

Discriminatory Laws/Equality

Women's Law and Development Fund, Women and Development Forum (Petitioners) v His Majesty's Government, Ministry of Law and Justice, Ministry of Parliamentary Affairs, Cabinet Secretariat, House of Representatives, Special Assembly (Respondents)

Supreme Court, Special Bench (unreported)
21 May 1998

Laws Considered

Constitution of Nepal 1990, Article 11;
Birth, Death, and Other Personal Events Registry, Sections 4(a), (b);
Bonus Act, Sections 10(1)(b), (c), 10(2)(b), (c);
Chapter on Husband and Wife, No. 1(2), No. 2;
Chapter on Adoption, No. 2, No. 12;
Armed Forces Act, Section 10.

The Court in this case considered whether certain Nepalese laws were discriminatory and in breach of the equality provisions contained in Article 11 of the *Constitution of Nepal 1990* ["the Constitution"]. The five laws considered by the Court were challenged for the following reasons.

The *Birth, Death, and other Personal Events Registry* distinguishes between husbands and wives. The *Bonus Act* provides a son may receive a benefit in the absence of a husband and wife in the family. By contrast, daughters can only receive a benefit if there are no sons in the family hence leading to unequal treatment between daughters and sons.

The *Chapter on Husband and Wife* provides for the automatic dissolution of a marriage where the wife is proven to have committed adultery, whereas the wife may only dissolve the marriage if the husband has a second wife or concubine. The Chapter also differentiates between the custodial rights of fathers and mothers over minors.

The *Chapter on Adoption* states that a husband without a son may adopt a son, but a wife without a son cannot adopt one. This Chapter also treats sons and daughters unequally in other provisions.

The *Armed Forces Act* bars women from recruitment into the army. The petitioners began court proceedings seeking a declaration that the statutes were unlawful.

The petitioners argued that the laws discriminated against women on the basis of sex and resulted in the unequal treatment of women. They argued each of the statutes was in breach of Article 11 of the Constitution.

The Ministry of Law and Justice, the Ministry of Parliamentary Affairs and the Cabinet Secretariat argued that they were not responsible for the laws. They also argued that the petitioners' arguments were baseless and unreasonable.

Two *amicus curiae* ("friends of the court") were called upon to give opinions on the issues before the Court. Learned Advocate S. K. Kharel stated that although some laws may appear discriminatory they are in fact in response to biological differences between women and men. He stated that the *Bonus Act* did not discriminate on the basis of sex. The second *amicus curiae*, Bala Ram, K.C. stated that many countries have different provisions which apply to women and men in similar situations. These, he argued, have not been held to be discriminatory.

Decision

The Court held that the relevant sections of the *Birth, Death, and other Personal Events Registry* and the *Armed Forces Act*, the *Chapter on Adoption* and the *Chapter on Husband and Wife* were consistent with Article 11 of the Constitution. The Court also held that some laws can be inconsistent with Article 11 but still be lawful. It found that although the identified sections of the *Bonus Act* were contrary to Article 11 of the Constitution it could not resolve this matter as the Ministry of Labour was not made party to the lawsuit. The Court ordered that the Government of Nepal look into the *Bonus Act* issue but did not provide a specific remedy. Finally, it noted that there was a need to consider the issues more fully and to formulate an overall plan to eliminate discrimination against women in the law, particularly in regard to property rights.

Commentary

This case is not positive for women's rights in Nepal. The Court continued to emphasise that there are exceptions to Article 11 of the Constitution without identifying any rules on appropriate grounds for such exceptions. The Court illustrated yet again a reluctance to repeal a law that it finds to be unconstitutional. Instead, the Court recommended that the appropriate Ministry undertake further research and consideration deferring any decision to a later date.

Marriage and Family Life

Marriage

Dagabe Jeremiah (Petitioner) v Nauru Local Government Council (Respondent)

Miscellaneous Cause No. 2 of 1971
Nauru Law Reports 1969-82
5 March 1971
Thompson CJ

Laws and International Instruments Considered

Births, Deaths and Marriages Ordinance 1957 – 1967, Section 23;
Constitution of Nauru 1968, Articles 3, 4 -13, 14;
Universal Declaration of Human Rights 1948, Article 16.

This petition considered whether Nauru marriage laws requiring consent from the Nauru Local Government Council were unconstitutional. The Court considered whether the *Births, Deaths and Marriages Ordinance 1957-1967* [“the Ordinance”], which limits the rights of Nauruan persons to marry, was contrary to Article 3 of the *Constitution of Nauru 1948* [“the Constitution”] and international conventions that protect the rights and freedoms of men and women to marry and found a family.

The petitioner, Dagabe Jeremiah, a Nauruan man, wished to marry a non-Nauruan woman. He applied to the Nauru Local Government Council [“the Council”] for its consent to the marriage under section 23 of the Ordinance. Consent from the Council is one of the prerequisites of a lawful marriage if one of the parties is Nauruan. The Council refused consent and the marriage could not be solemnised lawfully in Nauru. The Council provided no reasons for its decision.

Dagabe Jeremiah claimed that the requirement of consent from the Council to a marriage before it can be solemnised lawfully in Nauru was contrary to Article 3 of the Constitution. He argued that apart from certain limitations, which could lawfully be imposed on the right to marry including consanguinity, immature age and medical unfitness, the right to marry is unlimited. Article 3 of the Constitution confers on everyone in Nauru a right of respect for their private and family life. The right to respect for a private and family life includes the right to marry and that right

is not limited by race or nationality. The petitioner further argued that this position was supported by Article 16 of the *Universal Declaration of Human Rights 1948* [“*UDHR*”]. Article 16 provides that “men and women of full age, without limitation due to race, nationality or religion, have the right to marry and found a family.”

The respondent, the Council, argued there was no “right to marry” that the Court could enforce. Article 3 of the Constitution does not confer any substantive rights other than those in Articles 4 to 13 and there was nothing in those Articles to support the arguments of the petitioner. Further, the Council submitted that there is no common law right to have a marriage solemnised and that none is conferred by the Constitution or any statute other than the Ordinance, which imposes certain conditions including obtaining the consent of the Council in the case of non-Nauruan persons.

Decision

The Court held that consent must be obtained from the Council before a marriage of a Nauruan to a non-Nauruan person can be legally solemnised in Nauru. The Court rejected the petitioner’s argument that the *UDHR* was applicable in this case. It did so on the basis that the *UDHR* was not adopted in its entirety in the Constitution as some of the rights in the *UDHR* were not considered necessary or suitable for Nauru. The Court held that Article 3, when it refers to fundamental rights and freedoms, refers only to those set out in Articles 4 to 13 and does not include any pre-existing rights and freedoms. The Court held that the legally enforceable rights in the Constitution were therefore only those specifically identified in Articles 4 to 13. The right to marry was not one of these rights. Therefore the petitioner’s application to marry a non-Nauruan woman was held to be lawfully refused by the Council.

Commentary

This case was detrimental for women’s rights since the Court took a very conservative approach in its interpretation of the interaction between the *UDHR* and the Constitution. The Court chose to interpret the meaning of Article 3 narrowly, finding that only those rights specifically identified in Articles 4 to 13 were protected by the Constitution. It refused to “read in” other rights such as the right to marry without consent, stating that only some of the principles of the *UDHR* were applicable to Nauru. This view fails to appreciate that the *UDHR* applies to all nations regardless of ratification and that its norms and standards cannot be divided or separated in applications under international law. Unfortunately, the Court did not accept that the *UDHR* should provide an overarching guide to the form of the rights and freedoms recognised in international law and accepted in many other nations.

However, despite the outcome this is a progressive case as it was the first time in Nauru (1971) that a human rights instrument was used to argue a case before the courts. It marks a positive recognition of the increasing importance that such instruments play in the domestic law of many nations.

Marriage and Family Life Divorce

Jesmin Sultana (Petitioner) v Mohammad Elias (Respondent)

Supreme Court, High Court Division

Civil Revision No. 4591 of 1995

26 November 1997

Mohammad Gholam Rabbani and M. Balzur Rahman Talukder JJ

Laws Considered

Law of Personal Status 1957 (Tunisia);

Muslim Family Laws Ordinance 1961 (Bangladesh);

Tunisian Law of Personal Status 1957.

This case examined spousal maintenance laws in Bangladesh and the practice of polygamy. The Court considered the grounds on which prompt dower and maintenance could be awarded under Bangladeshi law. It also considered whether the practice of polygamy permitted by the *Muslim Family Laws Ordinance 1961* is contrary to Islamic law.

The petitioner, Jesmin Sultana, and the respondent, Mohammad Elias, were married on 25 May 1992, but began to live separately on 2 October 1992. Jesmin Sultana began proceedings on 26 September 1993 for prompt dower (“mahr-i-muajjal”, a fixed amount payable on demand) and maintenance (“mahr-i-muwajjal”, deferred dower and the remainder of the initial amount that is paid in the event of divorce or death of the husband).

The Trial Court awarded Jesmin Sultana 60,000 taka as prompt dower and 500 taka as monthly maintenance. On appeal, the lower appellate court reduced the amount of prompt dower to 40,000 taka on the basis that the respondent was unable to pay the full amount. Jesmin Sultana appealed to the High Court Division of the Supreme Court against the reduction of the prompt dower.

Jesmin Sultana argued that she had not voluntarily left her husband but was compelled to do so by his desire to remarry and that she was therefore entitled to prompt dower and maintenance. She argued that the Court cannot reduce prompt dower on the basis of the husband’s inability to pay.

The respondent argued that **Jesmin Sultana had voluntarily left his house and** was residing with her parents without lawful cause, and therefore was not entitled to maintenance. He relied upon a precedent established in *Mosammat Nur Akhter v Md. Abdul Mabud Chowdhury* (1996) 16 BLD 396 in which the petitioner was held not to be entitled to maintenance because she had voluntarily left her husband.

Decision

The Supreme Court decided in favour of Jesmin Sultana and restored the original amount of prompt dower on the basis that she was compelled to leave the marital home because of her husband's application to take a second wife. His application for a second wife was based on the fact that the petitioner was sickly and incapable of performing conjugal relations. The Court held that a husband will only be released from an obligation to pay the prompt dower in full if a wife voluntarily remits part of the dower. It reaffirmed Jesmin Sultana's right to maintenance as fixed by the lower court at 500 taka per month.

The Court noted, although not as part of the binding decision, that section 6 of the *Muslim Family Laws Ordinance 1961*, which permits polygamy, is contrary to Islamic law. It concluded, based on a variety of commentators, that Islamic law holds that in order to practice polygamy a husband must be able to deal "justly" with all his wives. The Court agreed with Muslim jurists and scholars who take the view that in the context of modern society it is impossible to deal with multiple wives "justly" and therefore Islamic law in effect prohibits taking a second wife during an existing marriage. The Court recommended that section 6 of the *Muslim Family Laws Ordinance 1961* be repealed and substituted with a section prohibiting polygamy.

Commentary

The matter before the Court did not require a ruling on the legality of polygamy, however the Court took it upon itself to state its opinion on the matter. Its statement, and ensuing recommendation, that the practice of polygamy is contrary to Islamic law is positive for women. The judges in their discussion of the Qu-ran and Sunnah interpreted the issue of polygamy from a broad perspective, using the opinion of jurists and the laws of other Islamic countries (e.g. the *Tunisian Law of Personal Status 1957*, which prohibits the practice of polygamy). They argued against the present law on polygamy on the basis that it is contrary to the principles and present practice of Islamic law. The position of the Court will provide a valuable springboard for further jurisprudential discussion and advocacy by women's groups and activists.

Marriage and Family Life Custody and Guardianship

Patricia Molu (Petitioner) v Cidie Molu (Respondent)

Civil Case 30 of 1996
Supreme Court, Port Vila
15 May 1998
Lunabek Acting CJ

Laws and International Instruments Considered

Convention on the Rights of the Child 1989, Article 3(1);
Matrimonial Causes Act CAP 192, Sections 15(1), (2), 4;
Ratification Act No 26 1992.

This case examines the principles on which child custody decisions should be based. The Court considered firstly, the customary laws of Vanuatu which provide that a father should be given custody of children, and secondly, the *Matrimonial Causes Act CAP 192*, which provides that the welfare of children is the paramount consideration in custody cases. The Court considered these issues in light of international conventions that protect the rights of children.

The petitioner Patricia Molu, and the respondent Cidie Molu, were married in August 1992 and had three children. On 26 September 1996, the marriage was dissolved. At the time of the divorce the oldest son Yannick Molu (10 years old), was living with Patricia Molu's family and had been since a young age. The couple's 6 year old daughter, Annie-Rose Molu, continued to live with her mother after the divorce in a rented house in Port Vila. The youngest child, Ian Molu, (4 years old), had lived with his father's family since February 1996. Although Patricia Molu had not consented to the removal of Ian by her husband's family she had not sought his return prior to these court proceedings.

Patricia Molu initiated court proceedings seeking custody of the three children after an unsuccessful attempt to negotiate custody and child maintenance with her ex-husband. Cidie Molu also sought custody of the three children and child maintenance from his ex-wife. In addition he lodged a claim for the return of the bride price (dowry) and wedding expenses.

Decision

The Court ruled that joint custody should be awarded to both parents in respect of Yannick Molu but Patricia Molu and her parents would have care and control of him. The Court also decided that Patricia Molu should be awarded full custody of Anne-Rose Molu but that Cidie Molu should be awarded full custody of Ian Molu on the basis that he was well settled with the respondent's family. Both parents were awarded access to all three children. Further, the Court awarded maintenance of 25,000 vatu to be paid per year for each child.

In reaching its conclusion on the issue of custody, the Court noted that section 15(1) of the *Matrimonial Causes Act CAP 192* gives the Court a wide discretion. The Court held that in exercising this discretion the paramount consideration is the welfare of the children. The common law position that the father has a right to the custody of his children was thus overturned. The Court noted that in custody proceedings, because of the social and cultural contexts of Vanuatu, many parents particularly fathers, base their applications on the mistaken belief that they have some property right to "own" their children. In doing so such parents neglect to consider how they would care for them if custody was granted to them. These considerations were taken into account by the Court in its finding that the welfare of the child is paramount.

In deciding that the welfare of the child is paramount, the Court also relied upon the *Convention on the Rights of the Child 1989* ["the Convention"]. In particular Article 3(1) provides: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The Court confirmed that the provisions of the Convention are binding on the Republic of Vanuatu since its ratification by the Vanuatu parliament. (*Ratification Act No 26 of 1992*)

The respondent's claim that he was entitled to the return of the bride price and wedding costs under customary law was refused by the judge. The Court noted that although it has the power to administer customary law, the parties had been married under civil law and therefore custom could not be pleaded in these circumstances. The Court held that the bride price and wedding costs did not form part of the matrimonial settlement under civil law, and that the respondent was not entitled to reimbursement.

The respondent also claimed the return of 600,000 vatu as his contribution to the three year marriage. The Court held that his contribution to the marriage was part of his fundamental duty as a father and a husband and no reimbursement could be awarded.

Commentary

This case marks a step forward in the welfare of children in custody disputes as it held that children must not be viewed as possessions. The Convention on the Rights of the Child 1989 was utilised to overturn Vanuatu custom that gave precedence to the father in custody disputes. In place of that custom the Court substituted the principle of the “best interests of the child”. This test creates a neutral standard under which either parent can be awarded custody depending on the best interests of the child. It requires that the ability of each party to care for the child be considered and weighed up.

This finding, as well as recognising the rights of children, also advances the rights of women in the context of custody disputes. This new standard provides a gender neutral basis affording women a better chance of being awarded custody of their children. However, that standard may favour the father over the mother, since often the father is in the strongest position to offer financial security for the children. Although such considerations may sway the Court towards finding for the father it is nevertheless a big step towards granting fair and unbiased decisions in future custody cases.

The reliance on the Convention on the Rights of the Children was integral to this case as the Court stated that Vanuatu, having ratified the Convention, had a legal responsibility to abide by it. The relevant Article, Article 3(1), is enforceable by the courts without specific legislation to implement it unlike other Articles in the Convention. The Court thus used its powers to the fullest in implementing international law.

The Court’s comments in relation to the respondent’s claim to be reimbursed for his costs during the marriage is also significant. It firmly emphasised that marriage is a commitment of mutual responsibility and that the contribution by a father and a husband is not one of payment for services rendered. Instead it is a fundamental duty, both moral and legal, amongst family members.

Marriage and Family Life

Inheritance and Succession

Prakash Mani Sharma (Petitioner) v His Majesty's Government, Ministry of Law, Justice, and Parliamentary Affairs, Secretariat of the Council of Ministers, House of Representatives, National Assembly (Respondents)

Supreme Court, Special Bench (unreported)

8 February 1996

Mohan Prashad Sharma, Krishna Jung Rayamaghi, Govind Bahadur Shrestha JJ

Laws Considered

Act Relating to Land, Section 26(1);

Constitution of Nepal 1990, Articles 11, 17.

This case examines sex discrimination in Nepalese inheritance and tenancy law. The Court considered whether a law authorising the transfer of tenancy after the death of the tenant to his wife provided she did not marry, and to male relatives, but not other female relatives was in breach of the *Constitution of Nepal 1990* [“the Constitution”].

The petitioner, Prakash Mani Sharma, claimed that section 26(1) of the *Act Relating to Land* discriminated against women. Section 26(1) stated that when a tenant died, the tenancy could be transferred to the husband, wife, or son of the deceased person. Section 26(1) also stated that the tenancy could not be transferred to a daughter, married woman, or widowed daughter-in-law of the deceased person.

The petitioner argued that section 26(1) was contrary to the equality provision of the Constitution and was therefore unlawful.

The respondents argued that this issue was not within their area of responsibility and the proceedings should not have been brought against them. However, if the Court did find them responsible, they argued that section 26(1) of the *Act Relating to Land* had not infringed any fundamental rights. They argued this on the basis that the right to acquire tenancy was a conditional right, and not a right that was generally

granted to everyone all the time. The respondents also argued that the law did not discriminate against women because a wife of the deceased person could inherit a tenancy.

The respondents argued that precedent supported their position. They also argued that a general law like the Constitution could not be used to interpret a specific law such as the *Act Relating to Land*.

Decision

The Court held that section 26(1) was lawful. The Court recognised that there were inconsistencies between the *Act Relating to Land* and the Constitution, but these must be seen in light of the fact that the right to tenancy is not an absolute right, but a conditional one. The Court accepted the argument that since a wife may inherit the tenancy, the law did not discriminate based on gender. The Court ruled that section 26(1) was consistent with the principle of equality guaranteed in the Constitution.

Further, the Court stated that it was reasonable to exclude daughters and daughters-in-law from inheriting tenancy because this ensured the smooth functioning of land after the death of a tenant. A daughter was likely to become a member of her husband's family, and if she inherited a tenancy, the tenancy would leave the original family and disrupt their use of the land. The Court also stated that daughters were in different situations to sons because they were entitled to inherit from their husbands.

The Court directed the government to study the issues further and examine the possibility of new legislation to deal with the issues raised in this case.

Commentary

This case was not positive for Nepalese women. The Supreme Court refused to recognise that tenancy laws discriminated against women and in doing so reinforced traditional roles and stereotypes of Nepalese women. The Court took the view that to give women the same rights as men in tenancy law would provide an additional privilege to daughters who would receive a "double share" of property as they would also inherit through their husbands. This viewpoint masked the truth of women's relative economic weakness.

Marriage and Family Life

Inheritance and Succession

John Noel (Applicant) (as representative of the descendants of Crero Toto, deceased) v Obed Toto (Respondent)

Case No. 18 of 1994
Supreme Court, Vanuatu
19 April 1995
Kent J

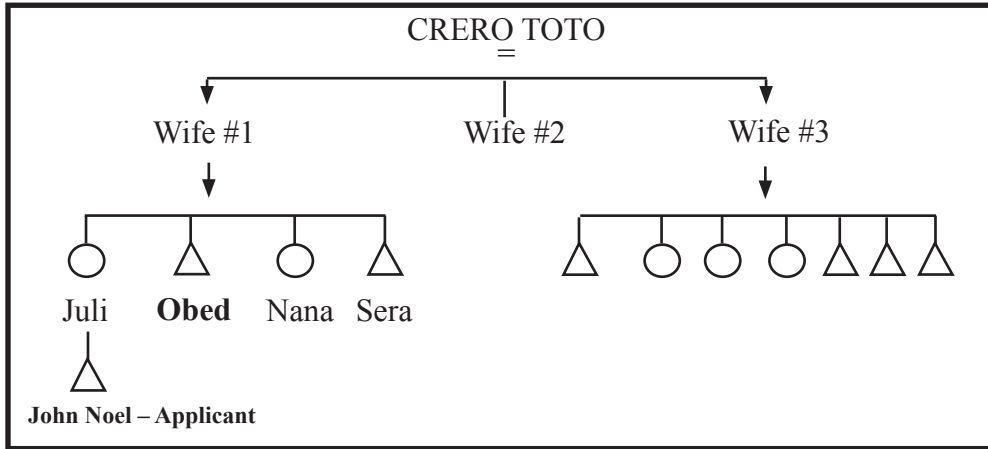
Laws Considered

Constitution of Vanuatu 1980, Articles 5, 71, 72, 73, 74, 75, 81.

This case deals with customary succession rights under Vanuatu law. The Court considered whether the customary patrilineal system, which provides exclusive succession rights for male descendants, was contrary to the *Constitution of Vanuatu 1980* [“the Constitution”] and international conventions that protect the rights of women.

In 1987, the Supreme Court named Obed Toto and Philip Pasvu the customary owners of an area of land on the island of Santo known as Loroneth. The greater portion of the land, which included the well-known tourist location Champagne Beach, was held to belong to the Toto family. Champagne Beach is a popular tourist location and earns income in a variety of ways. Cruise ships visiting the bay pay a fee and those visiting the beach by land pay an entry fee.

Land in Vanuatu is held under custom ownership pursuant to Articles 71 and 72 of the Constitution. Custom land does not belong to any individual and the custom owner is the representative of the family. Under the Vanuatu customary patrilineal system, the eldest son inherits the title as head of the family when his father dies. Crero Toto, the father of Obed Toto, had 3 wives but only had children to his first and third wives. His first wife died, leaving 4 children, his second wife died childless and his third wife bore 7 children. Of the 3 women, Crero Toto was legally married only to his first wife. When Crero Toto died, Obed Toto, as the eldest male, became head of the Toto family.



This action was brought by John Noel (nephew of Obed Toto and grandson of Crero Toto) on behalf of other members of the Toto family seeking the following declarations. The first declaration sought was that John Noel and those he represented were custom owners of Champagne Beach and that they were equally entitled to benefits from activities conducted on or from the land. The applicant was also seeking a declaration that they were entitled to an account of all profits from the land since the decision in the Supreme Court naming Obed Toto as custom owner. Finally, they sought a declaration which would set out the appropriate management and financial control of the land.

The applicant argued that the custom of East Santo was that brothers and sisters had equal rights to custom land and together owned the land. The custom owner was only the person who held the land on behalf of the rest of the clan. As the son of Obed Toto's sister, he had a right to his grandfather's custom land through his mother and therefore could claim a right in the income derived from it.

Obed Toto, the respondent, argued that according to the custom of Santo, he owned the land and therefore also owned any monies derived from it. Article 74 of the Constitution provides that land ownership must be determined according to custom. It is customary that the eldest male child inherits the title of land ownership from his father upon his death and becomes the sole decision-maker with regard to the land. Obed Toto claimed that 'he could do with it as he wished' as he was the owner of the land.

Obed Toto also argued that that when daughters marry, they lose their custom entitlement to their father's land. Thus when his sister Julie married outside the family she consequently derived rights to land from her husband and her children

acquired the rights of their father. Obed Toto qualified this evidence to some extent however, by conceding that sisters still may have some rights, but a lesser right than that of their brothers. This meant that if his sister wanted land from him she could ask for it but the decision was to be made by him as head of the family. This was also the case for nephews. According to custom, any decision for the distribution of profits was entirely up to him and although he would normally give some money to the family he was not obliged to do so.

Decision

The Court held that Obed Toto, in his capacity as a representative of the descendants of Crero Toto, was the custom owner of the land, but not in his own right. The applicant, John Noel and those he represented, being descendants of Crero Toto, were also held to be custom owners of the land. However, not all custom owners were held to be entitled to the same benefits. The Court held that in relation to the distribution of income derived from the land it was necessary to apply some restrictions. As a result it distinguished between custom owners who had *rights to the land* and those custom owners entitled to *a share of the income from the land*.

The Court declared that the custom owners who had rights to the income produced by the land were Crero Toto's children (the remaining descendants' entitlements were limited to a share of the land and not the income). It held that the right to income manifested in all of his children equally, irrespective of their mother's marital status because to distinguish between ex-nuptial and nuptial children would be inconsistent with the Constitution. Further, the judge noted that income that results from the individual labours of any of the custom owners could be retained by that person.

The Court found that Vanuatu custom with respect to land rights does not afford the same rights to women as it does to men. If a woman marries, she is deprived of a right to property that she would otherwise have had. The same did not apply to men. It held that custom therefore discriminates against women on the ground of sex and although Article 74 of the Constitution states that the rules of custom shall form the basis of ownership and use of land in Vanuatu, it is subject to the fundamental rights recognised in Article 5. Article 5 states that a law that discriminates against a woman on the grounds of her sex is inconsistent with the guarantee of equal protection of the law.

The Court noted that the adoption by the Vanuatu Parliament of Human Rights Charters with respect to women's rights recognises the rights of women as guaranteed under the Constitution. It would be entirely inconsistent with the Constitution and the attitude of the Vanuatu Parliament to rule that women had lesser rights than men. Thus, the Court held that all of Crero Toto's children were equally entitled to the income from the custom land regardless of their sex.

The Court held that the applicant was entitled to an account of the profits from the land since the case in 1985. The Court, however, did not consider it appropriate that it should lay down any plans for the management of the property. The parties should consult with each other to decide how to properly manage the property.

Commentary

This was the first case in Vanuatu that referred to international human rights conventions to support a finding in favour of the rights of women. For Ni-Vanuatu women this means that they can refer to this decision when negotiating land and other rights including greater speaking rights in customary courts. This decision can also be used in the formal courts as a precedent to overturn discriminatory common law decisions, and to bring test cases against other discriminatory customary laws.

This case also gave formal recognition to the children of de facto relationships by granting ex-nuptial children rights to their father's land. This precedent could indirectly assist Ni-Vanuatu women in de facto relationships to claim rights, if not for themselves, then for their children.

This decision established the principle that in Vanuatu the equality provisions of the Constitution take precedence over customary law, if the two systems are in conflict. Custom that discriminates against women cannot be enforced. The equal rights provision of Article 5 of the Constitution was held to have precedence over the custom that women lose their inherited land rights on marriage even although the Constitution also protects customary law. This case therefore provides an important recognition of the equality provision giving it a status above other provisions in the Constitution.

Violence Against Women Sexual Harassment

Hee Jung Woo (Appellant) v Jung Hue Shin, Jong Woon Kim (Seoul National University), the Republic of Korea (Respondents)

95 Da39533

Supreme Court of Korea

10 February 1998

Lee, Im Soo; Choi, Jong Choi, Young; Lee, Don Hee; Suh Sung JJ

Laws Considered

Constitution of the Republic of Korea, Article 10;

Civil Law, Article 751.

This case examines whether sexual harassment can give rise to a claim in tort for compensatory damages under Korean law. The Court considered whether sexual harassment amounts to a breach of Article 10 of the *Constitution of the Republic of Korea* [“the Constitution”] which protects personal rights. This case also considered whether an employer and the Republic of Korea could be vicariously liable for acts of sexual harassment by an employee.

The appellant, Ms Woo, was employed as a technical assistant at Seoul National University by the Republic of Korea. She was supervised by Professor Shin who in turn was supervised by the president of Seoul National University, Mr Jong Woon Kim. During the course of her employment, Professor Shin made physical contact with Ms Woo a number of times under the guise of training her in the use of the equipment. The physical contact was unnecessary and unwanted and also extended to looking at her in a sexual manner, and making comments and jokes of a sexual nature. Ms Woo rejected Professor Shin’s advances and claimed that his behaviour had caused her unpleasant and agonising feelings. She was subsequently dismissed from her job. She sought damages in tort (monetary compensation) for sexual harassment and her subsequent dismissal by Professor Shin; her employer, Mr Jong Woon Kim of Seoul National University and the Republic of Korea.

Ms Woo argued that Professor Shin made many unwanted and unnecessary physical advances towards her and that she was dismissed from her job after she refused his

advances. She also argued that the unwanted advances constituted sexual harassment, which was an interference with her rights under Article 10 of the Constitution. Further, Mr Kim and the Republic of Korea had obligations to Ms Woo to prevent Professor Shin from sexually harassing her and had not fulfilled those obligations. Ms Woo argued that because of the sexual harassment and the subsequent job loss, she was entitled to monetary compensation from each of the three respondents.

The respondents argued that Ms Woo had not expressly refused the physical contact and it therefore it did not constitute sexual harassment. They also argued that even if it was unwanted, the physical contact was not severe enough to cause any adverse change in the workplace environment. The respondents also argued Ms Woo was dismissed because of her attitude and poor performance at work, not because of her refusal of Professor Shin's sexual advances. The Republic of Korea and the University argued that they were not vicariously liable for the actions of Professor Shin as the sexual harassment was not part of his employment duties.

Decision

The Supreme Court held that Professor Shin had sexually harassed Ms Woo. In doing so he had committed a tort and was liable to pay compensation to her under Article 751 of the *Civil Law*. The basis of the ruling was that when sexual harassment causes mental distress to the victim, it interferes with their personal rights protected by Article 10 of the Constitution. Compensation was awarded for the mental damage that ensued from the sexual language used by Professor Shin. However, the claims based on his other conduct were rejected on the basis that it did not impact upon Ms Woo's mental instability or interfere with her ability to work. In relation to her dismissal, the Court did not agree that it was related to Ms Woo's refusal to accept Professor Shin's sexual advances. It dismissed the appeals relating to Mr Kim, Seoul University and the Republic of Korea on the basis that the actions of Professor Shin were not part of his work duties and that the responsibility for Professor Shin's actions lay only with him and not his employer.

Commentary

This case was significant for women's rights because it was the first case in Korea to recognise a sexual harassment claim. It enhanced social awareness on the issue of sexual harassment and prompted preventative mechanisms such as the amendment of the *Gender Equal Employment Law* in February 1999. Other legislative changes were also introduced by inserting sexual harassment provisions into the enactment of the *Law on the Prohibition and Relief of Gender Discrimination*. This case may also create an important platform for future advocacy by promoting a fuller understanding and definition of sexual harassment. However, although the Court recognised that sexual harassment was actionable in law, it was not sensitive to the issue of gender,

which was integral to the case. The Court adopted the “reasonable person” test when evaluating the conduct of Professor Shin. This test is applied from the viewpoint of the average “reasonable” person and consequently the Court found that most of Professor Shin’s conduct was reasonable. It would have been more advantageous to Ms Woo and women in general if the Court had applied a “reasonable woman” standard that recognised the gendered nature of sexual harassment and evaluated the conduct of Professor Shin from the viewpoint of the average “reasonable” woman. Finally, by focusing on the compensation liability issue between the two parties, the Court failed to take advantage of the opportunity to formulate a full definition of sexual harassment.

Japan

Violence Against Women Sexual Harassment

Kanazawa Sexual Harassment Case

Roudouhanrei No. 707, pp. 37-49
Nagoya High Court, Kanazawa Branch
1 March 1997

Laws Considered

Civil Code, Articles 44.1 and 709;
Labour Standards Law, Chapter 2.

This case deals with sexual harassment in employment and its place in Japanese law.

An employer subjected a female employee to unwanted sexual attention in the workplace. The female employee argued that the unwanted sexual attention from her employer took advantage of his position of power. Further, such acts were illegal because they violated the petitioner's dignity and right to sexual freedom.

Decision

The Court decided in favour of the female employee and held that the employer's "acts of obscenity by compulsion" were illegal because they were beyond the socially permissible limit and therefore violated the petitioner's dignity of personality, her sexual freedom and her right to sexual determination.

Commentary

This case is significant because it set a precedent in relation to sexual harassment. It was the first High Court case in Japan to recognise an action for sexual harassment as a distinct category. Previously, the only avenue for sexual harassment was in libel. This is positive for women's rights because it recognised sexual harassment as a serious and specific problem that is worthy of the attention of the High Court. However, some have criticised the amount of compensation awarded on the basis that it is low in comparison to similar cases in other countries.

Violence Against Women

Sexual Violence

Al-Amin and 5 others (Appellants) v The State (Respondent)

51 DLR (1999) 154

Supreme Court

10 December 1998

Md Abdul Mannan, A. K. Badrul Huq JJ

Laws Considered

Code of Criminal Procedure (V of 1898), Sections 164, 236, 237;

Cruelty to Women (Deterrrent Punishment) Ordinance 1983

Evidence Act (I of 1872), Sections 3, 9, 134, 156;

Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVII of 1995), Sections 6(3), 9(ka), (Ga), 20(2), 22, 23.

This case deals with rape and the difficulties in proving a charge where the victim may be reluctant to report the crime and to testify against the accused and where her evidence is uncorroborated. The Court considered whether these factors should be taken into account when determining if a charge of rape had been proved.

The principal victim (Victim A) was a female college student who, while walking through the college one morning with two males (Victim A1 and Nizam), was surrounded by the six appellants. Both Victim A1 and Nizam were beaten. Nizam was then freed after money was taken from him while Victim A1 was locked in a bathroom. Victim A was undressed and raped by five of the six appellants. After the rape, the appellants took a photograph of Victim A while she was naked. Victim A1 was also undressed and photographs were taken of him while he was naked.

Approximately nine days after the incident, Victim A reported the matter to the police by filing a First Information Report. The Report did not mention the rape as the victim had not informed the police of this, rather she reported an act of “outraging the modesty”. The incident was subsequently investigated and the full extent of the crime was reported by witnesses. The appellants were charged with rape under *Nari-*

O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVII of 1995) (“the Ain”). Victim A then provided a statement (under section 164 of the *Code of Criminal Procedure*) that she had been raped and photographed whilst naked.

The Trial Court (the Special Court on Violence against Women and Children) held that the prosecution had failed to prove the charge of rape. The main reasons for the decision were Victim A’s delay in filing a First Information Report and the fact that the First Information Report did not state that she had been raped. Further, Victim A’s evidence was uncorroborated by Victim A1 who testified to the “outraging of the modesty” of Victim A, but not to her rape. Finally, the Trial Court held that there was no physical evidence of rape. The appellants were instead convicted of “outraging the modesty” of Victim A under section 9(ka) of the Ain, rather than rape.

The appellants appealed the decision of the Trial Court. They argued that they were not guilty of “outraging the modesty” of Victim A on the basis that Victim A had delayed in making a First Information Report, that she had failed to make a complete report of the incident in the First Information Report, and that her evidence was uncorroborated. The appellants argued that the above reasons provided sufficient grounds upon which to acquit them of the crime of “outraging the modesty” under section 9(ka) of the Ain.

Decision

The Court upheld the decision of the Trial Court and reaffirmed the convictions for “outraging the modesty”. The Court held that there was sufficient evidence available to the Trial Court to have found the appellants guilty of rape. However, because the prosecution had not appealed the acquittal on the charge of rape, the Court was prevented from converting the order of acquittal for rape into an order of conviction. The appellants remained convicted of the lesser charge of “outraging the modesty” of Victim A.

The Court found that Victim A’s delay in making a First Information Report could have been due to a number of reasons, including that the crime of rape affects the reputation of the victim and the honour of her family. Accordingly, it was understandable that, following such a traumatic experience, Victim A may have been reluctant to report a crime which was embarrassing and shameful.

The Court found that the inconsistency between Victim A’s First Information Report and her statement under section 164 of the *Code of Criminal Procedure* was not a reason for acquitting the appellants. The First Information Report should not be treated as the definitive statement of the prosecution’s evidence. Rather, it is the evidence produced to the court at the time of trial that is the legal and substantive

evidence. At the trial, Victim A had unequivocally stated that she had been raped and photographs had been taken of her while she was naked. The Court considered that Victim A's failure to report this in the First Information Report was reasonable to protect her own honour and dignity and that of her family.

The lack of corroboration of Victim A's evidence was also rejected by the Court as a reason for acquitting the accused. The Court considered that the testimony of the victim of a sex crime was sufficient for a conviction. It stated that in cases of sex crimes, it is reasonable to expect a girl to conceal the crime committed against her, since an admission impacts both upon her personal honour and her family's honour. Accordingly, no girl would make a humiliating statement against her honour and dignity, unless it was true. Further, there is no need for a particular number of witnesses to prove a case. A conviction may be founded on the testimony of the victim alone, provided that evidence is credible and consistent.

In the present circumstances, where the testimony of Victim A appeared to be reliable, there was no reason to doubt that evidence on the basis that it was uncorroborated by the evidence of any other witnesses. The Court referred to the purpose and object of the Ain of 1995, which it described as a stringent law enacted to provide an effective check on the commission of heinous crimes to women and children, which were continuing despite the prevailing law, i.e. *The Cruelty to Women (Deterrent Punishment) Ordinance 1983*. The Court is required to adopt a beneficial construction of the Ain and to award proper and appropriate punishment to the offenders of such crimes, especially in instances of sexual assault.

The Court noted that the punishment imposed on offenders of sexual crimes should be sufficient to act as a deterrent to potential offenders, and to ensure that citizens retain confidence in the law. Further, the interest of the victim in ensuring that an appropriate punishment is imposed must also be recognised.

The Court also made the following observations in relation to the conduct of investigations and trials relating to sexual offences. The definition of rape should be amended to remove certain loopholes and inadequacies. The crime of rape seriously offends the honour and dignity of women and therefore a victim should be protected from further public embarrassment at the time of investigation and at trial. This could be achieved by, for example, having the investigation conducted by a female officer, having medical examinations conducted by a female doctor, and having the trial conducted in a closed court.

Finally, the Court stated that not only should the offenders of sexual crimes be punished, but the victims of sexual crimes should be compensated for the crime committed against them.

Commentary

This case is positive for women in Bangladesh. The decision of the Supreme Court in this case clearly focused on the effect of rape on a woman, and, in particular, the difficulties faced by a woman when reporting a sexual crime, and participating in any subsequent trial. The Court criticised the male-dominated criminal justice system and in particular the failure of the State to lodge an appeal against the acquittal on the charges of rape in the Trial Court.

The case recognised that in a tradition-bound non-permissive society, such as exists in Bangladesh, a woman may be extremely reluctant to admit that she has been raped as it will damage her own reputation, and the reputation of her family. Consequently when she does report a rape, her testimony should be taken extremely seriously, as no woman or girl of honour would want to bring shame to her name or to her family, by falsely testifying to being raped.

The Court confirmed that it is the duty of the legal system to recognise these difficulties, and to ensure that women are treated with compassion and fairness when sexual crimes are investigated and prosecuted. Further, some of the recommendations of the judges were reflected in the subsequent enactment of the *Suppression of Violence Against Women and Children Act 2000* indicating the significance of the judgment for Bangladeshi women.

Part III

Appendices

A	<i>Article</i>
APWLD	<i>Asia Pacific Forum on Women, Law and Development</i>
CAT	<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women 1979</i>
CJ	<i>Chief Justice</i>
CRC	<i>Convention on the Rights of the Child 1989</i>
DEVAW	<i>Declaration on the Elimination of Violence Against Women 1993</i>
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights 1966</i>
ILO	<i>International Labour Organisation</i>
J/JJ	<i>Judges/Justices</i>
No.	<i>Number</i>
NGO	<i>Non Government Organisation</i>
p/pp	<i>page/pages</i>
PLD	<i>Partners for Law in Development</i>
RRRT	<i>Pacific Regional Human Rights Education Resource Team</i>
Rs	<i>Rupees</i>
SC	<i>Supreme Court</i>
UDHR	<i>Universal Declaration of Human Rights</i>
UK DFID	<i>United Kingdom Department for International Development</i>
UNSW	<i>University of New South Wales</i>
VAW	<i>Violence Against Women</i>

Glossary

absolute

Unconditional, free from restriction or limitation, complete, not contingent on.

accede

To consent to something, or to enter a treaty or accord.

amicus curiae

Latin term meaning “a friend of the court”. An amicus curiae has no personal interest in the case and does not advocate a point of view in support of one party or another. The court may hear an amicus curiae if it considers it in the interests of justice to do so.

appeal

An application to a higher court or tribunal to review or reverse a decision of a lower court or tribunal. An appeal may be as of right, or may depend on the higher tribunal or court consenting to the appeal.

appellant

A party against whom an unfavourable decision has been made in a court or tribunal and who applies to have the decision reconsidered by a higher court or tribunal.

bequeath

The act of giving property or assets through the terms of a will.

bona fide

To do something honestly and in good faith, or to act without fraud or collusion.

certiorari

Latin term meaning “to be informed”. A type of remedy issued by a court. A writ of certiorari is a form of judicial review whereby a court is asked to consider a legal decision of an administrative tribunal or lower court and to decide if the decision has been regular and complete or if there has been an error of law. For example, a certiorari may be used to quash a decision of an administrative tribunal which was made in violation of the rules of natural justice, such as a failure to give the person affected by the decision an opportunity to be heard.

common law

Historically, a body of unwritten law derived from the traditional laws of England based on case law precedents and interpretation.

complainant

Generally a person who lodges a complaint with a court, or other decision maker.

In criminal proceedings it is a person, not necessarily the victim, who begins a prosecution by laying a complaint.

Convention on the Elimination of All Forms of Discrimination Against Women

A multilateral agreement recognising the civil, political, economic, social and cultural rights of women. It was adopted by the General Assembly of the United Nations on 18 December 1979 and entered into force generally on 3 September 1981 in accordance with Article 27(1). The *Convention on the Elimination of all Forms of Discrimination Against Women 1979* establishes the Committee on the Elimination of Discrimination against Women, which considers reports submitted by state parties in accordance with the reporting obligations laid down by the Convention. There is no right of individual complaint under the Convention.

corroboration

In criminal proceedings, independent evidence that implicates the accused person by connecting them with the crime.

custody

As it relates to children, a term encompassing most of the rights and duties concerned with the upbringing of children. These rights include the power to make decisions about a child's education, religion and property as well as a personal power of physical control. The corresponding duty is to provide the child with food, clothing, shelter, education and other necessities of life.

custom

A practice in society or rule of conduct established by long use, which binds those under it. In order for a custom to constitute a valid law, it must date back to time immemorial, and be certain and obligatory. It may run counter to the common law but cannot contravene existing statute law. A custom can be general, particular or local.

de facto

As it applies to relationships, it describes a relationship bearing the hallmarks of a marriage which, in effect, resembles a marriage, but which has not been formalised through a ceremony of marriage. De facto relationships in most jurisdictions are recognised at law.

defendant

A person or entity against whom legal action is being taken.

discrimination

Treating a person or persons less favourably; distinguishing, excluding, restricting, or preferring another on the prohibited basis of a certain or several features or attributes that the person or persons possess.

dissenting judgment

A judgment by a member of a court or tribunal which differs to the opinions of other members.

ex-nuptial

Out of marriage.

general damages

Compensation claimed or awarded for injuries or other loss for which there is no exact dollar value. General damages include damages for future loss and for intangible injuries such as pain and suffering.

guardian

In relation to a child, a person with the right to make decisions about the long-term needs of the child, as opposed to the day-to-day care of the child. A guardian has responsibility for such matters as decisions about a child's religion or education.

guardianship

A legal arrangement where one person has been appointed to take care of another person or the property of another.

indirect discrimination

Discrimination on the basis of a person's attribute by imposing, or proposing to impose, a term with which the person does not or is unable to comply because of that person's attribute, where a higher proportion of people without the attribute comply or are able to comply and the term is not reasonable in all the circumstances.

lakh/lac

A term used in India denoting the number 100,000, especially when referring to this sum of rupees. It is derived from the Hindi word, lakh.

legal standing/locus standi

The entitlement of a person or entity to commence legal proceedings or the right to be heard in a court.

libel

To publish in print (including pictures or writing) or broadcast through radio,

television or film (or through any other mode of communication capable of being understood visually) an untruth about another which will do harm to that person or his/her reputation, by tending to bring the target into ridicule, hatred, scorn or contempt of others.

mala fides

An act done in bad faith, dishonestly or with intent to deceive.

maintenance

Provision of the means of existence for a minor or adult.

mandamus

An order issued by a court to compel a public official to perform a public duty.

minor

A child, a person who has not attained the age of having full legal capacity.

ordinance

An authoritative rule or law.

party

One of the participants in a legal proceeding who has an interest in the outcome. Parties include the plaintiff (person filing suit), defendant (person sued or charged with a crime), petitioner (files a petition asking for a court ruling) or respondent (usually in opposition to a petition or an appeal).

patrilineal

Relating to, based on, or tracing descent or title through the paternal line.

plaintiff

A person or entity who initiates legal proceedings against another in a civil dispute.

preamble

An introductory statement at the beginning of legislation or an instrument providing information relating to the reason for the enactment, and intent, of the legislation.

precedent

A prior reported judgment of a court which establishes the legal rule (authority) for future cases on similar facts or the same legal question. It is also a legal principle or rule created by one or more decisions of a higher court. These rules provide a point of reference or authority for judges deciding similar issues in later cases. Lower courts are bound to apply these rules when faced with similar legal issues.

prerogative writ

A historic generic term for a writ (court order) directed to government agencies or public officials in order to prevent them from exceeding their powers or to make them carry out their functions.

public law

The body of law dealing with the rights, powers, obligations and responsibilities of the government including public officers and the governed (the public). It is composed of criminal, international, environmental, administrative and constitutional law.

ratification

The adoption or confirmation by a state of an agreement or treaty that the state was not obliged to adopt prior to ratification.

ratio decidendi

Literally means the ‘reason for the decision’.

repeal

The deletion, omission, or reduction in scope of an existing law by a subsequent law.

reservations

A unilateral statement made by a state when signing or ratifying a treaty, by which the state excludes or modifies the legal effect of certain provisions of the agreement in their application to that state.

respondent

A person or entity required to answer a petition for a court order. It is also a party to court proceedings against whom relief is claimed by an applicant or an appellant. It is analogous to the term defendant, which is used in many jurisdictions.

sexual harassment

Unwanted sexual approaches or an unwelcome request for sexual favours or engaging in other unwelcome conduct, of a sexual nature e.g. sexist remarks where a reasonable person would have anticipated that the person harassed would be offended, humiliated, or intimidated. Sexual harassment is a type of sex discrimination and is unlawful in many jurisdictions.

Sharia law

Sharia Law is derived from the teachings of the Koran and from Sunna (the practice of the prophet Mohammed), and is implemented to varying degrees in different Islamic

countries. Sharia is a religious code for living, and has been formally instituted as law by certain states and enforced by the courts.

special damages

In an action for tort, compensation awarded for loss actually suffered and expenses actually incurred, such as medical expenses and loss of income.

statute

A law made by parliament.

succession

The transmission or redistribution of the property on the death of its owner to the persons or entities entitled to that property, either by will or by operation of law.

taka

Monetary unit of Bangladesh.

testator

A person who makes a will.

tort

A wrongful act from which injury occurs to another. It is also a civil wrong based on the breach of a duty, imposed by law. The law of tort tries through the payment of compensation to restore the injured person to the position they were in before the tort was committed.

trial in camera (in camera proceedings)

A court case which is closed to members of the public. Although generally the courts conduct proceedings in open court, there should be provisions which permit or require the court to hear proceedings in a closed court where the case is of a particular nature or where a particular type of witness is giving evidence, for example, a child, or where the proceedings relate to a particular class of offence.

ultra vires

An act which is done in excess of the power or authority of a person, institution, or legislation. An ultra vires act is invalid.

usufructuary rights

The legal right of using and enjoying the fruits or profits of something belonging to another; the right to use or enjoy something.

vatu

The standard monetary unit of Vanuatu.

vicarious liability

The legal liability imposed on one person or entity for the wrongful act of another based on the legal relationship between them, for example the relationship between an employer and an employee where the employer may be held to be vicariously liable for the damage caused by his/her employee.

will

A written document in which a person (testator) specifies what is to be done with their property (estate) upon their death. A will usually names an executor who carries out the wishes of the deceased and distributes the estate to named persons or entities.

writ

A written order issued by a court ordering a person or entity to do or refrain from doing a specified act.

writ petition

An application for an order of a court.

Bangladesh

Ratification

Bangladesh acceded to *CEDAW* [“the Convention”] on 6 November 1984. The Government of Bangladesh also signed and ratified the Optional Protocol to *CEDAW* on 6 September 2000. The Optional Protocol provides that individual and collective complaints can be made to the *CEDAW* Committee after exhaustion of all domestic remedies.

Reservations

At ratification the Bangladesh Government originally expressed reservations to Articles 2, 13(a), 16(c) and 16(f) of the Convention. The reservations were made on the ground that the provisions of these articles conflict with Sharia law.

On 20 July 1997, the Government subsequently removed its reservations from Articles 13(a) and 16(f). These articles give women equal rights to family benefits and equality with regard to guardianship and adoption. However, the reservations on Article 2 and Article 16(c) remain. Article 2 provides that states shall embody principles of equality in their national constitutions and other laws. It provides that States should repeal all provisions that constitute discrimination against women. Article 16(c) provides for equal rights in marriage and its dissolution.

Impact

Bangladesh is the first country in South Asia to sign and ratify the Optional Protocol. However, discrimination persists in Bangladesh under religious based personal laws due to the continuing reservation to Article 2. The reservation to Article 2 is illogical because Article 7(2) of the Constitution of Bangladesh itself states that the Constitution is “the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”.

Several domestic laws have, however, been enacted or amended to prevent violence against women and comply with the Convention. The *Suppression of Violence against Women and Children (Special Provision) Act 1995*, for example, was subsequently replaced by the *Suppression of Violence against Women and Children Act 2000*.

Although both Acts were enacted to prevent violence, the 2000 Act introduces changes suggested by women’s organisations. Severe punishments including the death penalty were introduced for crimes of trafficking, kidnapping for ransom and physical mutilation of children for the purpose of beggary, which had raised serious concerns among human rights groups. Recognition of the rape of boys and two new offences - sexual harassment and sexual assault - were also introduced. The use of videos in trials (trial in camera) and the prohibition of the publication of victim’s identity in the news media were also incorporated. The law continues to ignore, however, other proposals made by women’s organisations including the incorporation into legislation of domestic violence and marital rape as new offences.

India

Ratification

The Government of India signed *CEDAW* on 30 July 1980 and ratified it on 9 July 1993, soon after the World Conference on Human Rights in Vienna in 1993.

Declarations

The Government modified its obligations in relation to Articles 5(a), 16(1) and 16(2) of the Convention with two declarations. First, in relation to Articles 5(a) and 16(1) it declared that it would continue to abide by its policy of non-interference in the personal affairs of any community without its initiative and consent.

Second, in relation to Article 16(2) the Government declared that although in principle it fully supports the principle of compulsory registration of marriages, it is not practical to enforce it in a vast country like India where there are variety of customs, religions and differing levels of literacy.

Reservations

The Government declared that it was not bound by Paragraph 1 of Article 29 of the Convention.

Impact

CEDAW's impact is evident in the legislative changes and the legal challenges being made in the Indian courts. After signing the Convention but prior to its ratification the *Citizenship Act 1955* was amended in 1986 with the express purpose of making it consistent with the Convention's provisions on citizenship. As a result of the amendment, all citizens regardless of sex, can confer citizenship on their children and foreign spouses removing the discrimination that had previously existed between male and female citizens.

In 1997 after the ratification of *CEDAW*, the Supreme Court of India applied General Recommendation 19 to lay down guidelines relating to sexual harassment in the workplace in the case of *Vishaka v State of Rajasthan* 1997 6 Supreme Court Cases 241. According to the Court the absence of law on this issue, despite the State's undertaking to eliminate discrimination, amounted to discrimination against women. Hence, guidelines on law on sexual harassment in the workplace came into being through judicial activism, with directions to the legislature to enact a law.

The Indian women's movement continues to debate and challenge the Government's policy of non-interference with religious-based family laws and the two declarations and reservation in relation to the Convention. They argue that religious-based family laws disadvantage women in different ways and a policy of non-interference by the

Government is discriminatory. Some challenges have been made in the superior courts, using both the constitutional guarantee of equality and the obligations the Indian Government has under *CEDAW*. In most of the cases which have challenged religion-based family laws on the basis that they discriminate against women, the courts have declined to intervene on the ground that the parliament and not the judiciary is the appropriate forum for such matters.

The first review of India's obligations under *CEDAW* by the *CEDAW* Committee was held in New York in January 2000. The Committee strongly urged the Government of India, in their concluding comments of the review, to initiate reforms in the area of family law. They also urged the Government to introduce a requirement for the compulsory registration of marriages. However, so far, the Government has not removed or amended the reservation or the declarations made when it ratified *CEDAW*.

Republic of Korea

Ratification

The Government of Korea ratified *CEDAW* on 27 December 1984 and enacted domestic legislation [Treaty No. 855] on 7 January 1985 to give effect to the Convention. Treaty No. 855 became operative on 26 January 1985.

Reservations

At the time of ratification Korea expressed reservations to Article 9 and Article 16(1)(c),(d),(g) and (h) of the Convention.

Article 9 provides for gender equality in both the nationality of children and for wives who follow the nationality of their husbands. The Government's justification for making this reservation was the conflict between Article 9 and the nationality laws of Korea which permit naturalisation of foreign wives only together with the husband. The reservation on Article 9 was subsequently withdrawn and was followed by the amendment of the domestic nationality law on 13 December 1997 to accord with the Convention.

Article 16 provides for gender equality in family life. Reservations were made to this article because it conflicted with the provisions of Korean Family Law which were biased in favour of the husband and father. The reservations on Article 16(1)(c),(d) and (h) were subsequently removed on 15 March 1991.

Article 16(1)(g) however, remains reserved. Children must follow the surname and origin of their father as required by Article 781(1) of the *Civil Law* and a wife must be registered as the family of the husband under Article 826(3) of the *Civil Law*.

Impact

A number of laws in Korea have been amended or enacted in response to the different articles of *CEDAW*.

Article 1 of *CEDAW*, the definitive provision on discrimination against women, was introduced in Article 2(1) of the *Law on Prohibition of Gender Discrimination and Relief 1999*. This Act, in line with *CEDAW*, defines gender discrimination as "all distinction, exclusion, or limitation that is done for the reasons of gender without reasonable basis, in exercising the rights or awareness and enjoyment of basic rights as human in all areas of political, economical, social and cultural life".

Articles 2 and 3 of *CEDAW*: The gender equality principle has been part of the *Constitution of the Republic of Korea* since its enactment. The Constitution states that all persons are equal before the law and that no one shall be discriminated

against on the basis of gender, religious or social ranking, in all aspects of political, economical, religious or social status. The basic *Law on Women's Development 1995*, in accordance with *CEDAW*, further defines the obligation of the national and regional governments as well as organisations to uphold gender equality and eradicate discrimination against women in all general fields.

The affirmative action provisions of Article 4 of *CEDAW* were initially introduced in Article 6(1) (Potential Preferential Treatment) of the *Law on Women's Development*, which states that national and regional governments as well as organisations shall promote greater participation of women, where the participation of women is clearly insufficient, and will take potentially preferential treatment in accordance with determinations made by the relevant laws. Further, Article 8 of the *Law on the Prohibition and Relief of Gender Discrimination* states that potential measures for promoting gender equality under other laws shall not amount to gender discrimination under this law. Clause 4 of Article 2.2 of the *Gender Equal Employment Law 1989* also states that measures taken to minimise existing discrimination by national, regional governments or business owners that prefer labourers from a certain gender shall not amount to discrimination under this law. Maternity protection of female labourers is also deemed as non discrimination under this law. Further, on 22 December 1998, Article 11.3 was added to the Decree of Government Official Appointment providing for the induction of additional female candidates to provide greater opportunities of employing female government officials.

Article 6 of *CEDAW* was incorporated into the *Preventive Law on Prostitution* to punish those who work in prostitution and also those who participate in the act of abetting prostitution thus strengthening the punishment of brothel masters.

Article 7 of *CEDAW*: To promote women's participation in the public arena, a Special Committee of Women in the National Assembly was established with the amendment of the *National Assembly Law* of 1994. This Special Committee on Women was brought under the direct command of the President of Korea by a later amendment of the *Government Organisation Law* in 1998. Further, the amendment of the Political Party Law in February 2000 states that the parties shall "recommend 30/100 or more of women as candidates for the National Assembly in national election districts, and for a ratio representative and election of city and provincial congressmen for ratio representatives".

Article 9 of *CEDAW* was incorporated into the 1997 amendments to the *Nationality Law* ensuring gender equality in nationality. The amendment states that the nationality of children and spouses may be selected either by the nationality of the husband or the wife and selection of the spouse's nationality.

Article 11 of *CEDAW*, which provides for the abolition of discrimination against women in employment, was incorporated into the Constitution by the 1987 amendments to Article 32(4). It extended protection to women's labour and prohibited unjustifiable unequal treatment of women in employment, wage and labour conditions. Further, the enactment of the *Gender Equal Employment Law 1987* now provides maternity protection and gender neutral equality of female labourers. It defines gender equality throughout the general aspect of employment. The first amendments to this law in 1989 under Article 6(2) also introduced the concept of equal pay for equal wages. This was extended in 1995 to the recruitment process prohibiting considerations based on physical requirements and a woman's unmarried status. In addition Article 7 was later inserted to prohibit the unfair treatment of women on the basis of marriage, pregnancy, birth or sex. Article 11 of *CEDAW* has also been incorporated into Korean domestic law by the enactment of the *Infant Nurturing Law 1991*.

Article 16 of *CEDAW* was incorporated into the 1990 amendments to the Civil Law which provides for gender equality in the areas of property division, inheritance, child custody, and the rights of divorced parents.

A number of Korean cases have referred to the domestic legislation that has been amended to accord with the provisions of *CEDAW*. However, despite the changes to domestic law the courts have often not interpreted their provisions to the benefit of women. For example, the courts have found that the criminal law of adultery does not violate the Constitution. In that case the Court held that the law was essential to maintain the matrimonial system of one-husband and one-wife, to guarantee family life and the protection of sexual obligations for sincerity between spouses, and to prevent social harms caused by adultery. Further, the Court held that the crime of adultery does not interfere with the true nature of freedom and rights or the equality provisions of the Constitution. The dissenting opinion, however, held that the crime of adultery was in breach of the Constitution.

The courts have also interpreted the *Gender Equal Employment Law* unfavourably for women. The Supreme Court held that provisions placing the retirement age of telephone operators, who were mostly women, at 53 years of age (5 years earlier than the general position of 58 years of age) was not gender discrimination. This decision damaged the guarantee of equal rights to work for women. Subsequently, however, the *Law of Gender Equality Law* was amended on 8 February 1999 to state "it is deemed discrimination to have the business owner apply standards or conditions to personnel positions that are staffed by any one gender". It is now possible to claim indirect discrimination and consequential discrimination.

In another case, the Court recognised damage compensation liabilities from the tort actions of a professor who sexually harassed an assistant of the University. Sexual harassment was held to be in breach of Article 10 of the Constitution. Subsequently, however, the issue of sexual harassment was clearly defined as a gender discrimination issue with the amendment of the *Gender Equal Employment Law* on 8 February 1999 and with the insertion of provisions on sexual harassment in the *Law on the Prohibition and Relief of Gender Discrimination*.

However, a positive decision, by the Constitutional Court of Korea in another case held that a provision in the *Civil Law* which prohibited marriage between persons of the same surname and same origin was inconsistent with the Constitution. The Court held that prohibition of marriage between parties of the same surname and of the same origin is a byproduct of the patriarchal system. It has lost its justifiability in light of social changes that have taken place to date. Further, regardless of the distance in degree of kinship, prohibition of marriage for the reasons of same surname and same origin is an excessive interference with the freedom that must be determined with respect to every individual: the right to pursue happiness, freedom of matrimony, and to determine as spouse as guaranteed under Article 10 and Article 36(1) of the Constitution. This decision guarantees the liberty of marriage.

In another positive decision, the Constitutional Court of Korea held that a provision in tax law to impose gift taxes on property division in divorce was unconstitutional. The majority held the imposition of a gift tax for asset transfer in property divisions upon divorce has no relationship with gifts that are acquired for free. This decision means that when divorcing, women are afforded an equal position with men. The value of family labour by women was recognised and the decision enables them to exercise an equal right to a share of the marriage property.

Pacific Region

Ratification

The following countries in the Pacific region have ratified *CEDAW*:

- Western Samoa on 11 January 1992;
- Papua New Guinea on 11 January 1995;
- Fiji Islands on 27 August 1995;
- Vanuatu on 7 September 1995;
- Tuvalu on 6 October 1999.

Kiribati and other Micronesian Islands are yet to ratify the Convention.

Reservations

At ratification the Fiji Government expressed reservations to Articles 5(a) and 9 of the Convention. Article 5(a) provides for the modification of practices and social and cultural patterns of conduct of men and women, which are based on the idea of inferiority or superiority of either sex. The Government was reluctant to modify the cultural practices of traditional Fijian societies and believed modification would draw strong criticism from the Fijian community. The Government also did not want *CEDAW* to be seen by the people as a “foreign, western document” and to combat this intended to provide education and conduct awareness raising about the Convention and the implications of Article 5(a) prior to removing the reservation.

At ratification the citizenship provisions in Articles 26 and 27 of the *Constitution of Fiji 1990* [“the Constitution”] were inconsistent with Article 9 of *CEDAW* relating to nationality. The Constitution was subsequently amended, resulting in gender-neutral provisions for nationality and residency rights of non-citizen spouses. Articles 12(7) and 16 of the Constitution gave non-citizen spouses married to Fijian women the right to acquire Fijian citizenship or to reside in Fiji. These changes nullified the reservation to Article 9.

The reservations to both Articles 5(a) and 9 of the Convention have however, been subsequently withdrawn.

Impact

In the latter years of the last decade, the courts in the Pacific region have cautiously begun to accept international human rights instruments such as *CEDAW*, *CRC*, and *ICCPR*. This is especially so in the courts of Fiji, where High Court judges are specifically applying international conventions to cases, as opposed to merely quoting them as references in their judgments.

Despite Kiribati not having ratified the Convention, lawyers have attempted to use *CEDAW* in the High Court in Kiribati [*The Republic of Kiribati v Tieta Timiti and Rabaere Robuti* HCCrC43/97, 1998]. Although the Court did not discuss the application of *CEDAW* it did not however rule out its relevance.

Whilst international conventions are rarely to be the sole reason for a judicial decision, they have often been cited in support of the ratio decidendi. In the Pacific region most cases citing international conventions are landmark decisions and have far reaching effects in the courts.

CEDAW's impact is also evident in legislative developments. The draft Sexual Offences Bill in Fiji, for example, incorporates the principles of *CEDAW*. The Bill aims to remove all legislative, interpretive and procedural discrimination against women and children in laws and practices in rape and other sexual assault crimes. These practices include the discriminatory corroboration warning and the admissibility as evidence of past sexual experience of the rape survivor.

The upward trend in the application of international human rights instruments in Pacific courts and legislative changes can be attributed to a range of factors. These include increasing globalisation, a greater commitment to constitutional equality, greater gender awareness and increased education and awareness programs undertaken by judicial officers including judges, magistrates, lawyers and legal rights training officers. Projects have been run by the Pacific Regional Human Rights Education Resource Team [“RRRT”] and funded by the United Kingdom Department for International Development [“UK DFID Pacific”]. One of the RRRT’s major projects is the training of judicial personnel and support staff, police, government law officers and legal practitioners in human rights and gender equality in order to increase the possibility of the application of human rights norms in the courts.

Further, with increasing pressure from the international community and human rights groups, Pacific Island nations will continue to feel the obligation to implement international human rights conventions into domestic legislation as well as applying them in the courts.

Pakistan

Ratification

Pakistan acceded to *CEDAW* on 12 March 1996.

Declaration

The accession by Pakistan was subject to the following declaration: “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”

Reservations

The Government of Pakistan also expressed the following reservation to the Convention, “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of Article 29 of the Convention.” The Government did not want to be obliged to take measures to eliminate discriminatory legislation, especially those enacted under “the garb of Islamic laws”.

The governments of Austria, Finland, Germany, Netherlands, Norway, Denmark, Sweden and Portugal submitted objections to the UN Secretary-General in relation to Pakistan’s declaration and reservation. They argued in their objections and noted that the general and unspecified nature of Pakistan’s declaration and reservation caused ambiguities in relation to its obligations under *CEDAW*. In particular the failure to apply the Convention to national law indicates that the Government of Pakistan is not committed to the object and purpose of the Convention. The various governments recommended that Pakistan’s declaration and reservation should not be given effect. They argued that it conflicted with the principle of international law which states that reservations incompatible with the object and purpose of a treaty should not be permitted.

Impact

The *Constitution of Pakistan 1973* [‘the Constitution’] does not address the incorporation or implementation of international treaties, and obligations and treaties are not considered part of domestic law unless there is an Act of Parliament. This was reinforced by the Supreme Court of Pakistan which held that treaties can only be “enforced as law when legislation is made by the country through its Legislature”. Hence the courts are not bound by international agreement and cannot take notice of violations of such agreements unless they have been incorporated into domestic legislation. Therefore initially, consideration of treaty obligations was not within the jurisdiction of the Pakistani courts, however a 1993 decision in Karachi held that international law “may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament”. If there is a conflict however, the Court has held that the “sovereignty and the integrity

of the Republic and the supremacy of the constituted legislature in making laws should not be subject to external rules except to the extent legitimately accepted by the constituted Legislature themselves”.

Further, as *CEDAW* cannot be the sole basis of a legal claim, the guarantee of equality and non-discrimination rests with the 1973 Constitution. Recourse is especially made to Article 25, which ensures that:

1. All citizens are equal before the law and are entitled to equal protection of the law.
2. There shall be no discrimination on the basis of sex alone.
3. Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

There is difficulty though in challenging statutes that invoke Islamic laws and principles because Article 2A of the Constitution also provides that legislation must be in conformity with the injunctions of Islam.

The case of *Humaira Mehmood v the State and others* 1999 P. Cr. R. 542 [Lahore] however, which cited Article 16 of the Convention and used Article 25 of the Constitution to support its main argument, provides evidence of the reliance and role of Article 25. This case involved a woman who married without the consent of her parents. Her parents forced her to sign a pre-dated marriage contract, which they used, with the collaboration of the police, to file a case under the Zina (adultery) Ordinance. The Court cited a violation of Article 25 and referred to Pakistan’s obligations under Article 16 of *CEDAW*. It stated that Pakistan failed to comply with its commitment to ensure equality between the sexes and to eliminate discrimination against women in matters relating to marriage, especially those in relation to removing impediments to the right to freely enter into marriage and to choose a spouse. The judge further criticised societal traditions and culture that discriminate against women arguing that they are contrary to Islam, the domestic law and international obligations.

The Pakistan Government has undertaken a number of initiatives in response to *CEDAW*. In August 1998, Pakistan’s Prime Minister launched the National Plan of Action (“NPA”), which established a “set of priority actions formulated to help achieve the agenda for the empowerment of women in Pakistan”. The NPA was drafted pursuant to the commitment made in the Fourth World Conference on Women in 1995. It adopted the framework of the Beijing Platform for Action and incorporated into the twelve critical areas of concern identified the relevant articles of *CEDAW*.

An Ordinance in July 2000 created the National Commission on the Status of Women. Although it does not mention CEDAW specifically, it lists as one of the functions of the Commission the review of all laws, rules and regulations affecting the status and rights of women and initiation of legislative reform to eliminate discrimination, in accordance with the Constitution and the obligations under international covenants and commitments.

Further, *CEDAW* was specifically mentioned as one of the guiding principles of the 28 April 2001 draft of the National Policy for the Development and Empowerment of Women prepared by the Ministry of Women and Development. However, the final version launched on 8 March 2002 deleted this reference and substituted a more general phrase, “universally-recognised rights and responsibility-based approach”. This national policy was launched as a statement of intent by the Government to specify how it intended implementing the development and empowerment of women. It was identified as an overall operating framework to include a gender perspective in all national policies and plans.

Pakistan’s initial report to the *CEDAW* Committee was due in April 1997 and the second report due in April 2001. Pakistan has not complied with any of its reporting obligations. It stated, however, that the final draft of the initial report has been submitted to the Pakistan Mission in New York and that it is preparing a supplement to update the initial document before it reports to the *CEDAW* Committee.

Finally, the main challenge for *CEDAW* in Pakistan lies in finding ways to overcome the reliance on the Constitution and current national laws as the over-arching framework for the elimination of discrimination against women. Increased advocacy, especially for law and policy-makers, judges, lawyers and NGOs on international law and on the Convention’s principles and obligations will greatly assist in the development of a new way of thinking on the relationship between *CEDAW* and domestic laws.

Status of Ratification of CEDAW and its Optional Protocol

* The following is the official UN list of countries in the wider Asia Pacific Region
As at November 2006:

COUNTRY	CEDAW	CEDAW-Op
Eastern Asia		
1. China	04 Nov 1980	
2. Democratic People's Republic of Korea	27 Feb 2001 a.	
3. Japan	25 Jun 1985	
4. Mongolia	20 Jul 1981	28 Mar 2002
5. Republic of Korea	27 Dec 1984	18 Oct 2006 a.
South-central Asia		
1. Afghanistan	05 March 2003 a.	
2. Bangladesh	06 Nov 1984 a.	06 Sep 2000
3. Bhutan	31 Aug 1981	
4. India	09 Jul 1993	
5. Iran Islamic Republic of		
6. Kazakhstan	26 Aug 1998 a.	24 Aug 2001
7. Kyrgyzstan	10 Feb 1997 a.	22 Jul 2002
8. Maldives	01 Jul 1993 a.	13 Mar 2006 a.
9. Nepal	22 Apr 1991	18 Dec 2001 s.
10. Pakistan	12 Mar 1996 a.	
11. Sri Lanka	05 Oct 1981	15 Oct 2002 a.
12. Tajikistan	26 Oct 1993 a.	07 Sep 2000 s.
13. Turkmenistan	01 May 1997 a.	
14. Uzbekistan	19 Jul 1995 a.	
South-eastern Asia		
1. Brunei Darussalam	24 May 2006 a.	
2. Cambodia	15 Oct 1992 a.	11 Nov 2001 s.
3. Timor-Leste	16 Apr 2003 a.	16 Apr 2003 a.
4. Indonesia	13 Sep 1984	28 Feb. 2000 s.
5. Lao People's Democratic Republic	14 Aug 1981	
6. Malaysia	05 Jul 1995 a.	
7. Myanmar	22 Jul 1997 a.	
8. Philippines	05 Aug 1981	12 Nov 2003
9. Singapore	05 Oct 1995 a.	
10. Thailand	09 Aug 1985 a.	14 Jun 2000
11. Vietnam	17 Feb 1982	

COUNTRY	CEDAW	CEDAW-Op
Western Asia		
1. Armenia	13 Sep 1993 a.	14 Sep 2006 a.
2. Azerbaijan	10 Jul 1995 a.	01 Jun 2001
3. Bahrain	18 Jun 2002 a.	
4. Cyprus	23 Jul 1985 a.	26 Apr 2002
5. Georgia	26 Oct 1994 a.	30 Jul 2002
6. Iraq	13 Aug 1986 a.	
7. Israel	03 Oct 1991	
8. Jordan	01 Jul 1992	
9. Kuwait	02 Sep 1994 a.	
10. Lebanon	21 Apr 1997 a.	
11. Oman	07 Feb 2006 a.	
12. Qatar		
13. Saudi Arabia	07 Sep 2000	
14. Syrian Arab Republic	28 Mar 2003 a.	
15. Turkey	20 Dec 1985 a.	29 Oct 2002
16. United Arab Emirates	06 Oct 2004 a.	
17. Yemen	30 May 1984 a.	
Oceania		
1. Australia	28 Jul 1983	
2. New Zealand	10 Jan 1985	07 Sep 2000
Melanesia		
1. Fiji	28 Aug 1995 a.	
2. Papua New Guinea	12 Jan 1995 a.	
3. Solomon Islands	06 May 2002	06 May 2002
4. Vanuatu	08 Sep 1995 a.	
Micronesia		
1. Kiribati	17 Mar 2004 a.	
2. Marshall Islands	02 Mar 2006 a.	
3. Micronesia (Federated States of)	01 Sep 2004 a.	
4. Nauru		
5. Palau		

COUNTRY	CEDAW	CEDAW-Op
Polynesia		
1. Cook Islands	11 Aug 2006 a.	
2. Samoa	25 Sep 1992 a.	
3. Tonga		
4. Tuvalu	06 Oct 1999 a.	

*a: date of assent

*s: date of signing

Collation of Relevant International Instruments

* A list of the full titles of the following abbreviated human rights instruments is located in the Abbreviations section on p 93.

NATIONALITY AND CITIZENSHIP

CEDAW

- A.2; A.15(1) & 15(4) – general provisions on non-discrimination & equality before the law
- A.9 – rights to acquire, change or retain nationality (including during marriage); rights of children

UDHR

- A.7 – equality before and under the law
- A.10 – fair and public hearing in determining rights and obligations
- A.15 – right to a nationality & shall not be arbitrarily deprived of his/her nationality, nor denied the right to change nationality

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.24 – rights of child to be registered and acquire a nationality
- A.26 – equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights

CRC

- A.2 – state obligation of non-discrimination and equal protection
- A.7 – right to registration and nationality
- A.8 – right to preserve his/her identity

FAMILY LAW

1. Marriage and custom

CEDAW

- A.2 (e) & 2(f) - general provisions on non-discrimination
- A.5(a) – gender stereotypes embodied in custom
- A.9 – nationality
- A.16.1(a) – right to enter marriage
- A.16.1(b) – right to choose spouse and full consent

UDHR

- A.2 – life, liberty and security of the person
- A.5 – cruel, inhuman or degrading treatment or punishment
- A.7 - equality before and under the law
- A.10 - fair and public hearing in determining rights and obligations
- A.16 – right to marry & found a family; equal rights during marriage and at dissolution

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.7 – no one shall be subject to torture or cruel, inhuman or degrading treatment
- A.9 – everyone has the right to liberty and security of person
- A.12 – right of liberty of movement and freedom to choose residence
- A.14 – equality before courts and tribunals with respect to rights and obligations at law
- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.10 – family protection, marriage, childcare benefits, protection of children
- A.16(b) & 16(c) – right to freely choose spouse & same rights and responsibilities during and upon the dissolution of marriage

DEVAW

- A.4 – states obligation to condemn violence against women and not use custom, tradition or religious consideration to avoid these obligations

2. Divorce

CEDAW

- A.1, 2(f), 5(a) - general provisions on non-discrimination
- A.15 – particularly 15(4) with respect to freedom of movement
- A.16.1(c) – same rights and responsibilities during and upon the dissolution of marriage

UDHR

- A.2 – life, liberty and security of the person
- A.7 - equality before and under the law
- A.10 - fair and public hearing in determining rights and obligations
- A.13 – right to freedom of movement and residence within the borders of each state
- A.16 - equal rights during marriage and at dissolution

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.7 – no one shall be subject to torture or cruel, inhuman or degrading treatment
- A. 9 – everyone has the right to liberty and security of person
- A.12 – right of liberty of movement and freedom to choose residence
- A.14 – equality before courts and tribunals with respect to rights and obligations at law
- A.23 – family protection, right to marry, rights and obligations during marriage and at dissolution
- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.11 – right to an adequate standard of living for oneself and family

3. Custody

CEDAW

- A.2; A.5; A.15 - general provisions on non-discrimination, custom & equality before the law
- A.13 – economic and social life – family benefits, financial credit
- 16 (d) – best interests of the child;
- 16(f) - guardianship, wardship, trusteeship

UDHR

- A.7 - equality before and under the law
- A.10 - fair and public hearing in determining rights and obligations
- A.25 – right to standard of living adequate for health and well-being of herself and family; motherhood and childhood are entitled to special care and assistance. All children, whether in or out of wedlock, shall enjoy the same social protection

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.14 – equality before courts and tribunals with respect to rights and obligations at law
- A.24 – rights of child to be registered and acquire a nationality

- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.10 – family protection, marriage, childcare benefits, protection of children
- A.11 – right to an adequate standard of living for oneself and family

CRC

- A.2 – state obligation of non-discrimination and equal protection
- A.3 – best interests of the child with respect to decision-making, care and protection, rights and duties of parents, legal guardians...
- A.4 – state obligation to implement legislative, administrative or other measures for realisation of the Covenant
- A.18 – recognition of the principle that both parents have common responsibilities in upbringing and development of the child; state assistance; child-care services for working parents

4. Property rights – Inheritance and Succession

CEDAW

- A.2(f); A.3; A.5; A.15 - general provisions on non-discrimination; custom & equality before the law
- A.13(1) – family benefits
- A.14 – rural women
- A.16 (h) – ownership, acquisition, management, administration, enjoyment and disposition of property

UDHR

- A.7 - equality before and under the law
- A.10 - fair and public hearing in determining rights and obligations
- A.17 – right to own property, no one shall be arbitrarily deprived of her property

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.5 - no state, group or person may restrict the rights and freedoms outlined in the Covenant

LABOUR LAW

1. Workplace harassment

CEDAW

- A.2; A.5(a) – general provisions on non-discrimination
- A.11 – particularly 11(f) – right to protection and health safety

UDHR

- A.8 – right to an effective remedy by competent national tribunals
- A.23 – right to work, free choice of employment and just and favourable conditions of work

ICCPR

- A.7 – no one shall be subject to torture or to cruel, inhuman or degrading treatment

ICESCR

- A.7 (b) – right to enjoyment of just and favourable conditions of work, including safe and healthy working conditions

DEVAW

- A.4 (c) - states should exercise due diligence to prevent, investigate and in accordance with national legislation punish acts of violence against women, whether those acts are perpetrated by the State or private citizens

2. Working age

CEDAW

- A.2; A.5 - general provisions on non-discrimination
- A.11 – employment provisions
- A.13 – non-discrimination in economic and social life

UDHR

- A.7 – equality before and under the law
- A.23 – right to work, protection against unemployment

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 - state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights

3. Wage discrimination

CEDAW

- A.2; A.15 - general provisions on non-discrimination
- A.11 - employment provisions
- A.13 - non-discrimination in economic and social life

UDHR

- A.7 – equality before and under the law
- A.23(2) – equal pay; 23(3) just and favourable remuneration

ICCPR

- A.2 – non-discrimination clause; right to effective remedy
- A.26 - equality under and before the law/equal protection clause

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.7(a) – right of everyone to enjoyment or just and favourable conditions of work, including fair wages, equal remuneration and equal conditions of work

4. Childcare

CEDAW

- A.11 (2)(c) - necessary supporting social services to enable parents to combine family obligations with work responsibilities.

UDHR

- A.25 - right to standard of living adequate for health and well-being of herself and family; motherhood and childhood are entitled to special care and assistance. All children, whether in or out of wedlock, shall enjoy the same social protection

ICESCR

- A.3 – state obligation to ensure equal right of men and women in enjoyment of economic, social and cultural rights
- A.5 – no state, group or person may restrict the rights and freedoms outlined in the Covenant
- A.7(a) – right of everyone to enjoyment or just and favourable conditions of work, including fair wages, equal remuneration and equal conditions of work

CRC

- A.18 – recognition of the principle that both parents have common responsibilities in upbringing and development of the child; state assistance; child-care services for working parents

CRIMINAL LAW

1. Sexual assault / rape

CEDAW

- A.2; A.5(a), A.15(1); general provisions on non-discrimination and customs

UDHR

- A.7 – equality before and under the law
- A.8 - right to an effective remedy by competent national tribunals
- A.10 - fair and public hearing in determining rights and obligations

ICCPR

- A.3 – state undertaking to ensure the equal rights of men and women in enjoyment of civil and political rights
- A.7 - no one shall be subject to torture or to cruel, inhuman or degrading treatment
- A.9 - everyone has the right to liberty and security of person
- A.14 - equality before the courts and tribunals with respect to rights and obligations at law
- A.26 - equality under and before the law/equal protection clause

DEVAW

- A.4 (c) - states should exercise due diligence to prevent, investigate and in accordance with national legislation punish acts of violence against women, whether those acts are perpetrated by the state or private citizens

CAT

- A.16 – each state party shall undertake to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed by or at the instigation of or with the consent or acquiescence of public official or other person acting in official capacity. (This line of reasoning however may be a bit tenuous, unless the public official has heard of the rapes and officially sanctions them, or ignores them.)