
A COMMENT ON PROFESSOR IRVING'S PAPER, "GENDER AND CONSTITUTIONAL CITIZENSHIP: COMBINING HISTORICAL, THEORETICAL AND DOCTRINAL PERSPECTIVES"

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I . Introduction

First of all, I would like to thank all who invited me as a commentator on Professor Helen Irving's lecture at University of Tohoku, Sendai, Japan. It is a great honor to be offered such an opportunity to make comments on Professor Irving's insightful, provocative and very rich paper. My special thanks go to Professor Miyoko Tsujimura who kindly invited me here and to Ms. Misumi Taeko, whose support and administrative work allowed me this opportunity to respond to Professor Irving's essay.

The structure of my comments is as follows: First I introduce my academic interest, especially the theory of citizenship. Although my research

field of political philosophy is different from Professor Irving's, I believe that I share with Professor Irving something both significant and challenging to mainstream arguments about citizenship. Therefore, I hope I can approach from a different point of view one of her main arguments about "how citizenship is acquired in the first place." Next, I would like focus on what makes her paper very provocative and to try to respond to her questions about the Japanese constitutional situation of citizenship as best I can. Finally I conclude my comment with a couple of questions for her.

II . A Right to Have Rights

I started my academic career by studying the political thought of Hannah Arendt. I was therefore pleased to see in her book *Gender and the Constitution* (p. 97), that Professor Irving points out Arendt's concern about the harm of statelessness. Arendt, a German Jewish scholar

living under the Nazi' regime, and who herself experienced stateless as a refugee, took seriously the perplexities of Human Rights in her masterpiece, *The Origins of Totalitarianism*. In one of its famous passages, Arendt argued:

The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice [...]. *This extremity, and nothing else, is the situation of people deprived of human rights.* [...] We became aware of the existence of a right to have rights [Arendt 1973: 296-7. Italics are mine].

Arendt even emphasized that being deprived of a right to have rights was identical with exclusion from humanity altogether.

Studying both her personal history and her political theory interested me in the situation and history of Korean permanent residents in Japan. When in the 1980s the issue of whether Japan should receive more immigrants as foreign workers or not gained public attention, Korean residents started to claim their political rights, especially local voting rights. During this period, there was an unforgettable phrase written by a Korean scholar living in Japan who insisted that “we don’t have voting rights since we have not acquired voting rights, yet.” The ironic, circular reasoning of his claim has been the enigma surrounding theories of citizenship to me. The enigma can be rephrased by referring back to Professor Irving’s fundamental question: “How is citizenship acquired in the first place?”

This fundamental question of how citizenship is acquired tends to be ignored also in the field of political theory, one of whose main arguments is about citizenship. When we argue about citizenship, we tend to focus on what rights should be included in citizenship and how to

fairly distribute social goods “among” citizens. On the other hand, following Arendt’s penetrating question about the relationship between citizenship and human rights, very few political philosophers asked the fundamental question of citizenship when they discuss about what social justice means. Let me take another example. In his 80s book *Spheres of Justice*, Michael Walzer suggested that the best way to create a just, pluralistic and equal society is to allocate political membership to everyone who shares the same territory. Obviously he recommended *Jus Soli* over *Jus Sanguinis*.¹ According to his argument, permanent Korean residents in Japan, especially third or fourth generation Koreans, are suffering from a tyranny of Japanese citizens. He also mentioned the difficulty of examining the principle of membership within the framework of justice.

Membership as a social good is constituted by our understanding; its value is fixed by our work and conversation; and then we are in charge (who else would be in charge?) of its distribution. But we don’t distribute it among ourselves; it is already ours [Walzer 1984: 32].

Since after World War II, the law of citizenship in Japan has been based on *Jus Sanguinis*. The process of naturalization is unclear and sometimes criticized for its arbitrariness. A right to have rights in Japan is not recognized as a right to claim but one permitted by the Ministry of Justice (Article 4, The Nationality Law). As Professor Irving has already mentioned, citizenship in Japan has never been thought of as a constitutional right. Only when Japanese citizens are willing to stop being Japanese by divesting themselves of their Japanese citizenship, does the Constitution recognize a right to divest nationality as inviolable (Article 22, Constitution 1946).

Although some political philosophers have

pointed out the fundamental question of citizenship, that is, “how citizenship is acquired in the first place,” their perspectives have thus far ignored gender. On the other hand, although many feminist scholars have criticized the exclusive, that is, masculine character of citizenship, they tend to claim for equal political and social rights and therefore miss the core meaning of citizenship as a status. That is, I think, the most significant insight of Professor Irving’s arguments.

While Professor Irving quite carefully cautioned against minimizing the importance of political rights, she is also aware of the problem of focusing on “normative citizenship.” This caution is understandable in the context of a masculinized republican and traditional ideal of citizenship that feminists have been criticizing as both demeaning and discriminatory for women. The dichotomy of public and private spheres forms the basic assumption of this ideal and has prevented women from being considered first class citizens. Unless the masculine and public character of citizenship is changed, women who have been expected to take feminine responsibilities in the private sphere remain second class citizens. Iris Young once regarded this problem as the paradox of citizenship. “Paradoxically,” she has written,

[S]uch autonomy and personal independence is thought to require the loving attention of particularist mothers who devote themselves to fostering this sense of self in their children. Attentive love disqualifies the nurturers of the

individuality and autonomy of citizens from the exercise of citizenship, however, because the character of mothers tends to be emotional and oriented to particular needs and interests instead of to the general good [Young 1997: 124].

Therefore Young criticized and tried to transform the ideal itself of autonomy and independence as the conditions necessary to attaining citizenship. However, feminist challenges from Young and others for transforming the norm or conditions of citizenship have led feminists to another kind of dilemma: “Are we seeking a gender-neutral conception of citizenship [...] or a gender-differentiated conception?” [cf. Irving 2008: 93].

I believe that significant implication of Professor Irving’s essay is a key to way out of the argument about “either equality or difference,” which has troubled feminists for a long time. Professor Irving’s suggestion is that we should first stop taking our citizenship for granted and then, look at what we are denied when we lose our citizenship. Citizenship is more than a bundle of rights. It is the recognition of “independent selfhood.” Without such recognition, people are placed “in a state of personal, and physical vulnerability.” (p. 39). Therefore, Professor Irving turns her attention from the problem of rights to the question about “how citizenship is acquired in the first place.” (p. 38)

III. Another History of Citizenship

Here her interest in citizenship meets the historical experiences of women, especially married women, and she tries to keep some distance from normative discourse of citizenship. The birth

of the modern notion of citizenship is closely related the development of sovereign nation-states in the context of international relations in seventeenth-century Western Europe. Sovereign

states are characterized as “the entity which holds a monopoly on the legitimate use of violence” according to Max Weber. Following the political revolution of the eighteenth century, sovereign power came to mean the people’s power. Then, who can share the allocation of sovereign power, or in other words, who can use legitimate violence became a matter requiring an urgent decision. Within these contexts, only soldiers of the fatherland were allowed to use legitimate violence. So the origin of citizenship as a status was basically masculine and militant, and according to Professor Irving, it was a residue of the “feudal principle of allegiance.” (p. 41).

Surprisingly this principle of allegiance remained viable up until the middle of the twentieth century. So the perspective of citizenship as a status showed another kind of history of citizenship different from T.H. Marshall’s famous history of developing citizenship as rights. From this historical point of view, women, even if they already gained voting rights, are not recognized as an independent self as long as their citizenship is dependent on her husband’s nationality. Because of “the principle that a husband and wife must have a single citizenship,” (p. 42) only women were forced to choose to either love her husband or her allegiance to fatherland.

When we look back at the history of the Japanese Nationality Law, we see that it followed the same path as Professor Irving’s story. The first Nationality Law during the Meiji era rigidly kept the principle of single family citizenship and then was modified by making an exception that wives could maintain their Japanese nationality just in the case of wives who could not automatically acquire her foreign husband nationality. These histories of citizenship lead us to rethink the concept of citizenship radically. Citizenship regarded as public status cannot be conceptualized without considering about how the family is legally

recognized. As long as citizenship is regarded as a status for taking part in sovereign power or violence and needs allegiance to the state, we could say that the husband whether literally or symbolically might remain the sovereign of family.

Now I would like to think about the current situation of Japan by responding to Professor Irving’s question in her presentation about “whether there have been gender discriminatory citizenship laws in Japan, and if so, whether there have been any constitutional challenges”.

As I already mentioned shortly, under the Meiji Constitution, women’s nationality was subsumed under her husband’s. Under the current Constitution, a new Nationality Act was enacted still based on *Jus Sanguinis*, relinquishing the principle of single family citizenship. However, until ratification of Convention on Elimination of All Forms Discrimination Against Women (CEDAW) in 1984, citizenship to a new born child came from only Japanese father. Therefore, for example, children born in Japan between Japanese mothers and American soldiers quite often became stateless. The nationality Act of those days was obviously unconstitutional and discriminatory based on gender. In 1985 the Nationality Act was amended and now its second article reads that “a child shall be a Japanese national when, at the time of birth, *the father or the mother* is a Japanese national.”

Now there is no such principle of single family citizenship nor are there any gender-differentiated conditions for naturalization. So at first glance CEDAW has overcome the masculinity of citizenship. As Professor Irving interestingly pointed out, the Japanese Constitution provides “the freedom of all persons to move to a foreign country and to divest themselves of their nationality.” (p. 42). Are there no elements of allegiance any more in Japanese citizenship?

This question is very interesting because the current Nationality Law in Japan cannot be fully understood without understanding the Household or Family Registration Law (*Koseki hou*). Unfortunately, because I am not a legal specialist, I cannot explain the problem of the Household Registration Law from the viewpoint of the Constitution, but only generally explain the extraordinarily anachronistic and highly masculine as well as nationalistic character of the Household Registration Law.

Unlike the Western world, the Asian world has of course been heavily influenced by Chinese culture in developing systems of controlling its population. Since the seventh century, the system of Household Registration has endured through the course of Japanese history, albeit with numerous changes. The Household Registration Law of 1871 played an important role in the creation modern nation-state. To be registered legally in the household meant to be a Japanese subject. Therefore one's position either outside or inside of the legal household also decided the boundary of nationality. In the Meiji era, the Household Registration Law allowed the head of family to exercise absolute power over other family members and ensure the preservation of a patrilineal society. The Household Registration Law reflected the Emperor system, which unified the whole nation at the same time that it stratified the society into proper subjects, dependent subjects (female Japanese), second class citizens, such as colonials in the Korean Peninsula, and foreigners outside the Household Registration Law.

Even though the current Household Registration Law changed its character, it still remains the essential law to authenticate the status of an individual and detail birth, marriage, death, divorce, family lineage and adoption, and ultimately, of course, nationality. Although several problems can be pointed out, I would like to

mention one of the most problematic for women. The existence of the Household Registration Law shows that Japan does not regard individuals but families as a unit of society. The Current law requires that whenever a new family is created by marriage, one person must assume position of first person (*Hittousha*). This makes it almost impossible for a woman to maintain her maiden name after marriage, because the Household Registration Law demands that all register under the single family name of the first person.² Moreover, because the Family Registration Law is linked with Japanese nationality, no foreign spouse can be registered as first person, even though his or her spouse chooses his or her surname.

With the rigid adherence to the single nationality against plural citizenship, the highly exclusive Household Registration Law in Japan forces children of Japanese born in the country of *Jus Soli* to choose which citizenship they want to maintain. Article 12 of the Nationality Law proclaims: "A Japanese national who was born in a foreign country and has acquired a foreign nationality by birth shall lose Japanese nationality retroactively as from the time of birth, unless the Japanese national clearly indicates his or her volition to reserve Japanese nationality according to the provisions of the Household Registration Law." According to the Household Registration Law, parents have to file a notice to reserve their children's Japanese nationality within three months after the birth. If they do not, new-born children are regarded as having excised their "freedom" and Constitutional right to divest themselves of their Japanese nationality.

The Household Registration Law, I believe, is unconstitutional, especially because of Article 24.³

IV. Conclusion

To conclude, I would like to ask Professor Irving a couple of questions. Firstly, I would like to know more about the positive implication of regarding citizenship as “constitutional” not “political.” We could learn a lot of exclusive and discriminatory elements if we looked back to the history of citizenship as “constitutional.” However, I think that “constitutional citizenship” hints at much more positive aspects to overcome the ideology of allegiance. If Arendt was right to say that deprivation of citizenship was the same as denial of humanity, should we, citizens, accept foreigners who claim “our” citizenship? Does it lead to arguments for the opening of national borders? As you discussed in *Gender and the Constitution*, the Constitution itself has closing, finalizing moments as well as opening, transformative ones. So is there any limitation, that is, exclusionary elements of “constitutional citizenship”?

Secondly, as I tried to show, and Professor Irving clearly showed us, members of a family and those of a nation are not identical. In the case of Japan, being members of a nation seems to surpass or oppress the tie of family because of the existence of the Household Registration Law. On the other hand, I came to realize that the diversity of nationalities within a family has some possibilities to go beyond or at least make unstable the current ultra-nationalism in Japan. I would like to know what Professor Irving thinks about not only multi-cultures but also multi-nations within a family? Is the recognition of plural citizenship a solution to the conflict between family and nation?

Finally, I would like to hear more about Professor Irving’s ideas about embodied persons from the perspective of the Constitution. Although Professor Irving did not mention reproductive rights, I think we could associate Professor

Irving’s essay with the importance of recognition of reproductive rights as a constitutional right. If I am right, the Constitution should reflect the significance of experiences of embodied persons and women.

References

- Arendt, H. (1973) *The Origins of Totalitarianism*, new (ed.), N. Y.: Harcourt Brace Jovanovich, Publishers.
- Irving, H. (2008) *Gender and Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge: Cambridge University Press.
- Shachar, A. (2009) *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge, London: Harvard University Press.
- Walzer, M. (1984) *Spheres of Justice: A Defense of Pluralism and Equality*, N. Y.: Basic Books.
- Sakakibara, Fujiko [榊原富士子] (1993) “Family Name and the Household Registration (「氏と戸籍」),” in Sakakibara, Yoshioka and Fukushima, *Changing Marriage, Changing Family* (榊原富士子, 吉岡睦子, 福島瑞穂『結婚が変わる, 家族が変わる——家族法・戸籍法 大改正のすすめ』), Tokyo: Nihon Hyoronsha.
- Young I. (1997) *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy*, Princeton: Princeton University Press.

Notes

- 1 Ayelet Shachar, however points out the exclusiveness and therefore inequality of both *Jus Soli* and *Jus Sanguinis*. She argues that “[w] hile *jus soli* and *jus sanguinis* are typically presented as antipodes, it is important to note that both rely upon, and sustain, a conception of bounded membership.” To resolve a difficult question about how to allocate the scarce resource of citizenship, both rely on “birthright transfer of entitlement.” [Shachar 2009: 7]. Professor Irving kindly mentioned Shachar’s book to me.
- 2 Only three point six percents of Japanese women become first person after their marriage in 2005. See the analysis of the trend of marriage by the Ministry of Health, Labor and Welfare in 2006. Available at: <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyuu/konin06/konin06-2.html#2-8>, [Accessed 10th January, 2012].
- 3 In 2005 the Constitutional Court of South Korea decided that the House Head (*Hoju* in Korean) system was unconstitutional because it was against the constitutional philosophies of individual dignity and gender equality. In 2007, the new civil law was introduced and the Korean family registry system was abolished. It transformed the family registration into the individual registration system. Although the Japanese household registration does not

demand the family head and patrilineage anymore, the household registration should be still criticized for its vestiges of patriarchy. See for example, [Sakakibara 1993].