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Note

The Right to Have Rights: Gender Discrimination in Nationality Laws

Lisa C. Stratton

Natasha Selemo Dow is the daughter of Unity Dow, a citizen of Botswana. Natasha was born in Botswana in 1987 and has lived there with her parents since birth. Natasha is not, however, a citizen of Botswana under Botswana law. Her right to remain in her country as a legal alien depends upon her ability to secure residency permits, which Botswana grants for no more than two years. Without citizenship, she will not be eligible to vote. Her rights to travel are limited. She will not be eligible for government assistance for advanced education.

Natasha's rights are circumscribed because her father is a

1. The right to a nationality has been equated with the "right to have rights." Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) ("Citizenship is man's basic right for it is nothing less than the right to have rights."); see also Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (noting that the punishment of denationalization violates the Eighth Amendment as the expatriate is stripped of the right to have rights).

2. Applicant's Founding Affidavit ¶ 8, In re Dow v. Attorney Gen. of Bots., Case No. Misc. A 124/90 (High Ct. 1991) (Bots.) [hereinafter Applicant's Affidavit]. I wish to thank Marsha Freeman and Arvonne Fraser, Deputy Director and Director, respectively, of the International Women's Rights Action Watch at the University of Minnesota, for making available their information on Unity Dow's case and their documentation on the Women's Convention.

3. Id. ¶ 4.
4. Id. ¶¶ 8-9.
5. Id. ¶¶ 12, 14. See infra note 13 and accompanying text (discussing Botswana's nationality laws).


7. Id. ¶ 11.3.

8. All citizens 21 years or older are eligible to vote in Botswana. David R. Stack, The Legal System of Botswana, in 6 MODERN LEGAL SYSTEMS CYCLOPEDIA 6.60.1, 6.60.7 n.34. (Kenneth Redden ed., 1990).

9. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 11.5.
10. Id. ¶ 11.4.
foreigner. Botswana, like many countries, grants citizenship by descent, through the citizenship of the parents; Botswana's Citizenship Act, however, grants citizenship to children of married parents only through the father. Thus the children of a Botswana woman who marries a citizen of Botswana will be citizens, while the children of a Botswana woman who marries a foreigner will have only the citizenship of their father. The children of a Botswana woman married to a refugee or stateless person will have no nationality. In short, Botswana denies its female citizens the ability to pass their nationality to their children.

The legal benefits of nationality are twofold. Domestically, most nationals gain the benefits of citizenship. Internationally, the national receives specific protections which interna-

11. Applicant's Affidavit, supra note 2, ¶ 7. Her father is a U.S. citizen. Id.

12. Bots. Citizenship (Amendment) Act, No. 17 of 1984, § 2. This is known as the principle of jus sanguinis. See infra note 21 (explaining distinction between jus sanguinis, and jus soli, under which nationality is granted based upon birth within a country's territorial jurisdiction); see also P. Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 95-96 (2d ed. 1979) (describing distinction between two systems).


14. A citizen of Botswana is a Botswana, citizens are Batswana. Stack, supra note 8, at 6.6.0.5 n.7.

15. Thus, for example, the children of a Botswana citizen married to a South African refugee would be stateless. They would only be able to travel on United Nations High Commissioner for Refugees passports, and would not enjoy the protection of any government. Keto Segwai, More Women Challenge Citizenship Act, THE REPORTER (Bots.), Aug. 17-23, 1991, at 1.

16. Although the terms "nationality" and "citizenship" are often used interchangeably, the two concepts are not always synonymous. While all citizens are nationals of a State, not all nationals are citizens. Weis, supra note 12, at 5-6 (also noting that a few States create different categories of citizenship for their nationals). "Nationality" is often defined as the characterization a state makes of an individual for the purpose of controlling and protecting that individual. Myres S. McDougal et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER 737-38 (1980). Accordingly, nationality is a reciprocal relationship entitling one to the rights, and subjecting one to the burdens, of citizenship. Weis, supra note 12, at 239.
national law requires the State to provide.\(^{17}\) Although the international benefits of nationality have received the most attention from the community of nations,\(^{18}\) the domestic benefits of citizenship derived from nationality have tremendous importance in the daily lives of individuals in every State.\(^{19}\) These benefits may include the rights to vote, to hold public office, to public education, to permanent residency, to own land, to travel, and eligibility for employment.\(^{20}\)

Laws concerning the acquisition, retention and deprivation of nationality traditionally have been considered a sovereign function of the State under international law.\(^{21}\) That domestic

17. A State's most basic duty is to admit nationals to the state's territory. See H.F. van Panhuys, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 56 (1959) ("The duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it."). The right of the national to reside within the State's territory is a natural consequence of this duty. Weis, supra note 12, at 45, 239-241. A United Nations survey of international instruments and national laws concluded that the right to leave and return is "a legal obligation according to customary international law." C. Mubanga-Chipoya, Analysis of the Current Trends and Developments Regarding the Right to Leave any Country Including One's Own, and to Return to One's Own Country, and Some Other Rights or Consideration Arising Therefrom, at 11, U.N. Doc. E/CN.4/Sub.2/1987/10, quoted in Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 97 n.46 (1989). The national also gains from his or her state the benefit of diplomatic protection. See Weis, supra note 12, at 32-33.


20. McDougall et al., supra note 16, at 921-22 (discussing the harm resulting from the lack of a nationality).

21. The Permanent Court of International Justice, the precursor to the
laws define the acquisition and loss of nationality does not, however, preclude regulation by international law.\textsuperscript{22} Obligations under both customary international law and multilateral treaties limit the ability of States to grant or deny individuals nationality.\textsuperscript{23}

The development of international human rights law has eroded the traditional view that nationality laws are solely within the purview of sovereign States.\textsuperscript{24} Historically, only

International Court of Justice, set forth the traditional view of state sovereignity over nationality in 1923. Tunis and Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7). Although the Court appeared to contradict itself by ultimately finding that the Decrees issued in Tunis and Morocco and their application to British subjects were by international law not solely a matter of domestic jurisdiction, the Court did so on the exclusive facts of the case. \textit{WEIS, supra} note 12, at 73. Domestic law thus determines how and under what conditions one becomes a national of a State. \textit{Id.} at 3-9; see also Johannes M. M. Chan, \textit{The Right to a Nationality as a Human Right}, 12 Hum. RTS. L.J. 1, 1 (1991) (noting that States guard their control over nationality closely). Nationality laws are often part of individual States' constitutions. \textit{WEIS, supra} note 12, at 45 (providing examples).

There are two legal theories regarding the original acquisition of nationality. Countries following the \textit{jus soli} theory view nationality as derived from a territorial relationship and thus recognize the acquisition of nationality by birth within their territorial jurisdiction. \textit{Id.} at 95. Those countries recognizing the \textit{jus sanguinis} theory grant nationality only by descent. \textit{Id.} Some countries use aspects of both approaches in their nationalities laws. \textit{Id.} at 95-96 (noting increase in mixed systems). \textit{See generally} DAVID WEISSBRODT, \textit{IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL} § 12-1.2 (3d ed. 1992) (summarizing historical development of the two systems). Some scholars of international law define nationality as a reciprocal relationship of rights and obligations between an individual and a State. \textit{Id.} Other scholars conceive of nationality as a legal status which leads to rights and obligations as a consequence of possession of the status. \textit{VAN PANHUYS, supra} note 17, at 20. \textit{See generally} \textit{WEIS, supra} note 12, at 29-32.

\textsuperscript{22} \textit{WEIS, supra} note 12, at 240.

\textsuperscript{23} Article 38 of the Statute of the International Court of Justice delineates three generally accepted sources of international law: "international conventions, whether general or particular, establishing rules expressly recognized by contesting states; international custom, as evidence of a general practice accepted as law; [and] the general principles of law recognized by civilized nations." Statute of the International Court of Justice, 59 Stat. 1031, art. 38 (entered into force Oct. 24, 1945), \textit{reprinted in} FRANK NEWMAN & DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS at 9-11 (1990) [hereinafter SELECTED INSTRUMENTS]. \textit{See generally} THOMAS BURGENTHAL & HAROLD G. MAIER, \textit{PUBLIC INTERNATIONAL LAW IN A NUTSHELL} 19-34 (2d ed. 1990) (discussing the sources of international law).

\textsuperscript{24} \textit{See, e.g., Chan, supra} note 21, at 1 (noting that 60 years after the 1923 Tunis and Morocco Nationality Decrees decision of the Permanent Court of International Justice, the Inter-American Court of Human Rights recognized that nationality is an inherent right of all human beings). Chan notes a "clear trend towards a gradual recognition of an individual's right to a nationality," attributable to the many international instruments protecting fundamental
States, not individuals, were subjects of international law.\textsuperscript{25} Nationality provided the individual with a legal relationship to a State and therefore with a link to international law.\textsuperscript{26} Today, however, multilateral human rights treaties limit the ability of sovereign states to circumscribe individual rights,\textsuperscript{27} thus mak-

human rights irrespective of nationality, to national legislation, and to customary international law protecting civil and political rights. \textit{Id.} at 13. Chan also notes a global consensus on the undesirability of statelessness due to states’ recognition that any international effort to eliminate statelessness must encroach on state sovereignty over nationality laws. \textit{Id.; see also WEIS, supra note 12, at 256} (noting that the enactment of the United Nations Charter signaled that human rights were no longer exclusively a matter of domestic concern, and that further development of international law on nationality is linked with the development of the position of the individual in international law). The Inter-American Court of Human Rights further described this development in an Advisory Opinion concerning proposed amendments to the nationality provisions of the Costa Rican constitution. Advisory Opinion No. OC-4/84, Amendments to the naturalization provisions of the Constitution of Costa Rica, 1984 Inter-American Court of Human Rights, ¶ 32 (Jan. 19), reprinted in 5 HUM. RTS. L.J. 161-67 (1984) [hereinafter Advisory Opinion on Costa Rica’s Naturalization Provisions] (international human rights law imposes limits on a state’s jurisdiction over the conferral and regulation of nationality).

25. Nationality served as the basis on which a State gained standing to protect its national’s interests in international affairs. Chan, \textit{supra} note 21, at 1. But the state retained absolute sovereignty over granting nationality status. \textit{Id.}

26. \textsc{Weis, supra note 12, at 29.} Prior to the 20th century development of protections for individual human rights, individuals were simply objects of international law. \textsc{Gerhard von Glahn, Law Among Nations} 235 (1992). In his 1950 proposal for an International Bill of the Rights of Man, Professor Lauterpacht noted that the importance of a right to a nationality is predicated on “the existence of sovereign states claiming to be the indispensable link between the individual and international law.” \textsc{Lauterpacht, supra note 19, at 347.} Thus he proposed a right to the nationality of the State of birth. \textit{Id.} at 346.

27. \textit{See, e.g.,} Advisory Opinion No. OC-2/82, Entry into Force of the American Convention for a State Ratifying or Adhering with a Reservation, Inter-American Court of Human Rights, ¶ 29 (Sept. 24), \textit{reprinted in} 3 HUM. RTS. L.J. 152, 162 (1982) (noting that human rights treaties impose various obligations on States “not in relation to other States, but towards all individuals within their jurisdictions”); \textit{see also} Rosalyn Higgins, \textit{The European Convention on Human Rights, in} 2 HUMAN RIGHTS AND INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 495, 538 (Theodor Meron ed., 1984) (noting the importance for an individual to be able to bring a claim as a human rights law claim is that human rights law, unlike classical international law, imposes obligations upon states regarding their treatment of nationals and non-nationals alike, and provides individuals with the procedural capacity to defend their rights). While under contemporary \textit{international} law individuals have greater protections due to a legal framework embodying inalienable human rights which States may not violate regardless of an individual’s nationality, the \textit{domestic} benefits of nationality also underlie the need for protecting the right to a nationality in
ing the individual a subject of international law. A number of these treaties protect the individual’s right to acquire, retain, change, or confer one’s nationality, thus limiting state sovereignty over nationality laws.

International human rights law also recognizes a norm of non-discrimination on the basis of sex, further limiting state sovereignty over nationality laws. The preamble and two ar-

human rights treaties. See supra notes 6-10, 19 (discussing domestic benefits of nationality).

In drafting an International Bill of the Rights of Man, Professor Lauterpacht explained that despite the fact that human rights treaties require states to act regardless of the nationality of the individual, the problems associated with statelessness still require that the right to a nationality must be included in any Bill of Rights. LAUTERPACHT, supra note 19, at 347-48.

28. As a “subject” of international law, an individual has international rights and duties, and may bring international claims. IAN BROWNLIE, PRINCIPLE


29. The Preamble to the United Nations Charter commits the organization to good faith in fundamental human rights. This commitment is also found in Article 55 which states that “the United Nations shall promote: universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. CHARTER art. 55, ¶ c. Furthermore, Article 56 creates an affirmative obligation on member States to “take joint and separate action” for the achievement of the purposes set forth in Article 55. U.N. CHARTER art. 56.

The Universal Declaration of Human Rights is the authoritative interpretation of the obligation to protect human rights embodied in the United Nations Charter. Article 15 of the Universal Declaration not only provides that “[e]veryone has the right to a nationality,” but also protects the right to retain it, and the right to change it voluntarily. G.A. Res. 217 A(III), U.N. Doc. A/810, art. 15 (1948), reprinted in INTERNATIONAL INSTRUMENTS, supra note 18, at 1-7.


30. Women’s rights are specifically addressed in, for example, the U.N. CHARTER art. 55, ¶ c; the International Covenant on Civil and Political Rights, supra note 29, art. 4, ¶ 1; the International Covenant on Economic, Social and
cles of the Universal Declaration of Human Rights set forth the right to freedom from discrimination on the basis of sex.\textsuperscript{31} Despite this nearly universally accepted statement and similar anti-discrimination provisions in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the United Nations Commission on the Status of Women concluded in 1974 that continuing de facto discrimination against women around the world warranted drafting a separate treaty to demonstrate the international community's commitment to eliminating all forms of

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\item Article 2 of the Universal Declaration of Human Rights provides that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, \textit{supra} note 29, art. 2, \textsuperscript{1}1; \textit{see also id.} pmb., art. 7.
\end{enumerate}
\end{footnotesize}
sex discrimination.\textsuperscript{32}

The Convention on the Elimination of all Forms of Discrimination Against Women (Women's Convention) contains the most explicit and comprehensive prohibition of sex-based discrimination in nationality laws of any multilateral human rights treaty. It provides for full equality with men in all circumstances\textsuperscript{33} and expressly mandates equality with men with respect to the nationality of any children.\textsuperscript{34} The Women's Convention entered into force in September 1981 and as of July 31, 1992 has 116 State Parties.\textsuperscript{35}

Despite these prohibitions on gender discrimination in nationality laws, women in many countries, some of which are parties to the treaties, face continuing discrimination. Although nationality laws vary considerably from country to country,\textsuperscript{36} discrimination on the basis of sex generally takes one

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33. The Women's Convention contains both a definition of discrimination, Women's Convention, supra note 29, pt. 1, art. 1, and a requirement that States Parties undertake affirmative measures to eradicate that discrimination. Id. pt. 1, art. 2. It contains provisions regarding sex roles and stereotyping, prostitution, political and public life, participation at the international level, nationality, equal rights in education, employment, health care and family planning, economic and social benefits, rural women, equality before the law, and marriage and family law. Id. pts. 1-4.

34. Article 9 requires that:

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

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

Women's Convention, supra note 29, art. 9.


of several forms. First, a woman may face deprivation of her nationality upon marriage to a foreigner or a change in her husband's nationality.37 Second, although states frequently make

ds., 1923). The United Nations published several compilations of domestic nationality provisions in the 1950's. The PROBLEMS OF STATELESSNESS: CONSOLI-

In 1962, the Economic and Social Council published both a history of the development of the concept of equality for married women in nationality laws culminating in the adoption of the Convention on the Nationality of Married Women, id., and a study compiling and categorizing the nationality laws of 106 countries, U.N. DEPT. OF ECON. AND SOC. AFFAIRS, NATIONALITY OF MARRIED WOMEN: REPORT OF SECRETARY-GENERAL, U.N. Doc. E/CN.6/254/Rev. 1, U.N. Sales No. 64.IV.1 (1963). The annex to Nationality of Married Women contains a chart showing the legal effect of marriage on the nationality of women in each surveyed country, while the body of the report reproduces the constitutions, laws, and other legal instruments relating to nationality of each country. Id. at 122.

The best source of current information regarding states' nationality provisions as they relate to women is the reports submitted by States Parties to CEDAW, the Committee on the Elimination of Discrimination Against Women, which is charged with implementing the Women's Convention. See infra note 90 for a description of the reporting process.

This writer has reviewed every report submitted by States Parties to the Women's Convention as of July 31, 1992. The following countries have indicated that their nationality laws continue to discriminate against women: the Dominican Republic, Egypt, Ghana, Iraq, Jamaica, Kenya, Madagascar, Nigeria, the Philippines, Rwanda, Senegal, Sri Lanka, Tanzania, Thailand, Yemen, and the United Kingdom. See infra Appendix (providing summaries of Reports).

37. Until 1910, a wife automatically took her husband's nationality under almost all countries' laws, with the exception of some South American nations. HISTORICAL BACKGROUND, supra note 36, at 3. During the decades between 1910 and 1930, at least twenty countries changed their laws to grant greater independence to women; by 1930, however, most countries continued to re-

quire that a woman's nationality follow that of her husband. Id. at 3-4, 5. The first reforms of domestic laws often entailed the addition of a condition providing that a woman would lose her nationality upon marriage only if she ac-
quired her husband's nationality. Id. at 6. Previously, a woman's own state might have withdrawn her nationality upon her marriage even though her husband's state did not grant her his nationality. See id. at 4. The reform pre-

vented women from being rendered stateless by marriage. Another reform re-

quired a woman's consent before any change in her nationality could result from her marriage. Id. at 7. In 1922, the United States passed the Naturaliza-
special provisions for the naturalization of foreign spouses of nationals, States often either offer these provisions only to spouses of men and not to spouses of women, or have much more stringent requirements for male foreign spouses. Finally, some countries also discriminate against women's capacity to pass their nationality to their children, even those born in the mother's country of origin.

In other countries such discrimination continues, even in countries that automatically grant nationality to foreign wives of nationals. See, e.g., Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Philippines, at 77-78, U.N. Doc. CEDAW/C/13/Add. 17 (1989) (Philippine nationality laws automatically consider a foreign woman a Filipina if she marries a Filipino man). If her country of origin does not recognize dual citizenship she may lose her nationality upon the death of her husband. Malvina Halberstam & Elizabeth F. DeFeis, Women's Legal Rights 28-29 (1987) (noting that a country that has changed a woman's nationality to that of her husband may upon his death deny her re-entry into her country of origin because she is no longer a national).

This type of discrimination occurs in States using the jus sanguinis approach to the acquisition of nationality. See supra note 21 (under jus sanguinis nationality passes linearly, rather than territorially upon birth within the nation's borders). Many countries employing the jus sanguinis approach grant nationality through the father only. These discriminatory provisions deny citizenship to the children of a woman who marries a foreigner, while granting citizenship to the children of a man who marries a foreigner. This practice presents a serious problem in states with large numbers of immigrants or refugees where intermarriage with nationals occurs. The children of women married to foreigners will not be nationals in their mother's country and will be denied the benefits of citizenship. See infra notes 132-174 and accompanying text (discussing Dow). Unity Dow has stated that many women living in Botswana in rural areas near the South African border have married South Africans, unaware that their children are not legally citizens of Botswana. Marsha A. Freeman, Women, Law and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems, Address at the Windsor Twelfth Symposium on Law and Development, University of Windsor, Windsor, Ontario (March 1992) (available from the International Women's
Given this continuing discrimination, the question arises as to how women can use international human rights law to challenge discriminatory nationality laws. This Note examines and evaluates the international standards and implementation mechanisms. Part I discusses limitations on State sovereignty under customary international law. Part II describes and evaluates the effectiveness of the implementation mechanisms of various international treaties that proscribe gender discrimination in nationality laws. Part III explores the option of using international standards to influence the interpretation of domestic law through test cases. Part III also analyzes a test case which successfully challenged a discriminatory nationality provision in Botswana. This Note concludes by recommending stronger implementation mechanisms for the Convention on the Elimination of All Forms of Discrimination Against Women, and by urging the use of international fora to enforce treaty obligations and to create precedents recognizing nationality rights. This Note also advocates challenging domestic nationality provisions through test cases invoking international standards to interpret domestic law.

I. CUSTOMARY INTERNATIONAL LAW

Customary international law consists of norms reflecting the general practices that States follow due to a sense of legal obligation. Customary norms bind all governments. Consis-
tent state practice, generally defined as "widespread acceptance" of a norm, is evidence of the ripening of a norm into customary international law. Customary law norms are developing continuously, a process that often results in disagreement as to whether a given norm has risen to the status of customary international law.

Commentators disagree about whether a customary international norm exists prohibiting sex discrimination in nationality laws. Such a customary norm could derive from either customary law concerning nationality or from the evolution of a non-discrimination principle into international custom. Because nationality laws enjoy a presumption of sovereign privilege, international law scholars hesitate to conclude that new objected to the development of the norm are not bound. RESTATEMENT, supra note 41, § 102 cmt. d. When a new state comes into existence and is admitted to the community of nations, it is bound by existing customary international law. Id.; VON GLAHN, supra note 26, at 19.

43. See BROWNLIE, supra note 28, at 5-6 (quoting Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 4); VON GLAHN, supra note 26, at 20 ("Observed repeated practice by itself is not sufficient evidence of the existence of a rule of customary law; there must have evolved an obligatory, or binding, aspect to the practice in question.").

However, wide acceptance of international treaties, declarations, resolutions and other instruments has arguably become a more significant indicator of the creation of customary law in the human rights field than State practice. The authority for use of statutory international law in developing customary norms stems from Article 38 (1)(c) of the I.C.J. statute which allows the Court to apply "general principles of law recognized by civilized nations." MERON, supra note 17, at 98; NEWMAN & WEISSBRODT, supra note 41, at 595. See also MERON, supra note 17, at 99-102 (analyzing human rights norms as sources of customary international law).

44. See, e.g., MERON, supra note 17, at 99 ("Given the rapid, continued development of international human rights, the list [of norms rising to the status of customary international law] should be regarded as essentially open ended."); Oscar Schachter, International Law in Theory and Practice, in 178 RECUEIL DES COURS 21, 338 (1982).

45. NEWMAN & WEISSBRODT, supra note 41, at 595; VON GLAHN, supra note 17, at 19.

46. Compare THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 54 (1986) (noting that in contrast to racial discrimination, sexual discrimination does not reflect customary international law) and Schachter, supra note 44, at 335-36 (noting that State behavior does not comport with the claim that equality between men and women is international custom) with McDougAL ET AL., supra note 16, at 273-74, 326 (noting that the Universal Declaration of Human Rights provisions prohibiting discrimination on the basis of sex bind all nations as customary law) and RESTATEMENT, supra note 42, § 702, cmt. l ("[F]reedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law.").

47. See supra notes 21, 24-25.
customary international law norms regulating nationality have emerged.\textsuperscript{48} The foremost modern legal scholar of nationality cites the prohibition of discriminatory denationalization as the only nationality norm that possibly has attained customary international law status.\textsuperscript{49}

As for the international acceptance of a non-discrimination principle, although commentators have uniformly posited non-discrimination on the basis of race as a customary international law norm,\textsuperscript{50} non-discrimination on the basis of sex does not en-

\textsuperscript{48} See, e.g., \textit{Weis}, supra note 12, at 250 (criticizing as wishful thinking the work of other scholars who have claimed the elevation of nationality norms to customary international law status).

\textsuperscript{49} Id. at 248. \textit{Weis} does not, however, define "discriminatory." He believes that such a norm is more properly based on the non-discrimination principle in international law. \textit{Id.} at 247, 248. \textit{Weis'} conclusions complement those of other scholars of international law. \textit{See, e.g., Richard B. Lillich, \textit{Civil Rights}, in 1 \textit{Human Rights in International Law: Legal and Policy Issues} 154 (Theodor Meron ed., 1984) ("[U]ntil the prescriptions of Article 15 [of the Universal Declaration of Human Rights] receive wider and stronger support, the 'right to nationality' will remain a relatively meaningless right and certainly not one recognized by customary international law."); \textit{Van Panhuys}, supra note 17, at 222 (claiming that the right to nationality is a meaningless phrase without agreement among States on the conditions under which the nationality of a state might be legally demanded); \textit{Ruth Donner, The Regulation of Nationality in International Law} 148-49, 161 (1983) (claiming that the Universal Declaration of Human Rights is a morally but not legally binding document and that the provisions of the 1957 Convention on the Nationality of Married Women are not customary international law). \textit{But see} \textit{Chan}, supra note 21, at 10-11 (citing evidence of state practice among parties to the European Convention on Human Rights and the large number of bilateral and multilateral treaties with provisions aimed at preventing statelessness as evidence of the evolution of certain customary norms). \textit{Chan} submits that the right of a stateless child to the nationality of the State of its birth has now formed part of customary international law. \textit{Id.} at 11. \textit{He also posits that although customary international law mandates few positive duties to confer nationality, it creates a negative duty not to cause statelessness or to impede arbitrarily the exercise of a right to change one's nationality. Id.; see also \textit{Advisory Opinion on Costa Rica's Naturalization Provisions}, supra note 24, at 163.}

\textsuperscript{50} The Restatement of Foreign Relations Law recognizes the norm against "systematic racial discrimination" as constituting customary international law. \textit{Restatement}, supra note 42, § 702. Professor Schachter also includes such discrimination among the rights recognized in the Declaration of Human Rights which have a strong claim to customary international law status. \textit{Schachter}, supra note 44, at 336; \textit{see also Meron, supra note 46, at 7 (1986) (stating that the International Convention on the Elimination of All Forms of Racial Discrimination developed a fundamental norm of the United Nations Charter which is now "accepted into the corpus of customary international law—requiring respect for and observance of human rights and fundamental freedoms for all without distinction as to race"); Bayefsky, supra note 40, at 19 (suggesting that the norm of non-discrimination has become a rule of customary international law).
joy the same consensus. Historically, treaty drafters have viewed a norm of equality for women as impossible to achieve due to the reality of widespread discriminatory State practice and, therefore, as jeopardizing the universality of more general human rights treaties. Although a large number of countries have ratified the Women’s Convention, for example, more countries have ratified it with reservations than other human rights treaties. These reservations reduce the likelihood of recognition of the principle of non-discrimination on the basis

51. MERON, supra note 46, at 54 (noting that unlike the norm outlawing racial discrimination, no comparable norm against gender discrimination has developed); Schachter, supra note 44, at 335-36 (noting that State behavior does not comport with the claim that equality between men and women is international custom). But see Bayefsky, supra note 40, at 20-22 (noting six reasons why “international law indicates that distinctions based on sex in particular are deserving of the highest degree of scrutiny”).

52. This “problem” has led treaty drafters to include provisions allowing limited reservations to the gender-related provisions of broader treaties or to reject language or provisions proposed by women’s rights advocates as too threatening to the universal application of the treaty. See, e.g., LAUTERPACHT, supra note 19, at 338-40. In his 1950 proposal for an International Bill of the Rights of Man, Professor Lauterpacht reasoned that to “include specifically non-discrimination on account of sex among the obligations of the Bill is either to jeopardize, to that extent, its binding character or to make it impossible for some States to subscribe to it consistently with a determination to abide by its provisions.” Id. at 338-39.

For an example of an instance in which language proposed by women’s groups for inclusion in a treaty concerning women was rejected, see infra note 57, describing the process leading to the adoption of the Hague Nationality Convention during which suggestions made by women’s groups were systematically rejected; see also Cook, supra note 32, at 644 (“The Women’s Convention may face the paradox of maximizing its universal application at the cost of compromising its integrity.”).

53. A reservation is an indication made by a State upon ratification of a multilateral treaty that it does not intend to be bound by a particular provision of the treaty. See Vienna Convention on the Law of Treaties, May 23, 1969, pt. 1, art. 2, ¶ 1(d), 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Of the 116 States Parties to the Women’s Convention as of July 31, 1992, see supra note 35, more than 40 have ratified with reservations. See MULTILATERAL TREATIES, supra note 35, at 170-78 (providing reservations as of December 31, 1991); Cook, supra note 32, at 687-692. See generally Belinda Clark, The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women 85 AM. J. INT’L L. 281 (1991); Charlesworth et al., supra note 40, at 633-34. The Women’s Convention contains an article providing for limited reservations, but a significant number of states have also reserved from the general non-discrimination provisions, which form the heart of the treaty. Countries reserving generally from the definition of discrimination in Article 1 or from Article 2 are Libya, Tunisia (by declaration), United Kingdom, Bangladesh, Egypt, New Zealand (for the Cook Islands), and Iraq. MULTILATERAL TREATIES, supra note 35, at 170-76.

Many Islamic countries have reserved from the general non-discrimina-
of sex as customary international law.\textsuperscript{54}

Given the extent of current discriminatory State practice, the many reservations to the substance of the Women’s Convention, and the traditional deference to state sovereignty in nationality laws, no customary standard has emerged that binds all nations. Customary international law thus fails to provide a clear and universally recognized prohibition of gender discrimination in nationality laws.

II. STATUTORY INTERNATIONAL LAW

Treaties concerning gender discrimination and nationality laws are of two types: specialized treaties involving nationality,\textsuperscript{55} and general human rights treaties containing either a non-discrimination provision, or a provision on the right to a nationality, or both.\textsuperscript{56}

A. SPECIALIZED TREATIES

In 1930 the League of Nations began a period of development of treaties dealing with nationality laws by including nationality among areas of international law ripe for codification.\textsuperscript{57} The primary objective during this period was to

\textsuperscript{54} MERON, supra note 17, at 16.

\textsuperscript{55} See, e.g., Convention on the Nationality of Married Women, supra note 30.

\textsuperscript{56} See, e.g., Convention on the Nationality of Married Women, supra note 30.

\textsuperscript{57} The Hague Codification Conference of 1930 produced the Hague Nationality Convention. Several entities argued for the inclusion of non-discrimination principles. International women’s organizations submitted a draft convention to the Hague Conference which incorporated the general principle that a woman’s nationality should not be affected by marriage. See RESEARCH IN INTERNATIONAL LAW: NATIONALITY, RESPONSIBILITY OF STATES, TERRITORIAL WATERS, DRAFTS OF CONVENTIONS PREPARED IN ANTICIPATION OF THE FIRST CONFERENCE ON THE CODIFICATION OF INTERNATIONAL LAW 124 (1929) [hereinafter RESEARCH IN INTERNATIONAL LAW] (including text of the Provisional Draft Convention on the Nationality of Married Women which the International Woman’s Suffrage Alliance approved in Rome in 1923). The faculty of Harvard law school prepared a Draft Codification for the Hague Conference with a provision requiring that a woman retain her nationality after marriage to an alien unless she both acquires the nationality of her hus-
reconcile nationality laws and thereby reduce cases of double
nationality and statelessness. 58 International acceptance of the
principle of equality of the sexes in nationality laws first oc-
curred at the regional level. At a regional conference in 1933,
many American states signed the Montevideo Convention on
Nationality of Women and the Montevideo Convention on Na-
tionality. 59 The first convention provides that among parties,
"[t]here shall be no distinction based on sex as regards national-
ity in their legislation or in their practice." 60 The second pro-
vides that "[n]either matrimony nor its dissolution affects the
nationality of the husband or wife or of their children." 61

In 1957, the United Nations adopted the Convention on the
Nationality of Married Women. 62 The drafters envisioned this
treaty as a narrow response to an immediate problem, rather
than a treaty dealing with all aspects of discrimination against
women in nationality laws. 63 Although the U.N. Commission
on the Status of Women proposed a gender-neutral treaty con-
cerning the nationality of married persons, that approach was

band and establishes permanent residence in his country. Id. at 69; see
DONNER, supra note 49, at 55-61 (comparing the provisions of the Harvard
Draft and the Convention adopted at the Hague Conference). In spite of these
recommendations, the Convention merely conditioned the loss of a woman's
nationality upon marriage to an alien upon the woman's acquisition of her hus-
band's nationality. At the time of the Hague Conference, only five countries
did not grant their nationality to the wife of a national upon marriage. RE-
SEACH IN INTERNATIONAL LAW, supra, at 70. Hence, this restriction had lim-
ited practical application. After the Hague Conference, the Commission of
Representatives of Women's Organizations submitted a report to the Secre-
tary-General of the League of Nations stressing the importance of equality be-
tween the sexes and recommending reconsideration of the Hague Nationality
Convention and deletion of the "articles that discriminated against women." HISTORICAL BACKGROUND, supra note 36, at 11.

58. HISTORICAL BACKGROUND, supra note 36, at 10.
26, 1933, reprinted in Report of the Delegates of the United States of America
to the Seventh International Conference of American States, U.S. Dep't of
State, Conference Series No. 19 (1933).
60. Id. art. 1.
61. Id. art. 6.
62. Convention on the Nationality of Married Women, supra note 30. As
of December 31, 1991, there were 57 States Parties and 27 signatories to this
treaty. MULTILATERAL TREATIES, supra note 35, at 638. The Convention on
the Nationality of Married Women has had considerable effect by virtue of the
number of parties, 57, and its indirect influence on national legislation. WEIS,
supra note 12, at 248.
63. The drafters were concerned primarily with reducing the incidence of
statelessness resulting from compulsory denationalization of women upon
The treaty provides that neither the celebration nor the dissolution of a marriage shall automatically affect the nationality of the wife. It also expressly allows States Parties to grant wives of nationals naturalization privileges not given to husbands of nationals.

Although these early, specific treaties remain in effect, they have largely been superseded in practice by the more comprehensive instruments that make up the International Bill of Human Rights, by regionally-based human rights instruments and, in the field of gender discrimination, by the Convention on the Elimination of All Forms of Discrimination Against Women.

64. Id. at 13-24 (describing history of the consideration of the treaty within the United Nations system).

65. Convention on the Nationality of Married Women, supra note 30, arts. 1, 3. This treaty did not include provisions concerning equality with respect to children of the marriage. The only international body other than CEDAW to deal directly with the questions of the effect of the nationality of spouses on children of the marriage is the Council of Europe. The Committee of Ministers, a policymaking body comprised of representatives of the member states of the Council of Europe, NEWMAN & WEISSBRODT, supra note 41, at 464, adopted two resolutions in 1977. Resolution (77) 12 recommends that States move toward ending distinctions between spouses of men and women in naturalization laws as part of the broader movement toward the establishment of legal equality between the sexes. Nationality of spouses of different nationalities and nationality of children born in wedlock, Comm. of Ministers of the Council of Europe, Res. No. (77) 12 and Explanatory Memoranda (adopted May 27, 1977). Resolution (77) 13 recommends that States grant their nationality at birth to children born in wedlock if either the father or mother is a national, in order to give men and women equal rights concerning their children. Id. Res. No. (77) 13.

66. Convention on the Nationality of Married Women, supra note 30, art. 3. While naturalization provisions favorable to wives may seem to discriminate in favor of women, refusing to allow husbands to apply for special naturalization provisions has an adverse effect on female citizens which gender-neutral treaty language would prohibit. See infra notes 73-82 and accompanying text (discussing Aumeeruddy-Cziffra v. Mauritius). For a discussion of the ramifications of such discrimination and how to best characterize it, see Tom Mullen, Nationality and Immigration, in THE LEGAL RELEVANCE OF GENDER 158 (Sheila McLean & Noreen Burrows eds., 1988).


B. GENERAL HUMAN RIGHTS TREATIES

1. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights forbids discrimination on the basis of sex. The Covenant established the Human Rights Committee as a monitoring and enforcement mechanism. The Optional Protocol to the Covenant provides for a communications procedure whereby individuals may bring complaints to the Human Rights Committee concerning violations of their rights. Women have successfully used this mechanism to challenge sex discrimination in nationality and related laws.72


70. Id. arts. 28-45.

71. States subject to this procedure are those States Parties to the Political Covenant which have also accepted the Human Rights Committee's competence to consider individual communications by ratifying the Optional Protocol. Optional Protocol, supra note 68, art. 1.

72. The Human Rights Committee has heard two cases related to gender discrimination in nationality laws. In both cases, the Committee found the discrimination a violation of the International Covenant on Civil and Political Rights. See infra notes 73-82 and accompanying text (discussing discriminatory residency and naturalization provisions in Aumeeruddy-Cziffra v. Mauritius).

The Human Rights Committee's decision in Lovelace v. Canada, Communication No. R.6/24, U.N. GAOR, 36th Sess., Supp. No. 40, at 165, U.N. Doc. A/36/40, reprinted in 2 HuM. RTS. L.J. 158-67 (1981), provides less guidance than the Aumeeruddy case. Sandra Lovelace, a 32-year old woman living in Canada, was born and registered as a “Maliseet Indian” in accordance with Canada's Indian Act. Id. ¶ 1. She later married a man who was not a member of the tribe and consequently lost her status as a member of the tribe under another provision of the Indian Act. Id. In contrast, male members of the tribe did not lose their status as Indians under the Act upon marrying outside the tribe. Sandra Lovelace challenged this discriminatory provision in a communication to the Human Rights Committee under the Optional Protocol.

Lovelace alleged that the Act was contrary to Articles 2 (1), 3 and 26, the sex discrimination and equal protection provisions, Articles 23 (1) and (4), the provisions relating to the protection of the family and the equality of spouses, and Article 27, the provision protecting the rights of minorities. Id. The Human Rights Committee acknowledged that the right to protection of family life and children under Articles 17, 23 and 24, the right to choose one's residence under Article 12, and the right to nondiscrimination on the basis of sex under Articles 2, 3 and 26 were potentially implicated in the case, but declined to reach the merits on these issues. Id. ¶ 18.

The Committee, however, found that denying Sandra Lovelace the right to reside on the reserve was unreasonable and not necessary to preserve the identity of the tribe. Thus, “read in the context of the other provisions,” the Act, by preventing her recognition as a member of the band, violated her
The Human Rights Committee addressed sex discrimination in statutes regulating the residency and naturalization of aliens married to nationals in *Aumeeruddy-Cziffra v. Mauritius.* In 1977, Mauritius amended its Immigration Act and Deportation Act to limit residency rights of alien husbands married to Mauritian women, but not of alien wives of Mauritian men. Twenty Mauritian women challenged the laws through a communication to the Human Rights Committee. The women challenged the statutes as violations of the sex-discrimination provisions of the International Covenant on Civil and Political Rights, the equal protection provision, the provision securing the right to participation in public affairs, and the provisions for protection of the family. In its submission to the Human Rights Committee, Mauritius admitted that the statutes discriminated on the basis of sex, that choosing to leave the country because her husband cannot stay in Mauritius may affect a woman’s ability to exercise her rights to participate in public affairs, and that the exclusion of a person whose family is living in the country may result in an infringement of that person’s rights to family life. Mauritius stated, however, that if the exclusion of a non-citizen is lawful and based upon security or public interest grounds, it cannot be an arbitrary interference with the family life of its nationals.

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73. *Aumeeruddy-Cziffra v. Mauritius,* supra note 38, at 139; see also Bayefsky, supra note 40, *passim* (analyzing the non-discrimination jurisprudence of the Human Rights Committee).


75. International Covenant on Civil and Political Rights, *supra* note 29, art. 2, ¶¶ 1, 3.

76. *Id.* art. 26.

77. *Id.* art. 25.

78. *Id.* arts. 17 and 23.

The decision of the Human Rights Committee in the Aumeeruddy-Cziffra case rested primarily upon the International Covenant on Civil and Political Rights' prohibitions against sex discrimination. The Committee stated that parties to the Covenant cannot limit a right guaranteed by the Covenant in a gender discriminatory fashion, regardless of whether the restriction would be independently permissible in isolation. The Committee also found that the Mauritius laws interfering with the family protection provisions violated the Covenant's prohibition of sex discrimination.

Although the Human Rights Committee has heard few cases on the subject of nationality, the result in Aumeeruddy-Cziffra is promising. The Human Rights Committee has also stated in three out of nineteen General Comments that it considers some types of discrimination in nationality and immigration provisions to be contrary to provisions of the International Covenant on Civil and Political Rights. A barrier remains, however, in the requirement that a complainant assert infringe-
ment of a specific provision of the International Covenant on Civil and Political Rights on the basis of sex. Unlike the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights does not recognize a general right to a nationality. A complainant, therefore, must argue infringement of a woman’s right to marry and form a family, her right to participate in public affairs, or some other independent right guaranteed by the Covenant on which the discriminatory nationality law impinges. Thus, a complainant cannot be guaranteed a hearing in this forum.

2. Convention on the Elimination of All Forms of Discrimination Against Women


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84. See supra notes 72-82 and accompanying text (discussing Lovelace and Aumeeruddy-Cziffra v. Mauritius).
85. See supra note 29 (noting that Article 15 of the Universal Declaration of Human Rights provides that everyone has the right to a nationality and also protects against arbitrary denial of a nationality or the right to change nationality).
86. Although the International Covenant on Civil and Political Rights was drafted to make binding treaty obligations of the Universal Declaration of Human Rights, Article 24(3) of the International Covenant on Civil and Political Rights, providing that “every child has the right to a nationality,” contains the only mention of nationality. International Covenant on Civil and Political Rights, supra note 29, art. 24, ¶ 3. The International Covenant on Civil and Political Rights does not create any binding obligation upon States Parties to grant their nationality. Nor does it protect against arbitrary deprivation or provide a right to change nationality, as did Article 15(2) of the Universal Declaration of Human Rights. See Chan, supra note 21, at 4-5 (discussing the travaux préparatoires of the International Covenant on Civil and Political Rights concerning the nationality provision and noting that the provision does not necessarily require states to confer nationality on every child born in their territory). See generally MARC J. BOSSUYT, GUIDE TO THE “TRAvaUX PrEPARATOIRES” OF THE INTERNAtIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1987) (providing extensive discussion of legislative history).
87. Conflicting priorities of the Human Rights Committee may also jeopardize results in some cases. See supra note 72 (discussing Lovelace and noting that although the communicant prevailed in that case, the Human Rights Committee based its decision on her right to participate in her minority as defined in Art. 27, rather than on sex discrimination).
88. See supra notes 33-34 (describing provisions of Women’s Convention).
89. Women’s Convention, supra note 29, art. 17.
empowered CEDAW to require and review reports from States
Parties about their nationality laws, and question States' repre-
sentatives on their compliance with the treaty.90

Although the treaty has a large number of States Parties
bound to enforce its provisions,91 the Women's Convention has
the weakest implementation mechanisms of any human rights
convention adopted since 1965.92 Even non-reserving States
Parties to the Women's Convention are bound only to submit
periodic reports on their compliance with the treaty to
CEDAW.93 The treaty contains no provision for individual or
inter-State complaints to the Committee.94 CEDAW itself

90 Id. arts. 20-21. CEDAW is empowered to consider reports submitted
by States Parties and to make suggestions and general recommendations based
on its examination of the reports and information it receives from States Par-
ties. Id. art. 20. Under the reporting scheme, parties to the Women's Conven-
tion must submit reports to the Secretary-General of the United Nations
concerning "the legislative, judicial, administrative or other measures which
they have adopted to give effect to the provisions of the [convention] and on
the progress made [in that regard]." Id. art. 18. These reports must be filed
within one year after the State becomes a party and at least once every four
years thereafter. Id. Several shortcomings of the reporting scheme have been
noted. See infra Appendix. The most comprehensive analysis of the reporting
process and its strengths and weaknesses can be found in Byrnes, supra note
83, at 12-28 (discussing submission and adequacy, status and quality of the
reports, the problem of overdue and inadequate reports, the "constructive dia-
logue" of the reviewing process, CEDAW's procedures, follow-up, and the
problems created by the current backlog of reports). Byrnes notes that the
differential treatment of men and women in nationality laws has been a topic
of questioning by CEDAW. Id. at 29. CEDAW's documentation function can
be extremely valuable. See supra note 36 (indicating that CEDAW reports and
reports of States Parties to the Women's Convention comprise the only cur-
cent collection of information on the nationality laws of individual states). On
the importance of disseminating States Parties' reports to CEDAW, see
Byrnes, supra note 83, at 8, 65-66.

91 See supra note 35 (as of July 31, 1992, 116 States are parties to the Wo-
men's Convention).

92 Holt, supra note 30, at § 17.02[3][d][ii][c][1]. See generally Sandra
Coliver, United Nations Machineries on Women's Rights: How Might They
Better Help Women Whose Rights Are Being Violated?, in New Directions in

93 Women's Convention, supra note 29, art. 18. See supra note 90 (noting
that reports are required only once every four years). But cf. DOMINIC MC-
GOLDRICK, THE HUMAN RIGHTS COMMITTEE, ITS ROLE IN THE DEVELOPMENT
OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 98-104
(1991) (characterizing reporting system as successful).

94 Part V of the Women's Convention provides for implementation
mechanisms. Women's Convention, supra note 29, art. 21. For comparisons of
the implementation mechanisms of CEDAW with the committees established
to implement other human rights treaties, especially the Convention on the
Elimination of Racial Discrimination and the International Covenant on Civil
meets for shorter periods\textsuperscript{95} and has fewer enforcement mechanisms and fewer resources than other human rights treaty bodies, including the Committee on the Elimination of Racial Discrimination.\textsuperscript{96}

Another barrier to implementation of the Women's Convention stems from the number of reservations to its substantive provisions.\textsuperscript{97} As of December 1991, three states had ratified with general reservations to the treaty as a whole, and seven states had ratified with a reservation to Article 2, the basic non-discrimination statement upon which the remaining substantive articles expand.\textsuperscript{98} Ten countries currently maintain reservations to the nationality provision.\textsuperscript{99}

CEDAW has recently shown signs of improving implementation of the Women's Convention, addressing many of the problems outlined above. CEDAW recently affirmed its power to issue General Comments, authoritative interpretations of the treaty provisions similar to those promulgated by the Human Rights Committee.\textsuperscript{100} The Committee recently adopted a Gen-

\textsuperscript{95} ANDREW BYRNES, INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, CEDAW No. 10: BUILDING ON A DECADE OF ACHIEVEMENT: A REPORT ON THE TENTH SESSION OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 12 (1991). As Byrnes notes in this report, Article 20 of the Women's Convention states that the Committee should normally meet for a two-week session. \textit{Id.} at 13. He and others have described the significant backlog of reports of States Parties awaiting review by CEDAW created by the inadequate meeting time. \textit{Id.} at 12; Byrnes, supra note 83, at 27; see also Coliver, \textit{supra} note 92, at 35-37.

\textsuperscript{96} Holt, \textit{supra} note 30, § 17.02[3][d][ii][c][1]; Byrnes, \textit{supra} note 83, at 5 n.18, 57-59 (noting that CEDAW is in a "particularly disadvantaged" position because it began with such a low level of secretariat support). Although the United Nations Charter recognizes the protection of human rights as one of its four purposes, the U.N. has allocated only 0.7\% of its budget to achieving that purpose. Torkel Opsahl, \textit{Instruments of Implementation of Human Rights}, 10 Hum. RTS. L. J. 13, 33 n.58 (1989).

\textsuperscript{97} See Cook, \textit{supra} note 32, at 643-44; Clark, \textit{supra} note 53, at 316-20.

\textsuperscript{98} See MULTILATERAL TREATIES, \textit{supra} note 35, at 170-78.

\textsuperscript{99} See \textit{id.} Egypt's reservation, for example, states that "it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality," yet it asserts that this custom does not infringe on the principle of equality between men and women. \textit{Id.} at 171. Ireland withdrew its reservation to Art. 9 on Dec. 19, 1986. \textit{Id.} at 182 n.15. Jordan, however, recently ratified with a reservation to Article 9(2). \textit{See supra} note 35.

\textsuperscript{100} CEDAW decided at its 1992 session to begin making general comments on each substantive article of the Convention starting in 1993 at its Twelfth Session. CEDAW included Article 9 as one of three articles it will address first, in preparation for the International Year of the Family in 1994. ARVONNE S. FRASER & MIRANDA KAZANTZIS, INTERNATIONAL WOMEN'S
eral Recommendation on reservations as part of a strategy to
deal with the issue of extensive reservation of the treaty provi-
sions.\textsuperscript{101} CEDAW met for four additional days in 1988, and ob-
tained approval for a three-week session in 1993.\textsuperscript{102} It has also
established working groups which meet prior to its two-week annual meeting.\textsuperscript{103} Although these developments are signifi-
cant, CEDAW still has limited capacity at the present time to
enforce the norms codified in the Women’s Convention. De-
spite the recommendations of several commentators,\textsuperscript{104} CEDAW recently decided against pursuing an optional protocol
to create an individual communication procedure.\textsuperscript{105} Thus, un-

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RIGHTS ACTION WATCH, CEDAW No. 11, 10 (1992). For a comparison of the
use of the power to issue general comments or recommendations by the
Human Rights Committee, by the Committee on the Elimination of Racial
Discrimination, and by CEDAW, see Byrnes, supra note 83, at 42-51.

101. The inherent weakness of the treaty itself has rendered it difficult for
CEDAW to address the many reservations to the Women’s Convention.
Whereas the International Convention on the Elimination of all Forms of Ra-
cial Discrimination provided that a reservation will be considered incompatible
with the Convention if at least 2/3 of the States Parties object to it, the Wo-
men’s Convention contains no analogous provision. \textit{Id.} at 55. The issue of res-
ervations has been raised at the Ninth, Tenth, and Eleventh CEDAW
meetings. At the Eleventh Meeting, the Committee adopted General Recom-
mandation No. 20 requesting that the Chairperson of the Committee raise the
issue of reservations to human rights treaties at the preparatory meetings for
the 1993 world human rights conference. FRASER & KAZANTSIS, \textit{supra} note
100, at 11. \textit{See generally} Cook, \textit{supra} note 32; Clark, \textit{supra} note 53 (analyzing
the legal status of reservations to the Women’s Convention).

102. \textit{Byrnes, supra} note 95, at 12; \textit{Fraser & Kazantsis, supra} note 100, at
7.

103. \textit{Byrnes, supra} note 95, at 14. \textit{But see} Theodor Meron, \textit{Enhancing the
Effectiveness of the Prohibition of Discrimination Against Women}, 84 AM. J.
INT’L L. 213 (concluding that attempts to reduce CEDAW’s backlog in reviewing
reports by convening a pre-sessional working group “have not fully served
the purpose” and that a better solution is needed).

104. \textit{See, e.g.,} Meron, \textit{supra} note 103, at 216-17.

105. Fraser and Kazantsis report that CEDAW decided not to pursue op-
tional substantive or procedural protocols because the effort required to create
and adopt international procedural mechanisms would detract from CEDAW’s
efforts to eliminate discrimination against women by making substantive
changes at the national and local levels. FRASER & KAZANTSIS, \textit{supra} note 100,
at 4. CEDAW may also have considered its experience with reservations to be
indicative of the likelihood that States Parties would ratify such a protocol.
For example, eighteen countries have entered reservations to Article 29, which
provides for arbitration of disputes by the International Court of Justice.
MULTILATERAL TREATIES, \textit{supra} note 35, at 169-83. The experience of the
Human Rights Committee is also instructive. Of the 100 countries that have
ratified the International Covenant on Civil and Political Rights, only 60 have
accepted the jurisdiction of the Human Rights Committee over individual com-

like the Human Rights Committee or the regional human rights bodies, CEDAW provides no help in individual cases.

C. REGIONAL HUMAN RIGHTS TREATIES

In addition to the human rights treaties adopted under the auspices of the United Nations, regional intergovernmental organizations in Europe, Africa and the Americas have developed systems for the protection of human rights. The American Convention on Human Rights, adopted under the auspices of the Organization of American States, is the only internationally binding instrument that contains a general right to a nationality.

The most encouraging recent international development in the enforcement of a non-discrimination norm in nationality laws is the 1984 advisory opinion by the Inter-American Court

communications by ratifying the Optional Protocol. MULTILATERAL TREATIES, supra note 35, at 133, 161.

Byrnes has suggested that CEDAW encourage the development of the confidential communications procedure of the Commission on the Status of Women as an alternative. Byrnes, supra note 83, at 63.


107. Chan, supra note 21, at 5. Article 20 of the Convention provides that:

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

American Convention, supra note 29, art. 20. The American Convention also contains a non-discrimination provision and an equal protection provision. Id. arts. 1(1), 24.
of Human Rights regarding the compatibility of proposed amendments to Costa Rica’s naturalization laws with the American Convention. Applying the nationality and non-discrimination provisions of the Convention to Costa Rica’s proposed amendments, the Inter-American Court recognized that arbitrary deprivation of nationality would result in the effective deprivation of all of the civil and political rights that nationality provides. The court further stated that the determination of a person’s nationality no longer lies within the sole jurisdiction of States, but that international law and the international system for the protection of human rights impose limits on

108. Advisory Opinion on Costa Rica's Naturalization Provisions, supra note 24. This decision, resulting not from an adversarial process, but from a request by the government of Costa Rica for an advisory opinion, id. ¶ 8, is the most definitive statement to date from an international body that gender discrimination in nationality laws violates human rights principles.

The European Court of Human Rights addressed gender discrimination in the immigration laws of the United Kingdom in Abdulaziz Cabales v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 45 (1985). This case suggests that the regional human rights machinery in Europe will examine critically nationality laws which discriminate on the basis of sex. The applicants in Abdulaziz Cabales challenged immigration laws granting unequal rights for male and female immigrants settled in the U.K. to obtain permission for their alien spouses or fiancé(e)s to enter or remain in the country, rather than rights to obtain U.K. citizenship or nationality. Id. at 11. Because the European Convention does not mention immigration or nationality, the applicants based their claims on Art. 3 (degrading treatment) and Art. 8 (respect for family life) in conjunction with Art. 14 (right to enjoyment of rights guaranteed by the Convention without regard to race, sex, etc.). Id. Declining to find independent violations of either Art. 3 or Art. 8, the Court found that “Article 14 taken together with Article 8 [had] been violated by reason of discrimination against each of the applicants on the ground of sex.” Id. at 45. In its judgment the Court stated that “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.” Id. at 38. But see Bayefsky, supra note 40, at 22-23 (reporting a decision of the European Commission of Human Rights upholding a discriminatory practice).

The Abdulaziz Cabales case may prove to be persuasive in nationality cases because the European Court of Human Rights rejected the discriminatory provisions as unjustified by general immigration policies that do not involve the additional consideration of nationality as a human right and traditionally enjoy a presumption of sovereign privilege. For a critical analysis of the practical effect of the decision, see Mullen, supra note 66, at 159-161 (detailing the minimal government response to the decision—eliminating only the discriminatory provision challenged and retaining many other discriminatory provisions in the immigration laws—and suggesting that the remaining provisions are open to challenge under the European Convention).

States' powers. Weighing the various provisions of Costa Rica's proposed amendments to its naturalization laws, the court allowed the State significant sovereign prerogatives to accord preference to certain groups in its naturalization provisions, but found that granting naturalization rights to wives but not to husbands of Costa Ricans constituted sex discrimination in violation of the human rights principle of sex equality. The Court found that the amendments constituted discrimination violative of Article 17(4) of the American Convention on Human Rights concerning equality of rights and responsibilities within marriage, and Article 24, the equal protection provision of the American Convention.

Appeal to an international treaty body, however, is not available in all cases. Individual communications are available only for complaints against States Parties to the International Covenant on Civil and Political Rights and its Optional Protocol, member states of the OAS under the American Declaration or the American Convention and some States Parties to the European Convention. Each implementation body imposes requirements for the submission of communications. For

110. Id. ¶¶ 32, 38.
111. Id. ¶¶ 59-63.
112. Id. ¶ 67. The court noted that the proposal was based on two assumptions underlying the principle of family unity: 1) that all members of a family should have the same nationality; 2) traditional notions of paternal authority over the marital domicile and marital property. Thus "the right accorded to women to acquire the nationality of their husbands was an outgrowth of conjugal inequality." Id. ¶ 64.
113. Id.
114. Under the Inter-American system, all member states of the OAS are subject to the right of individual petition, either because they are parties to the American Convention or through the obligations imposed by the Charter of the Organization of American States. BUERGENTHAL ET AL., supra note 106, at 113. An individual may only bring a case before the Inter-American Court of Human Rights, however, if the State Party has accepted the jurisdiction of the Court under Article 62 of the American Convention. Otherwise the petition will be considered only by the Inter-American Commission on Human Rights. Id. at 114. States may seek advisory opinions directly from the Inter-American Court of Human Rights. Id. at 26.

Although the European Convention provides for individual complaints against those High Contracting Parties which have separately recognized the competence of the European Commission of Human Rights to receive them, the European Convention does not contain a right to nationality or to be free from discrimination in nationality laws. In order to succeed, a communicant would have to assert improper infringement upon a right guaranteed by the Convention on the basis of sex. See European Convention, supra note 30, arts. 8, 12, 13, 14. For an analysis of non-discrimination jurisprudence under the European Convention, see Bayefsky, supra note 40.
example, a complainant normally must prove that she has exhausted domestic remedies.\textsuperscript{115} Weak enforcement mechanisms and the significant time required to process a complaint hinder the effectiveness of international treaty bodies. Such limitations on enforcing human rights norms through international human rights treaty bodies suggest a need for alternative approaches.

III. USE OF HUMAN RIGHTS NORMS IN DOMESTIC COURTS

Customary international law and treaty obligations may be invoked in domestic courts. Customary international law binds all States.\textsuperscript{116} The binding nature of a treaty depends on whether a country takes a monist or a dualist approach to international obligations. Under a monist approach a country considers treaty obligations part of its domestic law and actionable in domestic courts.\textsuperscript{117} A country following a dualist approach requires the implementation of domestic legislation to make international agreements binding in domestic courts.\textsuperscript{118} Therefore, depending on a state’s approach, a party may cite treaty obligations as binding on the government or as a means of interpreting domestic statutes or constitutions so as not to conflict with international obligations.

A developing body of law in common law countries evidences growing jurisprudential support for applying international standards in domestic cases. Two high-level judicial colloquia for senior Commonwealth judges\textsuperscript{119} have addressed

\textsuperscript{115} See Optional Protocol, supra note 68, art. 2; American Convention, supra note 29, art. 46(i)(a); European Convention, supra note 30, art. 26. This Note advocates the process of exhausting domestic remedies to inform domestic courts of the government’s international obligations. This approach assumes the existence of a functioning legal system. In the absence of adequate domestic remedies, an international forum provides the only possible option. The Optional Protocol to the International Covenant on Civil and Political Rights, for example, allows the Human Rights Committee to consider submissions without exhaustion of domestic remedies “where the application of the remedies is unreasonably prolonged.” Optional Protocol, supra note 68, art. 5; see also Buerenthal, supra note 106, at 93-98, 148-49.

\textsuperscript{116} See supra note 42 (when a norm rises to the level of customary law, countries are bound even if not signatories to a treaty codifying the norm); see also Meron, supra note 17, at 3.

\textsuperscript{117} See Newman & Weissbrodt, supra note 41, at 554; see also Vienna Convention, supra note 53, art. 18 (stating that states cannot use domestic laws to defeat treaty obligations).

\textsuperscript{118} Newman & Weissbrodt, supra note 41, at 554.

\textsuperscript{119} Judicial Colloquium in Bangalore, Developing Human Rights
the subject of the domestic application of international human rights norms. These conferences, the first held in Asia in 1988 and the second in Africa in 1989, resulted in the adoption of the Bangalore Principles and the Harare Declaration of Human Rights. These collective statements reflect a recognition by senior Commonwealth judges of the role that judges can and should play in implementing international human rights standards.

The Bangalore and Harare statements recognize that "a new process has begun" as judges in diverse jurisdictions "have begun to have recourse to, and to interpret fundamental rights and obligations against the background of, international human rights norms." The statements advocate using international human rights norms to resolve ambiguity or uncertainty in national constitutions and legislation and to fill gaps in the com-


121. The colloquium held from February 24 - 26, 1988, in Bangalore, India, included Chief Justices from Zimbabwe and Pakistan, a Deputy Chief Justice from Papua New Guinea, Justices from India, Australia, Mauritius, and Sri Lanka, a judge from the United States, and representatives of the United Kingdom and Malaysia. BANGALORE COLLOQUIUM, supra note 119, at xi.

122. The attendees at the Colloquium held from April 19-22, 1989, in Harare, Zimbabwe, included the Chief Justices of Zimbabwe, Gambia, Lesotho, Botswana, Malawi, Kenya, Tanzania, the Seychelles, and Zambia, as well as Justices from Nigeria, India, Zimbabwe, Australia, Mauritius, Ghana, and Malawi and a Recorder, Queens Counsellor from the United Kingdom. HARARE COLLOQUIUM, supra note 119, at 9.

123. Bangalore Principles, in BANGALORE COLLOQUIUM, supra note 119, ix, ix.


126. Shridath S. Ramphal, Introduction by the Commonwealth Secretary-General, in BANGALORE COLLOQUIUM, supra note 119, vii, vii; Shridath S. Ramphal, Introduction by the Commonwealth Secretary-General to the First Colloquium, in HARARE COLLOQUIUM, supra note 119, 7, 7.
They also cite the need for education to ensure that judges, lawyers, and litigants are aware of applicable human rights standards. The Harare Declaration noted recent cases from the highest courts of Australia, India, Mauritius, the United Kingdom, and Zimbabwe that have adopted international norms.

Several international human rights scholars and activists have also pointed to domestic implementation as the preferred long-term mechanism for enforcement of human rights norms. Such an approach implicitly relies on domestic acceptance of international standards. Acceptance may result from participation in developing the norms or from the power of moral suasion the standards attain in the international community. Proponents of domestic implementation argue that “[t]he provision of local remedies is a key element in the implementation of rights. While the content of rights may be set at the [international] level, individuals should be able to enjoy them — and to ensure that enjoyment — locally.”

A. Unity Dow’s Case

An example of a successful case invoking international standards and obligations to interpret a domestic constitution and nationality law is Dow v. Attorney General of Botswana.

130. Rosalyn Higgins, Some Thoughts on the Implementation of Human Rights, 89/1 BULL. OF HUM. RTS. 60, 64-65 (1990); Opsahl, supra note 96, at 32 (noting that domestic implementation is central, because all violations occur on the national level, and the secondary nature of international instruments precludes their timely and effective involvement in individual cases); see also Louis B. Sohn, Human Rights: Their Implementation and Supervision by the United Nations, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 369, 370 (Theodor Meron ed., 1984) (noting that most international agreements rely on legislative enactments of States Parties for enforcement); Byrnes, supra note 83, at 8 (“The ultimate criterion for success [for CEDAW] is whether the process contributes to a greater awareness and observance of the human rights of women in domestic fora.”); Freeman, supra note 39, passim (advocating use of women’s human rights in domestic cases).
131. Higgins, supra note 130, at 64.
132. In re Dow v. Attorney Gen. of Bots., Case No. Misc. A. 124/90 (High Ct. 1991). Since 1966, Botswana has been governed as a multiparty democracy with the dual customary and common law legal system that characterizes many African countries as a result of colonization. Stack, supra note 8, at 6.60.5-6 (summarizing history through period of British colonization); Athaliah...
Unity Dow, a Botswana lawyer, is married to Peter Nathan Dow, a U.S. citizen. Under Botswana's amended Citizenship Act, the two younger children, who were born after the marriage, were denied Botswanan citizenship and are aliens in the land of their birth. Unity Dow challenged the constitutionality of the discriminatory provisions of the Citizenship Act by bringing suit in the High Court of the Republic of Botswana in May 1990. In June 1991, the High Court ruled in her favor, prompting banner headlines in the national press reading “CONSTITUTION WRONG.” In 1992, the Court of Appeal upheld the

Molokomme, *Women's Law in Botswana, in The Legal Situation of Women in Southern Africa (2 Women and Law in Southern Africa)* 7, 8 (Julie Stewart & Alice Armstrong eds., 1990). During the colonial period, the law applicable to non-Africans was Roman-Dutch law received from what is now part of South Africa. Id. at 9. Africans were subject to what is now called “customary law,” the traditional laws and practices of the various peoples who inhabited the area. *Id.* at 8-9. See generally Athaliah Molokomme, *Botswana: Women and Customary Law, in Empowerment and the Law: Strategies of Third World Women* 116, 117-19 (Margaret Schuler ed., 1986) (summarizing evolution of customary law in Botswana). This dual legal system was retained in Botswana after independence in 1966. Molokomme, *Women's Law in Botswana, supra,* at 10. In the dual court system, customary and common law courts exist in tandem in a single hierarchy. *Id.* at 11.

134. *Id.* at ¶¶ 8-10.
135. See *supra* note 13 (1984 amendments provided that a child born in Botswana would be a citizen of Botswana if the father is a citizen, or, in the case of a child born out of wedlock, if the mother is a citizen).
136. The children’s status as aliens means that they must receive residency permits which they can obtain only as part of their father’s permit. Botswana grants these permits for no more than two years and only if the father is able to remain in the country. See *supra* notes 6-7 and accompanying text. In *Dow,* the Court of Appeal noted that “for some time, at least, two of [Dow’s] three children had no more than three months granted each time for their stay in Botswana.” *In re Attorney Gen. v. Dow,* Court of Appeal No. 4/91 (Ct. App. 1992) (Bots.), at 63. The children may not travel outside of Botswana except on their father’s passport; thus they cannot leave or return to Botswana with their mother alone. As aliens, the children are not eligible for government-sponsored financial assistance for a University education which is available to citizens. Applicant’s Argument (Oct. 23, 1990), *supra* note 6, at ¶¶ 12-13. Essentially, the children are denied the civil and political rights of citizens. See *supra* text accompanying notes 6-10.
137. Applicant’s Affidavit, *supra* note 2, ¶¶ 13, 15, 17, 19, 20, 22.
An analysis of Dow's arguments, the government's response—both before the court and in private communications—and the judgment, demonstrates the benefits she and other potential plaintiffs gained from invoking international standards. Dow claimed that the Citizenship Act of 1984 violated provisions of the Constitution of Botswana guaranteeing liberty, equal protection of the law, immunity from expulsion, and

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140. The Court of Appeal, Botswana's highest court, hears appeals from the High Court, holding sessions only when necessary. Stack, supra note 8, at 6.60.9.

141. In re Attorney Gen. v. Dow, Court of Appeal No. 4/91 (Ct. App. 1992) (Bots.) (3-2 decision). The ruling below held that both section 4 of the Citizenship Act of 1984, applicable to children born in Botswana, and section 5, applicable to children born outside of Botswana, were ultra vires of the Constitution. While upholding the decision, the Court of Appeal confined its decision to section 4, striking the reference to section 5. Id. at 65-66. See infra notes 173-174 (summarizing the Court of Appeal opinions).

142. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 3.1. Section 3 of the Botswana Constitution provides that "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his [or her] ... sex ... to" "(a) life, liberty, security of the person and the protection of the law." BOTS. CONST. ch. II, § 3, reprinted in Patricia E. Larkin et al., Botswana, in 2 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD § 3, at 19 (Albert P. Blaustein & Gisbert H. Flanz eds., 1989) [hereinafter CONSTITUTIONS].

Dow argued that the right to liberty guaranteed by Section 3 of the Constitution includes the right to marry freely and found a family. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 10.1. She maintained that the Citizenship Act violated this liberty interest by not securing the right of residence of children born to Batswana women who are married to aliens. Id. ¶ 11. Naturalization in Botswana generally requires 10 years of residency. Citizenship Act, No. 25 of 1982, § 11 (Bots.). The amendments, however, allow for the naturalization of alien wives of Batswana men upon application after two and one-half years of residency. Citizenship (Amendment) Act, No. 17 of 1984, § 6 (Bots.). Because this provision does not apply to alien husbands of Batswana women, Peter Dow's residency status and, therefore, the residency status of Peter and Unity's two younger children, is contingent upon the government's willingness to continue granting them residency permits. Dow argued that these provisions affected her freedom to marry and found a family with the man of her choice, violating her constitutional right to liberty. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶¶ 8, 10-11. A male Botswana never suffers this deleterious consequence because he automatically passes his citizenship to his children, irrespective of his wife's nationality. Id.

143. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 3.2. See BOTS. CONST. ch. II, § 15, reprinted in 2 CONSTITUTIONS, supra note 104, at 31. ("Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.").
the right to be free from degrading treatment. Dow invoked international standards to support each of her claims, citing international human rights standards and the specific interna-

144. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 3.2. See Bots. Const. ch. II, § 14(1).
145. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 3.4. See Bots. Const. ch. II, § 7 ("No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.").
146. To substantiate her claim that the Act violated her right to liberty, Dow cited two international human rights cases. She first cited Aumeeruddy-Cziffra v. Mauritius. Appellant's Argument (Oct. 23, 1990), supra note 6, at ¶ 10.1. In Aumeeruddy-Cziffra, the U.N. Human Rights Committee found that inequality in residency rights, based only upon the gender of foreign spouses, violated the right to freedom from interference in family life. See supra notes 73-82 and accompanying text. The Committee found this interference unjustified even on grounds of national security. See supra note 82 and accompanying text. Dow also cited the Abdulaziz Cabales decision of the European Court of Human Rights. Appellant's Argument (Oct. 23, 1990), supra note 6, ¶ 10.3. See supra note 108 (noting that in Abdulaziz Cabales the Court found that the practical exclusion of applicants' husbands and acceptance of applicants' wives entailed sex discrimination with respect to family life).

To buttress her interpretation of Botswana's equal protection provision, Dow cited interpretations of similar provisions in other countries' constitutions, Appellant's Argument (Oct. 23, 1990), supra note 6, ¶ 7, equal protection clauses in international human rights instruments, id. ¶ 9, and definitions from the Women's Convention. Id. ¶ 12.3 (citing art. 9(2) of the Women's Convention). Dow based her constitutional argument upon the guarantee of protection of the laws irrespective of sex found in Section 3 of Botswana's Constitution. Applicant's Argument (July 12, 1990) ¶ 5, In re Dow v. Attorney Gen. of Bots., Case No. Misc. A 124/90 (High Ct. 1991) (Bots.) [hereinafter Applicant's Argument (July 12, 1990)]. Dow also cited the constitutions of the United States, India, and Mauritius, which have equal protection provisions interpreted to prohibit gender discrimination. Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 9. She further submitted that equal protection clauses are found in international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights. Id. To justify her reference to these international instruments, Dow quoted Botswana caselaw noting that "recognition of fundamental human rights has started to take on the garb of international customary law amongst civilised democratic states of the world." Id. ¶¶ 4, 9 (citing Clover Petrus, Criminal Appeal No. 34 (1983) (Bots.)).

Dow next invoked Botswana's status as a party to the African Charter to establish Botswana's duty to grant her equal protection under its law. Id. ¶¶ 12.1-12.3. Dow noted that the African Charter requires that the state "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions." Id. ¶ 12.1 (emphasis added) (citing Article 18 of the African Charter). Dow then quoted the right to nondiscrimination with respect to nationality in the Women's Convention as an obligation Botswana has undertaken by virtue of its ratification of the African Charter, although Botswana has not ratified the Women's Convention. Id. ¶ 12.3 (citing Article 9). Dow also cited the Human Rights Committee decision.
tional obligations of Botswana as guidelines for interpreting the substance of these domestic constitutional provisions. Dow asserted that because the Constitution purported to protect human rights and prohibit discrimination, the Court must construe its meaning in light of Botswana's membership in the United Nations and the Organization of African Unity, and Botswana's status as a party to the African Charter on Human and Peoples' Rights.

The Attorney General of Botswana rejected the international aspects of Dow's argument. The government took the position that international treaties become part of the law in Botswana only when incorporated by legislation. The government stated that "at most they are an interpretive aid when the meaning of a local statute is unclear," but then submitted that the United Nations Charter and the African Charter were

In support of the argument that the discrimination Dow suffered constituted degrading treatment, Dow employed language from the Declaration on the Elimination of Discrimination Against Women describing discrimination as "an offence against human dignity." Applicant's Argument (Oct. 23, 1990), supra note 6, ¶ 13.2. She quoted the Declaration, rather than the Convention because Botswana participated in the adoption of the Declaration, but has not ratified the Convention. Dow argued that "degrading treatment" includes not only physical acts but any interference with a person's dignity. Id. ¶ 13.5.

Dow also invoked customary international law protecting the right to settle and reside in the territory of one's state of nationality, id. ¶ 9, and the corresponding duty of the state to grant residence to its nationals to support her claim to a violation of her constitutional right to immunity from expulsion. Id. ¶ 13.6. The Citizenship Act, according to Dow, presumes that a Botswana woman who marries a foreigner "wishes, intends or is able to emigrate to the country of her husband's origin." Id. She argued that unless her children are citizens, her right to reside in Botswana and her immunity from expulsion "are meaningless." Id. Should her husband leave the country, she contended, she would be obligated to follow him to preserve her children's citizenship. See id. ¶ 10.1-10.2. If he left her and the children, the children would lose their right to residency in Botswana. Id. ¶ 11.1-11.3.

Dow also referred to decisions of courts in other commonwealth countries and to United States Supreme Court decisions. See supra note 146. International bodies also have cited United States Supreme Court decisions for principles of interpretation of fundamental rights. See, e.g., Anthony Lester, Freedom of Expression, in BANGALORE COLLOQUIUM, supra note 119, at 27-28 (noting that the European Court of Human Rights relied upon Procunier v. Martinez, 416 U.S. 396 (1974)).

Applicant's Argument (July 12, 1990), supra note 146, ¶¶ 10, 11.


Id. ¶ 14.1. See supra notes 116-118 (discussing the application of international treaties in domestic cases).
not of assistance in the case.\textsuperscript{151} The government also claimed that Unity Dow had no standing,\textsuperscript{152} that the drafters of the Constitution of Botswana did not intend to guarantee freedom from sex discrimination,\textsuperscript{153} and that she herself had not experienced any effects due to the Citizenship Act.\textsuperscript{154}

The Botswana government's internal discussion during the case differs substantially from its legal response and demonstrates the effectiveness of Dow's strategy of invoking international standards. Before filing its response with the High Court, the Attorney General prepared a memorandum directed to the Permanent Secretary to the President.\textsuperscript{155} The memorandum stated that the government would probably prevail in the case, but "for technical reasons, and not because the Citizenship Act is non-discriminatory."\textsuperscript{156} It proceeded to describe "other

\textsuperscript{151.} Respondent's Argument, \textit{supra} note 149, ¶ 14.2-14.4.

\textsuperscript{152.} The government raised the issue of standing as a threshold argument. \textit{Id.} ¶¶ A-A.10. The government did not contest Dow's assertion that the Citizenship Act affords different citizenship status to the children of Batswana women as opposed to the children of Batswana men. \textit{Id.} The Attorney General denied, however, that the Citizenship Act affected Unity Dow as it concerned the acquisition of citizenship by her children. \textit{Id.} ¶ A.4. The Attorney General asserted that the children, as minors, may litigate only through their guardian. \textit{Id.} Under Botswana law, the father is the legal guardian of children born to a married couple. \textit{See id.} The government maintained that Dow, as the children's mother, has no legal standing to make a claim on their behalf. \textit{Id.} ¶ A.10. Furthermore, because "the right to pass citizenship" does not appear in the Constitution, the Attorney General denied that Dow had any claim of her own. \textit{Id.} ¶ A.6.

\textsuperscript{153.} The government challenged Dow's basic premise that the Constitution prohibits gender discrimination. \textit{Id.} ¶¶ B.6-B.11.5.1.1. Noting the omission of sex as a basis of discrimination in the Constitution of Botswana, the Attorney General maintained that the Constitution was never intended to prohibit sex discrimination. Respondent's Argument, \textit{supra} note 149, ¶ B.11.9. \textit{See BOTS. CONSTIT. ch. II, § 15(3), reprinted in 2 CONSTITUTIONS, supra note 142.} Citing the extensive sexual discrimination in the statutes, customary law, and common law of Botswana, the Attorney General argued that gender-neutrality "could not have been the intention of the Constitution." Respondent's Argument, \textit{supra} note 149, ¶ B.11.6.

\textsuperscript{154.} The Attorney General contended that Dow had experienced neither degrading treatment nor the threat of expulsion. The government accepted Dow's definition of "degrading treatment,” \textit{id.} ¶ B.13.11.4, but denied that the statute had "meted out" such treatment to her. \textit{Id.} ¶ A.7. The Attorney General also assessed her risk of expulsion without reference to her family members, claiming that Dow did not suffer a threat of expulsion because she herself is a national. \textit{Id.} ¶ A.5.

\textsuperscript{155.} Memorandum from I.S. Kirby, Attorney General's Chambers, to Permanent Secretary to the President of Botswana (August 16, 1990) (on file with the \textit{Minnesota Law Review}).

\textsuperscript{156.} \textit{Id.} § 7.
factors that make the matter significant," particularly that the Dow case highlighted Botswana's failure to sign the Women's Convention. The Attorney General acknowledged Botswana's general policy prohibiting discrimination against women consistent with the fundamental rights provisions of the Constitution, but stated that "practice (and indeed the law) falls far short of achieving that ideal." Weighing the advantages and disadvantages of signing the Women's Convention, the Attorney General advocated signing, noting that signing "would provide an answer of substance to the adverse comment that is sure to arise from the case."

The High Court judgment also reflects the success of Dow's strategy of highlighting Botswana's international obligations. When confronted with two plausible constitutional interpretations, the judge cited these obligations as requiring an interpretation consistent with the treaties and with case law from other Commonwealth jurisdictions. The judge concluded that Dow suffered adverse consequences which denied her fundamental rights on the basis of her sex. He found that the effect of the Citizenship Act was to "unnecessarily hamper free choice, the liberty of the subject to exercise her rights in terms of the Constitution in the way she sees fit." In holding for Dow on the claim of degrading treatment, he referred to the definition of discrimination in the Declaration on the Elimination of All Forms of Discrimination Against Women that Dow cited as proof of an evolving standard of the nature of degrading treatment.

157. Id. § 8 (including media attention at home and abroad, an amicus brief submitted to the court by a human rights institute in the U.S., and a World Bank Financial Report noting married women's lack of capacity to contract in Botswana).
158. Id.
159. Id. § 10.
160. Id.
161. Id. §§ 10-17.
162. Id. § 18.
164. Id. at 18-20.
165. Id. at 13-14 (rejecting the government's standing argument, and detailing the deleterious consequences suffered by the plaintiff, but not by a male in similar circumstances).
166. Id. at 15.
167. Id. at 23. Unlike a Convention, a Declaration does not require ratification. While not ratifying the Convention, Botswana participated in the adoption of the Declaration. See supra note 146.
168. See supra notes 145, 146.
Concerning the central question of whether the Botswana Constitution mandates equal protection of the law for men and women, the judge again relied on international standards. A ruling excluding gender from the equal protection provision of the Constitution, he wrote, would not be consistent with the guarantee of equal protection of the law found in the fundamental rights provision.\(^{169}\) The judge considered his view strengthened by Botswana's status as State Party to the African Charter of Human and Peoples' Rights,\(^{170}\) even though he acknowledged that the convention did not compel the ruling.\(^{171}\) In holding that the equal protection clause included gender discrimination, however, he construed the Constitution so as not to "do violence to the language" of the Convention.\(^{172}\)

The Court of Appeal's decision in the *Dow* case also includes extensive discussion of the proper application of international standards and obligations in Botswana's domestic courts. The three decisions that comprise the majority cite Dow's and the High Court Judge's use of international norms.\(^{173}\) The two

\(^{169}\) *In re Dow*, Case No. Misc. A 124/90, at 17-18 (concluding that reference to contemporary standards of sexual equality to interpret the Constitution would not violate nor exceed his judicial function).

\(^{170}\) *Id.* at 18 (mistakenly referring to the Organization of African Unity Convention on Non-Discrimination).

\(^{171}\) *Id.*

\(^{172}\) *Id.*

\(^{173}\) Judge Amissah, writing the majority opinion, noted that although municipal law governs citizenship, whatever basis the legislature chooses for citizenship, that law must do so with "two pre-requisites: it must, in the first place, conform to the constitution of the state in question, and secondly it must conform to international law." *In re Attorney Gen. v. Dow*, Court of Appeal No. 4/91, at 29 (Ct. App. 1992). Rejecting the Attorney General's opposition to the use of international norms, the judge wrote that they may be used as an interpretive aid when constitutional provisions are unclear, as they were in this case. *Id.* He further stated that at the time that the Constitution was adopted, Botswana was "[entering] the comity of nations," and thus international standards existing at that time, including the International Declaration of Human Rights, informed the approach of the framers of Botswana's Constitution. *Id.* He then cited Botswana's status as a signatory to the African Charter, cited the Charter provisions prohibiting sex discrimination and guaranteeing freedom of movement, *id.* at 52, and concluded that "it would be wrong for [Botswana's] Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken." *Id.* at 52-54. He also quoted with approval the High Court judge's reference to contemporary standards in order to interpret the Constitution. *Id.* at 53. *See supra* note 169.

Judge Aguda, concurring, engaged in a more extensive analysis of the use of international norms in the case. He stated that Botswana could not afford to insulate itself from international sources of law and the opinions of judges in other jurisdictions. *Id.* at 80. He noted with approval the conclusions of the
dissenting opinions, however, express disapproval of this aspect of the majority decision.\textsuperscript{174}

B. LESSONS FROM UNITY DOW’S CASE

Women clearly need alternative methods of using international law to challenge discriminatory nationality provisions. Strengthening the implementation mechanisms of the Women’s Convention and increasing the resources provided to CEDAW would improve international options for women challenging discriminatory laws. Perhaps the most accessible option, however, as illustrated by the successful case of Dow, is the increased use of international standards in domestic courts to inform and interpret domestic law.\textsuperscript{175} Although women may face significant impediments in gaining access to domestic courts,\textsuperscript{176} a domestic case may proceed more quickly and offer better enforcement mechanisms than a complaint before an in-

Bangalore Colloquium, observing that Commonwealth judges are expressing the opinion that they are obligated to ensure that domestic laws within their countries conform to their countries’ international obligations. \textit{Id.} at 81-82.

In applying these principles to the Dow case, the judge cites Arts. 2 and 9 of the Women’s Convention, \textit{id.} at 82-83, the Organization of African Unity, \textit{id.} at 83, and Botswana’s ratification of the African Charter, \textit{id.}, which prohibits discrimination on the basis of sex in Article 2 and provides for equal protection of the law in Article 3. \textit{Id.} at 84. Judge Aguda states that international instruments may serve as aids to interpretation, even if not ratified, when “such international convention agreement, treaty, protocol etc. purports to or by necessary implication, creates an international regime within international law recognised by the vast majority of States.” \textit{Id.} at 85. He concluded that there is a clear obligation on all signatories to the Charter to eliminate discrimination against women, and that courts must interpret domestic statutory law so as to be compatible with international law. \textit{Id.} at 86-87.

\textit{174. Id.} at 127-28 (Schreiner, J., dissenting) (noting that international agreements prohibiting sexual discrimination, even those to which Botswana was a party, do not require “the alteration of the meaning of section 15 (3) by the insertion of words which are not there”); \textit{id.} at 140-41 (Puckrin, J., dissenting) (stating that permitting reference to extraneous interpretive aids such as international law where the Constitution is unambiguous would abdicate the sovereignty that the Constitution was designed to protect).


ternational forum. A complainant in a domestic court may invoke provisions from treaties such as the Women's Convention which have the most helpful standards, but do not have effective independent international implementation mechanisms applicable to individual cases. Under international law countries that have signed, but not ratified, a treaty may not act in contravention to the goals of the treaty; thus, complainants may invoke provisions from these treaties in the courts of signatories who are not legally bound by implementation mechanisms. A domestic court may have greater power to enforce a favorable decision and its judgment will likely enjoy greater domestic legitimacy than the decision of an international body. The process of invoking international standards in domestic courts also provides an educational benefit, and may lead to pressure on a government to ratify international human rights treaties.

Women bringing such cases must anticipate arguments like those of the government of Botswana in the Dow case, particularly those opposing the concept that international standards may inform domestic law. Yet the process of bringing these cases focuses increased attention on discrimination against women and highlights individual countries' obligations toward women under international law. The Bangalore Principles and the Harare Declaration as well as the judgment in Dow's case indicate that some courts are receptive to these arguments.

177. Due to the large number of nations party to the Women's Convention, the argument that the country has pledged to conform its laws to progressively implement the treaty standards is available in many countries. FRASER & KAZANTSIS, supra note 100, at 36-41.

178. Vienna Convention, supra note 53, art. 18. The United States, for example, has signed but not ratified the Women's Convention. MULTILATERAL TREATIES, supra note 35, at 170; MERON, supra note 46, at 53-54.

179. See Vienna Convention, supra note 53, art. 18; see also Cook, supra note 32, at 648 (analyzing the application of the Vienna Convention to the Women's Convention, particularly in the context of a state's duty not to reserve in contravention of the purpose of a treaty).

180. See supra notes 155-162 and accompanying text (noting that Unity Dow's case publicized the fact that Botswana is not party to the Women's Convention, and that the press reported the Attorney General's memorandum recommending ratification of the Women's Convention to counteract negative publicity generated by Dow).

181. See supra notes 119-31 and accompanying text (discussing the significance of the legal status of international obligations in domestic courts).

182. See supra notes 123-24 and accompanying text (discussing the domestic application of international human rights standards in domestic courts).
Women in many countries face discriminatory nationality laws. Several sources of international law prohibit such discrimination. Although customary international law fails to provide an explicit prohibition against such discrimination, it forms a continuously evolving body of law which may arguably prohibit sex discrimination in nationality laws as nationality becomes more widely accepted as a human right and the principle of nondiscrimination on the basis of sex gains international acceptance. Treaty-based law and the implementation mechanisms of international human rights treaties provide a second source. The Human Rights Committee and the Inter-American Court of Human Rights appear receptive to cases challenging discriminatory nationality laws. The requirements for bringing a case in an international forum and the weak implementation mechanisms of the Convention on the Elimination of All Forms of Discrimination Against Women, however, present significant drawbacks. Finally, women may invoke international standards to inform domestic law. Bringing a domestic case may present the best option in appropriate cases. This approach has the advantages of being more accessible, of highlighting a country's international obligations and making more women aware of their rights, of greater enforceability and domestic acceptance, and of establishing a body of precedent that women of other countries and international bodies may use.

The current movement is toward limitations on state sovereignty over nationality laws and greater acceptance of nationality as a fundamental right. This movement must be viewed in light of the developing international principle of non-discrimination. Together, these trends imply that states may not continue to discriminate on the basis of gender in their citizenship and nationality laws.
The following summary of Reports is not an exhaustive collection of countries which discriminate; the list includes only those countries which have submitted reports to CEDAW reflecting an admission of noncompliance with Article 9 of the Women's Convention.

As a source of documentation of individual countries' nationality laws, these reports have several weaknesses. Parties submitting reports may describe their nationality laws selectively or inaccurately. Reports may contain conclusory statements and often fail to include citations to the country's laws which would allow independent verification of the assertions in the reports. See Byrnes, supra note 83, at 14. Reports indicating that the country is not in compliance with Article 9, however, are likely to be reliable. Having ratified or acceded to the Women's Convention and having prepared a report on its implementation, a State Party likely wants CEDAW to view it in the best possible light. It is doubtful that a party to the Convention would intentionally represent its laws as violative of the Convention.


In the Dominican Republic, Article 11, § 4, para. 3, of the Constitution allows a man to confer his nationality on his foreign wife, but does not provide this capacity to women. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Dominican Republic, at 16, U.N. Doc. CEDAW/C/5/Add.61 (1987). Thus the Dominican Republic would require a foreign husband to comply with naturalization procedures to acquire Dominican nationality. In the case of naturalized Dominicans, the State grants citizenship to the unmarried children under 18 years of age of a naturalized male, but not to such children of a naturalized woman unless she is unmarried or has custody of the children. Id. at 16. In its report to CEDAW, the Dominican Republic indicated that this discrimination in naturalization provisions violated the coexisting law establishing shared authority of mothers and fathers for their children. Id. The report indicates that this provision "will have to be modified in order to bring it into harmony with the principles of equality that currently prevail." Id.

Egypt's laws grant a woman the right to pass her Egyptian nationality to her children only if her husband is of unknown nationality or stateless, or if the father is not legally determined. A child born abroad to an Egyptian mother and an unknown or stateless father may choose Egyptian citizenship within one year of reaching majority. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Arab Republic of Egypt, at 3-4, U.N. Doc. CEDAW/C/5/Add.10/Amend.1 (1984).

Ghana states in its report that "[t]here are provisions for women to acquire citizenship by marriage to a Ghanaian male." Committee on the Elimination of Discrimination Against Women, Initial, second and third periodic reports of States parties: Ghana, at 13, U.N. Doc. CEDAW/C/GHA/1-3 (1991) (emphasis added). It further states, "[t]he Nationality Act makes no direct provision for a man married to a Ghanaian woman to be registered as a citi-
The report states that the suspended 1979 constitution allowed a man married monogamously to a Ghanaian woman for a continuous period of at least five years while permanently residing in Ghana to apply to be registered as a citizen. *Id.* Although the report indicates that this constitution was suspended at the time of the report, it noted that this provision “was supposedly to protect Ghanaian women from foreigners marrying them in order to take advantage of liberal citizenship laws, [although] it merely served to reinforce the image of women as being incapable of looking after themselves.” *Id.* The current law is discriminatory insofar as it allows foreign wives but not foreign husbands to register as citizens.

Iraq’s report states that its nationality law is “based on general principles, foremost among which are the maintenance of the one-nationality family, nonduality of nationality and non-loss of nationality by any of the family members.” Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Iraq, at 14-15, U.N. Doc. CEDAW/C/5/Add.66/Rev.1 (1990). Iraqi law, as described in its report to CEDAW, provides for the acquisition of Iraqi nationality by a foreign woman who is a citizen of Iraq and married to an Iraqi male upon approval of the Minister of the Interior. *Id.* The requirements are more stringent if the foreign wife is non-Arab. Furthermore, Iraqi law states that a “foreign woman [who is not a citizen of Iraq, but is] married to an Iraqi may not acquire her husband’s nationality according to [the application upon marriage provisions]; moreover, a foreign woman married to a foreign national may not acquire Iraqi nationality alone.” *Id.* at 15. Regarding children, minor children of foreign nationals acquire Iraqi nationality upon such acquisition by their father. Minor children also lose Iraqi nationality if their father loses his Iraqi nationality. *Id.*

Jamaica states in its report that “there is regrettably [sic] a difference between existing Jamaican laws and the objective of paragraph 2 [of Article 9 of the Women’s Convention].” Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Jamaica, at 14, U.N. Doc. CEDAW/C/5/Add.38 (1986). The Jamaican Constitution provides that “a person born outside Jamaica after the 5th day of August 1962 shall become a citizen of Jamaica at the date of his birth if at that date his father is a citizen of Jamaica.” *Id.* The report further indicates that the existence of this incompatibility with the Women’s Convention motivated Jamaica’s reservation to Art. 9 of the Convention. *Id.* The report states that the reservation will be withdrawn once legislation is enacted to conform with Art. 9, ¶2. *Id.* As of July 31, 1992, Jamaica’s reservation was still in effect. *Multilateral Treaties*, **supra** note 35, at 169-83.

Kenya’s report also states that its laws relating to citizenship and nationality “are not yet in conformity with the convention as far as the nationality of the children is concerned.” Committee on the Elimination of Discrimination Against Women, Initial and second periodic reports of States Parties: Kenya, at 6, U.N. Doc. CEDAW/C/KEN/1-2 (1991). Acquisition of citizenship by descent is granted only through the father unless the child is born to a single mother. *Id.*

Madagascar grants Malagasy nationality to children of Malagasy fathers only. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Madagascar, at 13-14, U.N. Doc. CEDAW/C/5/Add.65/Rev.1 (1991). The mother passes her nationality to her children only if the father is unknown or stateless. *Id.* Madagascar’s report indicates that children of a Malagasy mother and a foreign father may claim the mother’s nationality until they reach majority. *Id.*

In its initial report, under the subtitle *Political Rights*, Nigeria stated, “Nigeria is a patriarchal society, perhaps more male-oriented than is normally ap-

The Philippines' report states that the 1987 Constitution completely removed discriminatory provisions imposed on women marrying aliens. Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Philippines, at 77-78, U.N. Doc. CEDAW/C/13/Add.17 (1989). However, it also indicates that if an alien woman marries a Filipino man, she automatically becomes a Filipina. Id. The same occurs if a foreign woman's husband acquires Filipino citizenship after marriage. Id.

Under the law of Rwanda, "the man is the sole donor of Rwandese nationality." Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Rwanda, at 9-10, U.N. Doc. CEDAW/C/13/Add.13 (1988). A Rwandese woman may transmit her nationality to her children only if the father is unknown or stateless. Id. Rwandese law also discriminates in naturalization upon marriage. A Rwandese man who marries a foreigner may transmit his nationality to his spouse, but a woman who marries a foreigner may not. Id.

Senegal maintains unequal provisions for the naturalization of foreign spouses. Male spouses must maintain a 5-year period of residence before acquiring Senegalese nationality, while female spouses automatically acquire Senegalese nationality unless the woman renounces it. Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Senegal, at 7-8, U.N. Doc. CEDAW/C/SEN/2 (1991). Like many reports, the Senegalese report does not indicate whether the country's laws conform to Article 9(2) of the Women's Convention regarding the nationality of children. See id. at 7-8.

Sri Lanka's initial report states that the country does not discriminate with regard to citizenship on the ground of sex. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Sri Lanka, at 8, U.N. Doc. CEDAW/C/5/Add.29 (1985). The report continues, however, by noting that "there are several races [in Sri Lanka] and the wife is treated as of the race of her husband for certain purposes." Id. The Report states that a wife acquires "the rank and dignity" of her husband as well as his domicile, but not his citizenship unless she opts to do so. Id. Sri Lanka indicates in its Second Periodic Report, however, that within marriage the father's citizenship determines acquisition of citizenship by descent. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Sri Lanka, at 12, U.N. Doc. CEDAW/C/13/Add.18 (1989).

Tanzania's provisions for naturalization upon marriage discriminate on the basis of sex. A foreign woman who marries a Tanzanian man is automatically entitled to citizenship, but a foreign man cannot gain citizenship through marriage to a Tanzanian woman. Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: Tanzania, at 122-123, U.N. Doc. CEDAW/C/5/Add.57/Amend.1 (1989). Tanzanian women enjoy more liberal rights to reacquire citizenship after renouncing it. Id. at 122.

Thai law also favors acquisition of the Thai nationality by foreign women marrying Thai men but not by foreign men marrying Thai women. Thailand ratified the Women's Convention with a reservation to Art. 9(2) because a 1972

The United Kingdom reserved from the nationality provisions of the Women's Convention, stating that although the British Nationality Act of 1981 reflects the principle of equal rights for men and women regarding the acquisition, change, or retention of nationality, the United Kingdom also intends to retain "temporary and transitional provisions" extending certain rights conferred under previous nationality law which treat men and women differently. MULTILATERAL TREATIES, supra note 35, at 176. The most recent report of the United Kingdom to CEDAW reveals that several of these provisions remain in effect. Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: United Kingdom of Great Britain and Northern Ireland, at 50-51, U.N. Doc. CEDAW/C/UK/2 (1991). The United Kingdom's report provides a good example of a report underemphasizing the discriminatory aspects of its laws. For an analysis of the discriminatory provisions of the British Nationality Act of 1981 and its corresponding immigration regulations, see Mullen, supra note 66, at 146.


As more countries ratify or accede to the Women's Convention, report to CEDAW on their implementation efforts and change their nationality laws to comply with the treaty, they frequently extend rights to women previously granted only to men. In some cases, however, where the discrimination may be perceived as favorable to women, such as a favorable naturalization provision upon marriage to a national, the country may eliminate the more favorable provision rather than extend it to men. See, e.g., Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Zambia, at 5, U.N. Doc. CEDAW/C/5/ZAM/1-2 (1991) (indicating that Article 8 (b) of the Zambia Constitution has been replaced so that both men and women may apply for citizenship only after 10 years of residence in Zambia). This change eliminated a favorable naturalization provision for wives rather than extend it to husbands. The Constitution of Zambia Act of 1991 retains the favorable provision for women married for the required three-year period prior to July 24, 1988. ZAMBIA CONST. (Constitution of Zambia Act, 1991), pt. II (Citizenship), § 6.

On a more positive note, some countries that have changed their laws to eliminate discrimination have also taken steps to ameliorate the effects of past discrimination by applying the new provisions retroactively. See, e.g., Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Philippines, at 77-78, U.N. Doc. CEDAW/C/13/Add.17 (1989) (making the change partially retroactive by deeming persons born before [the right to pass nationality was extended to mothers] who elect Philippine citizenship upon reaching the age of majority, natural-born citizens); Committee on the Elimination of Discrimination Against Women, Initial Reports of States Parties: New Zealand, at 52, U.N. Doc. CEDAW/C/5/Add.41 (1987) (citing a provision remedying past discrimination by granting a right to application for citizenship to persons born outside of New Zealand to a mother with New Zealand citizenship). But see Irene R. Cortes, Women's Rights Under the 1973 Constitution, 50 PHILIPPINE L. J. 1, 9-10 (1975) (noting that the
1973 Constitution removes some but not all discriminatory effects of Philippine nationality law).

A last factor regarding gender discrimination in nationality laws which deserves mention is the remaining discrimination against men in nationality laws. In many countries, unlike women, men have no rights to pass their nationality to children born outside of marriage. See, e.g., Committee on the Elimination of Discrimination Against Women, Second Periodic Reports of States Parties: Sweden, at 81, U.N. Doc. CEDAW/C/13/Add.6 (1987) (stating that the child of a Swedish father who is not married to the mother of the child obtains Swedish citizenship at birth only if the mother is Swedish). Such discrimination is arguably prohibited by Art. 9(2) of the Women's Convention which provides that countries shall grant women "equal rights with men" with respect to the nationality of their children. Women's Convention, supra note 29, art. 9(2).