembourg's act of 11 December 1986, have predicted the equal rights for parents in passing the nationality and when one of the parents is a foreigner, their child would have Luxembourgian nationality (Moyses, 2007).

Article 584 of the **Finland Nationality Code** states that the nationality could be passed through mother's lineage (Fagerlund, 2006).

Act of 19 December 1984 resulted in **Netherlands Nationality Code** in 1 January 1985. These amendments is about the equality between the parents in passing the nationality (the most important executive aspect of this rule is about giving the right to pass the nationality of mother to the child born after 1 January 1985) (Oers, 2006).

Article 469 of the 1976 **Scandinavian Code** has amended the article 382 of the 1950 Nationality Code, which enacted in 1 January 1977:

- The child born after the divorce, would acquire the mother's nationality;
- Automatic passing of nationality (to children) of the parents have acquired citizenship through the proclamation (Bernitz, 2006).

Article 382 of the 1979 Act in 1 July 1979 has amended the 1950 **Sweden Nationality Code** as follows:

- Automatic passing of nationality of mother, instead of father, through birth;
- Automatic passing of nationality of Sweden father through proclamation (Bernitz, 2006).

Also the **United States' legal system**, although having accepted the jus soli (article 14 of the United States of American Constitution), in passing nationality through jus sanguinis has recognized the equal role for mother and father, and the country's Immigration and Nationality Law has employed the term "parents" (Saljougi, 1998).

2.5 Modern Approaches of the States to Non-Discriminatory Application of Jus Sanguinis

The convention on the elimination of all forms of discrimination against women (CEDAW) is an action toward promotion and development of women's rights. One factor of women's right in the equality between paternal and maternal roles is in passing nationality through jus sanguinis, which is clear in the convention. We give some explanation about it below:

Perusing the articles of convention which has an introduction and 30 articles, we find that the article 9 is about the equal passing of nationality by parents.

Paragraph 2 of article 9 of the convention states:

- "States Parties shall grant women equal rights with men with respect to the nationality of their children."
(Convention on the elimination of all forms of discrimination against women)

Article 9 of the convention is about the equal rights for women and men regarding acquiring, changing or maintaining the nationality by state parties. Paragraph 2 of this article binds the state parties to grant women equal rights with men with respect to nationality of their children, which does not have any opposition with Islam, so it is worthy that the legislators in Islamic Republic of Iran concern more about that.

3. Conclusions

In discriminatory and non-discriminatory application of jus sanguinis, we discussed the question that whether the mother and father have equal roles in passing nationality through jus sanguinis, or only the father has rights in this respect?

By passing time and developments in human societies, the tendency is toward gender equality in passing nationality.

A reason can be stated for this equality is when a child is born to a stateless father and a mother with given nationality. By considering equal rights for parents in passing nationality, we can prevent statelessness of the child by granting the mother's nationality to the child. So it is worthy to take steps toward equality between women and men in passing nationality to their child.

In Iranian legal system, in which the jus sanguinis is stated in paragraph 2 of article 976 of the Civil Code, the father has the exclusive right in passing nationality through jus sanguinis. In the former legal system of France, according to 1945 Law, the father had exclusive right in passing nationality to the child, while the present legal system, as stated in the 1973 and 2000 Nationality Code, has considered equal role for parents in passing nationality to their child. In article 44 of 1981 English nationality Law, gender equality is emphasized.

The convention on the elimination of all forms of discrimination against women (CEDAW) in paragraph 2 of article 9 has emphasized on the equality between women and men's rights in passing their nationality to their children among state parties.

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Notes

Note 1. according to a part of article 982 of the amended (1982) Civil Code, those who acquire or have acquired Iranian nationality benefit all the rights stated for Iranians, except the right to be candidate for presidency

Note 2. Cirulaire du 12 mai 2000 DPM 2000/254.

Note 3. sos-net.eu.org/interne/rtrangers/natidx.htm.