IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 9

WOMEN'S RIGHT TO NATIONALITY AND CITIZENSHIP

International Women's Rights Action Watch Asia Pacific

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I. Introduction

The concepts of nationality and citizenship have traditionally been "gender discriminatory". Until the end of the Second World War, nationality laws did not provide women with equal rights to acquire, change, transfer or retain nationality. Citizenship rights of men were treated as primary and those of women were seen to flow from their relationships with men: father, and then husband. This inequality was based on two assumptions: firstly, a rigid belief in oneness of family and unity of nationality, and secondly, the patriarchal notion that this unity should be determined only by the male "head of the household". These assumptions interconnect with the patriarchal public-private dichotomy: the restriction of women to the private or domestic domain, and the belief that only men should determine the constitution of the public arena: that of the workforce and the market, i.e. that of the "citizen".

This resulted in two broad forms of discrimination against women in the realm of citizenship rights. For one, the principle of "dependent nationality" assumed that upon marriage a wife joined her husband in his nation state. Therefore a wife, after renouncing her own nationality, was automatically granted the nationality of her husband. However, women were not granted the same right to transfer citizenship to their foreign husbands. As well, the citizenship of a child born to parents of differing nationalities was determined solely by the father's nationality.

In turn, this contributed to the subordination of women in society, and the perpetuation of gender inequality through women's "second-class citizenship". Women who were divorced, abandoned or widowed were rendered stateless in their own country and women who continued to live in their nation after marriage to a foreigner were similarly left without any rights associated with citizenship. As children acquired citizenship from their fathers and often only within wedlock, single mothers, and lesbian couples were – and continue to be – adversely affected by such laws. The denial of equal citizenship rights has had a devastating effect on many women and children, unnecessarily limiting their mobility, access to services and opportunities.

This situation has now been remedied in many nations in the world due to efforts by the women's movement, and the establishment of a framework in international law that protects the right of women to equal treatment before the law, both as citizens of their own state and as members of the international community. However, some countries like Nepal and Bangladesh have resisted the change, reflecting either national and/or cultural subordination of women. In these nations, women continue to be discriminated against in terms of the acquisition and loss of nationality, and the transfer of nationality to their children. Such discrimination is anachronistic in the face of globalisation, massive transnational migration, an increased presence

of women in the workforce, and a more liberal concept of "family". Furthermore, it stands in stark contrast to internationally established ideals of human rights and equality as elaborated later.

Before proceeding, it is necessary to point out the distinction between the terms "nationality" and "citizenship". Although these are often used interchangeably as they are here, the terms are not synonymous. Nationality is a term of international law, while citizenship is a term of municipal or local law. While all citizens are nationals of a state, not all nationals are citizens.[1]

Nationality determines the political status of the individual, especially with reference to allegiance.[2] For example, in the *Nottebohm* case, nationality was described as a "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".[3] In the past, nationality was viewed largely as a privilege, of a somewhat rigid and almost mystical character, conferred by the state. It is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres.[4]

Citizenship, on the other hand, creates members of a political community who have established or submitted themselves to the authority of a government for the protection of their general welfare and the protection of their individual and collective rights.[5] The right to citizenship is a basic right of all people because it has a tremendous impact on the political, administrative, and socio-economic spheres of life. Citizenship rights have been directly linked to certain fundamental rights, many of which are only guaranteed to citizens of a country, including freedom of movement and residence within the country; the right to leave and return to one's own country; the right to nationality; the right to own property; the right to participate in politics and government; the right to vote; and the right to hold public office.[6]

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1 Committee on Feminism and International Law (2000), International Law Association London Conference, Final Report on Women's Equality and Nationality in International Law [hereinafter known as Final Report on Women's Equality and Nationality in International Law], p12. See also: <http://www.ila-hq.org/pdf/Feminism.pdf>.

2 Henry Campbell Black (1990), *Black's Law Dictionary*, (6th edition), p1025.

3 *Liechtenstein v. Guatemala* (1955), ICJ Rep 4, 23. See <http://www.uniset.ca/naty/maternity/nottebohm.htm>.

4 *Perez v. Brownell* (1958), 356 US 44, 64 (Chief Justice Earl Warren, Dissenting Opinion).

5 Black, *op. cit.*, p244.

6 "An Update of Discriminatory Laws in Nepal and Their Impact on Women: A review of the current situation and proposals for change," [hereinafter "An Update of Discriminatory Laws in Nepal and Their Impact on Women"], Forum for Women, Law and Development (FWLD), 2006, pp43-48.

International law recognises that each state can determine the identity of its citizens, according to its own national law. Consequently, the human rights and responsibilities of an individual, within a state as well as her or his status within the regime of international law, depend on the important status of nationality.

II. CRITERIA FOR ACQUIRING CITIZENSHIP

There can be three major grounds for obtaining citizenship under national laws: *jus sanguinis*, *jus soli* and naturalisation. These distinctions, however, are not relevant in international law.

Jus sanguinis

Jus sanguinis is the principle that a person's citizenship is determined by the citizenship of their parents.[7] The Philippines uses the concept of *jus sanguinis* as the basic foundation of citizenship. Its 1973 Constitution[8] expanded the concept of citizenship to grant Filipino citizenship to children whose mothers or fathers are citizens of the country.[9] In addition, a female Filipino citizen who marries an "alien" shall retain her citizenship, unless by her act or omission she is deemed, under the law, to have renounced her citizenship.[10] India also recognises that a person born in or outside the country is an Indian citizen by descent if *either* of her or his parents is a citizen of India at the time of her or his birth.[11] Similarly, under the Vietnamese law on nationality, any child born to parents who are citizens of the country shall hold Vietnamese nationality regardless of where that child was born.[12] Further, any child shall also hold Vietnamese nationality even if only one of her or his parents is a Vietnamese citizen (i.e. the other parent could be a stateless person).[13]

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7 Black, *op. cit.*, p862.

8 The 1973 Constitution has since been replaced by the 1987 Constitution. The relevant provision, originally Article III, Section 1(2) in the former, is now Article IV, Section 1(2) in the new Constitution.

9 Prior to 1973, i.e. under the country's 1935 Constitution, only the child of a Filipino father was considered a Filipino citizen.

10 Section 4 of Article 4 of the 1987 Constitution of the Philippines.

11 1992 Amendment to the Indian Citizenship Act (1955), Section 3(b).

12 Law on Nationality of Vietnam (1988), Article 6(1).

13 *ibid*. Article 6(2).

There are a number of other countries where the principle of *jus sanguinis* is practised. For example, the Bhutan Citizenship Act (1985) stipulates that any person whose parents are citizens of Bhutan shall similarly be a citizen of the country.[14] Under Japan's Nationality Law, Japanese parents have equal rights to transfer citizenship to their children, either through birth[15] or through legitimation.[16] Since the law was amended in 2000, children born to Pakistani women with foreign husbands are entitled to Pakistani citizenship by descent.[17] Prior to this, only children with Pakistani fathers could claim such a right.

The above notwithstanding, in many countries too, there is a requirement that the parent or grandparent is a resident of a particular state for a specified time or up to a specified date before *jus sanguinis* can take effect.

Jus soli

The principle of *jus soli* dictates that a person's citizenship is determined by her or his place of birth.[18] Many countries in the Asia Pacific region recognise citizenship by birth. For example, the Constitution of India grants Indian citizenship to anyone who "has his domicile in the territory of India and was born in the territory of India".[19] Such rights are also recognised in Pakistan, Japan and Bangladesh.

Naturalisation

Naturalisation is a process by which a person acquires nationality after birth and becomes entitled to the privilege of citizenship.[20] In relation to naturalisation, the Inter-American Court of Human Rights has observed that "[n]ationality no longer depends on fortuity of birth in a given territory or on parents having that nationality; it is based rather on a *voluntary act aimed at establishing a relationship with a given political society*"[21] (emphasis in italics added). Therefore, citizenship

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14 Bhutan Citizenship Act (1985), Section 2.

15 Japanese Nationality Law (1950), Articles 2 and 3.

16 *ibid*., Article 3.

17 Section 5 of the Pakistan Citizenship Act (1951), as amended by Ordinance No. XIII of 2000.

18 Black, *op. cit*., p863.

19 Constitution of India (1977), Section 5(a).

20 Black, *op. cit*., p1026.

21 Inter-American Court of Human Rights, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984.

conferred by the process of naturalisation operates independently of *jus soli* and *jus sanguinis*. However, the applicant must fulfil particular conditions and meet various requirements set forth by the states to become a naturalised citizen.

A foreign male spouse will often use this procedure to acquire his wife's citizenship. In some states, a foreign female spouse does not have to apply to become a naturalised citizen because she automatically acquires her husband's citizenship upon marriage. As pointed out earlier, this rests on the patriarchal and discriminatory notion that the nationality of a family should be uniform, and that this nationality should only be determined by the nationality of the husband. However, nowadays some states[22] provide equal right of citizenship transfer to spouses, and there is no law discriminating between men and women. For example, spouses of Indian citizens obtain Indian citizenship, regardless of the sex of the Indian citizen they are marrying.[23]

Under Hungarian law, preferential naturalisation may be granted to a non-Hungarian citizen who has resided continuously in Hungary for at least three years before submitting the application, and for whom the conditions provided in paragraphs (b) to (e) of subsection (1) of the Act exist, if s/he has lived with a Hungarian citizen in valid marriage for at least three years.[24] In Australia, acquisition of citizenship is based on rules that apply equally to men and women, and marriage does not affect the acquisition or loss of citizenship.[25] Likewise, in Vietnam, Vietnamese women have the same rights as men with regard to acquiring, changing or retaining their nationality,[26] while in Japan, an "alien" may be granted citizenship by naturalisation if s/he is married to or is the spouse of a Japanese national of either sex.[27]

Under the English law, a mother and father have equal rights to transfer citizenship to their child by birth,[28] adoption,[29] descent[30] or registration.[31] The only exception

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22 Countries that have specific provisions on marriage include Austria, Belgium, Finland, France, Germany, Ireland, Israel, Italy, Luxembourg, Mexico, the Netherlands, Portugal, Russia, Spain, South Africa, Sweden, United Kingdom and United States of America.

23 Indian Citizenship Act (1955), Section 5(c).

24 Hungarian Citizenship Act (1993), Section 3.

25 Australian Citizenship Act (1948) (Act No. 46 of 2006).

26 Law on Nationality of Vietnam (1988), Chapter 1.

27 Japanese Nationality Law (1950), Article 7.

28 British Nationality Act (1981), Sections 1-2, 14-17.

29 *ibid*.

30 *ibid*., Sections 2, 14, 16.

31 *ibid*., Sections 3, 17.

is the process of legitimation, as this is only valid "by the law of the place in which his *father* was domiciled at the time of the marriage the marriage operated immediately or subsequently to legitimate him"[32] (emphasis in italics added).

III. GENDER-BASED BIASES IN ACQUIRING CITIZENSHIP

Surprisingly, even today some countries in the Asia Pacific region have been continuing the patrilineal practice of tracing one's nationality only through the father's or husband's lineage. This approach adopts the position that a woman's nationality and legal status is acquired through her relationship to men i.e. her father and/or her husband.

Many states still do not believe that a woman is capable of supporting her foreign husband. Instead, they universally acknowledge that a male citizen can support his wife regardless of her original status, thus perpetuating the problem. The patriarchal assumptions that a woman goes to her husband's house rather than vice-versa, and that her rights are created only within his house, continue to prevail in the minds of lawmakers and enforcers.

Indeed, the notion of "dependent nationality"[33] is still operative in many countries. For example, in Pakistan, the government amended Section 5 of the Citizenship Act (1951) to provide that children of Pakistani women married to foreigners be entitled to Pakistani citizenship. However, Section 10(2) of the same Act, which provides for the granting of citizenship to the foreign spouse of a Pakistani man but does not provide an equal facility for the foreign spouse of Pakistani women, was not amended.

In the Philippines, a foreign woman marrying a naturalised Filipino citizen becomes *ipso facto* a Filipino citizen, provided she is not disqualified under the law.[34] However, the naturalisation of a married woman does not benefit her foreign husband in any way.[35] In Nepal, a foreign woman who is married to a Nepalese citizen, and who has already applied for the renouncement of her original citizenship, is entitled to acquire the citizenship of Nepal under matrimonial naturalisation. However, the

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[32] *ibid*., Section 47(2).

[33] This refers to the assumption that upon marriage, a wife will join her husband in his nation state. This has resulted in foreign wives being automatically granted the nationality of their husbands, whilst having to renounce their own.

[34] Philippine Administrative Naturalization Law (2000), Section 15.

[35] *ibid*., Section 12.

same right is not provided to the foreign husband of a Nepalese woman. When this question was raised in the Supreme Court in *Benjamin Peter v. Government of Nepal (GoN)* (1992),[36] the Court held that citizenship is a special provision within the Constitution whereas non-discrimination is a general clause, and that a general clause cannot override a special provision. This view of the Court has been reinforced in later cases as well.

Frequently, the gender of the parent or grandparent is crucial. For example, the Bangladesh Citizenship Act (1951) grants Bangladeshi citizenship by descent if, "[the child's] father is a citizen of Bangladesh at the time of [the child's] birth".[37] Under the Bangladesh Citizenship (Temporary Provisions) Order of 1972, a person is a citizen of Bangladesh if her or his father or grandfather was born in the territories now comprising Bangladesh, and was a permanent resident there. The citizenship of the child's mother has no bearing on the matter. In *Malkani v. Bangladesh* (1997), the Supreme Court[38] did not declare the law invalid even though it agreed that the law was not consistent with the Constitution that guaranteed equality between the sexes.

In Nepal, the Constitution of Nepal (1990) provides that citizenship by descent can only be acquired by "a person who is born after the commencement of this Constitution and whose father is a citizen of Nepal at the birth of the child".[39] When this provision was challenged, the Supreme Court held that the issue raised in the application for writ was a constitutional question, and therefore the Court had no competence to decide the constitutionality of the Constitution itself, as this is only subject to amendment by Parliament.[40] Similarly, any child found within the Kingdom of Nepal whose parents are not known is deemed to be a citizen of Nepal by descent until the *father* of the child is traced,[41] thereby not recognising the existence of the mother.

This constitutional and legal bias was further reinforced in *Achyut Prasad Kharel v. GoN* (2005),[42] where the Supreme Court held that if citizenship is provided without identifying the father, it is a practice against the dignity of the country, national moral and religious values.

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36 *Nepal Kanoon Patrika* (Nepal Law Journal) 2049 (1992), Decision No. 4413, p749. See also *Chhabi Peter v. Kathmandu District Administration Office*, *ibid.*, Decision No. 4533, p19.

37 Bangladesh Citizenship Act (1951), Section 5.

38 Application for writ petition No. 3192 of 1992 (decided on 1 September 1997).

39 Constitution of Nepal, Part II, Article 9(1). Also see, Nepal Citizenship Act (1964), Section 3(1).

40 *Chandrakant Gyawali v. GoN*, Nepal Law Journal 2058 (2001), Vol. 11-12, p614.

41 Constitution of Nepal, Article 9(2) and Nepal Citizenship Act (1964), Section 3(4).

42 Writ petition No. 3504 of 2060 (decided on 23 March 2005).

IV. EFFECTS OF DEPRIVING EQUAL CITIZENSHIP RIGHTS

This section discusses how the denial of citizenship impacts on the availability of services, benefits and opportunities for women, as well as their foreign spouses and children.

Restriction on freedom to choose residence and domicile

As pointed out earlier, under many citizenship laws in the Asia Pacific region, a foreign woman automatically acquires her husband's citizenship upon marriage. However, as a woman cannot transfer her citizenship to her foreign spouse under such nationality laws, she must choose between residence in her country of citizenship and residence with her husband and children. Laws that only recognise fathers and husbands deny the independent existence of mothers and wives as citizens of a country. This discriminates not only against female citizens, but also against foreign males and their children. Such legal provisions negate the right to movement and the right to live in a residence of choice.

Inability to transfer citizenship to children

In many situations, the law does not give a woman whose children are fathered by an "alien" husband, the right to pass her citizenship to them. These children will carry their father's citizenship if so permitted by his state. In contrast, a male citizen's children acquire his citizenship, regardless of the mother's status. This not only denies the importance and independent existence of the mother but also has many negative effects on children. For example, a child's right to vote, engage in occupations, travel freely, take part in politics, and enjoy social benefits like education and healthcare that accrue to citizens, is severely limited in her or his mother's country of citizenship.

Risk of becoming stateless

Under discriminatory nationality laws, children born to parents of different nationalities inherit the citizenship of their father, with no regard to where they were born or the citizenship of their mother.[43] Such provisions not only violate women's rights, but also violate the rights of children, putting them at risk of statelessness. The risk is particularly grave when a man denies fathering

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[43] See for example the Constitution of Malaysia (1962), Section 14, Second Schedule, Part I, Section 1(d). The Constitution extends citizenship to children born outside Malaysia to a Malaysian father, regardless of the status of their mother.

a child. In Nepal, children of sex workers and Badi women[44] face severe consequences because their mothers cannot transfer citizenship to them.[45] Fortunately, there has been a recent court decision to ensure citizenship for the children of Badi women – including those whose fathers are unidentified – to protect them from statelessness.[46] Otherwise, in general the risk of minor children becoming stateless is even higher when the nationality of the father is unknown.

Children born out of wedlock are also at extreme risk of becoming stateless. Under Nepalese law, the birth of a child was registered by the male head of the family and in his absence, by the eldest male member of the family.[47] Though a recent judgement of the Supreme Court has invalidated this provision, the judgement has not been implemented up to now.[48] The Constitution of Nepal provides that if any child is found within the territory of the country, and the whereabouts of her or his parents are unknown; the child will be considered a citizen of Nepal by descent until the identity of the child's father can be determined.[49] As well, under Nepalese citizenship law, children born within a reasonable time after their father's death shall be provided citizenship as per the status of their father.[50] This policy has adversely affected children born to female citizens with foreign husbands.

Restriction on employment opportunities

Discriminatory citizenship laws also result in the deprivation of employment opportunities, affecting not only women but also their husbands and children. For example, if a woman's foreign husband or children cannot acquire citizenship, they are deprived of employment opportunities. They are unable to enter into

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44 This is a community of women whose traditional means of livelihood is prostitution.

45 "Shadow Report on the Second and Third Periodic Report of the Government in Nepal on the CEDAW Convention", Coordinated by Forum for Women, Law, and Development.

46 *Tek Tamrakar for Pro Public v. GoN* (2004), Writ petition No. 121 of 2060 (decided on 15 September 2005). However, even in this case, citizenship rights are upheld only from the child's, as opposed to the woman's, perspective.

47 Nepal Birth, Death, and Other Personal Incidents Registration Act (1976), Section 4(1)(a).

48 *Tek Tamrakar for Propublic v. GoN* (2004), Writ petition No. 121 of 2060 (decided on 15 September 2005).

49 Constitution of Nepal, Article 9(2).

50 Nepal Citizenship Act, 1964, Section 3(5) (5th Amendment in 1992).

public service including civil, military and police services. The children of such a couple also face similar discrimination in employment because they cannot acquire citizenship through the mother.[51]

Risk of losing children

In cases of divorce between parents of different nationalities, fathers often gain custody of their children due to the practice of denying women the right to confer citizenship to their daughters and sons. For instance, because the law dictates that women cannot transfer their citizenship to their children, a court in Bangladesh will handover a child to her or his foreign father even though s/he has been born in the country to a Bangladeshi woman. This practice disrupts family life because the child will be residing in a country where the mother can neither see nor care for her or him. The notion that a child's best interests must be a central factor in deciding custody[52] is limited in this instance since the court's hands are tied at the outset by the fact that the father and child are not citizens, and thus beyond its jurisdiction. In sum, discriminatory provisions of nationality laws adversely affect children as well as women by denying the latter the right of custody, and the former the benefits of their mother's care and love.

Other consequences

Restriction on acquiring property
Many countries in the region also require formal identity documents establishing one's relationship with the state to acquire, transfer and to dispose of property. Those who do not have such identity documents are deprived of transfer of property of spouse or parents even through inheritance or succession.[53]

Restriction on establishing and running business
Although economic liberalisation policies have opened doors for foreign investment in many countries, discriminatory citizenship laws deny foreign husbands the opportunity to run a business in the country of their wife unless an investment is made as part of foreign direct investment.[54]

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51 An Update of Discriminatory Laws in Nepal and Their Impact on Women, pp43-50.

52 UN Convention on the Rights of the Child. Article 9.

53 An Update of Discriminatory Laws in Nepal and Their Impact on Women, p45.

54 *ibid*., pp43-46

Restriction on participation in civil and political life
To run as a candidate or to participate as a voter in local elections, one needs to have national identity documents. This means that many foreign husbands and children who have resided for years in the country of their wife or mother – and do not have citizenship rights – are denied their legitimate right to be involved in the political process, whilst such rights are not denied to foreign wives and their children.[55]

Denial of access to juvenile justice
Under the UN Convention on the Rights of the Child, children are entitled to juvenile justice including exemption from criminal liability. To exercise such a right, however, an identity document establishing the age and nationality of the applicant is needed. In cases where mothers cannot confer their citizenship to their children, this requirement results in the practical denial of juvenile justice.[56]

V. VIOLATION OF RIGHTS

While the previous section discussed the ramifications of denying equal citizenship rights to women, this section names the actual rights that are violated when citizenship is denied. Violations of rights resulting from the application of gender-biased citizenship laws are manifold and have far-reaching consequences even where the right to nationality is recognised.

Right to equality

Most of the world's democratic constitutions have enshrined the principles of equality before the law and equal protection under the law for all citizens. They are thus entitled to certain basic rights regardless of sex, race, religion, place of birth, etc. For example, the Constitution of the United States of America (US) declares that "[no state shall] deny to any person within its jurisdiction the equal protection of the laws".[57] Similarly, the Constitution of India reads, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.[58] The Constitution of Pakistan also regards that "all citizens are equal before the law and are entitled to equal protection

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55 *ibid*., pp45-6.

56 *ibid*.

57 Constitution of the United States of America, 14th Amendment.

58 Constitution of India, Part III, Article 14.

of [the] law".[59] It outlaws discrimination based on sex alone,[60] and promises to protect the institutions of marriage and the family.[61] Like the US Constitution, the Constitution of Pakistan supersedes any law that is inconsistent with fundamental rights.[62] In fact, this guarantee of equality eventually prompted amendments to the country's Citizenship Act of 1951.[63]

Elsewhere, the Constitution of Bangladesh also provides that any law inconsistent with the fundamental rights guaranteed by the Constitution is void.[64] All Bangladeshi citizens are regarded as equal before the law and entitled to equal protection under the law.[65] As well, the state is prohibited from discriminating against any citizen on the grounds of religion, race, caste, sex, or place of birth,[66] and women are guaranteed equal rights with men in all spheres of the state and of public life.[67] The fact that the country's citizenship laws clearly discriminate against women, their foreign husbands and their children in the acquisition and transfer of citizenship, flagrantly violates these constitutional guarantees of equality and equal protection.

In response to the equal protection clauses of other nations, the Constitution of Nepal declares, "All citizens shall be equal before the law. No person shall be denied the equal protection of the laws".[68] It further declares, "No discrimination shall be made against any citizen in the application of the general laws on the grounds of religion, race, sex, caste, tribe, ideological conviction, or any of these".[69] However, discriminatory citizenship-related provisions in the Constitution effectively negate these guarantees.

In a 1983 judgement, the Italian Constitutional Court considered whether the avoidance of dual nationality justified a 1912 law that regarded children of a

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59 Constitution of Pakistan (1973), Part II, Chapter 1, Section 25(1).

60 *ibid*., Section 25(2).

61 *ibid*., Part II, Chapter 2, Section 35.

62 *ibid*., Part II, Chapter 1, Section 8(1).

63 Before the 1951 Citizenship Act was amended, a person was a citizen of Pakistan if "his father [was] a citizen of Pakistan at the time of his birth". The status of the mother was irrelevant (Section 5). The law also permitted the wife of a Pakistani husband to obtain Pakistani citizenship, but did not afford the same right to the foreign husband of a Pakistani wife (Section 10).

64 Constitution of Bangladesh, Article 26 (1).

65 *ibid*., Article 27.

66 *ibid*., Article 28(1)

67 *ibid*., Article 28(2).

68 Constitution of Nepal, Part III, Article 11(1).

69 *ibid*., Article 11(2).

male Italian citizen as Italian citizens by birth but making no such provision in the case of children of a female Italian citizen. The Court concluded that the need to avoid dual nationality was not a valid reason to ignore the articles of the Constitution on equality before law without distinction as to sex, and on legal equality of spouses.[70]

Right to non-discrimination

Like the right to equality, discrimination on the basis of sex is prohibited by many constitutions of the region, for instance, Nepal, India, Bangladesh and Pakistan. Discriminatory laws and practices in relation to nationality are not only a form of direct discrimination against women but also have serious ramifications on their husbands and children. Having such laws in the region is thus a direct violation of the right to non-discrimination.

Right to family life

More often than not, when women marry foreign men, they usually have to leave the country because it is difficult for a foreign husband to stay in his wife's country given the obstacles in obtaining a visa, procuring employment, and participating in the civil and political life of the country. The couple is left with little choice but to return to the country of the husband's citizenship, where both partners can obtain citizenship. When this happens, women lose an important aspect of their citizenship: the right to live with their own family in their country of origin.

In the case of *Family K and W v. The Netherlands* (1985), the European Commission concluded that the exclusion of a person from a state in which her or his close relatives lived could constitute a violation of the right to family life.[71] In *Berrhab v. The Netherlands* (1988), the residency permit of a foreign husband married to a Dutch national was not renewed after the couple's divorce, and the husband was arrested and his deportation ordered. The European Court of Human Rights decided that where a non-national has real family ties in the state from which he is ordered to be deported, and the deportation would jeopardise the maintenance of those ties, this can be justified only if the interference with family life is not excessive in comparison to the public interest at stake.[72]

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70 Judgment No. 30 of 28 January 1983, 62 Raccolta Ufficiale delle Sentenze e Ordinanze della Courte Constituzionale 157 (Italian Constitutional Court).

71 "Women 2000 and Beyond: Women, nationality and citizenship" [hereinafter "Women 2000 and Beyond"], UN Division for the Advancement of Women, June 2003, p13.

72 *ibid*.

A woman's inability to pass citizenship to her children also violates her right to family life. As noted earlier, if she cannot pass her nationality to her child, a child born outside of marriage or of an unknown or stateless father will be stateless.[73] This problem of statelessness potentially affects, among others, children born to foreign husbands, single mothers and lesbian couples.

Right to choose residence and national identity

In almost all the countries of the world, the right to citizenship includes the right to live in any part of one's country. When women who marry foreign men have to leave their country of citizenship for reasons already discussed, their right to choose residency is impaired. Women in this situation sacrifice yet another significant aspect of their citizenship – the right to live in the country of her nationality – simply by marrying a foreigner. Prohibiting the foreign husband of a woman from residing in her country is ultimately a denial of her right to reside where she wishes, a restriction on her freedom of movement, and a denial of her right to life and liberty. As a result, broken marriages, single parenthood, and custody battles are common, adversely affecting not only women but children and men as well.[74]

Freedom of movement

Many constitutions of nations in Asia guarantee every citizen the "freedom to move throughout the [country] and reside in any part thereof".[75] However, if a female citizen marries a foreign national, and her children and her husband cannot obtain citizenship, this infringes on the constitutional guarantee of freedom of movement since mothers wishing to travel with non-citizen husbands or children face a huge obstacle in obtaining visas or passports for them.[76] As increasing numbers of women work overseas due to the economic pressures of globalisation,[77] or seek refuge abroad from civil war or other emergencies, the problems caused by this

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73 Final Report on Women's Equality and Nationality in International Law, pp18-19.

74 An Update of Discriminatory Laws in Nepal and Their Impact on Women, pp43-48.

75 Article 12 of the Constitution of Nepal. See also Article 19(d) and (e) of the Constitution of India.

76 Because the conditions stipulated for obtaining a residence visa are virtually the same as that of a tourist visa or a work permit – one must either be wealthy or exceptionally well qualified – this makes it extremely difficult for a foreign spouse of a female citizen to reside in the country with her.

77 "Human Rights Protection Applicable to Women Migrant Workers: A UNIFEM briefing paper", Asia Pacific and Arab States Regional Programme on Empowering Women Migrant Workers in Asia, 2003, p3.

unacceptable discrimination between the ability of mothers and fathers to pass nationality to their children will only become more acute.[78]

Other violations

Other violations include, but are not limited to, the violation of the right to dignity and the rights of the dependent children. In *Benner v. Canada (Secretary of State)* (1997),[79] the Canadian government argued that the petitioner could not challenge the law because the nationality provisions of the country only had implications on his mother, not him. The Canadian Supreme Court, however, held that there was a connection between the plaintiff's rights and the denial of equal nationality rights to his mother.[80]

The Constitutional Court of South Africa has also concluded that denying a temporary residence permit to an individual married to a South African citizen violates that individual's constitutional right to dignity because it would adversely affect her or his ability to achieve personal fulfilment through a relationship with her or his partner.[81]

VI. INTERNATIONAL HUMAN RIGHTS STANDARDS ON NATIONALITY

Under international law, laws regarding the acquisition, retention, and deprivation of nationality have traditionally been considered a sovereign function of the state.[82] However, the presence of domestic laws defining the acquisition and loss of nationality does not preclude regulation by international law, and states are often obligated to follow both.[83] Multilateral instruments such as treaties and declarations have set standards which impact on the acquisition and retention of nationality.

The manner in which a state must follow a treaty or international human rights instrument depends on the approach it has taken: either "monist" or "dualist". On one hand, the "monist" approach argues that international law and municipal law

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78 Final Report on Women's Equality and Nationality in International Law, p19.

79 (1997) 1 SCR 358.

80 Women 2000 and Beyond, p14.

81 *ibid*., p15.

82 The Permanent Court of International Justice, the precursor to the International Court of Justice, set forth the traditional view of state sovereignty over nationality in 1923.

83 See Lisa C. Stratton (1992),"The Right to Have Rights: Gender discrimination in nationality laws", in 77 *Minnesota Law Review* 195, pp197-98.

are not two separate systems but one interlocking structure and that the former is the supreme.[84] It further argues that municipal courts shall apply international law directly without the need for any act of adoption by the courts or transformation by the legislature. On the other hand, the dualist approach argues that rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on – or overrule – the other.[85] Nowadays, however, the classification of dualism and monism is largely regarded as outdated.

Further, all member states of the United Nations have an obligation to uphold constitutional guarantees of basic human rights that are compatible with international law. The Charter of the United Nations, for instance, reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women".[86] It imposes a duty on member states to promote "universal respect for and observance of, human rights and fundamental freedoms of all without distinction as to race, sex, language or religion".[87]

Reinforcing the doctrine of *pacta sunt servenda* (treaties must be performed in good faith), the Vienna Convention on the Laws of Treaties provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[88] The Convention also provides that no State party may invoke national laws as justification for its failures to perform a treaty.[89]

Treaties

Major human rights instruments that deal with the right to nationality are as follows:

UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), 1979[90]

The CEDAW Convention recognises women's autonomy and equality in the transfer and acquisition of nationality, and permits either spouse to confer nationality on their children.

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84 Malcolm N. Shaw (2003), *International Law*, 5th edition, Cambridge University Press, p50.

85 *ibid*., pp121-22.

86 Preamble to the UN Charter, <http://www.un.org/aboutun/charter/>.

87 *ibid*., Article 55.

88 Vienna Convention on the Laws of Treaties (1969). Article 26.

89 *ibid*., Article 27.

90 Adopted by UN General Assembly Resolution 34/180, 18 December 1979.

Article 1 of the Convention defines discrimination as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women…on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

In terms of nationality and citizenship rights, this means that the Convention prohibits distinctions in law and discrimination based upon marital status.[91]

Further, under Article 2, States parties are obliged to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women. To reach these goals, they are required to:

- Embody the principle of equality of men and women in their national constitutions or other appropriate legislation, if not incorporated therein, and ensure, through law other appropriate means, the practical realisation of these principles (Article 2a);
- Adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women (Article 2b);
- Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices, which constitute discrimination against women (Article 2f); and
- Repeal all national penal provisions, which constitute discrimination against women (Article 2g).

Hence, on the issue of nationality, the granting of equal rights to women requires having an independent nationality, regardless of the nationality of one's husband, and granting equal rights regarding the nationality of children. States parties are also expected to uphold equal rights with regards to laws relating to the movement of persons and the freedom to choose one's residence and domicile.[92] As well, they must take measures to eliminate discrimination against women in matters relating to marriage and family relations, and ensure that overall there is equality between men and women.[93] Any state that neglects to follow these provisions in practise and law has thus failed to fulfil its obligations under the CEDAW Convention.

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91 CEDAW, General Recommendation No. 21 (1994), Equality in marriage and family relations.

92 CEDAW. Article 15(4).

93 *ibid*., Article 16.

Article 9 of the Convention sets a stringent standard for citizenship laws:

(1) States Parties must grant women equal rights with men to acquire, change, or retain their nationality. They shall ensure, in particular, that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless, or force upon her the nationality of the husband.

(2) States Parties shall grant women equal rights with men with respect to the nationality of their children.

The CEDAW Committee's General Recommendation No. 21 emphasises the importance of granting equal rights to women with regards to the acquisition and retention of citizenship.[94] Paragraph 6 reads:

> Nationality is critical to full participation in society… Without status as nationals or citizens, women are deprived the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.

On the basis of the CEDAW Committee's General Recommendations on Articles 9, 15 and 16, it has also been argued that whatever procedures for naturalised citizenship that applies to wives and husbands should apply to *de facto* partners as well.[95] Ironically, citizenship laws which draw a distinction between married and unmarried women and their rights to transfer citizenship to their children and spouse mean that women married to a foreigner cannot transfer citizenship to their children, but unmarried women can.[96] This distinction also violates provisions of the CEDAW Convention.

In the CEDAW Committee's Concluding Comments on Nepal,[97] the Committee noted the remaining major challenges – including socio-cultural, government, economic, and legal obstacles, a lack of adequate gender awareness, and the

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94 General Recommendations are authoritative interpretations by the CEDAW Committee, of the provisions in the Convention with regards to the rights of women and obligations of States parties.

95 Final Report on Women's Equality and Nationality in International Law, p39.

96 See, for example, Sections 4 and 5 of the Botswana Citizenship Act, 1984.

97 Concluding Comments are recommendations issued by the CEDAW Committee to individual governments upon reviewing their achievements in fulfilling the obligations under the Convention through the reporting process.

non-existence or insufficient implementation of international instruments[98] – that make it difficult to eradicate discriminatory laws. The Committee blamed, at least in part, the inadequate gender sensitivity and gender responsiveness of the legislative process.[99] It expressed particular concern that the Constitution, in violation of Article 9 of the Convention, precludes Nepalese women from passing their nationality to their children or to foreign spouses and urged Nepal to repeal Article 9 of the Constitution.[100] On a positive note, following developments around the recent popular movement in the country, the House of Representatives adopted a historic declaration stating *inter alia* that all gender-based discriminatory laws and practices shall be abolished.[101]

The CEDAW Committee made similar remarks regarding Sri Lanka's nationality laws, which prevent a woman citizen from passing her nationality to her children if her husband is not Sri Lankan, while a Sri Lankan man married to a foreigner may do so.[102] The Committee urged Sri Lanka to amend the discriminatory provisions because they conflict with the CEDAW Convention as well as with constitutional guarantees of fundamental rights.[103] Shortly after this, the Sri Lanka Citizenship Act (1948) was amended to grant mothers the equal right to transfer citizenship to their children.[104]

UN International Covenant on Civil and Political Rights (ICCPR), 1966[105]

The ICCPR provides that everyone shall have the right to recognition everywhere as a person before the law.[106] States parties are obligated to undertake measures to ensure the equal enjoyment by men and women of all civil and political rights set forth in this Covenant.[107] The ICCPR recognises the family as the natural and fundamental group in society and emphasises the obligation of States

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98 Concluding Comments of the Committee on the Elimination of Discrimination against Women on Nepal. A/59/38. 2004. p36, para. 186.

99 *ibid*., para. 187.

100 *ibid*., p38, paras. 198-99.

101 Proclamation of the House Representatives adopted on 18 May 2006.

102 Concluding Comments of the Committee on the Elimination of Discrimination against Women on Sri Lanka. A/57/38, 2002. p33, para. 274.

103 *ibid*.

104 Sri Lanka Citizenship Act (1948), Sections 5, 5A, 9, 10. See also Sri Lanka Citizenship (Amendment) Act, No. 16 of 2003.

105 Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966.

106 ICCPR. Article 16.

107 ICCPR. Articles 3 and 26.

parties to protect it.[108] The Covenant also obligates states to guarantee "every child shall be registered immediately after birth" and "[have] the right to acquire a nationality".[109] Furthermore, it recognises that within this territory of the state, everyone has the right to liberty of movement and freedom to choose her/his place of residence.[110]

UN International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966[111]

The ICESCR undertakes to ensure the "equal right of men and women to the enjoyment of all economic, social, and cultural rights".[112] Among other things, this means that States parties to this treaty must recognise the right of everyone to work.[113] As well, the Covenant recognises the need for the strongest possible protection of the family, which is perceived as the natural and fundamental group unit of society.[114]

Citizenship is the basis of entitlements for services, benefits and opportunities for individuals, and denying citizenship results in discrimination in the exercise of all other rights including civil, political, economic, social and cultural rights.

UN Convention on the Rights of the Child (CRC), 1989[115]

The CRC requires States parties to respect and ensure the rights set forth in the Convention to every child within their jurisdiction, without discrimination of any kind, irrespective of the sex, nationality, ethnicity or any other status of a child's parents or legal guardians.[116] Indeed, States parties have an obligation to respect the right of a child, to preserve her or his identity, including nationality, name, and family relations as recognised by law.[117]

They are also obliged to ensure that a child is not separated from her or his parents against their will, except when competent officials, in accordance with

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[108] ICCPR. Article 23. It also says, "No one shall be subjected to arbitrary or unlawful interference with his privacy [or] family…" (Article 17).

[109] ICCPR. Articles 24(2) and (3).

[110] ICCPR. Article 12.

[111] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966.

[112] ICESCR. Article 3.

[113] ICESCR. Article 6.

[114] ICESCR. Article 10.

[115] Adopted by UN General Assembly Resolution 44/25, 20 November 1989.

[116] CRC. Article 2(1).

[117] CRC. Article 8.

applicable laws and procedures and subject to judicial review, determine that such separation is necessary in the best interests of the child.[118] Otherwise, the CRC declares that States parties are required to ensure that a child has, "as far as possible, the right to know and to be cared for by his or her parents".[119] States parties are also obligated "to ensure the implementation of this right in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless".[120] In addition, states, to the best of their abilities, should ensure recognition of the principle that both parents have a common responsibility for the upbringing and development of the child.[121] The Convention also recognises the right of the child to education.[122]

In the Committee on the Rights of the Child's Concluding Observations on Nepal, it was recommended that children's birth registrations be given priority to ensure that every child is recognised as a person and can fully enjoy her or his rights.[123] The Committee expressed similar concerns regarding the failure to register the birth of children in Bangladesh where comparable laws on the nationality of children are in force.[124] Unregistered children are denied the full enjoyment of fundamental rights and freedoms, and thus, further measures should be taken to ensure universal registration.[125] The same concerns about statelessness and failure to register births were also raised in the Committee's Concluding Observations on Sri Lanka.[126]

UN Convention on the Nationality of Married Women, 1957[127]

Under Article 1 of this Convention, each member state agrees that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien [sic], nor should the change of nationality by the husband during marriage,

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118 CRC. Article 9.

119 CRC. Article 7 (1).

120 CRC. Article 7(2).

121 CRC. Article 18(1).

122 CRC. Article 28.

123 Concluding Observations of the Committee on the Rights of the Child on Nepal. CRC/C/15/Add.261. 2005. paras. 41-44.

124 Concluding Observations of the Committee on the Rights of the Child on Bangladesh. CRC/C/15/Add.74. 1997, para. 17

125 *ibid*., paras. 17 and 37.

126 Concluding Observations of the Committee on the Rights of the Child on Sri Lanka. CRC/C/15/Add.40. 1995, para. 14.

127 Adopted by UN General Assembly Resolution 1040 (XI), 29 January 1957.

should automatically affect the nationality of the wife". Additionally, States parties agree "neither the voluntary acquisition of the nationality of another State nor the renunciation of [such] nationality by one of its nationals shall prevent the retention of its nationality by the spouse of such national".[128] Though this Convention grants women and men equal right in obtaining citizenship, it is silent on the nationality of children.

UN Convention Relating to the Status of Refugees, 1951

Determining whether an individual meets the legal definition of a "refugee" is frequently a long and difficult process.[129] The Convention Relating to the Status of Refugees, 1951 does not require states to confer nationality on a refugee but it provides for the latter, the right to live in the country of refuge and obliges the State party involved to provide her or him with identity papers[130] and travel documents.[131] The State party also has a duty to facilitate the administration and naturalisation proceedings for a refugee.[132]

European Convention on Nationality, 1997

Under current international law, there are some grounds to argue for the right of one spouse to the nationality to the other or to a sped-up naturalisation procedure. The 1997 European Convention on Nationality is unusual in providing that each State party shall facilitate in its internal law, the acquisition of its nationality for spouses of its nationals.[133]

The Convention stands on two principles, the avoidance of statelessness and ensuring equality. Article 4(d) provides that "neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse". Protecting against discrimination, Article 5 of the same convention stipulates, "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour, or national or ethnic origin".

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128 UN Convention on the Nationality of Married Women. Article 2.

129 Women 2000 and Beyond, pp4-5.

130 UN Convention Relating to the Status of Refugees (1951). Article 27.

131 *ibid*., Article 28.

132 *ibid*., Article 34.

133 European Convention on Nationality (1997). Article 6(4a).

Declarations

Universal Declaration of Human Rights (UDHR), 1948

The UDHR affirms that "all human beings are born free and equal in dignity and rights". The Declaration states that "everyone is entitled to all of the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[134]

More importantly, Article 15(1) of the Declaration recognises that "[e]veryone has the right to a nationality". No one shall be arbitrarily deprived of their nationality nor denied the right to change this.[135] It further says that men and women of full age, without any limitations based on race, nationality, or religion, have the right to marry and found a family, the natural and fundamental unit of society, which is entitled to protection by society and by the state.[136]

Beijing Declaration and Beijing Platform of Action, 1995

The Beijing Declaration reaffirms the commitment of states to "equal rights and inherent human dignity of women and men"[137] and demands "[w]omen's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power [as] fundamental for the achievement of equality, development and peace".[138] The declaration aims to provide equal rights, opportunities, and responsibilities to men and women with regard to the family.[139] It also calls on states to take measures to eliminate all forms of discrimination against women.[140]

Likewise, the Beijing Platform for Action calls on states to provide constitutional guarantees or enact legislation to prohibit discrimination on the basis of sex, to ensure through law and other means, the practical realisation of equality between men and women, and to review national laws to ensure the implementation of the

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134 UN Universal Declaration of Human Rights (1948). Article 2.

135 *ibid*., Article 15(2).

136 *ibid*., Article 16(1) and 16(3).

137 UN Beijing Declaration (1995). para. 8.

138 *ibid*., para. 13.

139 *ibid*., para. 15.

140 *ibid*., para. 24.

principles of the international agreements.[141] It emphasises on states their role to strengthen and protect the family unit, recognising the contributions women make in this regard. Under this too, it is established that "[t]he upbringing of children requires shared responsibility of parents, women, and men, and society as a whole".[142] In 2000, the Outcome Document of the Beijing+5 meeting renewed the commitment of states to amend all discriminatory laws as a matter of priority by 2005.

VII. DECISIONS

Discriminatory legal provisions have been challenged in courts of many countries and at the level of treaty and other human rights monitoring bodies as well. Even though some cases have been decided along patriarchal lines with the effect of continuing discrimination against women, in many others, the courts, treaty bodies and other human rights instruments have played proactive roles in enforcing the right to citizenship without discrimination on the basis of sex.

Decisions by courts

Laws discriminating on the basis of sex and between children born within and outside wedlock declared unconstitutional

In *The Attorney General of the Republic of Botswana v. Unity Dow* (1992), the Botswana High Court ruled that Sections 4 and 5 of the 1984 Citizenship Act were *ultra vires* the country's Constitution because they discriminated against women on the basis of sex.[143] Specifically, these sections provided that children of Botswana men married to foreigners or children born out of wedlock were entitled to Botswana citizenship by birth while children of Botswana women married to foreigners were not. The discrimination was thus at two levels; one, between Botswana male and female citizens and two, between the children born

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141 UN Beijing Platform for Action (1995). Chapter Four. paras. 232 (a), (b), (c) and (d).

142 *ibid*., Chapter 2, para. 30.

143 (1992) Law Reports of the Commonwealth (Const.) 623 (Botswana High Court). Section 3 of the Botswana Constitution provides that, "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely – (a) Life, liberty, security of the person and the protection of the law".

to married and unmarried mothers. The general effect of the provisions of the Act interfered "with the dignity of the person" and punished a female citizen for marrying a non-citizen.

The Court relied on liberal authorities from various jurisdictions and backgrounds in making and supporting this decision, including quotes from the Organisation of African Unity Convention on Non-Discrimination and the CEDAW Convention, even though the latter had not been ratified by Botswana at that time. It subsequently ruled that discriminating against women and denying or limiting their equality of rights with men is fundamentally unjust and constitutes an offence against humanity. In his judgement, the presiding judge argued, "the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others".[144]

Requirement of skills not available in Zimbabwe cannot be a ground for granting or denying visas to spouses of Zimbabwean women citizens

Rattigan v. Chief Immigration Officer (1994)[145] involved three Zimbabwean women who had married non-citizen men and sought to live in Zimbabwe along with their families. The husbands were denied residence visas on the basis that they had no skills that were scarce in Zimbabwe. The petitioners challenged the denial of visas as a violation of their freedom of movement. The Supreme Court of Zimbabwe adopted a "generous and purposive approach" and considered the right to protection of the privacy of the home (Section 11 of the Constitution) in conjunction with right to freedom of movement (Section 22). It then held that preventing the husbands from living with their wives in Zimbabwe, the country in which the complainants owe an allegiance to as citizens, would be an infringement on the complainants' freedom of movement, a right possessed by the complainants as members of family units. Thus, the actions of the immigration officer were held to be unconstitutional.

In *Salem v. Chief Immigration Officer* (1995),[146] the Supreme Court of Zimbabwe held that the immigration officer had acted in blatant defiance of the *Rattigan* decision, thereby infringing on Ms Salem's constitutional right to have her husband residing in her country of nationality, as guaranteed by the Constitution. The Court held that a "generous and purposive" interpretation of the word "reside"

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144 *ibid*., p659.

145 1995 (2) SA 182 (Zimbabwe Supreme Court).

146 1995 (4) SA 280 (Zimbabwe Supreme Court).

was necessary to refrain from diminishing the right to freedom of movement guaranteed to female citizens of the country, particularly in cases where old age, poverty, illiteracy, or disability would render the woman unable to sufficiently provide for her family. Through this, the Court thus expanded its ruling in the *Rattigan* case on the right of foreign husbands to work in Zimbabwe.

Cancellation of endorsement in a passport declared without legal authority

In *Malkani v. Bangladesh* (1997)[147] mentioned earlier, the Supreme Court of Bangladesh held that the actions of the visa officer in not endorsing the minor children in their mother's passport was *ultra vires* the Constitution. Ms Malkani was a Bangladeshi national living in France while pursuing a course of study and working for the UN in Paris. She married an Indian citizen and had two sons with him. On several occasions, she took her two sons with her to visit Bangladesh. In 1992, an official at the Bangladeshi Embassy in Paris cancelled the boys' names from Ms Malkani's passport, claiming that her children were not Bangladeshi citizens since their father was a citizen of India.[148]

Ms Malkani's lawyer argued that Section 5 of the Citizenship Act and Article 2 of the Bangladeshi Citizenship (Temporary Provision) Order 1972 were discriminatory because they denied a woman the right to transmit citizenship to her children if her husband was a foreign national, thus violating the fundamental rights guaranteed by Articles 27, 28, and 29 of the Constitution. Her lawyer also argued that Section 13 of the General Clauses Act clearly states that words importing the masculine gender be taken to include females and as such, the word "father" in the relevant sections also includes "mother". What's more, the Bangladeshi government in its Combined Third and Fourth Periodic Report before the CEDAW Committee had specifically stated, "Measures are being taken by [the] Government to ensure equality between men and women with regard to citizenship rights".[149]

The Court held that the cancellation of the endorsement in Ms Malkani's passport had been made without legal authority, and that the mother, being the legal and natural guardian of her minor children, was entitled to visit her country with her children and to have their names endorsed in her passport. Interestingly, the Court also decided that despite the guarantee provided in the

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147 Application for writ petition No. 3192 of 1992 (decided on 1 September 1997).

148 Faustina Pereira (n.d.), "Bangladeshi Women's Right to Transmit Citizenship Continues to be Denied." Unpublished paper.

149 Bangladesh's Combined Third and Fourth Periodic Report to the Committee on the Elimination of Discrimination against Women. CEDAW/C/BGD/3-4. 1 April 1997, p43, para. 2.8.

Constitution, the statutory provision would prevail so that the children could only inherit the citizenship status of their father. The judges felt that in the face of such deliberate discrimination, at least in the case before them, they had little choice but to declare the cancellation of the endorsement illegal. However, they refused to extend this position to the rest of society so that Bangladeshi women citizens could enjoy the same rights as their male counterparts, and they also refused to declare the previously mentioned sections of the law discriminatory.[150]

Rejection of residential visas to foreigner husbands of native women represents unequal treatment

In *Meera Gurung v. Department of Immigration, GoN* (1991),[151] the main issue was whether it was reasonable under Article 11 of the Constitution to reject the granting of a residential visa to a foreigner husband of a native wife under Rule 14 of the Immigration Rules 1975, when the same law affords a foreign wife of a native husband the right to a visa.

Since the rule in question allowed the authorities to refuse a visa to the foreigner husband of a Nepalese woman but granted this with no time limit to the foreigner wife of a Nepalese man, the Supreme Court held that the provisions in question led to unequal treatment and discriminatory practices on the grounds of sex against Nepalese women with foreign husbands, and that they were therefore, in contravention with the right to equality.

Requiring Canadian women's children born abroad to undergo security checks and oath-swearing constitutes unlawful denial of equal protection

In *Benner v. Canada (Secretary of State)* (1997),[152] the Supreme Court held that the law requiring children born abroad by Canadian mothers to undergo a security check and to swear an oath – but not requiring the same of children born abroad to Canadian men – constituted unlawful denial of equal protection under the law. Access to the privilege of Canadian citizenship is restricted in differing degrees depending on the gender of an applicant's parent. It is unreasonable to make these demands only of children born abroad to Canadian women, as opposed to those born abroad to Canadian men. The Court viewed that the children of one status (Canadian mother) do not pose a greater threat to national security than those of the other (Canadian father).

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150 Application for writ petition No. 3192 of 1992 (decided on 1 September 1997).

151 Nepal Law Journal 2048 (1991), Vol. 11, p479.

152 (1997) 1 SCR 358.

This decision is in contrast to that of the US Supreme Court in 1998 which upheld a provision of the US Immigration and Nationality Act that, based on stereotypes about the different parenting roles of men and women, made it harder for American fathers than mothers to pass citizenship to children born abroad.[153]

Validity of differential treatment for mother and father challenged

In *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001),[154] the US Supreme Court upheld the law providing that a child born abroad and out of wedlock would acquire the nationality status of a citizen mother, if she meets a specified residency requirement. For a father in the same position, however, paternity had to be first established. This set different standards for unmarried women and men on the basis that women must always be present at the birth of their child, but the same is not required for men. In fact, even if the latter was present at the birth of his child, paternity is not assured.

The Court held that Congress could have required both mothers and fathers to provide proof of parenthood by the time the child reaches 18 years of age. Given that the mother is always present at the child's birth but that the father need not be, the facially neutral rule would still require fathers to take additional steps that would not be required of mothers. The government has an interest in assuring that the child and the citizen parent have some demonstrated opportunity to develop a real relationship. While the mother will always know that the child is her offspring, the same circumstance does not result in the case of an unwed father. It is not always certain that the father will know the child was conceived, nor is it certain that the mother will always be sure of the biological father's identity.

Providing only women married to Costa Rican citizens special naturalisation status deemed unconstitutional

In seeking to amend the naturalisation provision of the country's Constitution from one which granted only foreign women married to Costa Rican men special status when applying for citizenship, to one that affords all foreigners married to Costa Rican citizens this status, the government of Costa Rica sent an advisory opinion to the Inter-American Court of Human Rights.[155] The Court was requested

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153 *Miller v. Albright* (1998), 118 Supreme Court, 1428. See also, Final Report on Women's Equality and Nationality in International Law, p8.

154 533 US 53 (2001), decided on 11 June 2001.

155 Inter-American Court of Human Rights, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984.

to investigate whether this and other proposed amendments were compatible with the rights to the family (Article 17(4)), nationality (Article 20) and equal protection (Article 24) as provided for by the Inter-American Convention, to which Costa Rica was a signatory.

The Court held that discrimination between men and women in the acquisition of citizenship through marriage with a Costa Rican was incompatible with the right to equal protection guaranteed by the Inter-American Convention. The Court observed that, "nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values".[156]

The Court had the view that the notion of equality sprung directly from the oneness of the human family, and that this was linked to the dignity of the individual. This principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. Citing the European Court of Human Rights in the *Belgian Linguistics* case, the Court adopted the idea that objective and reasonable differences were compatible with the principle of equality, provided they were proportional to legitimate aims. However, it found that the gender discriminatory nature of Article 14(4) of the Costa Rican Constitution had no such legitimate aim, and was therefore incompatible with Articles 17(4) and 24 of the Inter-American Convention.

Accordingly, the Court recommended the amendment of the Constitution and this was promptly done.

Decisions by treaty monitoring bodies

Marrying men outside the tribe cannot be grounds for losing one's status as a member of the tribe

In *Lovelace v. Canada* (1981),[157] Ms Lovelace, a 32 year-old woman living in Canada, was born and registered as a Maliseet Indian in accordance with Canada's Indian Act. She married a man who was not a member of the tribe.

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[156] Final Report on Women's Equality and Nationality in International Law, p15.

[157] UN Human Rights Committee. Communication No. 24/1977. UN Doc. CCPR/C/13/D/24/1977 (1981).

Consequently, she lost her status as a member of the tribe under another provision of the Act, which deemed that women lost their tribal status upon marrying outside the tribe. The Act did not revoke the status of male tribe members who did the same. Ms Lovelace challenged this provision in a communication to the Human Rights Committee under the Optional Protocol to the ICCPR. She argued that the Act was contrary to Article 2(1), Article 3, and Article 26 of the ICCPR's sex discrimination and equal protection provisions; Articles 23(1) and Article 23(4) of the provisions regarding protection of the family and the equality of spouses, and Article 27 of the provision protecting rights of minorities.

The Human Rights Committee acknowledged that the right to protection of family life and children under Articles 17, 23 and 24, and the right to chose one's residence under Articles 2, 3 and 26 were potentially implicated in the case. However, it declined to rule on the substantive issues of the case, as the Covenant had not come into force in Canada at the time of Ms Lovelace's marriage – the Covenant only applied to the continuing effects of her loss of status.[158] Stating that Ms Lovelace's right to freedom from sex discrimination was only indirectly at stake and that the "facts of the case" did "not seem to require further examination under these articles",[159] the Human Rights Committee nevertheless declared this a denial of one's right to his or her own culture. The Committee concluded that the ongoing denial of her Indian status, and therefore her right to return to the reserve following the break up of her marriage, violated her rights as a person belonging to a minority community as read in the context of her right to equality and non-discrimination.[160]

Law discriminating against Mauritian women on the basis of national security cannot be justified

In *Shirin Aumeeruddy-Cziffra et al v. Mauritius* (1981),[161] the government amended its Immigration Act and Deportation Act in 1977 to limit residency rights of foreign husbands of Mauritian women, but not of foreign wives of Mauritian men. Through a communication to the Human Rights Committee, twenty Mauritian women

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158 *ibid*. See also, Final Report on Women's Equality and Nationality in International Law, p13.

159 Stratton, *op. cit*., p212.

160 Final Report on Women's Equality and Nationality in International Law, p13.

161 UN Human Rights Committee, Communication No. 35/1978, UN Doc. CCPR/C/12/D/35/1978 (1981).

challenged the laws as violating the sex discrimination provisions of the ICCPR,[162] its equal protection provision,[163] the provision securing the right to participate in public affairs,[164] and the provision for the protection of the family.[165]

In its submission to the Committee, Mauritius admitted that the statutes discriminated on the basis of sex; that choosing to leave the country because one's husband cannot stay in Mauritius may affect a woman's ability to exercise her rights and participate in public affairs; and that the exclusion of a person whose family is living in the country may result in an infringement on that person's right to family life. However, it also argued that if the exclusion of a non-citizen is lawful – based on security or public interest grounds – such exclusion could not be deemed an arbitrary interference with the family life of its nationals.[166]

The Committee decided that a law limiting the residency status of foreign spouses of Mauritian women but not the spouses of similarly situated Mauritian men was discriminatory on its face. It also stated that the parties to the Covenant could not limit a right guaranteed by the ICCPR in a gender discriminatory fashion, regardless of whether the restriction was permissible on independent grounds. As well, the Committee found that the laws of Mauritius interfering with the family protection provisions of the ICCPR violated the Covenant's prohibition of sex discrimination.[167] Specifically, it viewed that legislation, which only subjects foreign spouses of Mauritian women to restrictions but not foreign spouses of Mauritian men, was discriminatory against Mauritian women and could not be justified on grounds of security.

The Committee also argued that while legal protection of the family may vary from country to country, and depend on different social, economic, political and cultural conditions and traditions, it cannot vary with the sex of the spouse. Accordingly, the Committee recommended that Mauritius adjust the provisions of the Immigration (Amendment) Act, 1977 and the Deportation (Amendment) Act, 1977 to implement its obligation under the Covenant and to provide immediate remedies for the victims.

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162 ICCPR. Article 2.

163 ICCPR. Article 26.

164 ICCPR. Article 25.

165 ICCPR. Article 17.

166 Stratton, *op. cit.*, p213.

167 *ibid.*

Decision by a regional human rights body (European Court of Human Rights)

Protection of the domestic labour market is not a ground for denying visas to husbands of women permanent residents in the United Kingdom

In *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985),[168] the validity of certain immigration rules in the UK was questioned before the European Court of Human Rights (ECHR) under the European Convention on Human Rights. The applicants Ms Abdulaziz, Cabales and Balkandali were lawfully and permanently settled in the UK. In accordance with the immigration rules in force at the time, Mr Abdulaziz, Cabales and Balkandali were refused permission to remain with or join their wives in the UK as their husbands. The applicants charged that by reason of this denial, they had been victims of a practice of discrimination on the grounds of sex, race, and also, in the case of Ms Balkandali, of birth. This practice also violated Articles 3 and 8 of the Convention taken alone or in conjunction with Article 14. They further alleged that contrary to Article 13, no effective domestic remedy existed for the aforementioned claims. The British government's main argument was that the legislation had the legitimate intention of protecting a fragile domestic labour market at a time of high unemployment.

The ECHR decided that the immigration rules that allowed foreign wives but not foreign husbands of UK citizens to reside with their spouses in the UK were inconsistent with the right to family life (Article 8) read together with the right to equality (Article 14) provided by the European Convention on Human Rights. The ECHR found the prospective difference in impact on the labour market between male and female immigrants insufficient to justify discriminatory treatment based on sex.

[168] Essex Human Rights Reports (1985), Vol. 7, p471.

Countering Frequently Used Myths

Myth	Fact
A woman's identity is determined through her relationship with men (i.e. father, husband) so she does not need the same citizenship rights as them.	Women, like men, are independent citizens. This means that their identity does not need to be defined through their relationships with men. Various international human rights instruments have established that women have a right to nationality and thus to obtain, confer, change and retain citizenship. All human rights instruments have prohibited discrimination on the basis of sex.
During times of unemployment, discriminatory citizenship laws protect the domestic labour market from an influx of foreign men.	As ruled by the European Court of Human Rights in the *Abdulaziz* case, the protection of domestic labour markets and national interests are not valid reasons for denying equal citizenship rights. Moreover, current trends in transnational migration show an increased migration from developing countries to more affluent, developed nations, often out of economic necessity or due to threats to personal safety. This trend is necessitated by global economic forces. Curing the problem of unemployment can no longer be justification for restrictive or discriminatory citizenship laws as the problem has to be solved through upholding the human rights of people, rather than subjecting this to further restrictions.
Women need to be protected from marriages of convenience to foreigners engaged in illegal activities.	Even if a woman marries a citizen of the same country, he may be engaged in illegal activities. Getting married to a foreigner cannot in itself put women at greater risk.
Dual nationality should be prevented to maintain loyalty to a nation.	The acceptance of dual nationality by most developed and prosperous countries has proved to have little impact on national security, loyalty to the nation and so on especially when these are accompanied by effective administration and governance systems. Further, the concept of supranational citizenship – alive in Article 8 of the Treaty of the European Union (Maastrich Treaty) 1992 which recognises nationals of the individual member states as citizens of the European Union – has diluted the traditional notion of dual nationality.

Myth	Fact
There is a risk that foreign husbands will not have enough bonds or links with the countries of their wives.	The risks associated with the level of bonds or links with the countries of wives are unfounded and misleading because there would be no adverse effects to the country even if foreign husbands had few bonds or links with the countries of their wives.
There are open-border, cross-border and national security issues to consider.[169]	India has for a long time maintained an open-border policy with Nepal and it has provided equal rights to nationality to its citizens, with no ill effects. Hence, Nepal's raising of security concerns as a reason for denying equal citizenship rights is irrational and unfounded, especially given the increasing trend of migration by Nepalese citizens to nations in which services and opportunities are readily available. Moreover, as the Human Rights Committee held in the case of *Shirin Aumeeruddy-Cziffra*, national security and a weak administration system cannot be an excuse to deny equal protection of citizenship rights.[170] Every person is entitled to state protection of their rights, as human rights are universal, inalienable, indivisible, interconnected and interdependent.
In cases where local women marry foreign men, it is sufficient that their children acquire the nationality of their fathers.	The best interest of a child lies in tracing her or his nationality to both parents and having her or his rights understood through the standards of the CEDAW Convention and Convention on the Rights of the Child. The latter should also be viewed from a perspective of gender equality as well as a family and parental rights and responsibilities perspective.

[169] In some countries like Nepal, which has a long and unregulated border with a large country like India, marriage with Nepalese women enables Indian men to obtain a visa. This is often perceived as the cause of the demographic surge in Nepal.

[170] UN Human Rights Committee, Communication No. 35/1978, UN Doc. CCPR/C/12/D/35/1978 (1981).

VIII. CONCLUSION AND STRATEGIES FORWARD

Nationality laws of many countries in Asia and the Pacific infringe upon women's fundamental freedoms and human rights by denying them the right to transfer citizenship to a foreign husband and their children. Such laws violate the requirements of international human rights standards and often are in stark contradiction to national constitutional guarantees. Such laws unjustly force a woman to choose between her country of nationality and her family, and unnecessarily restrict the rights of her husband and children. They deny the existence of women as autonomous and independent citizens.

Unfortunately, the issue of nationality has received little attention as a general human rights issue, and has in some ways become marginalised because of political insensitivities in relation to cross-border security issues and gender inequality in the region. Powerful interests and deeply entrenched cultural norms discourage governments exercising political will to revise discriminatory nationality laws. The ideology of patriarchy that is reflected in legislation may have a historical origin but is reinforced by perceptions of stereotyped gender relations among politicians, judiciary, policy planners and bureaucrats.

Therefore, it is vital that law reform experiences be shared and that comparative jurisprudence be developed to assist nations still lobbying for reform of discriminatory citizenship laws, and to help them overcome the barriers along the way of reform. It is also important to recognise that social values and customs are not static, and that egalitarian attitudes to gender relations have existed and do exist in many countries of the region, most of which have been transformed or revived by social reformers and activists.[171] Most developed countries have adopted gender-neutral forms of *jus sanguinis*, *jus soli* and naturalisation as modes of acquiring citizenship: this must be extended to all nations of the world.

The right to nationality must be recognised on many levels for genuine change to occur locally. It has already been recognised through various human rights instruments as a fundamental human right but more needs to be done. The boundaries of rights should constantly be pushed and progressively broadened. For example, concepts of *locus standi* must be expanded so that this issue can be

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[171] Savitri Goonesekere (1997), "Nationality and Women's Human Rights: The Asia Pacific experience" in Andrew Byrnes, Jane Connors and Lum Bik (eds.), *Advancing the Human Rights of Women: Using international human rights instruments in domestic litigation*, Commonwealth Secretariat. p86.

raised on behalf of women who cannot or are unwilling to be identified as victims of injustice. As well, the concept of "state inaction", which is being developed in South Asia, can be used to ensure that state apathy and inaction in preventing discrimination is just as justiciable as state action that infringes on the right to gender equality. Such a development can help promote accountability on the part of the judiciary, bureaucrats and enforcement officials.

Procedures for the review of discriminatory domestic laws have been established under some international instruments and used to establish that domestic laws are in contravention of international treaties. Because many countries in the Asia Pacific region are party to treaties like the ICCPR and CEDAW, cases can and should be brought under their respective treaty monitoring bodies. Using domestic courts to challenge the laws may be unsuccessful for many reasons including political instability, corruption, contradictory laws or discriminatory norms entrenched within the judiciary itself. Therefore the use of treaty monitoring bodies may be the best way to mobilise the process of reforming discriminatory laws after the exhaustion of national legal remedies.

Declarations of various courts and human rights treaty monitoring bodies have further reinforced state obligations to guarantee against discrimination on the basis of sex. Such decisions have challenged the rigid attitude of domestic jurisdictions, holding that national courts should not compartmentalise issues of human rights and discrimination, and that they should instead be innovative and holistic in their approach. These decisions also recognise and reinforce many fundamental rights such as that to privacy of home, right to family, right to equality before law and equal protection of law, and right to mobility.

Some countries in the region have begun to revise their discriminatory citizenship laws. For example, India, Pakistan and Sri Lanka have recently amended their citizenship laws to include gender-neutral language, equal rights for men and women, and the right of both men and women to pass their citizenship to their children in the same manner. However, many others countries have yet to do so.

At times, decisions of the courts and human rights bodies may result in negative effects. For example, the amendment of the British immigration rules following the decision in the *Abdulaziz* case above made it harder for foreign wives to join their husbands settled in Britain rather than making it possible for foreign husbands to do so. Similarly, following the Nepalese case of *Meera Gurung*[172] in which a discriminatory immigration rule was declared ***ultra vires***, the law was amended

[172] Nepal Law Journal 2048 (1991), Vol. 11, p479.

to impose an additional visa fee on the basis of a matrimonial relationship when previously no such fee existed. The point here is that advocacy for reform is not enough in itself; vigilant and continuous monitoring is also equally crucial for the practical realisation of women's human rights.

More importantly perhaps, even though it is imperative to reform laws to recognise nationality as a basic right to the identity of a human being, such initiatives alone will not be effective unless patriarchal value systems based on gender stereotyping and traditional norms are also changed and redefined. Creating an effective institutional system of service delivery and enhancing its capacity through trainings and sensitisation along with adequate resource allocation are also equally important. The recognition of women's equal rights would serve a meaningful purpose only when the law and society work together to ensure and accommodate changes in a sustainable manner.

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