

To this effect, the CEDAW Committee in its Concluding Observations has stated to all States Parties in SEA that their constitution or other appropriate legislation does not include an effective guarantee of substantive equality. It does not include a definition of discrimination that encompasses both direct and indirect discrimination and discrimination in public and private spheres, in accordance with Article 1 of the Convention. The outcome of this is that there is a risk that courts will tend to interpret constitutional guarantees of equality narrowly or there will be inconsistent interpretations of equality.<sup>32</sup>

In an exemplar act, the High Court of Malaysia in *Noorfadilla Ahmad Saikin v. Chayed Basirun et al.* (2012) 1 CLJ 781-3, illustrated the direct applicability of CEDAW in interpreting the provisions on gender equality incorporated in the Malaysian Constitution. It stated:

CEDAW is without doubt a treaty in force and Malaysia's commitment to CEDAW is strengthened when Article 8(2) of the Federal Constitution was amended to incorporate the provisions of discrimination based on gender. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and 'gender discrimination' under Article 8(2) of the Federal Constitution."

In upholding the right of the complainant – a pregnant woman – to be employed, the court applied the CEDAW definition of discrimination under Article 1. It also invoked Article 11 of the Convention, which specifies the duties of the State Parties to take all appropriate measures to eliminate gender discrimination in employment.

Absent a comprehensive framework on substantive equality in the national constitution, as illustrated in the *Noorfadilla Ahmad Saikin* case, the courts can take the initiative to refer to CEDAW in interpreting equality provisions in the constitution. Again, the judges' knowledge of international human rights law and jurisprudence and their ability to apply international standards of equality are crucial for this practice to prosper. Comprehensive and purposeful implementation of CEDAW at the domestic level requires full participation of members of the judiciary.

## Enforcement of Domestic Laws that Comply with CEDAW

Despite the constitutional infrastructure now in place in SEA countries, the difference between the *de jure* and *de facto* realisation of women's human rights remains a fundamental challenge. The recognition of rights and freedoms contained in the constitution and in other legal and relevant entities are not benefitting women as intended. The CEDAW Committee has consistently recommended that State party reports must show the implementation and impact of laws, policies and programmes. However, this is never taken seriously even by some countries in the region that have acceded to CEDAW for close to 30 years.<sup>33</sup>

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32. Presentation of Shanthi Dairiam, Director, IWRAW Asia Pacific, 4 September 2013

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