

NATIONALITY AND WOMEN'S HUMAN RIGHTS: THE ASIA/PACIFIC EXPERIENCE



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Introduction

Migration of women across borders has been familiar to the Asia Pacific region for centuries. The phenomenon has acquired new dimensions in the last few decades because of the problems of refugees, displaced women needing international protection and migration of large numbers of women workers from the region for employment within and outside the region. Residence, employment and acquisition of citizenship within the host country raise difficult cross-border issues with political implications. Consequently, there is often a lack of political will by governments in addressing gender discrimination in laws and policies that violate international and national constitutional standards. The 'sensitivity' of these issues has resulted in some States parties to international conventions entering reservations in respect of articles on nationality. For instance, a reservation to the article on non-discrimination in regard to laws and policies on nationality stated in the Convention on Elimination of All Forms of Discrimination against Women (the Women's Convention) has been entered by several countries, including two countries in the Asia Pacific region.¹ It is estimated that half of the countries of the world have nationality laws that discriminate against women.²

A 1993 report of the International Women's Rights and Action Watch (IWRRAW) referred to the various dimensions of discrimination in nationality laws and recommended that all States parties should address, as a matter of urgency, the need to review and amend laws and policies on nationality that discriminate against women.³ *General recommendation No 21* of the Committee on the Elimination of Discrimination against Women (CEDAW), on equality in marriage and family relations, also calls upon States parties to enact and enforce legislation so as to comply with the provisions in the Women's Convention on nationality.⁴

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¹ Article 9 of the Women's Convention, 1249 UNTS 13. Both Thailand and Korea entered reservations to the article. Thailand subsequently withdrew its reservation to article 9(2) on 26 October 1992: UN Doc CEDAW/SP/1996/2, at 31 and 53 (Thailand), and 29 (Korea).

² International Law Association Committee on Feminism and International Law, *Preliminary Study and Comparative Analysis of the Immigration and Nationality Laws of Different States and their Impact Upon Women*, in *Report of the International Law Association, Sixty-Sixth Conference* (Buenos Aires, Argentina, 1994) 641 at 641 [hereinafter *ILA Preliminary Study*].

³ Marsha Freeman, *IWRRAW Report: Human Rights in the Family* (Minnesota, University of Minnesota, 1993), pp 10-11.

Yet, States parties to the Convention from the region have rarely changed their laws. The report of the United Nations Fourth World Conference on Women in 1995 also indicates that the Beijing Declaration and Platform for Action does not deal specifically with the issue of nationality.⁵ The importance of the issue of discrimination in nationality laws has therefore been undervalued, and it is merely considered one of many instances of gender discrimination that infringes the human rights of women. This is ironical, since the very capacity to claim rights and assume responsibilities, both at the national and international levels, depend on the crucial concept of nationality or citizenship.

These terms are used synonymously in international law as well as in most national legal systems. International law recognises that each State can determine who its citizens are, according to its own national law. It is the conferment of nationality on an individual that gives a State *locus standi* as well as responsibility in regard to an individual within national boundaries. Consequently, the human rights and responsibilities of an individual, within a State as well as his or her status within the regime of international law, depend on the important status of nationality.

In the *Nottebohm case*⁶ 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.”⁷ Due to historical and other reasons, many States in the Asia Pacific region have accepted norms in determining effective linkage with the State that reflect bias against women. Discrimination surfaces traditionally in the acquisition and loss of nationality by married men and women, and the transfer of nationality to children.

International standards on nationality

Though nationality is an issue that can be determined by domestic law, several multilateral instruments have set standards which impact on the acquisition and retention of nationality. Most of the international instruments that impact on nationality relate to general standards on human rights. Consequently, the Universal Declaration of Human Rights (the Universal Declaration)⁸ contains an important norm on gender equality, while the right to nationality is expressed as a right to have *some* nationality.⁹ The Universal Declaration is sometimes considered to embody customary international law which is binding on all

⁴ CEDAW, *General recommendation No 21* (thirteenth session, 1994), *Report of the Committee on the Elimination of Discrimination against Women 1994*, UN Doc A/49/38, at 1 (1994), reprinted in UN Doc HRI/GEN/1/Rev.2, at 119–128 (1996) and (1995) 2 IHRR 1.

⁵ For details, see *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995).

⁶ *Liechtenstein v Guatemala*, Judgment of 6 April 1955, [1955] ICJ Rep 1.

⁷ *Id* at 23.

⁸ GA Res 217A(III), adopted on 10 December 1948.

⁹ Universal Declaration, articles 2 and 15.

nation States. If the norm on gender equality is considered a standard of customary international law, the right to non-discrimination in nationality law can be considered a core norm of international law, and binding even on States that have not ratified multilateral treaties and instruments that deal with the issue of gender discrimination and nationality.

Several multilateral treaties deal with the subject of non-discrimination in nationality law, and these are binding on States parties that ratify these treaties and voluntarily consent to abide by these human rights standards in determining the issue of who is entitled to citizenship under their own domestic laws. The International Covenant on Civil and Political Rights (ICCPR)¹⁰ contains important standards regarding the conferment of political and civil rights on men and women, and equality before the law without discrimination based on sex.¹¹ Articles in both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹² contain norms which recognise “the family” as the “natural and fundamental group unit within society” and a State party’s obligation to protect the unit.¹³ An article in the ICCPR, which creates a child’s right to “a nationality”, is repeated in the Convention on the Rights of the Child (the Children’s Convention);¹⁴ it does not address the specific issue of a denial of a right to nationality through gender discrimination against the mother. The article in the Children’s Convention emphasises that a State party is required to ensure that a child has “a nationality and as far as possible, the right to know and be cared for by his or her parents.” The obligation of States parties is to ensure the implementation of this right in accordance with their national law and obligations under other international treaties, “in particular where the child would otherwise be stateless.”¹⁵ The emphasis on domestic law and the avoidance of statelessness re-enforces the concept that a child can acquire a nationality through one parent, a position that can legitimise transmission of nationality exclusively through the male parent.

In this environment, specific standards on nationality set by the Women’s Convention and the Convention on the Nationality of Married Women¹⁶ have expanded and strengthened the international standards set by multilateral treaties. The Convention deals with the right of a woman to retain and acquire a nationality as an autonomous individual, irrespective of the solemnisation or dissolution of a marriage. Article 9 of the Women’s Convention contains the strongest standard,

¹⁰ 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

¹¹ ICCPR, articles 3 and 26.

¹² 993 UNTS 3, adopted on 16 December 1966, entered into force 3 January 1976.

¹³ ICCPR, article 23; ICESCR, article 10.

¹⁴ ICCPR, article 24(3); Children’s Convention, article 7, GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

¹⁵ Children’s Convention, article 7(2).

¹⁶ 309 UNTS 65, adopted on 29 on January 1957, entered into force 11 August 1958.

since it recognises autonomy and equality in transferring or acquiring nationality and also permits either spouse to confer nationality on their children. However, it has been pointed out that since a woman cannot now automatically acquire her husband's nationality, she will have to prove a period of residence in his country, making her vulnerable to deportation.¹⁷

Reception of international human rights standards in nationality and domestic laws

Despite the lack of consensus in regard to nationality issues, it is possible to argue that the standard of non-discrimination is now an aspect of customary law, and that even States that are not parties to the international instruments discussed, are bound by an obligation to eliminate discrimination against women in nationality laws. If this standard is not accepted as customary international law, the application of the human rights standards will depend on whether or not a State in the Asia Pacific region has ratified these treaties.

As of January 1996, twenty-five countries in the Asia Pacific region had ratified the Women's Convention. These countries include many from the Commonwealth. Several countries, including Fiji and Malaysia in the Commonwealth, have entered reservations to article 9 of the Women's Convention, as recently as 1995.¹⁸ The fact that the CEDAW has adopted a general recommendation governing the nationality issue and also requiring States parties to review and justify their reservations, has not inhibited the record of reservations to the nationality provision.¹⁹ The records of ratification of the other international conventions are also poor, but there has been a nearly universal ratification of the Children's Convention.

The Children's Convention does not state that a child has a right to nationality through both parents. However, this interpretation can be argued on the basis of general articles in the Convention on the family, parental rights and responsibilities, gender equality and the norm of the best interests of the child.²⁰ These international standards on children's rights link to the standards in the Women's Convention, and can prove extremely important in forging an international consensus on non-discrimination in the politically sensitive area of nationality. The issue of nationality has received little attention as a general human rights issue and has in some ways become marginalised because of political sensitivity in

¹⁷ *ILA Preliminary Study*, *supra* note 2, at 647.

¹⁸ Papua New Guinea, Vanuatu, Fiji, Malaysia and Singapore acceded in 1995, and Pakistan acceded in 1996: *Status of ratifications of the Convention*, available on the website of the United Nations Division for the Advancement of Women: <http://www.un.org/DPCSD/daw/cedaw.htm> (status as of 25 March 1997).

¹⁹ *General recommendation No 21*, *supra* note 4.

²⁰ For family life, parental rights and responsibilities, see articles 5, 18, 8, 9 and 10; for gender equality, see article 2; and for the best interests of the child, see article 3.

regard to cross border relations and gender equality in this region. The international standards on children's rights may become one strategy for obtaining interventions and policy change in domestic legal systems.

Realising international standards in domestic legal systems: problems and prospects

Many countries in the Asia Pacific region adopt a dualist approach to international law, and have, in the case of countries within the Commonwealth, been influenced by English common law values on the relationship between international law and domestic law. The act of ratification of any of the above international instruments does not lead to an automatic reception of international standards, so as to create rights and the capacity for enforcement at the domestic level. In the absence of an individual complaints procedure, by ratification to the Optional Protocol to the ICCPR,²¹ ratification does not create individual rights. The obligation is placed on the State to bring its legislative policies and domestic practices in line with the standards of a treaty. In countries that follow this approach, courts of law are reluctant to incorporate or indeed be influenced by norms of international treaties, in the absence of domestic legislation that reflects these standards. It is very rarely that an appeal court will refer to an international treaty standard even in interpreting a national constitution or domestic law.²²

In this environment, reception of international law depends on legislative intervention and judicial activism.

Legislative intervention

Discrimination in the area of nationality in legal systems based on English law derive their inspiration from early perceptions on gender relations in the family. Most legal systems in the region confer nationality by legislation which distinguishes between citizenship acquired on the basis of birth within the territory (*ius soli*) or birth and descent (*ius sanguinis*), or a combination of these principles. Sometimes, as under the Indian Constitution, acquisition of citizenship depends on the additional factor of being "domiciled" within the country.²³ Domicile is a complex concept that is interpreted by courts applying early English law as the establishment of a permanent home within a territory.²⁴ The *ius sanguinis* concept, as well as the domicile concept, have been influenced by deeply entrenched values on the male head of household within the family.

²¹ 999 UNTS 301.

²² A decision of the Supreme Court of Sri Lanka which does so is *Leela, Violet, Saminona and Beetanona v Inspector General of Police and others*, 2 December 1994 (unreported), per Sarath Silva J.

²³ Indian Constitution, article 5.

²⁴ *Whicker v Hume* (1858) 7 HLC 124 at 160.

The family unit created within marriage was perceived in early English law as well as in European civil law as a family, with a single male head of household and a female spouse under the marital power or 'coverture' of her husband. Blackstone, for instance, commented that "by marriage the husband and wife are one person in law; that is the very being and legal existence of the woman is suspended during marriage or at least is incorporated and consolidated into that of the husband."²⁵ Inevitably, a wife and minor children had a domicile that was 'dependent' on the husband or father.²⁶ A child born to an unmarried woman was considered a *filius nullius* in early English law, but was subsequently considered to have an exclusive relation to the mother. Such a child was not considered to have a status that could be linked to the biological father.²⁷

These legal values have influenced the legislation and administrative regulations on citizenship and grant of visas in several countries in the region. Consequently, the citizenship law of Sri Lanka, Bangladesh, Fiji, Nepal, Pakistan, Malaysia and Singapore reflect or continue to reveal the influence of this ideology on family relations. India's citizenship law also reflected a bias against women until a recent amendment enacted in 1992.²⁸

In Bangladesh and Pakistan which share a similar piece of legislation, and in Fiji, Nepal and Sri Lanka, different standards apply in regard to the grant of citizenship and resident visas to non-national male and female spouses of citizens.²⁹ In general, male spouses cannot apply for citizenship and, where they can do so, find it more difficult to obtain resident visas. Since Pakistan and Bangladesh recognise a qualified concept of *ius soli* or citizenship by birth, the law is less harsh than Sri Lankan law, which is limited to grant of citizenship by birth or registration. In all these countries, a married woman cannot transmit nationality by descent to her children, and a child of married parents obtains citizenship by descent exclusively through the father or male relatives. In addition to these general constraints, certain specific provisions reinforce the discrimination against women. In Bangladesh, even a child born outside wedlock in the territory obtains citizenship by descent through the link to the

²⁵ W Blackstone, *Commentaries on the Laws of England* (London, A Strahan, 1825) 366.

²⁶ For example, see *Lord Advocate v Jaffery* [1921] AC 146 and *Attorney General for Alberta v Cook* [1926] AC 444.

²⁷ Blackstone, *supra* note 25, at 454-459.

²⁸ Indian Citizenship (Amendment) Act 1992.

²⁹ For details, see Pakistan Citizenship Act (1951), sections 2, 3, 5 and 7; Sri Lanka Citizenship Act (1948), sections 4, 9, 11 and 7 and Administrative guidelines based on regulation 1956; Bangladesh Adaptation of Existing Law Order No. 48 (1972), retaining Pakistan Citizenship Act (1951), subject to amendments in Bangladesh Citizenship Order 1972, discussed by M R Islam, "The Nationality Law and Practice of Bangladesh" in Ko Swan-Sik (ed), *Nationality and International Law in Asian Perspective* (Dordrecht, Martinus Nijhoff, 1990) [hereinafter *Nationality in Asian Perspective*] 1; Constitution of Fiji, articles 26(2) and 25, Citizenship Act, section 7(3), cited by Imrana Jalal, "The Legal Status of Fiji Women", unpublished paper, ESCAP Expert Group Meeting, Saitama, Japan, August 1996; Nepal Constitution, article 9(1) and (5), cited by Sapana Malla Pradhan, "Country Paper Nepal", unpublished paper, ESCAP Expert Group Meeting, August 1996.

biological father. The mother's Bangladeshi nationality becomes relevant only if biological parentage of the father cannot be proved. The law also recognises that a Bangladeshi married woman can travel on the passport of her husband in the same manner as a child under 16 years. Pakistan recognises the right to citizenship on the basis of birth within the territory (*ius soli*) but denies citizenship to a child born to a Pakistani woman in circumstances where the child's father is a foreign diplomat. A similar constraint is found in Bangladeshi law.

In Sri Lanka, even a foundling acquires citizenship on the basis of a fiction that he or she is "a citizen of Sri Lanka by descent" through the male line. The adult child of a Sri Lankan married woman can apply for citizenship by registration (naturalisation), on the satisfaction of rigid requirements such as a specified period of continuous residence by the mother immediately prior to the application. The period of residence is seven years in the case of a married woman and ten years in the case of an unmarried woman. The current administrative interpretation that has not been challenged requires residence for this period by the child. This makes it even more difficult to obtain citizenship by registration, since the mother or the child may travel abroad for studies or employment and may not be able to prove the required period of residence. Sri Lankan law permits an unmarried woman to transfer her nationality to her child, but there must be evidence that certain male relatives, such as the maternal grandfather and maternal great grandfathers, were born in Sri Lanka.

Malaysia and Singapore recognise the concept of *ius soli* in determining citizenship, and birth within the territory enables a person to obtain citizenship through either parent.³⁰ However, when a child is born outside the territory, the paternal parentage is the only relevant criterion. A similar position in regard to birth outside the territory is found in Fiji. In Malaysia and Singapore, a woman who is an alien can apply to be registered as a citizen when she marries a man who is a citizen, if she satisfies the specified requirements. A similar provision has not been introduced in respect of alien spouses of Malaysian or Singaporean women. The Singaporean and Malaysian laws also discriminate against women who have acquired nationality by registration on marriage to a citizen, when the marriage is subsequently dissolved by divorce. Such women can lose their citizenship when they contract a marriage with an alien, though women who are citizens by birth or descent continue to retain their citizenship after marriage to a foreigner. This makes a woman vulnerable to deportation.

The Citizenship Act 1955 of India recognised the concept of *ius soli*, so that citizenship could be acquired by birth in India without evidence of domicile. An anomalous provision in the Act, which infringed the constitutional provision on acquisition of citizenship through either

³⁰ Constitution of Malaysia, articles 14 and 15; Constitution of Singapore, articles 122(1) and 123(2) (as modified by an 1967 amendment).

parent, prevented an Indian woman from transferring citizenship by descent to her marital or non-marital children. This provision was repealed by a recent amendment to the Act introduced in 1992.³¹ A person can now claim citizenship by descent if either of his parents are citizens of India at the time of birth. The amendment ensures that section 4 of the Citizenship Act, which had other discriminatory aspects against women, now applies on a basis of equal rights for men and women. For instance, a provision that refers to the employment of the parent in government service refers to both the father and the mother. Another provision in the Citizenship Act which referred to the impact of renunciation of citizenship by the father on a minor child refers to both father and mother.³²

Other countries in the region, both within and outside the Commonwealth, have nationality legislation which recognises the principle of gender equality in the acquisition and transmission of nationality to children. Thus, New Zealand enacted legislation which permitted both men and women to transfer citizenship to children and a married woman is not required to retain the same domicile as her husband.³³ Acquisition of citizenship in Australia is based on rules that apply equally to men and women and marriage has no impact on the acquisition or loss of citizenship.³⁴ Japanese nationality law permits both the father and the mother to transmit nationality to a child, while a child of unknown parentage acquires nationality on the basis of *ius soli* or birth in Japan. The spouse of a Japanese national may apply for Japanese nationality by naturalisation and the rules on loss of nationality do not differentiate between men and women. The law generally discourages dual nationality.³⁵

Several of these countries that discriminate against women in their nationality laws are States parties to international conventions that require them to take positive steps to change their legislative policies and domestic practices that impact on nationality. For instance, Sri Lanka, Malaysia and Singapore are States parties to the Convention on the Nationality of Married Women. These countries are also States parties to the Women's Convention and they have ratified the Children's Convention. The Committee on the Elimination of Discrimination against Women (CEDAW), established by the Women's Convention to review the performance of States parties in bringing their laws and policies in line with the Convention, has unfortunately not been able to promote accountability in conforming with these standards.

³¹ Articles 3(1) and 4 of the Indian Citizenship Act modifying article 5 of the Indian Constitution, were amended by the Citizenship (Amendment) Act 1992. The same applied for article 8 of the Citizenship Act 1955.

³² 1995, 1 *Gender Justice Reporter* 14, National Law School of India University.

³³ Citizenship Act 1977.

³⁴ Reference to Australian Citizenship Act 1948, *Achievements of the United Nations Decade for Women in Asia and the Pacific*, UN Doc ST/ESCAP/434, 53 at 158 (1987).

³⁵ Japanese Nationality Act (c147 of 1950), articles 2, 7 and 11.

The regular country reports on Sri Lanka, for instance, have not indicated that this issue has been given any priority for legislative intervention.³⁶ Yet, CEDAW has not been able to persuade the government to address the issue. The Constitution of Sri Lanka guarantees gender equality and a local policy document, the Women's Charter (1993), has set guidelines that require an extensive review of nationality laws. Efforts by non-governmental organisations and the local monitoring committee, the National Committee on Women, established under this Charter to raise nationality law reform as a critical issue, have not yet met with an effective response. A recent report by the National Law Reform Commission has recommended extensive changes in the law, in conformity with Sri Lanka's international obligations, constitutional guarantees on gender equality and the norms of the Women's Charter (1993). The report is being studied by the Ministry of Defence, the appropriate ministry responsible for matters connected with immigration. No action has yet been taken to amend the citizenship laws and administrative guidelines on the issue of visas to foreign spouses.

In this environment of clear lack of political will in effecting change, the superior courts are being used to challenge these laws and administrative decisions on nationality. The touchstone for judicial review is the provisions in national constitutions which incorporate a general standard of gender equality.

Constitutional litigation

South Asian constitutions in particular contain articles which restate and incorporate the international norms on gender equality and equality before the law which are found in the ICCPR. Where these provisions are combined with a wide power of judicial review of all laws that infringe the constitution, there is a legal basis for challenging discriminatory laws on nationality, as well as governmental and administrative decisions based upon these laws.

In Pakistan, a writ petition, filed some years ago, challenged the provision of the Pakistan Citizenship Act that denied a Pakistani woman the right to obtain nationality for her spouse while permitting an alien woman to obtain citizenship on satisfaction of conditions set for alien female spouses of male Pakistani citizens.³⁷ Since Pakistani law remains unchanged, it appears that the petition is pending or that it failed. A similar petition has been filed recently, by a Pakistani grandparent on behalf of a Pakistani minor born to her daughter, who is married to an Indian and residing in one of the Gulf States. The application is being

³⁶ For the initial and second reports of Sri Lanka, see UN Docs CEDAW/C/5/Add.29 (1985) and CEDAW/C/13/Add.18 (1988).

³⁷ *Begum Rashida Patel and others v Federation of Pakistan*, 1987 Petition No 515, cited in Patel Rashida, *Socio, Economic, Political Status and Women and Law in Pakistan* (Karachi, Faiza Publishers, 1991) at 16.

made on the basis that the grandparent wishes to apply for guardianship of the child and cannot do so, because Pakistani law infringes the constitutional guarantee on gender equality, by preventing a Pakistani woman from transferring her citizenship to her child.³⁸ A similar case was filed in 1992 or 1993 in Bangladesh and appears to be pending. In this case a Bangladeshi woman living in France and married to an Indian applied to the Bangladesh Consulate to have her children's names included in her passport. The entries were made in her passport and cancelled later on the basis that the mother could not transfer citizenship to her children, born of a marriage to an alien. A constitutional petition filed in the High Court in Bangladesh by this woman alleged a violation of the constitutional guarantee on gender equality stated in the Bangladesh Constitution. The case is still pending.³⁹ However the Nepal Supreme Court has recently struck down a regulation discriminating against the foreign spouses of Nepalese women in the issue of visas, on the ground that they were inconsistent with the provision on gender equality in Nepal's Constitution.⁴⁰

The power of judicial review of Sri Lanka courts is limited. Past legislation cannot be challenged for infringement of fundamental rights, including the right to equality before the law and gender equality.⁴¹ The Citizenship Act (1948) which discriminates against women cannot therefore be challenged for infringement of the constitution. Consequently, an administrative decision by the Controller of Immigration which refuses to issue a passport to the minor child of a Sri Lankan woman married to an alien, cannot be challenged as an infringement of the constitutional guarantee on equality, since the Citizenship Act incorporates such a discriminatory provision. On the other hand, an arbitrary administrative decision to deny naturalisation of an adult child, who has the right to make an application to be registered as a citizen, can be challenged, since Sri Lanka courts are increasingly interpreting the constitutional guarantee on equality before the law to strike down arbitrary and unfair administrative or executive action.

Sri Lanka's Citizenship Act also contains a provision which gives male and female spouses of Sri Lankan citizens the same right to apply for citizenship. Nevertheless, administrative guidelines issued by the Controller of Immigration require a male spouse of a Sri Lankan citizen to satisfy strict conditions, including deposit and remittance of a substantial

³⁸ Case referred to the author by Pakistani lawyer and human rights activist Hina Jilani, as a fundamental rights action on nationality, filed by her in the Supreme Court of Pakistan, under article 25(1) and 25(2) of the Constitution.

³⁹ Case filed in Bangladesh High Court in 1992-1993 under articles 27 and 28 of the Constitution, as cited *Women's Rights, Human Rights, Asian Women's Profile*, Asia Pacific Forum for Women, Law and Development, Kuala Lumpur, Malaysia, 1993, p 2.

⁴⁰ *Meera Gurung v Department of Immigration*, Nepal Decision No 4858, NLJ 2051, at 68, cited in Pradhan, *supra* note 29.

⁴¹ See the Constitution of Sri Lanka: article 12(1) on equality and article 16(1) on limited power of judicial review.

amount of foreign exchange, prior to consideration of the application. These discriminatory guidelines have been questioned, by women affected by these regulations, in applications filed before the Commission on Elimination of Discrimination. The Commission has not been successful in persuading the Controller to revise and withdraw these regulations.

Sri Lankan Governments, in the past, have not intervened and the affected women have been unwilling to challenge the discriminatory exercise of administrative discretion, due to insecurity that their spouses may be denied resident visas pending such litigation. The first case brought by a woman, challenging an administrative decision to deny a resident visa to her foreign spouse, was filed in the Supreme Court in 1996, but was settled out of court when the man was granted his visa. Another case filed recently, as a violation of the constitutional right to gender equality, is still pending. It is only a few months ago that the present government has been persuaded to examine the nationality issue, with a view to revising and amending existing law. The recent concern with exploitation of Sri Lankan children by travelling paedophiles, seems to have re-enforced arguments that a new policy on issue of visas to foreign male spouses will encourage marriages of convenience for illegal purposes.

The provisions in the Malaysian and Singapore Citizenship Acts which infringe the constitutional guarantees on gender equality in these countries do not appear to have been challenged in the courts yet.⁴²

Conclusion

Many countries in the region, particularly South Asian countries, influenced by values of English law derived from a colonial period, have enacted nationality laws that violate international standards that they have ratified and their own constitutional guarantees on equality. Powerful interests seem to discourage governments from acquiring the political will to revise obviously discriminatory laws.

The ideology of patriarchy that is reflected in legislation may have a historical origin, but it is reinforced by perceptions of gender relations among policy planners and even bureaucrats. When the law of the United Kingdom was changed in 1981 by a Nationality Act that permitted either parent to transfer citizenship to a child, one prominent Member of Parliament proposed an amendment suggesting that "nationality, in the last resort, is tested by fighting. A man's nation is the nation for which he will fight... [W]omen on the other hand, are involved in the preservation and care of life."⁴³ These attitudes are entrenched in

⁴² M Sornarajah, "Nationality and International Law in Singapore" in *Nationality in Asian Perspective*, *supra* note 29.

⁴³ Speech by Enoch Powell MP, as quoted in *ILA Preliminary Study*, *supra* note 2, at 644.

many of the provisions of the post-independence citizenship legislation in South Asia, where the English legal values have been reinforced by local patriarchal values of policymakers and bureaucrats. The Controller of Immigration in Sri Lanka has justified discriminatory guidelines for the issue of residence visas and conferment of citizenship on the argument that different standards are justified because men are “the head of the household” in Sri Lanka.⁴⁴ The Blackstonian ideology on gender relations in the family, endorsed by local religious and social norms and beliefs, provides an easy rationale for resisting change. Political rhetoric on women's rights is, therefore, easily accommodated with discriminatory laws and policies, so that there is a failure to recognise the obvious contradictions.

The myth of protecting a domestic labour market against an ‘influx’ of foreign males in a situation of unemployment, has been used to justify discrimination against male spouses. In a recent letter to the editor justifying discrimination in the issue of visas, Sri Lanka's Controller of Immigration stated that “there is an element of irregularity... [but] this element of irregularity is prevalent in other countries. Sri Lanka is a very small country with limited natural resources and employment opportunities, and certain restrictions need therefore be placed in granting resident visas to male spouses in the interests of the country.”⁴⁵ The fact that the rates of female unemployment in the country are also high and alien women could also compete in the labour market, has been completely ignored in this effort at rationalising discrimination. This type of rationale is not untypical of the official standpoint in immigration decisions that discriminate against women.⁴⁶

The need to “protect” local women, from “marriages of convenience” to foreigners engaged in illegal activities, is another argument used to justify discrimination in nationality law.⁴⁷ On the other hand, the argument of “marriage of convenience” is also used to justify laws that lead to loss of nationality when a married woman, who has obtained citizenship by naturalisation as a spouse, is subsequently divorced. The motivation of preventing dual nationality has been often used against married women, on the argument that unless a woman loses her own nationality, there is a risk that she will not have the required bond of an effective link with the country of her husband's nationality.

It is vital that comparative experience should be shared through the international monitoring bodies, so that a comparative jurisprudence can be developed on nationality issues. Such an effort can strengthen the

⁴⁴ Interview with members of National Committee on Women on administrative guidelines and nationality in 1995.

⁴⁵ *Island* (Sri Lanka) 5 May 1996.

⁴⁶ A similar response is seen in the case of *Abdulaziz, Cabales and Balkandali v United Kingdom*, European Court of Human Rights, Judgment of 28 May 1985, Series A, No 94, 81 ILR 139, 7 EHR.R. 471.

⁴⁷ See *supra* note 45 and *ILA Preliminary Study*, *supra* note 2, at 648 (discussing administrative decisions under the UK Nationality Act 1981).

capacity of professionals, as well as non-governmental organisations, to lobby for change and counter the arguments of so-called 'political' expediency. Decisions of the Inter-American Court of Human Rights and the European Court of Human Rights that have dealt with the issue are not available for reference and use in the region. However, the interpretations of these courts of the guarantee of non-discrimination in the context of nationality laws, can be used in countries of the Asia Pacific region with written Constitutions.⁴⁸ Similarly, the decision of the Court of Appeal of Botswana in the landmark case of *Attorney General v Unity Dow*⁴⁹ is relevant to countries where custom and personal law, based on ethnicity and religion, are used to argue for a qualification of the fundamental right of gender equality guaranteed in national constitutions and even accepted through ratification of international instruments. In this case, an argument that the traditional and customary ideology of patriarchy must be accommodated in a constitutional interpretation of the core norm of equality was rejected by the Botswana Court of Appeal, which declared that in the event of a conflict of standards, "it is custom not the constitution which must go."⁵⁰ A similar activist approach is reflected in the decision of the Supreme Court of Nepal in *Meera Gurung v Department of Immigration*, when it struck down a discriminatory regulation on the issue of resident visas to foreign spouses of Nepalese women.⁵¹ These decisions have special relevance to countries in the Asia Pacific region that argue for a relativist approach to rights that accommodates the special ideology of a non-Eurocentric scale of "Asian family values".

Relativist arguments justify an erosion of international standards on human rights and will, if they prevail in the area of nationality, prevent a revision of existing law and practice in the region. It is important to recognise that social values and customary tenets have never been static, and that egalitarian attitudes to gender relations have existed in countries of the region, and that they have been transformed or revived through the process of change. A perusal of matrimonial property and inheritance laws in Thailand, Vietnam, Burma and Sri Lanka indicates that community of property and the concept of sharing economic assets equally was superseded by later trends that gave preference to males.⁵² Women's

⁴⁸ See *ILA Preliminary Study*, *supra* note 2, at 655 and Cecilia Medina, "Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System" in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994) 257 at 267.

⁴⁹ (1992) 103 ILR 128, [1992] LRC (Const) 623 (CA of Botswana), affirming [1991] LRC (Const) 574 (HC of Botswana).

⁵⁰ [1992] LRC (Const) at 640c.

⁵¹ Pradhan, *supra* note 29.

⁵² For details, see My Van Tran, "The Position of Women in Traditional Vietnam" in K M de Silva and others (eds), *Asian Panorama* (New Delhi, Vikas Publishing House, 1991) 274 at 281; C Bunnag and V Nasakul, *Thailand in Law Asia Family Law Series*, Vol 1 (Singapore, Lawasia, 1979), at 197; S Goonesekere, "Colonial Legislation and Sri Lanka Family Law: the Legacy of History" in *Asian Panorama*, at 193; and Alan Gledhill, "Community of Property in the Marriage Laws of Burma" in J N D Anderson (ed), *Family Law in Asia and Africa* (London, Allen and Unwin, 1968) 205.

groups who are studying and interpreting the Koran refer to a similar concept of equal property and preferential custodial rights of women in Islamic law. They would deny that Islamic law justifies the State preventing a married woman in a Muslim country like Pakistan or Bangladesh transmitting her nationality to her child or seeking citizenship for her spouse.

It is therefore vital that international standards on gender equality should be used, to review and revise the obvious discrimination in nationality laws of domestic legal systems. The Children's Convention is a widely ratified document but its provisions on nationality are not strong enough, unless they are interpreted in relation to other articles, so as to link with the standards on nationality in the Women's Convention. There is a strong case for both monitoring committees under these two conventions drafting a general recommendation on the nationality issue.

Monitoring government performance, so as to promote accountability and legislative and policy changes, through these committees must be combined with jurisprudential developments that give women access to judicial fora and alternative tribunals, so that they can challenge discriminatory laws and policies. The concept of *locus standi* must be expanded, so that the nationality issue can be raised on behalf of women who cannot or are unwilling to be identified as victims of injustice. Similarly, the concept of state inaction, which is being developed in the jurisprudence of South Asian countries with written constitutions, can be used to ensure that state action in infringing the right to gender equality is as justifiable in the courts as state apathy and inaction in preventing discrimination. Such a development can help to promote accountability on the part of bureaucrats and law enforcement officials concerned with immigration issues.

The adoption of an Optional Protocol to the Women's Convention will also be helpful in providing for an individual complaints procedure. In *Aumeeruddy-Cziffra v Mauritius*,⁵³ twenty Mauritian women used the Optional Protocol to the ICCPR to make a submission to the Human Rights Committee that Mauritian nationality law discriminated in favour of men. The decision of the Committee that the law infringed certain standards set by the Covenant resulted in the government revising the law. The ICCPR and its Optional Protocol has been ratified by a very few countries. It may be possible to ensure wide ratification of an Optional Protocol to the Women's Convention, so as to enable the key issue of nationality to be raised in an international forum, through the more visible device of an individual complaint.

International standards are, in the ultimate sense, a strategy to promote governmental accountability at the domestic level to all

⁵³ Human Rights Committee, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to Sixteenth sessions)* (United Nations, New York, 1985) vol 1, 67, (1985) 67 ILR 285, 2 HRLJ 139.

citizens. That accountability is a matter of critical concern to women of all countries in the region. The realisation of the basic human right to nationality on the basis of gender equality is as vital for the peasant and the urban poor. These women also cross borders as workers or migrants and they, as well as women of other classes, form cross-national family units and face similar problems of marginalisation through discriminatory nationality laws. This reality must be recognised. Nationality and infringement of human rights must no longer be perceived as one of low priority and a middle-class issue that does not concern a majority of women in the Asia Pacific region.