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A Digest of Case Law  
on the Human Rights of Women  
(Asia Pacific)

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Asia Pacific Forum on Women, Law and Development



A Digest of Case Law  
on the Human Rights of Women  
(Asia Pacific)

A collation of case summaries  
from the Asia Pacific region citing the  
Convention on the Elimination of  
All Forms of Discrimination Against Women  
and  
National Constitutions  
and  
other Human Rights Instruments  
to protect and promote equality of rights  
between men and women

A Project of the Women's Human Rights Working Group of the  
Asia Pacific Forum on Women, Law and Development

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This digest is a collection of judicial verdicts on women's rights claims from the Asia Pacific. It illustrates the contentious issues, complex barriers, and the commonalities in women's rights activism across the diversity of the region. In doing so, it reflects judicial treatment of women's rights claims and the disparate successes with the law, thereby taking stock of the achievements and challenges of the region.

Law has been a significant site of women's rights struggles. The wide ratification of the Convention on the Elimination of All forms of Discrimination Against Women [CEDAW] in the region, particularly after the World Conference on Women in Beijing, 1995, has considerably strengthened the claims for justiciability of women's rights. The increasing reliance upon CEDAW by women's rights activists to firstly, challenge discrimination in law and secondly, to expand narrow judicial interpretation of national laws is evidence of the Convention's growing importance. While it may be too premature to definitively comment on whether or not this has actually enabled better results, it is clear that the ratification of CEDAW has lent legitimacy and moral force to feminist engagement with the law in many national contexts. The court room in the last decade has been an arena where many of these struggles, developments and politics have been played out - it is visible in the increasing reliance on international law, universal standards, in the terminology used and the formulation of the claims. It is equally evident in the judicial responses to them - regardless of the upholding of or rejection of the claims.

The litigation being pursued to advance women's rights from the Asia Pacific are not adequately documented, reported or available for making linkages in women's activism regionally. This vacuum formed the core need for this project. In our work, particularly the regional trainings of APWLD on 'Feminist Legal Theory and Practice', it was a struggle to source information on litigation strategies and case law from the countries of this region. One often heard from the participants in the trainings and the national NGOs about examples from their countries, but these remained unverified, undocumented and therefore difficult to retrieve and share for wider usage. Instead, it was easier to rely upon 'international case law' that is well documented and therefore well known; inadvertently reinforcing the notion that there were no significant legal challenges from Asia Pacific. This digest endeavors to fill this gap by consolidating a decade of women's rights cases from the region, from 1990 to 2000.

Implicit in the regional coverage of judgments was the challenge of working with different languages, different legal systems and diverse socio economic, customary/cultural contexts. How could one cobble together the disparate standards, terminology and systems, maintain lucidity and coherence of legal texts that are inherently complicated and verbose, for a wider usage? The process of preparing this digest was in a sense built into the type of output desired. It required involvement of national and

regional groups - an involvement that was necessarily contingent upon their finding this exercise and output useful. This digest, therefore, is as much a product of each of the contributing partner organisations in this project, as of APWLD.

While the digest is a shared output, and APWLD acknowledges the valuable contribution of the partner organisations in this exercise, it must alone bear the responsibility for any shortcomings in compilation, the lapses if any in the selection process, and in processing the ‘distilled’ matter received. An exercise of this description has a vast terrain to cover, but equally needs to define what it cannot cover. Our principal interest was in women’s rights cases that had relied upon CEDAW/ international human rights law or Constitutional rights, and had been finally adjudicated by superior national courts with the power of judicial review and settling last appeals. The selection of cases mounted solely on Constitutional rights was the most difficult - each national partner had the discretion of selecting the landmark decision in this category for their country, no doubt from a vast number of such cases. The editorial team subsequently sifted through this category for finally selecting those that could be considered landmark for the region. It is this level of selection that was the most challenging for APWLD’s editorial team, and a subject of much debate amongst us.

## **How to use this digest**

The case summaries have been organised into subject headings that correspond to the substantive articles of CEDAW. Some of the subjects covered by CEDAW are very broad, such as those on violence against women [VAW] under General Recommendation 19 and Equality within the Family under Article 16. These have been divided into sub-categories for coherence and easy reference. For example, VAW is sub divided into sexual violence, domestic violence and sexual harassment at the workplace. Similarly, the chapter on Family is sub-divided into marriage, divorce, inheritance and custody/ guardianship. Readers should note that the cases relating to inheritance and succession which have been categorised under Article 16.1 (h) may also correspond to Article 13 (a) of the Convention.

This compilation aims to be a resource for a broad range of users - for those working within the courtroom, such as professional legal practitioners and judges, as well as for those working for women’s rights with different skills and capacities in different arenas. To enable such a wide usage, the case summaries have been simplified without losing the legal issues, the defenses and the rationale for the decision. The case references include the year of the judgment and the publication in which it is reported. Most of the cases also have a brief comment drawing attention to feminist legal issues arising from the case.

The appendices provide a range of additional information to meet the needs of the user range. It includes glossary of terms, a table of ratification of CEDAW and its Optional Protocol (Status of CEDAW and its Optional Protocol), a note on ratification and steps taken by governments in countries where such information was available (Country Ratification Repots). A framework of relevant international law on each of the substantive areas covered in this digest has been provided (Collation of Relevant International Instruments). In addition to CEDAW, it lists the corresponding international law provisions pertaining to each of the thematic subjects. These include the provisions of the Universal Declaration of Human Rights [UDHR], the International Covenant on Civil and Political Rights [ICCPR], the International Covenant on Economic, Social and Cultural Rights [ICESCR], and the Convention on the Rights of the Child [CRC]. The framework on violence against women [VAW] is covered by the General Recommendation No. 19 of CEDAW, and additionally supported by provisions from the UN General Assembly Declaration on Violence Against Women along with those of the Convention Against Torture [CAT].

Despite our best efforts, this exercise has had its share of hurdles and limitations. The regional coverage of the digest is limited to the countries where APWLD was able to find partners with the capacity to undertake research, prepare case summaries and undertake translations into English. We worked with partners with varying capacities, for many of whom English was not even a second language, or law/ litigation a primary area of work. Some of the contributions received remain un-reflected in this work, such as the case summaries received from Thailand and Malaysia. Although descriptive of legal strategies nationally, these could not be included because they fell outside the criteria of inclusion for this digest. Given these circumstances and the grinding schedules of each of the national partners, the digest with all its limitations is still an achievement for all of us who joined hands - whether visibly or invisibly in this exercise.

This work is a contribution to and resource towards the ongoing efforts to contest, negotiate and fight the complex web of barriers to equal status, opportunities and dignity of women. This, for many of us in the region, is a new endeavor. It is hoped that this initiative will be refined and updated with use over time - to overcome its present limitations and to better respond to the regional needs it seeks to fulfill.

Madhu Mehra  
Editorial team  
30 June 2003



# **Part I**

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## **CEDAW Cases**

## Article 7

### Political Participation and Public Life

#### *Imelda Romualdez-Marcos (Petitioner) v Commission on Elections and Cirilo Roy Montejo (Respondents)*

G. R. No. 119976

Supreme Court, Manila

18 September 1995

Davide, Francisco, Kapunan, Mendoza, Padilla, Puno,  
Regaldo, Romero, Vitug JJ

#### Laws and International Instruments Considered

*CEDAW 1979*, Article 15;

*Civil Code 1950*, Articles 50, 110, 114, 117;

*Constitution of the Philippines 1987*, Article 2;

*Family Code 1988*, Section 69;

*Women in Development and Nation Building Act 1992*.

This case examines the meaning of “residency” in election law in the Philippines. It considers whether a woman who changes her place of residence after marriage continues to retain domicile in her residence of origin. The case also considers whether it constitutes sex discrimination to define “residency” for election purposes on the basis of where the family home is situated, since women often adopt the residency of their husbands.

The petitioner, Imelda Romualdez-Marcos, applied as a candidate to contest elections to the House of Representatives in the district of Leyte. The incumbent representative of the constituency of Leyte, Cirilo Roy Montejo (a candidate for the same position) applied to Commission on Elections [“COMELEC”] to have Imelda Romualdez-Marcos’s application rejected on the grounds that it did not meet the constitutional requirement for residency. The constitutional requirement for residency for election purposes stated that in order to contest a position, the candidate must have resided in the location for which they are standing for a period of one year or more. The purpose of the provision was to prevent the possibility of strangers or newcomers who were unacquainted with the needs of a community standing for office. In her original application form, Imelda Romualdez-Marcos had stated that she had resided in Leyte for seven months. In response to the complaint filed by Cirilo Roy Montejo

she amended the time of residency in her application from seven months to “since childhood”. She claimed that the entry of the word “seven” in her original Certificate of Candidacy was the result of an “honest misinterpretation”, which she now sought to rectify. She further stated that she had always maintained Tacloban (in the district of Leyte) as her domicile or residence.

COMELEC, after considering the petition of Cirilo Roy Montejo to have the candidacy of Imelda Romualdez-Marcos rejected, found the claim meritorious and refused the petitioner’s original application for candidacy and her amended version. COMELEC rejected the petitioner’s application for candidacy on the basis that her conduct revealed that she did not intend to make Tacloban her domicile, that she had registered as a voter in different places, and on several occasions had declared that she was a resident of Manila. COMELEC stated that although she spent her school days in Tacloban she had abandoned residency when she chose to stay and reside in other places.

Imelda Romualdez-Marcos subsequently appealed to the Supreme Court requesting a declaration that she had been a resident, for election purposes, of the First District of Leyte for a period of one year at the time she applied to contest the 1995 elections. She argued that the meaning of residency in the Constitution, which designated the requirements for candidacy for election purposes, was that of domicile. She argued that she had domicile in Leyte because that was her place of original domicile and she had not acted to replace that domicile with another. She also argued that her marriage and changes of residency alongside her husband when he changed residency did not result in a change in her place of domicile. In support of that argument she claimed that section 69 of the *Family Code 1988*, which gives a husband and wife the right to jointly fix the family domicile, illustrates the intent of the Philippines Parliament to recognise the rights of women. She claimed therefore that since she had domicile in Leyte she automatically fulfilled the requirements for a one-year residency for election purposes.

The respondents argued the meaning of residency in Article 110 of the *Civil Code 1950* was the meaning that should be applied to the constitutional requirement for a one-year residency prior to qualifying for candidacy for the elections. Imelda Romualdez-Marcos, they argued, had changed her residency to that of her husband upon her marriage and at the same time automatically gained her husband’s domicile. After returning to Leyte she had resided there for only seven months and she therefore did not satisfy the one year requirement for candidacy.

### **Decision**

The majority of the Supreme Court (eight judges in favour, four against) held that Imelda Romualdez-Marcos was a resident of the First District of Leyte for election



purposes, and therefore possessed the necessary residence qualifications to run in Leyte as a candidate for a seat in the House of Representatives. The Court held that the term “residence” in the context of qualifying for certain elected positions is synonymous with the term domicile. Domicile denotes a fixed permanent residence to which one intends to return after an absence. A person can only have a single domicile, although they can abandon one domicile in favour of another. To successfully change domicile, one must demonstrate three requirements: an actual removal or an actual change of domicile; a *bona fide* intention of abandoning the former place of residence and establishing a new one; and one must act in accordance with that intent. Only with clear and positive evidence that all three requirements have been met will the residence of origin be lost, otherwise residency will be deemed to continue.

The Court held that the meaning of “residence” in Article 110 of the *Civil Code*, which states that “the husband shall fix the residence of the family”, is different therefore to the meaning of residence in the Constitution. The term residence may have one meaning in civil law (as under the *Civil Code*) and another different meaning in political law as represented in the election requirements identified in the Constitution. Residency is satisfied under the *Civil Code* if a person establishes that they intend to leave a place when the purpose for which they have taken up their abode ends. The purpose of residency might be for pleasure, business, or health and a person may have different residences in various places. However, residency in the Constitution as opposed to the *Civil Code* means domicile and therefore the key issue is to determine the domicile of the petitioner, Imelda Romualdez-Marcos.

The Court held that Article 110 does not create a presumption that a wife automatically gains a husband’s domicile upon marriage. When the petitioner was married to then Congressman Marcos in 1954, she was obliged by virtue of Article 110 of the *Civil Code* to follow her husband’s actual place of residence as fixed by him. The right of the husband to fix the residence was in harmony with the intention of the law to strengthen and unify the family. It recognised the fact that the husband and wife bring into the marriage different domiciles and if the husband has to stay in or transfer to any one of their residences, the wife should necessarily be with him in order that they may “live together.” However, the term “residence” in Article 110 of the *Civil Code* does not mean domicile and therefore it cannot be correctly argued that petitioner lost her domicile as a result of her marriage to the late President Ferdinand E. Marcos in 1952. The Court also held that it would be illogical for the Court to assume that a wife cannot regain her original domicile upon the death of her husband, if she has not positively selected a new one during the subsistence of the marriage itself.

The Court held that the new *Family Code*, which was introduced to replace the *Civil Code*, confirmed the petitioner’s argument that marriage does not automatically

change a wife's domicile to that of her husband. The *Family Code* replaced the term "residence" (used in the *Civil Code*) with the term "domicile". Article 69 of the *Family Code* gives a husband and wife the right to jointly fix the family domicile. The provision recognised revolutionary changes in the concept of women's rights in the intervening years by making the choice of domicile a product of mutual agreement between the spouses. The provision recognised the right of women to choose their own domicile and removed the automatic transfer of a husband's domicile to his wife.

### **Justice Florida Ruth Romero**

Justice Romero agreed with the findings of the majority of judges that the term "residence" in electoral law is synonymous with domicile. She also agreed with the finding of the majority that a woman did not lose her domicile when she changed her residence to comply with the *Civil Code*, which gives a husband the right to choose their place of residence. In coming to her decision the judge relied upon a number of international instruments that protect the rights of women and made a number of positive statements about the role of women in contemporary Philippines society.

Justice Romero in her judgment made specific reference to *CEDAW* and noted that Article 15(4) grants to men and women "the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile". Justice Romero noted that the impact of *CEDAW* on other laws in the Philippines was significant. She referred to the *Constitution of the Philippines 1987* into which the values of *CEDAW* had been incorporated. For example, Article 2, section 11 states that, "the State values the dignity of every human person and guarantees full respect for human rights" and Article 2, section 14 states that "the State recognises the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men". She also referred to the *Family Code*, by which many of the unreasonable strictures on Filipino wives enshrined in the *Civil Code*, were removed. For example, Article 114 of the *Civil Code* had previously stated that a wife could not, without a husband's consent, acquire any property by gratuitous title, except from her ascendants, descendants, parents-in-law, and collateral relatives within the fourth degree. Article 117 similarly had stated that a husband wields a veto power if a wife exercises her profession or occupation or engages in business, provided his income is sufficient for the family, according to its social standing, and if his opposition is founded on serious and valid grounds. Article 84 had prohibited a widow from marriage until three hundred days following the death of her husband, unless in the meantime she had given birth to a child. The removal of these provisions indicated the powerful impact of *CEDAW* on Philippines law.

Justice Romero also referred to the *Women in Development and Nation Building Act 1992*, which gives married women rights to act in contracts on an equal basis to that of men. She referred to the Fourth World Conference of Women in Beijing and its objectives, which included the removal of “all obstacles to women’s full participation in decision making at all levels, including the family”. Justice Romero beseeched the Supreme Court to be the first to respond to the Fourth World Conference on Women and its clarion call “Women’s Rights are Human Rights”.

### **Commentary**

This case is positive for women. The rights of women are categorically mentioned and explicitly recognised. The decision recognises the rights of women to choose their own place of domicile and not to be given the domicile of their husband upon marriage. The judgment of Justice Romero is particularly positive as it discusses at length the many restrictions on the personal freedoms of Philippines women, which have since been removed in response to international norms and conventions.

More significantly, Justice Romero focuses on *CEDAW* as a framework for the articulation of women’s rights. The recognition of *CEDAW* as a binding treaty and a source of State obligation gives emphasis to the fact that it is not only “part of the law of the land” (section 2, Article II of the Philippines Constitution), but part of Philippine case law. This gives *CEDAW* the potential to be used as a legal basis in future cases that involve discrimination against women, without an additional requirement to cite a specific national law that further articulates a provision in *CEDAW*. The Philippines Supreme Court does not always cite international treaties or conventions in support of its decisions so this case signifies a positive development.

## Article 9

### Nationality and Citizenship

*Sayeeda Rahman Malkani and others (Petitioners) v The Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh and others (Respondents)*

Supreme Court, High Court Division, Dhaka  
1 September 1997

Md. Mozammel Hoque and Md. Hassan Ameen JJ

#### Laws and International Instruments Considered

*Bangladesh Citizenship (Temporary Provisions) Order of 1972*, Article 2;  
*CEDAW 1979*;

*Citizenship Act 1951*, Sections 3, 5, 11;

*Constitution of the People's Republic of Bangladesh 1972*, Articles 1, 27, 28, 29;

*General Clauses Act 1897*, Section 13, 15;

*P.O. 149 of 1972*, Article 2.

This case considers whether Bangladesh law, which limits the rights of its female citizens married to foreign nationals who wish to raise their children as Bangladesh citizens, constitutes sex discrimination. The Court considered whether the law breached the *Constitution of the People's Republic of Bangladesh 1972* [“the Constitution”] and international conventions that protect the rights of women such as *CEDAW*.

The first petitioner, Sayeeda Rahman Malkani, a citizen of Bangladesh married Rabinder Malkani, an Indian national, in 1984, while pursuing her postgraduate studies in Paris. The couple had two sons, Sanjay Rahman Malkani and Ihsan Rahman Malkani (the second and third petitioners), who were registered in the Bangladesh Embassy in Paris as Bangladeshi citizens. The minors' names were endorsed in their mother's passport mother and they both visited Bangladesh regularly with her.

On 11 August 1992, an official at the Bangladesh Embassy in Paris cancelled the endorsement of the names of Sayeeda Malkani's two sons from her passport, alleging that the earlier endorsements had been mistakenly entered. She was informed that as she had married an Indian national, her sons could not be considered Bangladeshi citizens. Sayeeda Rahman Malkani applied to the Court seeking a declaration that

the cancellation of the endorsement of the names of her two sons in her passport was unlawful. She also sought a declaration that her sons were entitled to Bangladeshi citizenship on the basis of her own citizenship.

The petitioners argued that the statutory provisions of the *Citizenship Act 1951*, which state that a female who marries a foreigner cannot raise her children as Bangladeshi citizens, are contrary to Articles 27 and 28 of the Constitution. The Articles state that “all citizens are equal before the law”, that “the State shall not discriminate against any citizen on grounds only of religion, race, sex or place of birth” and that “women shall have equal rights with men in all spheres of the State and Public life”. They argued therefore that the cancellation of the endorsement of Sayeeda Rahman Malkani’s sons from her passport was unlawful.

The petitioners also argued that section 13(1) of the *General Clauses Act 1897*, which states that, “in all Acts of Parliament and regulations unless there is anything repugnant in the subject or context words importing the masculine gender shall be taken to include females,” should be applied. On the basis of this section, she argued, the word "father" in the *Citizenship Act 1951* should be taken to include mother. They further argued that if the term "father" does not include mother then the laws on citizenship violate *CEDAW*, which obliges State parties to eliminate discrimination against women in relation to acquiring, changing or transmitting nationality.

The respondents argued that Article 6(1) of the Constitution provides that the citizenship of Bangladesh shall be determined and regulated by law. Therefore the citizenship of her two sons must be determined by the *Bangladesh Citizenship (Temporary Provisions) Order 1972* and the *Citizenship Act 1951*. The provisions in both Acts state that a Bangladeshi citizen is one who himself, or his father or grandfather, was a permanent resident of the territories as comprised in Bangladesh on 25 March 1971. The respondents argued that the husband of Sayeeda Rahman Malkani was not a citizen, nor a permanent resident of Bangladesh on 25 March 1971 and consequently her two sons could not claim citizenship.

Finally, two of the three amicus-curiae (“friends of the court”) appointed by the Court to give their opinions on the relevant issues, argued that the *General Clauses Act 1897* only applied to situations of ambiguity and that there was no ambiguity in the use of “father” in the *Citizenship Act 1951*.

## **Decision**

The Court found in favour of the petitioners regarding the cancellation of the endorsement. The Court held that Sayeeda Rahman Malkani was the natural guardian of her minor sons, and their names had been legally endorsed in her passport. The cancellation of the endorsement by the Bangladesh Embassy in Paris was therefore

illegal. They were unsuccessful, however, in establishing that the sons had a right to citizenship through their mother's citizenship. The Court agreed with the respondents that there was no ambiguity in the use of the words “father” and “grandfather” in the *Citizenship Act 1951*. The equality provision relied upon by the petitioners merely states that all citizens are equal in the eyes of the law. The Constitution defines a citizen as “a Bangladesh person who is a citizen according to the law” and the *Citizenship Act 1951* provides the authority on who can be a citizen. The petitioners' argument, according to the Court therefore had no substance.

### **Commentary**

The judgment denies female citizens of Bangladesh the right to transfer citizenship to their children. The Court refused to accept the argument that the *Citizenship Act 1951*, by recognising only male lineage, violates a fundamental right to equality. The Court interpreted the Constitution narrowly, finding that the meaning of citizenship should be guided by the relevant laws on citizenship rather than in light of the equality provisions of the Constitution. The Court also accepted as relevant, a ruling which preceded the Constitution and the ratification of *CEDAW*, that minors cannot acquire domicile different to that of their father.

The Court appointed three senior lawyers as *amicus curiae* to provide their opinions on the relevant issues. Two of the three lawyers provided conservative opinions that did not promote the interests of women in Bangladesh. They submitted that the children could not claim citizenship under the *Citizenship Act 1951*. Further, although the petitioners' lawyers referred to *CEDAW* in their argument, the Court evaded the issue of the obligation of the State as a party to the Convention to observe its provisions. The Court also overlooked the submission of the third *amicus curiae* who challenged the constitutionality of the *Citizenship Act 1951* and other laws in question and also raised the issue of a woman's right to transmit nationality.

## Article 9

### Nationality and Citizenship

*Mr Benjamin Peter, Mrs Mina Kumari Tilija Peter (Petitioners) v His Majesty's Government, Ministry of Home Affairs, Department of Immigration, Kathmandu (Defendants)*

Decision No. 4413, Nepal Law Magazine 2049 (1992)

Supreme Court, Division Bench

16 February 1992

Gajendra Keshari Banstola, Keshav Prasad Upadhyaya JJ

#### Laws and International Instruments Considered

*CEDAW 1979*;

*Constitution of the Kingdom of Nepal 1990*, Articles 11, 88(1);

*International Covenant of Civil and Political Rights 1966*;

*Nepal Treaties Act 1990*, Section 9(1);

*Regulations Relating to Foreigners 2032*, Regulation 14(3), (4), (5).

The Court in this case was asked to consider whether regulations which treat Nepalese men marrying non-nationals differently, to Nepalese women marrying non-nationals, were in breach of the *Constitution of the Kingdom of Nepal 1990* [“the Constitution”] and international conventions such as *CEDAW*.

The petitioners, Mina Kumari Tilija, a permanent resident of Nepal, and Benjamin Peter, a citizen of Switzerland, married and sought natural settlement status in Nepal. They were denied that right on the basis of Rule 14(3) of the *Regulations Relating to Foreigners 2032* [“the Regulations”], which provided that a foreign citizen married to a Nepalese woman was only entitled to obtain a non-tourist visa for a maximum period of 4 months. By contrast, Rule 14(3) of the Regulations provided that a foreign woman married to a Nepalese citizen would have her visa automatically extended during the period of the marriage and if the marriage ended, for a further three months. The petitioners filed a writ petition seeking a declaration that Rule 14(3) of the Regulations was unlawful. They also sought a non-tourist visa for Benjamin Peter issued on the same terms as those issued for non-Nepalese women married to Nepalese men.



The petitioners argued that Rule 14(3) was discriminatory on the basis of sex and was inconsistent with the equality provision conferred in Article 11 of the Constitution. Rule 14(3), according to the petitioners, was also contrary to *CEDAW* and the *International Covenant of Civil and Political Rights 1966*. The petitioners argued that the Regulation should be declared unlawful as the *Nepal Treaties Act 1990* provided that international law prevailed over national laws, which were inconsistent with the relevant treaty.

The defendants argued that the petitioner had not filled out the form required for foreigners wanting to enter Nepal. Without completion of the relevant form, the Department could not decide whether the visa should be issued. Since the procedure had not been adhered to it could not be argued that its action was discriminatory. The defendants also argued that the equality provision in Article 11 of the Constitution is a general provision and could not be used to interpret the special provisions of the Constitution such as Part 2, which relates to citizenship.

### **Decision**

The Court rejected the petition. It held that the petitioners had not filed the proper application form for a visa duration extension and their petition was therefore premature. The Court did not address any of the substantive issues raised in this case except to comment that it did agree with the defendants in their assertion that a general provision of the Constitution could not be used to interpret a special provision.

### **Commentary**

This case is a setback for Nepalese women's rights. The Regulation clearly discriminates against Nepalese women who choose to marry foreigners and the Court's decision to reject the petition reinforces this discrimination. No substantive reasons were given by the Court to justify the presence of additional regulations placed on Nepalese women who marry foreigners.

Nepal has a progressive Constitution and since the *Nepal Treaties Act 1990* expressly provides for international standards to be incorporated into domestic law, the case reflects a disregard for women's rights in Nepal. The Court opted for a conservative and easier path by not addressing the constitutional issues raised by the petitioners.

However, this case does not represent a negative precedent because the Court avoided the substantive issues and made its finding against the petitioners on the basis of their failure to correctly follow the visa application procedures. It can therefore be distinguished by advocates in future cases (see also: *Meera Gurung v Her Majesty's Government*, Supreme Court, Decision No. 4858 of 1994 included under constitutional law cases).



## Article 11

### Employment

*Nurhatina Hasibuan (Petitioner) v Pt. Indonesia Toray Synthetics, Functionaries of Indonesian Labour Union, Functionaries Board of Indonesian Labour Union Branch, Central Management Board of Indonesian Labour Union (Respondents)*

No. 651/PDT/1988/PT.DKI

Jakarta High Court

2 July 1988

Hasan Basri Pase CJ, Moeridjatun, Soengkono JJ

#### Laws and International Instruments Considered

*CEDAW 1979*, Articles 1, 4, 11;

*Kesepakatan Kerja Bersama 1954*, Articles 12, Figure 2 (Mutual Working Agreement) 16, 68;

*Labour Act 1969*, Article 2;

*Occupational Act 1948*, Articles 7, 8, 9, 13.

This case examines whether a lower mandatory retirement age for women constitutes sex discrimination. The Court considered whether the lower retirement age was in breach of the *Labour Act 1969*, which prohibits discrimination on the ground of sex, and international instruments such as *CEDAW*. The Court also considered whether it had the jurisdiction to hear this case.

On 27 April 1987, the petitioner, Ms Hasibuan, received a notice from her employer Toray Synthetics stating that as she would be turning 40 the following month, she would be required to resign from her job. The work agreement under which Ms Hasibuan was employed included a mandatory age for retirement of 55 years for men and 40 years for women. For Ms Hasibuan, this meant that she would not be eligible for the same benefits as a man, because her age would prevent her from qualifying for the pension. Ms Hasibuan applied to the Court for an order requiring her employer to change the mandatory retirement age so that it would be the same for men and women. She also asked the Court to issue an order requiring her employer to employ her until she reached the age of 55. The lower court decided in favour of Ms Hasibuan and the respondents appealed to the Jakarta High Court.

Ms Hasibuan argued that Article 12, Figure 2 of the *Mutual Working Agreement 1954* [“the Working Agreement”] was discriminatory as it set a lower retirement age for women than for men. She argued it breached Article 2 of the *Labour Act 1969*, which states that employers should not discriminate on the basis of sex. Further, she argued that the Labour Union, by knowingly agreeing to the Working Agreement, had also breached the *Labour Act 1969*. Finally, Ms Hasibuan argued that Indonesia had international obligations to promote the equality of women under *CEDAW*, and should therefore amend the Working Agreement to make equal provision for men and women.

The respondents argued that the Court did not have jurisdiction to decide this matter and that it should be handled by the administrative bodies responsible for solving labour disputes. **These administrative bodies, the respondents argued, included the** Head Office of the Labour Ministry, as well as the Director General of Developing Labour Relationships and Job Norm Supervision. As these were the bodies responsible for the Working Agreement any action should be directed at them.

The respondents also argued that even if the Court was found to have jurisdiction, the different mandatory retirement age for men and women was part of a labour agreement that was only temporary (for two years) and on this basis should not be subjected to challenge for discrimination.

The respondents also argued that even if the Working Agreement was discriminatory, it was acceptable discrimination. They argued that the biological difference between men and women justified a lower age of retirement for women. Women, for example, were more likely to experience work related stress and illness. The respondents argued that the purpose of the provision was protective, similar to legislation that prohibits women from working in mines, or at night. Further, differences in retirement ages could also be found in other groups of employees in the workforce such as government positions where workers had a lower retirement age. This, the respondents argued, was allowed as acceptable discrimination.

Finally, the respondents argued that Ms Hasibuan had not specified which article of *CEDAW* she wished to rely upon. They also argued that *CEDAW* must not be applied rigidly but instead interpreted flexibly in light of the local social norms of a given society.

## **Decision**

The Court decided in favour of Ms Hasibuan, confirming the decision of the lower court. The Court rejected the argument that it did not have jurisdiction on the basis that if a law is broken, the Court will have the jurisdiction to rule upon it. The Court ordered that the company, Indonesia Toray Synthetics, immediately amend the

Working Agreement to make the mandatory retirement age the same for men and women and imposed a daily fine for any delay in making the requisite changes. The Court also ordered that the company maintain Ms Hasibuan as an employee until she reached the new retirement age of 55 years.

In its decision, the Court expressly adopted the definition of discrimination used in *CEDAW*. Further, it noted that in the Indonesian community “women are the backbone to support the family economy” and for this reason, an identical retirement age for men and women was essential.

### **Commentary**

This decision is very progressive for women’s rights. The Court applied *CEDAW* directly and did not accept the argument that *CEDAW* must adapt to local social norms. Further, the Court recognised the importance of women’s labour not only to themselves, but also to the family and society. This reasoning could be used by advocates to argue for women’s equality, particularly in employment discrimination cases.

In this case, the Court heard expert evidence with regard to biological and psychological differences between men and women that sought to establish that women were more likely than men to suffer mental and physical illness in the context of work. The Court did not find this argument persuasive. The case is an excellent precedent for advocates in any situation where a “mental/physical difference” argument is being used to support discrimination against women.

Finally, this case is significant because it recognised that labour unions and boards are also responsible for discrimination practices, in addition to employer companies. This is useful because it defines the responsibilities of labour representatives to actively protect all of their workers, including women.

## Article 11

### Employment

#### *Teikoku Zouki Case*

Roudouhanrei No. 694, p. 29  
Tokyo High Court  
29 May 1996

#### **Laws and International Instruments Considered**

*CEDAW* 1979;

*Civil Code*, Articles 90 and 709;

*Constitution of Japan 1949*, Articles 13, 24;

*International Covenant on Civil and Political Rights 1966*;

*International Labour Organisation Treaty No. 156*,

and *Attached Recommendation No. 165*;

*Labour Standards Law*, Chapter 2;

*Universal Declaration of Human Rights 1948*, Article 16.3.

This case considered whether transferring a worker away from his family breached a fundamental right to family life enshrined in international conventions and the *Constitution of Japan 1949* [“the Constitution”].

The company for which the petitioner worked ordered him to transfer locations from Tokyo to Nagoya, which resulted in him living apart from his family. The petitioner claimed that this order to transfer violated his fundamental right to family life, which was protected under *CEDAW*, Articles 13 and 24 of the *Constitution*, Article 16.3 of the *Universal Declaration of Human Rights 1948*, the *International Covenant on Civil and Political Rights 1966*; and the *International Labour Organisation* [“ILO”] *Treaty No. 156*, and *Attached Recommendation No. 165*.

#### **Decision**

The Court dismissed the petitioner’s claim. It held that living apart from one’s family for work purposes is a socially acceptable part of the burden of a family. The Court also noted that current social norms did not place family life above work commitments and company interests.

## **Commentary**

Although the petitioner in this case was a man, the decision is relevant to women's rights because family life and obligations continue to play an important role in the lives of many women. The Court did not appear to consider the international trend towards humanising working conditions, including a consideration of the need for families to be together; in particular with regard to *ILO Treaty No. 156*. This treaty recognises the family as fundamental to society, and emphasises the need for workers to maintain family obligations.

## Article 16.1(a)

### Marriage and Family Life

### Marriage

#### *X1 and X2 (Appellants) v Government of Japan (Respondent)*

The Hanreijihou, No. 1406 pp. 3-8  
Hiroshima High Court  
28 November 1991

#### **International Laws and Instruments Considered**

*CEDAW 1979*, Preamble, Articles 2, 15, 16;  
*Civil Code*, Articles 733, 772;  
*Constitution of Japan 1949*, Articles 13, 14, 15, 16, 24;  
*International Covenant on Civil and Political Rights 1966*, Article 23;  
*State Redress Law*, Article 1.

This case considered whether Section 733 of the *Civil Code*, which prohibits women from remarrying for 180 days after a divorce, violates the *Constitution of Japan 1949* (“the Constitution”) and international instruments such as *CEDAW* and the *International Covenant on Civil and Political Rights 1966* [“ICCPR”].

The appellants, X1 and X2, began living together in a de facto marriage immediately after X1, on 1 December 1988, obtained a divorce from her former husband and obtained custody of her two children. On 9 December 1988, X2 applied for permission to adopt the two children of X1. On 7 March 1989, X1 and X2 submitted official notification of their marriage. They were unable to register their marriage because Article 733 of the *Civil Code* prohibited women from remarrying for 180 days after obtaining a divorce. The Family Court also denied X2 the right to adopt X1’s children during the 180 day waiting period on the basis that it was contrary to the welfare of the children since the marriage might never be formalised. X1 and X2 began court proceedings on the basis that Article 733 of the *Civil Code* was unconstitutional as it discriminated against women. Their claim was dismissed in the District Court and they subsequently appealed to the High Court.

The appellants argued in the High Court that the purpose of Article 733 was unreasonable as it was not established to ensure clarity in paternity but rather was based on Confucian

morals and paternalism. Even if the purpose was reasonable they argued the waiting period was unreasonable and did not address the purpose of Article 733 for a number of reasons. First, it did not reflect the reality that many couples would have ceased sexual relations and lived apart for some time prior to an official divorce. Further, since de facto remarriages could not be avoided, the waiting period did not reduce the possibility that a child of a new de facto husband might be born, but still be presumed to be the child of the former husband. Further, the appellants argued that there were other reliable means of determining paternity. These included blood tests or an alternative law creating a paternity presumption in favour of a later husband but making it subject to challenge by a former husband. The appellants concluded that if a waiting period was reasonable then 180 days was too long. They claimed that a period of 101 days after the end of the marriage should be sufficient to clarify paternity.

Finally, the appellants argued that the provision, since it applied only to women and not to men, was discriminatory and in breach of Articles 13, 14.1, 15, 16 and 24 of the Constitution, the Preamble, Articles 2, 15 and 16 of *CEDAW*, and Article 23 of the *ICCPR*. The appellant concluded that the provision represented an illegal exercise of public authority by government officers and should be abolished or amended.

## **Decision**

The Court dismissed the appeal. It held that the appropriate standard that applies to discrimination is reasonableness as provided by Article 1 of the *State Redress Law*. Consequently, either the purpose of Article 733 of the *Civil Code* must be unreasonable or if the purpose is reasonable the provisions must provide unreasonable methods of achieving those purposes. For example, if the waiting period does not prevent confusion in relation to paternity but instead unnecessarily limits the remarriage of women, then the method (i.e. the waiting period) would be considered unreasonable.

The Court held that neither the purpose of the Article nor the restrictions it imposed were unreasonable. The Court referred to the Constitution and a number of international conventions including *CEDAW* and the *ICCPR*. Although the Court conceded that Article 733 discriminated against women it held it did not breach the Constitution or international conventions because discrimination was acceptable where it aimed to protect the welfare of newly born children by clarifying paternity.

The Court noted that the purpose of the law was not to enforce paternalism, but rather to avoid confusion in paternity. Further, the Court stated that this waiting period was necessary because in Japan, married couples may divorce by agreement, without any required period of being apart. Hence, without the legal waiting period, children could be born without certainty of their paternity. In relation to alternative measures

to clarify paternity suggested by the appellants, the Court found that they would not be cost-effective and that the potential harm to the welfare of children outweighed the need for such law. The Court also stated that the waiting period of six months was reasonable because pregnancy could be clearly determined after this time.

### **Commentary**

This judgment supported the existing system, which restricted women's freedom of marriage. The Court stated that Article 733 of the *Civil Code* was not sufficiently unreasonable to be struck down or amended. The judges left it to the legislature to make changes in the provision and to decide the extent to which women's freedom to marry could be restricted.

The judgment used the constitutional domestic standard of reasonableness that is provided in the *State Redress Law*. This made it hard to prove discrimination and satisfy the equality provision. To prove that a law is discriminatory, it must be shown that there were reasonable alternatives available to replace it. For example, current medical advancements show that 100 days is long enough to determine paternity and the longer waiting period should have been considered unconstitutional on the basis of unreasonableness. In relation to *CEDAW*, the Court assumed that its equality provisions were no stricter than those in the Constitution, and therefore a constitutional analysis was sufficient. However, the Committee on *CEDAW* has stated that provisions such as Article 733 are contrary to *CEDAW*, and the Court should have considered this and further examined the implications of international standards in this case.

Although this judgment is conservative in its findings, it did inspire a public debate on women's rights to marriage, which subsequently forced the Japanese government to review the law in question. Further, although the role of international law needs to be further emphasised by advocates in courts, the extensive reference by the Court to international law is a positive recognition of its potential utility.



## Article 16.1(b)

### Marriage and Family Life

#### Marriage and Consent

*Humaira Mehmood (Petitioner) v The State and others (Respondents)*

1999 Pakistan Current Criminal Rulings 542 (Lahore)  
18 February 1999  
Tasadduq Hussain Jilani J

#### Laws and International Instruments Considered

*CEDAW 1979*, Article 16;  
*Cairo Declaration on Human Rights in Islam 1990*, Articles 5, 6;  
*Constitution of Pakistan 1962*, Article 98;  
*Constitution of Pakistan 1973*, Articles 4, 25, 35, 199;  
*Contempt of Courts Act*, Section 3;  
*Criminal Procedure Code*, Sections 491, 561-A;  
*Muslim Personal Law*, Section 34.

The Court considered two writ petitions in this case. In the first petition it examined the meaning and role of consent in a valid marriage under Pakistani law. In the second petition, brought by a human rights activist, the Court considered whether the police in their investigations had acted male fides (in bad faith). It also considered whether courts have the authority created by the *Constitution of Pakistan 1973* [“the Constitution”] and *CEDAW* to sanction the actions of the police and whether it should do so in this instance.

On 16 May 1997, a marriage ceremony (Nikah) was performed between Mehmood Butt and Mst. Humaira. Both parties consented to the marriage. The marriage was officially registered on the same day. After disclosing her marriage to her parents, who did not agree with her choice of husband, Mst Humaira was beaten severely and confined to hospital for one month. Nikah Khawan, who conducted the marriage ceremony, claimed that he was threatened by the police and told to deny that he had performed the ceremony. On 28 October 1998, the police received a report from Mst. Humaira’s family that Mehmood Butt and his brother had abducted a young woman named “Rabia”. The investigation was later cancelled on the basis that no such abduction had ever taken place. In November 1998, Mehmood Butt and Mst.

Humaira fled to the Edhi Centre, a women's shelter in Karachi. On 30 November 1998, Mst. Humaira was forcibly arrested at the shelter and removed by the police who were accompanied by her brother, although no charges had been laid against her. She was later released.

On 25 December 1998, charges were laid against Mehmood Butt and his mother for the alleged abduction of Mst. Humaira from Fortress Stadium, Lahore on 29 October 1998, two months earlier. Mst. Humaira was also charged with breaking Hudood law by committing adultery (Zina). Mst. Humaira's family claimed that she had been previously married to Moazzam Ghayas by a ceremony on 14 March 1997. The marriage was not officially registered until 7 March 1998. A video tape of this ceremony, in which Mst. Humaira was weeping, was offered as evidence of its occurrence. On 29 January 1999, both Mehmood Butt and Mst. Humaira were arrested and publicly beaten by the police, despite police knowledge that "pre-arrest bail" had been granted in court.

In the first petition, Mst. Humaira argued that her initial marriage to Mehmood Butt was valid and her subsequent marriage to Moazzam Ghayas was invalid. She based that claim on two arguments. First, her marriage to Moazzam Ghayas could not be valid because she was already married to Mehmood Butt at the time of registration of the marriage to Moazzam Ghayas. She married Mehmood Butt of her own consent and various witnesses observed that it was a valid marriage. She claimed that the video evidence of her marriage to Moazzam Ghayas that attempted to place the ceremony prior to her marriage with Mehmood Butt was a false attempt to pre-date it. Second, the petitioner relied upon Muslim law to argue that marriage is not valid without consent. She argued that as she did not consent to the marriage with Mr. Moazzam Ghayas, it was invalid.

In the second petition, a human rights activist intervened to challenge police practice and to propel the courts to sanction their actions. She argued that the police had acted in allegiance with the family and in doing so had abused their powers. She cited the following incidents in support of her arguments. She argued that the abduction of Mst. Humaira by Mr. Mehmood Butt never took place. It was unlikely that Mr. Moazzam Ghayas would have waited two months to report the supposed abduction of his wife. It was unlikely that someone could abduct a person from a busy shopping centre in Fortress Centre, Lahore. Mst. Humaira also claimed she had not been abducted. She referred to the earlier report regarding the abduction of "Rabia" which the police had conceded was a false cover used to seek out and arrest Mst. Humaira and Mr. Mehmood Butt, and the arrest at Karachi of Mst. Humaira despite a 'pre-arrest bail' on record. The second petitioner argued that such actions cumulatively showed bad faith and maliciousness on the part of the police. Further, such actions were in breach of international instruments such as *CEDAW*.

The respondents, Moazzam Ghayas and Malik Abbas Khokar (the petitioner's father), argued that Mst. Hamaira had broken Hudood law, and at the same time, the law of god, which is beyond the scope of the Court.

The other respondent, the State, argued that the police did not go beyond their duty in their activities. The Court may not quash a case unless there is no evidence or the charges are malicious. In this case, the police were within their duty to investigate the abduction charges and to investigate any other offences that appeared to have occurred.

### **Decision**

Both petitions were successful. In the first petition the Court held that a marriage without consent is invalid. It noted that if two people indicate they have a consensual marriage, there is a presumption of truth based on what they say, rather than what a third party might say. Further, the Court held that a marriage with a person who is already married is invalid. The Court found that because the marriage between Mst. Humaira and Mehmood Butt was valid, it could not uphold a case against Mst. Humaira for adultery.

In the second petition brought by a human rights activist, the Court stated that it does have the power to intervene in police action or to quash a case when there is evidence of bad faith on the part of the police. In this case, the Court found that there was ample evidence of bad faith by the police. Firstly, it cited the false case against "Rabia", and the arrest of Mst. Humaira despite police knowledge that "pre-arrest bail" had been granted. The Court also agreed with the petitioner that it was unlikely that a husband would wait two months to report the abduction of his wife. Secondly, the Court acknowledged the police's abusive treatment of Mst. Humaira and Mehmood Butt upon their arrest. Finally, it found that the threats by police to the person who performed the marriage ceremony between Mst. Humaira and Mehmood Butt were also evidence of bad faith on the part of the police.

The Court made a number of orders in response to its finding of bad faith. It convicted a police officer, who had lied in court, of the offence of obstructing the process of justice. The officer was sentenced to fifteen days in jail and a fine of 5000 rupees. The Court also ordered the Inspector General of Police to delegate a high-ranking officer to investigate and proceed against other police officials involved with this case. Finally, the Court ordered that the medical superintendent at the hospital in which Mst. Humaira was confined conduct an inquiry and proceed against any officials responsible for abusing Mst. Humaira.

The Court noted that its findings accorded with a number of international instruments that protect the rights of women. It noted that Pakistan is a signatory to *CEDAW*

which enjoins member states to take all appropriate measures in relation to ensuring equality in matters of marriage and the right to consensual marriage (Article 16). The Court also referred to the *Cairo Declaration on Human Rights in Islam 1990*, which Pakistan had adopted. Articles 5 and 6 state that women have the right to enter marriage without any restrictions stemming from race, colour or nationality and that the State has a duty to facilitate marriage. Women have an equal right to human dignity with men, they also have their own civil entity and financial independence and the right to retain name and lineage.

### **Commentary**

This judgment is significant for women's rights in Pakistan in a number of ways. Firstly, the finding was favourable for both petitioners validating Mst. Humaira's choice of husband and censuring the police for their treatment of her. Secondly, the Court was sensitive to, and acknowledging of, the context of women's rights. The Court made a number of positive comments about the place of women in Pakistani society describing women's equality as a fundamental tenet of Islam, "male chauvinism, feudal bias, and compulsions of a conceited ego should not be confused with Islamic values. An enlightened approach is called for". By acknowledging the role of the family, tradition, and religion, and by speaking out against the abuse of Mst. Humaira by both the State and her family the Court made a distinctive step towards the "enlightened approach" that it encourages.

Finally, the Court referred favourably to the international obligations of Pakistan, including reference to *CEDAW*. Although its decision was based on domestic statutes and the case law of Pakistan it noted that its findings accorded with international instruments that protect the rights of women.

## Article 16.1(f)

### Marriage and Family Life

### Custody and Guardianship

*Ms. Githa Hariharan and another (Petitioners) v Reserve Bank of India and another (Respondents)*

*With*

*Dr. Vandana Shiva (Petitioner) v Jayanta Bandhopadhyaya and another (Respondents)*

AIR 1999 Supreme Court 1149

Supreme Court of India

17 February 1999

Dr. A. S. Anand CJ, M. Srinivasan and Umesh C. Bannerjee JJ

#### Laws and International Instruments Considered

*Beijing Declaration 1995;*

*CEDAW 1979, Article 16 (d), (f);*

*Constitution of India 1949, Articles 14, 15;*

*Guardians and Wards Act 8 of 1890, Section 19(b);*

*Hindu Minority and Guardianship Act 1956, Section 6(a).*

This case deals with sex discrimination under Indian guardianship law. There were two separate writ petitions filed in these proceedings both utilising the equality provision of the *Constitution of India 1949* [“the Constitution”] to challenge the legality of section 6(a) of the *Hindu Minority and Guardianship Act 1956* [“HMG”] and section 19(b) of the *Guardians and Ward Act 1890* [“GWA”]. The Court considered whether the Acts contravene the equality provisions (Articles 14, 15) of the Constitution on the basis that they exclude mothers from being the natural guardians of their children during the father’s lifetime, and therefore discriminate against mothers on the basis of their sex. As both writ petitions challenged the constitutionality of the same sections of the two Acts, they were heard together.

In the first petition, Githa Hariharan (a writer) and her husband (a medical scientist), jointly applied to the Reserve Bank of India (the first respondent) for Relief Bonds in the name of their son. In the application they expressly stated that Githa Hariharan would act as guardian for the investments for their son. The Reserve Bank of India,

requested that either the father sign as guardian or a certificate of guardianship from a competent authority in favour of the mother accompany the application, to meet the requirements of section 6(a) of the HMG Act. This led to the filing of the first petition.

In the second petition, the petitioner, Dr. Vandana Shiva, was the wife of the respondent, Jayanta Bandhopadhyaya. The respondent had instituted divorce proceedings against his wife, and claimed custody of their minor son. He claimed to be the natural guardian of the child according to the provisions of the HMG Act and stated that no decision could be taken in regard to his son without his permission. This led to the filing of the second petition.

The petitioners argued that section 6(a) of the HMG Act and section 19(b) of the GWA violate the equality clauses of the Constitution because the mother of the minor is relegated to an inferior position on the grounds of sex alone since her right as natural guardian is only cognisable “after” the father. The petitioners argued that both sections should be struck down as unconstitutional.

The respondents argued that section 6(a) of the HMG Act states clearly that the father of a Hindu minor is the only natural guardian and only after the lifetime of the father can the mother act as the natural guardian.

## **Decision**

The Supreme Court granted relief in both petitions by broadening the meaning of the statutes rather than by striking down the provisions of the two Acts as unconstitutional. It held that a literal interpretation of the word “after” to mean “after the death of” “undoubtedly violates gender equality, one of the basic principles of the Constitution”. The Court therefore reinterpreted the word “after” to mean “in the absence of” and held that the Reserve Bank of India was incorrect in not accepting the application naming the mother as guardian.

The Court defined “in the absence of” to mean where the father is not in actual charge of the affairs of the minor. This could either be because of his indifference or because of an agreement between him and the mother of the minor (oral or written), and the minor is in the exclusive care and custody of the mother, or the father for any reason is unable to take care of the minor because of his physical and/or mental incapacity. The mother would then act as the minor’s natural guardian and all her actions would be valid even during the lifetime of the father, who would be deemed absent for the purposes of section 6(a) of HMG Act and section 19(b) of the GWA.

The Court also noted that its interpretation of the two sections conforms to two international instruments, *CEDAW* and the Beijing Declaration. These instruments

direct state parties to take appropriate steps to prevent all forms of discrimination against women. The Court observed that domestic courts in India are under an obligation to construe domestic laws in line with international conventions and norms.

### **Commentary**

The Court used the fundamental right to equality to reinterpret the law so as to allow mothers guardianship of their children in limited circumstances during the lifetime of their father. In that sense the decision of the Court was a positive step in the direction of the rights of women in that it recognised and upheld a fundamental principle of equality as entrenched in the two instruments. However, a closer reading of the judgment reveals strong patriarchal leanings. It is only when the father is not able to take actual charge of the affairs of the minor, or when there is a specific arrangement between the father and the mother, that the mother can be recognised as the natural guardian. Thus, if the mother acts in the capacity of the guardian and that is challenged, she would have to prove “the absence of” the father. Notably by contrast, section 6(a) states that the mother of an “illegitimate” child shall be the natural guardian, and “after” her, the father would be recognised as the guardian. This reverses the onus so that a mother must take responsibility for the “illegitimacy”.

If the Court had struck down the provisions as unconstitutional and declared both parents to be the guardians in any circumstances, it would have gone a long way towards the recognition of the mother as an independent person and given her much more freedom to make decisions with regard to her child. This judgment therefore does not bestow equal status on the mother and the father as guardians.

## Article 16.1(f)

### Marriage and Family Life

### Custody and Guardianship

#### *Surya Prakash (Appellant) v Shirley Reshmi Narayan (Respondent)*

Civil Appeal No. HBA0001J.99L  
High Court of Fiji, Lautoka  
5 May 2000  
Madraiwiwi J

#### Laws and International Instruments Considered

*CEDAW 1979*;

*Constitution of Fiji 1997*, Sections 3, 22, 43, 43(2);

*Convention on the Rights of the Child 1989*, Articles 3, 9;

*Criminal Procedure Code Cap 21*;

*Magistrates Courts (Civil Jurisdiction) Decree*, Sections 2(1)(e), 4(b), 26, 27(2);

*Matrimonial Causes Act Cap 51*;;

*Magistrates Courts Act Cap. 14*, Section 27(2);

*Maintenance and Affiliation Act. Cap. 52*, Sections 3(d), 4(b), 26, 27(2);

*Matrimonial Causes Act Cap 51*;

*Matrimonial Proceeding Act 1960* (UK).

This case considered whether courts have the power to issue “interim” custody orders under the *Maintenance and Affiliation Act* [“the Maintenance Act”]. In doing so, the High Court [“the Court”] considered whether the test of ‘the best interests of the child’, articulated in international conventions that protect the rights of children, should be imported into the meaning of the Maintenance Act to empower courts to issue interim custody orders.

Shirley Reshmi Narayan and Surya Prakash separated when their two children, Sudharsan and Akarshan, were two years and eight months and nine months old respectively. At the time of the separation Akarshan continued to live with the mother and Sudharsan went to live with his father’s parents. Shirley Reshmi Narayan filed for maintenance and custody of both children. On 7 January 1999, an order was made granting her interim custody of Sudharsan Prakash Sami. Reasonable access was granted to the father, Surya Prakash.



The father of the children appealed the order on the basis that the Magistrate had no power to make interim custody orders under the Maintenance Act. He argued that an interim order could only be granted if divorce proceedings were before the court and as divorce proceedings were not in issue the Magistrate was precluded from issuing an interim custody order. Further, he argued he was not granted a fair hearing as the Magistrate had refused an adjournment to enable him to properly present his case and call witnesses.

### **Decision**

The Court held that the interim custody order granted by the lower court was legally granted on the basis that the “best interests of the child” was the appropriate test to apply to the circumstances of the case. The application of that test supported the granting of an interim custody order in favour of the mother. Although there is precedent to support the argument that the Maintenance Act does not empower the Court to make an interim custody order, the Court held that a broader interpretation of the Act was required on two grounds. First, although the Act does not, on the surface, empower the making of interim custody orders there are exceptions to that position. The *Criminal Procedure Code Cap. 21* and the *Magistrates Courts (Civil Jurisdiction) Decree 1988* both operate concurrently to the Act and empower the making of interim custody orders except where ‘the validity or dissolution of any marriage’ is at issue. In this case that issue was not in contention because the dissolution of the parties’ marriage was not before the Court and therefore an exception could be granted.

Second, the Court looked to the *Constitution of Fiji 1997* [“the Constitution”] and international conventions to support their findings that the best interests of the child was the appropriate test for the interpretation of the Act. The Court referred to section 22 of the Constitution, which states that every person has a right to life and sections 3 and 21(4) of the Constitution, which emphasise the need to take a broad and contextual approach to the interpretation of its provisions.

The Court also looked to Article 3 of the *Convention on the Rights of the Child 1989*, which states that the best interests of the child is the primary consideration in all cases concerning children. Article 43(2) of the Constitution compels Fiji courts to take note of international human rights instruments. The Court decided therefore that the Act should be interpreted to conform to the *Convention on the Rights of the Child* and other international instruments such as the Bangalore Principles of 1998. The Bangalore Principles were formulated by a high level colloquium of eminent judges from the Commonwealth and included statements encouraging the practice of courts to read international norms into domestic law. The Court also relied heavily on the Indian decision of *Vishaka v State of Rajasthan* (1997) VII AD SC53 where *CEDAW* was cited and the Australian decision of *Minister of State for Immigration*

and *Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 as further favourable support for the domestic use of international norms and conventions. The Court noted that it had little hesitation in moving beyond the jurisdictions to which it traditionally had regard (i.e. England, Australia and New Zealand) since human rights are a universal concept.

In this case, the application of the international principle of the “best interests of the child” resulted in the making of an interim custody order in favour of the mother of the children.

### **Commentary**

This case was positive for women in both its immediate outcome and the broader implications. The Court interpreted the Act broadly to include power to make interim custody orders if it is in the best interests of the child even though the Act does not, on the surface, appear to grant such power. Since most maintenance and custody cases are heard in the Magistrates Court, this will enable women to force the courts to make immediate custody decisions in similar cases. This case overturned 25 years of decision-making that had followed a restrictive approach to legislative interpretation. This approach did not did not prioritise children. (See *Kamoe v Kamoe*, Civil Appeal No. 3/1984, which ruled that the Maintenance Act gave no power to order interim custody).

The reference to, and reliance upon, the *Convention on the Rights of the Child 1989* and other international norms and conventions is also significant, not only because its contents are recognised as relevant to the case, but because it gains strength and legitimacy from each subsequent use in the courts. Cases such as this and the earlier decision of *Seniloli and Another v Semi Voliti* (Civil Appeal No. HBA0033 of 1999S) citing the *Convention of the Rights of Children* are setting precedents for lawyers to utilise international conventions when fighting for the rights of women and children. Finally, the Court’s acknowledgement of the Bangalore Principles is in line with growing international recognition of their importance and is a further positive outcome of this case. In applying standards such as the Bangalore Principles, the judiciary can play an increasingly important role in the furtherance of women’s rights.

## **Article 16.1(h)**

### **Marriage and Family Life**

### **Inheritance and Succession**

*Madhu Kishwar and others (Petitioners) v State of Bihar and others (Respondents)*

*With*

*Juliana Lakra (Petitioner) v State of Bihar (Respondent)*

(1996) 5 Supreme Court Cases 125

Supreme Court of India

17 April 1996

Kuldip Singh, M. M. Punchhi and K. Ramaswamy JJ

#### **Laws and International Instruments Considered**

*Bihar Scheduled Areas Regulation 1969;*

*CEDAW 1979*, Articles 1, 2(b), (c), (e), (f), 3, 5(a), 13, 14, 15;

*Chotanagpur Tenancy Act 1908*, No.6 of 1908, Sections 7, 8, 76;

*Constitution of India 1949*, Preamble, Articles 13-16, 21, 32, 38, 39, 46, 51 A(h), (j), 366;

*General Clauses Act 1897*, Sections 13(1), (2);

*Hindu Succession Act 1956*, Section 2(2);

*Indian Succession Act 1925*, Sections 3, 29;

*Protection of Human Rights Act 1993 (10 of 1994)*, Sections 2(d), 12;

*Santhals (Amendment) Act 1958;*

*Santhals Parganas Tenancy (Supplementary Provisions) Act 1949;*

*Universal Declaration of Human Rights 1948;*

*United Nations Declaration on the Right to Development 1986*, Articles 1, 6(1), 8.

This case examines the succession rights of tribal women in India. There were two separate writ petitions in these proceedings where the Court considered whether legislation, which provides for succession along the male line to the exclusion of women, was contrary to the *Constitution of India 1949* [“the Constitution”] and international conventions that protect the rights of women.

Customary succession law, enshrined in the *Chotanagpur Tenancy Act 1908* [“the

Tenancy Act”] governing tribal communities in the state of Bihar and other parts of India, provided for succession along the male line to the exclusion of women. Traditionally in tribal communities cultivation was always carried out as a joint enterprise by the family in which women, as wives and daughters of the male landholder, worked on the land alongside the men. At the death of the landholder the tenancy was transferred to the next male in the line. As a result, the females whose interests were joined with the last male holder, were rendered landless and often suffered loss of livelihood and destitution. Although a widow or an unmarried daughter had usufructary rights (the right to use without any title) in the family land for her lifetime, as established by the State Level Tribal Advisory Board in 1988, there was no guarantee that the male heirs would respect that right.

The first petitioner was the editor of an activist women’s magazine, a widow and a married daughter from the Ho tribe. The second petitioner was a woman from the Oraon Christian tribal community. The petitioners based their claim on two arguments. First, they claimed that sections 7, 8 and 76 of the Tenancy Act discriminated on the basis of sex because they provided for exclusive male succession and thus contravened the fundamental right to equality between men and women and the right to livelihood for women, which were both guaranteed in the Constitution.

Alternatively, the petitioners argued that the term “male descendants” in section 7 of the Tenancy Act should be interpreted expansively to include “female descendants” in accordance with the rules of legislative interpretation set out in section 13(1) of the *General Clauses Act 1897*. This Act states that where legislation refers to the masculine gender, it is to include females, unless such an interpretation is repugnant to the context of the statute.

The respondents, the State of Bihar and others, argued that allowing succession rights to female heirs would increase the threat of land alienation and fragmentation. They relied upon a report, commissioned by the State of Bihar, which had found that the tribal people in the area were not interested in having the law changed or reinterpreted to change the existing situation. The report concluded that if the estates went into the hands of female heirs, there would be great agitation and unrest amongst tribal people who were sensitive to matters relating to their custom. The respondents also argued that the usufructary rights of female dependants, which were supported by the Constitution, sufficiently protected the livelihood of female dependants and as a result, changes to succession rights for females were unnecessary.

### **The majority decision**

The Court recognised that the customary law of succession discriminated against tribal women but refused to strike it down. The Court held that it was not desirable to declare customary law to be contrary to the constitutional rights of women under

Articles 14, 15 and 21, since rules of succession do sometimes provide differential treatment that is not necessarily equal. Such lack of uniformity would not in all situations constitute a violation of equality since this would disrupt the existing state of the law. The majority of the judges held that if they found in favour of the petitioners, there may be a flood of similar claims in diverse situations.

However, the Court held that the right to a livelihood was protected by the Constitution and therefore the exclusive right of male succession, enshrined in sections 7 and 8, must remain in suspended animation until the right to livelihood of the female dependants of the last male holder expired. Only upon the exhaustion or the abandonment of land by female relatives could the males in the line of descent take over the holding exclusively. The Court held this sufficiently protected female dependants.

The Court also held that the term “female descendants” could not be read into the term “male descendants” using statutory interpretation in matters of succession since customs vary from people to people and region to region in Indian law. The Tenancy Act specifically protects customary succession laws in favour of males because tribal people value their own customs and traditions. The Court found that there was no legislative intent therefore to include “female” in the term “male”.

The Court further held that judicial activism in the courts, where judges reinterpret provisions beyond the legislative intent should be avoided. It found that it was inappropriate and elitist for judges to enforce on tribal people the principles of equal succession that is enshrined in other personal laws such as the *Hindu Succession Act 1956* or the *Indian Succession Act 1925*. The role of the courts, it was held, is merely to advise and point out any legislative gaps to the Executive so that the State, in its legislative role, can attend to any problems.

### **The dissenting judgment: K. Ramaswamy J**

Ramaswamy J held, in contrast to the majority, that the full rights to the estate of their parent, brother, or husband should be granted to women in tribal communities as heirs of intestate succession so that they could inherit the property equally with male heirs and with absolute rights. He found that the safeguard provided by granting usufructary rights to female dependants was insufficient due to the diverse pressures women face.

The dissenting judge found that the *Protection of Human Rights Act 1993*, enacted by the Indian Parliament defines human rights to mean, “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.” Sections 7 and 8 of the Tenancy Act are in breach of the Articles 13, 14, 15, 16 and 21 of the Constitution,

which prohibit discrimination on the ground of sex. Further, the Constitution states that customary law and statute law must comply with the fundamental rights protected by the Constitution and permits challenges to the validity of laws to the extent that they are inconsistent with the fundamental rights provisions. This secures the primacy of fundamental rights over customary and statute law.

The dissenting judge noted that the principles of equality, having been ratified by the Government of India in various international conventions and declarations, should be upheld. He noted that India had supported the ratification of the *United Nations Declaration on the Right to Development 1986* adopted by the UN General Assembly in 1986, which prohibits sex discrimination by ensuring equality of opportunity and resources and the fair distribution of income. *CEDAW*, ratified by the Government with reservations to Articles 5, 16 and 29, also reflects the obligation of the State to extend human rights to women in all spheres of their life. Article 13 prompts the State to eliminate discrimination against women in areas of economic and social life; Article 14 focuses on the elimination of discrimination faced by rural women; Article 15 promotes equality before the law particularly in the administration of property.

The dissenting judge found that the provisions and principles of *CEDAW* and the concomitant *United Nations Declaration on the Right to Development 1986* had become integral to the Constitution with the enactment and enforcement of the *Protection of Human Rights Act 1993*. The reservations made by the Government of India to *CEDAW* therefore stood denuded.

The minority judgment also addressed the effect on fragmentation and alienation of tribal lands if equal succession rights were granted to women. The judge found that any fear of fragmentation that applies to women would also apply to men who could already claim partition of land. Therefore the argument was without substance and inconsistent with public policy. The denial of equal succession rights to women on this basis, the judge found, was unfair, unjust and unconscionable.

Finally, the dissenting judge found that section 13(1) of the *General Clauses Act 1897* does operate to include the term “female” within the term “male”. This interpretation allowed principles of justice, equity and fairness as embodied in the fundamental rights provision of the Constitution to prevail. He found that this interpretation had been applied in two other succession laws, the *Hindu Succession Act 1956* and the *Indian Succession Act 1925*. In the circumstances the dissenting judge held that such a reading be permitted to allow female descendants to receive equal treatment with male descendants.

## **Commentary**

Although the majority judgment did recognise the discrimination and economic injustice inflicted by customary law against tribal women, the Court refused to intervene. It adopted a conservative approach to the issue on a number of levels. At the outset its finding that inequality was inevitable in matters of succession and could not be tested against the fundamental right to equality inflicted a blow to women's rights jurisprudence. The protectionist approach recommended by the majority was based on a concern that women might be left destitute, rather than a focus on women's rights. Further, even that paternalistic concern for potential destitution is not so much to "save" women, but to guard against any disturbance of public order or breaches of morality. It is debatable if the judgment succeeded in serving that purpose given the limited nature of usufructary rights. In the end the finding of the Court merely reinforced the status quo and ruled against any change in line with the recognition of women's rights in the international arena.

In contrast, the dissenting judgment encourages judicial activism to the fullest, by incorporating international law into both domestic law and the Constitution to grant women equal entitlements rather than entrenching a protectionist policy. Equally, this judgment is significant in its effort to unpack the conservatism embedded in each of the arguments protecting tribal customs and land. It builds human rights jurisprudence on two fronts: it supports gender justice with its reference to *CEDAW* and other international conventions which protect the rights of women and it supports the incorporation of the principles of international law into domestic law.

## Article 16.1(h)

### Marriage and Family Life

### Inheritance and Succession

***C. Masilamani Mudaliar and others (Appellants) v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others (Respondents)***

(1996) 8 Supreme Court Cases 525

Supreme Court of India

30 January 1996

K. Ramaswamy, S. Saghir Ahmad and G. B. Pattanaik JJ

#### **Laws and International Instruments Considered**

*CEDAW 1979*, Preamble, Articles 1, 2(f), 3, 13, 14, 15(2);

*Constitution of India 1949*, Articles 13, 14, 15(3), 21, 51-A(h), (j);

*Hindu Succession Act 1956*, Sections 14(1), (2), 30;

*Protection of Human Rights Act 1993*, Section 2(b), 12;

*UN Declaration on the Right to Development 1986*, Articles 1(1), 3, 6, 8.

This case deals with the property rights of women and sex discrimination in Hindu succession law. It considered whether Hindu women have equal succession rights with men under the *Hindu Succession Act 1956* [“the Succession Act”].

The owner of 10 acres of property bequeathed it, upon his death in 1950, to his wife S, and his cousin’s widow J, to be enjoyed by them both in equal shares during their lifetime. The will stated that if one of them were to die before the other, the surviving member would have the right to enjoy the property in its entirety. It was also stated in the will that the testator’s actions were based on his duty to provide maintenance for S and J as they were his only family members. S and J enjoyed the property together until J died in 1960. In 1970 S sold the property.

The respondents, the Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others, filed a writ petition against the new owners of the property as they had expected to benefit from the property after S’s death as stated in the will. The respondents requested a declaration from the Court that S obtained only restricted



estate or limited ownership after J's death and that she was therefore not entitled to sell the property. The Division Bench of the High Court found in favour of the respondents and held that S had acquired only restricted estate under section 14(2) of the Succession Act rather than absolute estate and could not sell the property. The new owners of the property, the appellants, appealed against that decision to the Supreme Court.

The appellants relied on section 14(1) of the Succession Act which states that a woman has an absolute right to certain types of property such as gifts, items given in marriage, her own income or property earned through a skill or labour, purchased property, and maintenance or property owed to her in lieu of maintenance, whether acquired before or after the commencement of the Succession Act. The appellants argued that as the property was given to S in lieu of maintenance, on the basis of section 14(1), S was the absolute owner of the property and not a limited owner with a restricted right.

The respondents argued that there is an exception to this provision contained within section 14(2), which states that women do not have complete ownership over property given by a gift, will or award if their terms attach any restriction to the property. Section 14(2) of the Succession Act states that if a will gives only "restricted estate" to the beneficiary then section 14(1) does not apply. The respondents argued that the will provided only restricted estate to S and therefore section 14(1), which gives an absolute right of ownership, did not apply. S, they argued, only had a restricted right to the property and could not sell it.

The appellants responded by arguing the inapplicability of section 14(2), which states that a will that grants a restricted right only is not subject to section 14(1), because S had a pre-existing right to maintenance separate from the will. It has been held in a series of cases that the combination of a pre-existing right with the bestowal of a restricted rights under the Succession Act leads to an absolute right. An interpretation of the Succession Act in favour of the equal rights of women, they argued, is in line with the Constitution and a variety of international conventions protecting the rights of women.

The main question before the Supreme Court was whether S, the widow, had become the absolute owner by operation of section 14(1) of the Succession Act, or whether she was a limited owner falling within the purview of section 14(2).

## **Decision**

The Court held that S, the widow, had become absolute owner upon J's death. The property bequeathed fell within the scope of section 14(1) and consequently she acquired complete ownership. The Court came to this conclusion by taking into

account the testator's acknowledgement that he had obligations and duties to provide maintenance for S and J. Although the terms of the will only gave the property and income for the duration of the women's lifetime, it was in lieu of their pre-existing right to maintenance. This pre-existing right to maintenance, combined with the limited right that was bequeathed, converts into a full right to ownership by virtue of section 14(1) and precedent set by previous cases.

In support of its decision, the Court relied upon several international human rights norms and conventions that were applicable in India by virtue of India's ratification of those instruments. The consequent enactment of domestic laws such as the *Protection of Human Rights Act 1993* brings international human rights standards within the scope of India's definition of human rights. The Court referred to the *United Nations General Assembly Declaration on the Right to Development 1986* ["the Declaration"], which recognises that all human rights are indivisible and independent and the State is under an obligation to fulfil the same without any discrimination as to sex, race, language or religion.

The Court also referred to *CEDAW* and its preamble, which states that discrimination against women violates the principles of equality of rights and respect for human dignity. The Court noted that discrimination presents an obstacle to the equal participation of women in the social, political, economic, and cultural life of the country. In doing so it applied the substantive model of equality that comes from *CEDAW*. Although India acceded to *CEDAW* with some reservations, Articles 2(f), 3 and 15 of *CEDAW* when read together with the Declaration negate the effect of such reservations. Together these provisions oblige a State to take all appropriate measures, including legislation, to modify or abolish gender-based discrimination in the existing laws, regulations, customs and practices.

The Court also referred to sections 2(b) and 12 of the *Protection of Human Rights Act 1993* and Article 21 of the *Constitution of India 1949* ["the Constitution"] which both protect human rights including the right to life, liberty, equality and the dignity of the individual. Article 21 of the Constitution defines the scope of the right to life. This must incorporate within its scope the elimination of gender-based discrimination to make it meaningful for human development. Women are entitled to enjoy economic, social, cultural, and political rights, without discrimination. The Court noted that women's human rights are recognised as part of the right to life under the fundamental human rights provision of the Constitution. This reading is important to give effect to the fundamental duty to develop scientific temper, humanism and a spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Articles 51-A(h) and (j) of the Constitution. Property is an important endowment or natural asset that accords opportunity, and a means to develop personality, independence, equal status and dignity of persons. The State should

therefore create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.

### **Commentary**

This is a particularly significant case because the Supreme Court of India cited and relied upon a number of international conventions that protect a variety of human rights. International human rights law and standards add impetus and urgency to eliminate gender-based obstacles and discrimination. The Supreme Court, by citing international laws, addressed the discrimination against women that was present under traditional Hindu law by interpreting it so that the law conforms with the right to equality as espoused in the Constitution. Harmonious interpretation is thus required to give effect to provisions removing gender-based discrimination in matters such as marriage and succession.