

INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH
ASIA PACIFIC

WOMEN'S PROPERTY RIGHTS



PATHWAY TO GENDER EQUALITY: A PERSPECTIVE FROM SOUTH ASIA

FEBRUARY 2022

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This presentation was delivered by Prof. Savitri Goonesekere at the Marriage and Property Rights Pathways for Gender Equality in Africa and Asia workshop on 22 June 2021.

The following organisations joined IWRAW Asia Pacific in co-organising the workshop.



The Global Initiative
for Economic, Social and Cultural Rights



African Commission
on Human & Peoples' Rights



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Presentation by Prof. Savitri Goonesekere

The CEDAW Committee has in several General Recommendations, especially GR 21 and 29, focused on the link between property rights and achieving the broader goal of equal human rights for women, in their families, communities and countries. With economic liberalisation, ground realities in many countries indicate that some women do acquire property and income by engagement in large and small economic enterprises.

There is evidence based on this including the regular Women and Business Reports of the World Bank. It is also clear that restrictions in the formal laws pose challenges and impact on even these women. There are, besides, large cohorts of rural and economically impoverished women, who may acquire economic resources in diverse ways such as overseas migrant work, and yet lack access to the important economic resource of property because of the legal regime and/or their lack of financial literacy.



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The Maputo Protocol on Women's Human Rights and the proposed GR 6 seeks to reinforce and strengthen human rights standards on non-discrimination and women's equal rights to the important economic asset of property. Globally there is a history of women's exclusion in access to property. South Asia's experience can be of comparative interest to Africa.



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In South Asia, as in other regions, the gold standard for women's property rights is CEDAW. This treaty has crafted the golden thread of substantive equality, which links all the different rights of women, including property rights, in a holistic and interconnected vision of gender equality. Achieving substantive equality is the standard for determining the obligations of both State and Non-State actors. Substantive equality as a standard recognises that achieving formal equality for women in laws and legal procedures is only one step in achieving gender equality. Achieving gender equality, therefore, recognises moving beyond formal legal equality, by evaluating the outcome and impact of laws, taking account of de facto realities of women's lives. The substantive equality lens is important, and especially relevant in ascertaining how women's property rights can also become a pathway to achieving non-discrimination and gender equality. There is evidence that focusing on only law reforms to gain equal property rights is not adequate to achieve a standard of non-discrimination and equal access to economic resources and property.

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Colonial legal values have impacted legal systems in South Asia and Africa and influenced the approach to international law as set out in treaties like CEDAW. On the legal theory of dualism, international law does not apply directly on ratifications of a treaty like CEDAW by a government. International law and local domestic laws operate as dual systems. This means that government lawmakers and/or the courts must, through law, policy or judicial decisions, bring these international standards home into the domestic legal systems.

A country that ratifies an international treaty can also enter Reservations to that treaty, stating that they will not be bound by a particular provision or provisions in the treaty. Many South Asian countries have therefore entered Reservations to Article 16 of CEDAW, which sets standards relating to family relations, including women's property rights. In this context, regional treaties like the Maputo Women's Rights Protocol in Africa can be a very important strategy for bringing international treaties like CEDAW that a government has ratified, into the domestic laws, policies and programmes of countries.

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South Asia unfortunately does not have a regional treaty like the Maputo Women's Rights Protocol or the proposed GR 6 to the Maputo Protocol. IWRAW AP is a women's human rights organisation that has focused on bringing CEDAW and international human rights norms and standards into domestic laws, policies and interventions in countries. It has supported regional standard setting as an important way of impacting on the domestic environment on gender equality within countries. However, it has advocated the position that regional standards must reinforce and not undermine international treaty standards like CEDAW, even as they address local contexts and realities of a region. In a case like Ephraim vs Pastory in Tanzania, the courts adopted this approach, and showed how regional standards in Africa can be used to strengthen women's property rights within a country and reinforce international norms.

The Maputo Women's Rights Protocol has been called the 'African CEDAW'. The proposed GR 6 to the Protocol on Property Rights should in the draft also reinforce CEDAW standards, even as it is crafted to respond to local realities of the African region. South Asia's experience suggests that such harmony is good for gender equality. Undermining and lowering international standards in regional instruments must be avoided.



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South Asia's experience indicates that there are other mechanisms, besides regional standard setting, to achieve gender equality, through equal access to property rights. These seem important, even when there is a regional instrument.

Constitutions

A strong equality clause in a national constitution which defines gender equality and non-discrimination, and covers both State and non-State actors, is especially relevant. The State may enact laws or initiate policies and programmes that deprive women of property rights. Similarly, private actors such as corporations and families or communities can follow customs and practices that discriminate against women in the area of property and access to economic resources. Nepal has introduced constitutional provisions on women's property rights, including tax relief for property transfers to women. Constitutional provisions have been used in South Asia by women's groups and gender activists to challenge discriminatory laws, policies and customs.

Legislation

Legislation and policies that give women equal property rights are important. Such legislation has been rare in South Asian countries because there are diverse property laws in place, due to customary and religious laws of different communities.

Governments make laws in areas like national security or the economy, but tend to be conservative and lack political will to interfere with norms in customary and religious laws. Women's groups have been at the forefront in lobbying hard for changes to the law in many countries, but changes have not come in the area of property rights. Regime changes and the shrinking space for democratic activism by civil society prevent this activism from manifesting in property law reform within South Asian countries. Maldives and Nepal have specific gender equality laws; the Civil Code was reformed in Nepal, consequent to court decisions, and recognises women's rights to inherit property.

Courts

In this environment the courts in South Asian countries have played an important role. Indian courts have recognised women's property rights in interpreting customary laws. In Nepal, even before constitutional reforms, the Supreme Court recognised inheritance rights of women. Good court cases also contribute, as in Nepal, to law making or legislation recognising women's property rights.

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Teaching positive jurisprudence on court cases from within regions or across regions in law schools, and citing them in court cases, can impact to obtain positive judicial interpretations in local cases. The nationality case of *Unity Dow* in Botswana, and *Ephraim vs Pastory* on property rights in Tanzania, are such cases. The *Mudgal* case in India on the polygamous marriages of a convert to Islam impacted on a Sri Lankan court to prevent such marriages. Polygamy impacts on women's rights, including property rights.



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Challenges to comprehensive law reform on property rights

Reforming the laws relating to property to give women equal rights has not been easy in South Asian countries due to several reasons.

Family relations

South Asian countries, like in Africa, have different systems of family law. There are also different types of family relationships. These invariably impact negatively on women's property rights. The CEDAW Committee recognises this reality, as does the CEDAW treaty, which is not anti-family. The family is considered as an important basic unit of the society. However, a ratifying State and its governments and non-State actors are required to work towards transforming family relations and giving women equal rights. Articles 9, 15 and 16 of CEDAW clarify this approach and so do GR 21 and 29, and another important GR 35 on giving women's access to justice.

The impact of colonialism and religious laws has created a sharp difference between marital and non-marital families – the former considered a legal marriage, and the latter non-legal cohabitation. In both types of families, women may be denied equal access to property and economic resources. There are also different types of marriages, as in Bhutan and Sri Lanka, where a woman loses or forfeits inheritance rights when she leaves her birth home to join her husband's family. Inheritance rights remain only if she continues to live with her birth family. Polygamous and joint families can also impact negatively on women's property rights in South Asia.

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Homosexuality is considered an offence, in many countries incorporating values in early colonial English law. Child marriage takes place and these child wives are even more powerless and have no access to property or economic resources. Registration of events like birth and death among rural and urban poor may not take place, making it difficult to respond to child marriages, even where formal legislation prohibits them. In Sri Lanka compulsory education regulations from the 1940s have helped to almost eliminate child marriage. The phenomenon has surfaced again due to the 30-year internal armed conflict, and contemporary issues on teenage sexuality disapproved of by parents and elders. India legislated on compulsory education in 2009, recognising that access to education can encourage child development and prevent child marriage. South Asia also has systems of customary and religious laws, such as Hindu and Islamic laws, that apply to different communities, and deny women some property rights.



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The CEDAW Committee requests countries to review their family laws, and grant property rights to all women, in light of ratified international norms on substantive equality. However, though some constitutions as in India encourage governments to enact such uniform family codes to apply to all, giving property rights to everyone, this development has not taken place.

Customary practices and legal systems

South Asian countries do not recognise the custom of levirate marriages prevalent in the African continent. However, there are many abusive social practices and customs, such as giving dowry to the bridegroom on marriage which negates women's property rights. Dowry is prevalent in Pakistan, Nepal, India and Sri Lanka. There have been government efforts to ban dowry customs in legislation, but implementing the law has been problematic.

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Putting the law in place with legal prohibitions, without effective law enforcement, has proved to be useless.

Diverse Courts and Property Rights Regimes

Claims to property rights in South Asia are also determined in different legal forums. These are ordinary courts, customary courts and courts which enforce Islamic religious laws and customary laws. A breakdown of marriage may take place and a divorce may only be obtained through litigation in the ordinary courts. On the other hand, customary and religious courts may have a different approach to marriage breakdown and divorce. Usually, these courts do not ensure that women obtain equal access to property and economic resources after a marriage is terminated by divorce.

It is therefore useful to share experiences from South Asia on claims by women to property rights when a marriage is terminated by death or divorce. English colonial law introduced in the subcontinent of India, and Roman-Dutch Law in Sri Lanka (as in South Africa) determine matrimonial property rights of women in these circumstances.

Women may have been granted separate property rights with capacity to own and manage this important asset. There also can be a concept of 'community of property', where all property owned by parties comes into a common pool of assets, on marriage unless excluded by a prenuptial contract. Community of property, therefore, benefits a woman who does not bring any property and contributes to the family's welfare in many other ways. Both national laws derived from colonial times and customary and religious laws may give the husband marital powers over a wife's property and its management. Today legislative reform may focus on giving joint title to husband and wife when the State transfers property to family members, as after a natural disaster or armed conflict. A concept of 'acquired marital property' rights may ensure that property acquired during marriage is shared between the spouses or obtained on death or divorce. Usually, a half share of the marital property or half share of the common pool of assets is obtained by the women. A concept of 'equitable distribution' beyond the half share proposed in the GR 6 to the Maputo Protocol is not recognised in South Asian countries and is likely to be considered discriminatory against the male spouse.

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Inheritance rights on death vary according to the property regime of the ordinary law of the country or customary or religious law. In South Asia, if there is no will, a woman may inherit a share of the property of a spouse or family member. The concept of 'deferred community of property' means that the wife will acquire a fixed portion of the husband's property on his death. In a deferred community of property, no rights of ownership or management of common assets acquired during a marriage can be claimed as part of a common pool of assets. In many communities it is possible to leave a will and deny inheritance rights to women members of the family. If that happens, there is rarely a concept of 'family provision' or a fixed portion that must be given on death, as in Islamic law or Sri Lankan Tamil customary law.

Sometimes colonialism impacted beneficially on marital property laws, helping women to acquire property rights. This is seen in Sri Lanka where British legislation on property rights had a positive impact on matrimonial property rights and inheritance under the general law applicable to a majority of women not governed by customary or religious laws. But the impact of colonialism on some customary laws was to undermine women's property rights. This is seen in two customary systems called Kandyan law and Mukkuvar law in Sri Lanka. Reforms to these customary laws must be introduced, but current discourse on minority rights and ethnic and religious identity creates resistance to reform efforts based on constitutional and CEDAW norms on gender equality.



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Remedies for violation of property rights are important if these rights are to help women access property.

In South Asia the following remedies have proved useful:

1) A constitutional remedy that helps to challenge both State denial of property rights in law and policy or customary laws that deny property rights in courts. Nepal and India have such jurisprudence. Comparative jurisprudence from other countries can be cited and is useful.

2) Countries may have gender equality laws that can be used to advocate for and obtain property rights for women. Joint title can be advocated for under the laws when the government allocates land, as after a natural disaster that has destroyed property.

3) Laws that prohibit abuse and exploitation of women and girls, such as domestic violence laws and prohibition of child marriage, have an indirect positive impact. Domestic violence laws are found in all countries of South Asia and invariably give rights in the matrimonial home. A recent law of special interest is the elder abuse law in India which is a response to abuse of elderly women to obtain property transfers to others.

4) Providing access to justice is a critical dimension of strengthening property rights. This is dealt with comprehensively in CEDAW GR 35. Programmes and institutions that provide legal literacy for women, free legal aid with support from cause-lawyering private firms and State legal aid commissions are a vital aspect of giving women access to justice in making claims to assert property rights.



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International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific) is an independent, non-profit NGO in Special Consultative Status with the Economic and Social Council of the United Nations. IWRAP Asia Pacific has gained expertise, experience and credibility from over 20 years' work of mobilising and organising women's groups and NGOs to support the work of the State in fulfilling its obligations to respect, protect and fulfill women's human rights under CEDAW, through capacity building, advocacy and knowledge creation initiatives aimed toward development of effective national women's rights advocacy strategies.



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