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*women's right to equality:*  
**THE PROMISE OF CEDAW**

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#### WOMEN'S RIGHTS TO EQUALITY: THE PROMISE OF CEDAW

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## ACRONYMS

|          |  |
|----------|--|
| AICHR    | ASEAN Intergovernmental Human Rights Commission                        |
| ASEAN    | Association of Southeast Asian Nations                                 |
| CEDAW    | Convention to Eliminate All Forms of Discrimination against Women      |
| CRC      | Convention on the Rights of the Child                                  |
| CSW      | UN Commission on the Status of Women                                   |
| FWLD     | Forum for Women, Law and Development                                   |
| GAD      | Gender and Development   |
| DFATD    | Department of Foreign Affairs, Trade and Development                   |
| IAW      | International Alliance of Women  |
| ICCPR    | International Covenant on Civil and Political Rights                   |
| ICESCR   | International Covenant on Economic, Social and Cultural Rights         |
| ICW      | International Council of Women   |
| IWRAW    | International Women's Rights Action Watch                              |
| Lao PDR  | Lao People's Democratic Republic                                       |
| NCWO     | National Council of Women's Organizations, Malaysia                    |
| OHCHR    | Office of the High Commissioner of Human Rights                        |
| SEA      | South East Asia  |
| UDHR     | Universal Declaration on Human Rights                                  |
| UN Women | United Nations Entity for Gender Equality and the Empowerment of Women |
| WIDF     | Women's International Democratic Federation                            |

## ABOUT THE AUTHOR

Shanthi Dairiam, a Malaysian human rights and women's rights advocate has been involved in the promotion of women's right to equality and non-discrimination for the past 35 years. Her work has focused on building capacity for the domestic application of international human rights norms and standards through law and development policy reform at the national level, to achieve gender equality.

In 1993, Ms Dairiam founded the International Women's Rights Action Watch Asia Pacific, a regional and international independent, non-profit NGO, based in Malaysia that monitors and facilitates the implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). She has served as Vice President, of Women's Aid Organization Malaysia (a program to combat domestic violence), was a past member of National Advisory Council of Women, Malaysia, past Executive Committee member of the National Council of Women's Organizations, Malaysia (NCWO) and was a member of the Gender Equality Task Force of UNDP between 2007 and 2008.

Ms Dairiam has also served as an expert assisting key UN agencies such as APGEN, the Office of the High Commissioner of Human Rights (OHCHR) and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and provided technical services to several governments in the Asia Pacific Region, in selected countries of Africa and in Latin America to build capacity for the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). She holds a Masters in Literature from the University of Madras, India and a Masters in Gender and Development from the Institute of Development Studies, University of Sussex, United Kingdom.

Ms Dairiam served as a member of the UN Committee on The Elimination of All Forms of Discrimination against Women (CEDAW) from 2005-2008, and was its rapporteur from 2007-2008.



## FOREWORD

The principle of equality and non-discrimination are essential principles for the promotion of women's rights. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines the rights of women to be free from discrimination and sets the core principles to ensure women have equal access and equal opportunities in public and private life. It establishes an agenda for national action to address the persistent nature of inequality and discrimination, to provide a basis for achieving equality and freedom in the public and private sphere, both directly and indirectly, intentionally and unintentionally, and to provide a theoretical framework by which to identify barriers to women's advancement, assess needs, set goals, and to identify measures to be taken for action.

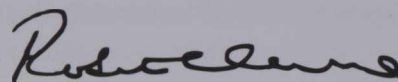
The CEDAW Convention is a human rights treaty. It carries with it the strength and obligation that are legally binding on states while also establishing a monitoring mechanism for individual State Parties as well as the possibility for individuals around the world to lodge a complaint to the CEDAW Committee. While progress has been made in many countries, there is no denial that human rights violations exist in all countries and cultures to varying degrees; disparities in well-being, status, rights and power between men and women continue to persist. Custom and culture often override considerations of state obligations under CEDAW, and to maintain such balance, there is a need to create, maintain, and reinforce social relations between women and men as an element of group identity.

This paper enshrines the concept of equality through CEDAW to provide a resource for the ASEAN Intergovernmental Human Rights Commission (AICHR) in its engagement with the ASEAN governments using international standards in promoting and protecting the human rights of women and girl children. With the exception of Brunei, Malaysia and Singapore who have no reservation to the substantive articles of CEDAW, most of the ASEAN countries have ratified CEDAW and have undertaken binding obligations to promote and protect the human rights of women according CEDAW standards. AICHR remains to be the main mechanism for the promotion and protection of the human rights of all people, with women included in ASEAN. It needs to continually develop its capability in using the standards of CEDAW for equality and non-discrimination when carrying out its mandate. The UN Women Regional Office for Asia and the Pacific would like to gratefully acknowledge the Department of Foreign Affairs, Trade and Development (DFATD) for their continued generous support and their leadership through the Regional Programme on Improving Women's Human Rights in South East Asia.

The author traces back into the awakening history and the universal recognition of basic rights, without any distinction between the needs and experiences of women comparing to men. It further elaborates on the concept of equality and non-discrimination as enshrined in CEDAW, the application of CEDAW

## FOREWORD

standards and looking at the conflict of rights, particularly in South East Asian countries. While treaty law may be recognized as part of domestic law in Cambodia, Laos, Indonesia, Philippines and Viet Nam, there is no clear guidance in the Constitutions of these countries as to what will prevail if domestic law is in conflict with international treaty law. Nor is it clear whether treaty law is self-executing. As this paper identifies the gaps and its evidence in the legal framework, it is with our deepest hope that it will provide further guidance and aid to ensure the applicability of the substantive equality standards of the Convention to promote and protect women's right to equality, and more importantly, to ensure that the rule of law protects the human rights and inherent dignity of all human beings.



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June 2014



## WOMEN'S RIGHT TO EQUALITY: THE PROMISE OF CEDAW

This paper on the concept of equality as enshrined in the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) has been commissioned by UN Women to provide a resource for the Association of Southeast Asian Nations (ASEAN) Inter-governmental Human Rights Commission (AICHR). While under the ASEAN Charter an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children has also been established, AICHR should remain the primary mechanism for the promotion and protection of the human rights of all people, women included. Hence it needs to develop a capability in using the standards of CEDAW for equality and non-discrimination in carrying out its mandate. All ASEAN countries have ratified CEDAW and with the exception of Brunei, Malaysia and Singapore, have no reservations to CEDAW's substantive Articles. All of these countries have undertaken binding obligations to promote and protect the human rights of women according to the standards of CEDAW. All of these countries with the exception of Brunei have reported to the CEDAW Committee, many of them more than once. So they have the Concluding Observations of the Committee to guide them in their task, they are able to show increased levels of compliance with the standards of CEDAW.

This paper aims to provide guidance to AICHR in its purpose of engaging ASEAN governments in using international standards for the promotion and protection of the human rights of women and girl children in furthering the fulfillment of their obligations under CEDAW.

The paper starts with the history of the recognition that gender creates differences in the experiences of human rights in the lives of women and men and that the adoption of CEDAW as a human rights treaty for women was essential to counter the inadequacies of the human rights regime of the day. In the second section, the paper provides some clarity in regard to equality approaches. It elaborates on the concepts of formal equality that takes an anti-discrimination approach, and the significance of the substantive model of equality as enshrined in CEDAW. The latter approach requires the recognition of pre-existing inequality and subordination that women face, that leaves their capacities reduced compared to men. This approach imposes positive duties on the State to help women gain merit and equalize their capacity to seize opportunities on par with men. Above all it needs transformation of the social relations of women and men. Equality measures must aim to bring about social change. The third section provides some elaboration of the impediments to women's equality and the application of the standards of CEDAW. The final section takes a cursory look at the situation in South East Asian (SEA) countries as well as gaps in the legal framework that will aid in the fulfillment of their obligation to promote and protect women's right to equality.



## INTRODUCTION

The 20th century has witnessed the awakening of the world to the idea that human rights are universal. As a consequence of the Second World War, there was a growing conviction that "how human beings are treated anywhere concerns everyone, everywhere"<sup>1</sup> leading to the adoption of the United Nations Charter which was signed on 26 June 1945. The Charter declared that promoting respect for human rights was a principle purpose of the United Nations.<sup>2</sup> This purpose of the United Nations was carried forward by the Universal Declaration on Human Rights (UDHR) which defined the content of human rights and was adopted on December 1948. But it is with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW in December 1979 that universal standards were set for women's equality. However, the acceptance that women's rights were an integral part of human rights did not gain currency until the United Nations Conference on Human Rights in 1993 declared in paragraph 18, Part I that:

"The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."<sup>3</sup>

A tale needs to be told of the evolution of the legitimacy of women's right to equality as a human right. If we go back historically, we will see that it took a long time for the philosophers of the time and the international community to accept that discrimination against women was an unacceptable fact of life and that women's right to equality was integral to the understanding and acceptance of the concept of human rights itself. As mentioned earlier, in the first half of the 20th century, the world awoke to the horrors of the Second World War. The world in particular came face to face with the experiences of the Holocaust and the gross assaults on human dignity and humanity that was one of the outcomes of war. Because of this horrific experience, the age of human rights was given an impetus that is still taking us forward.<sup>4</sup> However, this awakening was partial and by no means universal. Zehra F Kabasakal

1. Henkin, L., *The Age of Rights*, Columbia University Press, New York, 1990, p.1

2. *Ibid.* p. 16

3. United Nations., 'Vienna Declaration and Programme of Action,' June 1993

4. It is not my intention to say that World War II prompted the notion of human rights. Writers such as Susan Waltz cited in Zehra F Kabasakal Arat, 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights', have pointed out there were various episodes of international human rights discussions that pre-dated World War II.



Arat points out that historically even during the "Age of Enlightenment"<sup>5</sup> and subsequent centuries, while some rights were extended to some groups of people, discrimination on the basis of sex, race, ethnicity, and sexuality was seen as legitimate.<sup>6</sup> Arat explains that the Christian Church leader St Thomas Aquinas (c. 1225-1274) who, in spite of espousing the theory of natural rights (that human beings are created with inalienable rights), reinforced Aristotle's misogynous perception of women as "misbegotten men", and viewed women as defective, valuable only for their reproductive role.<sup>7</sup> Even more modern and progressive philosophers such as Jean-Jacques Rousseau (1712-1778) rejected the equality of the sexes. And neither did the articulation of rights in The French Declaration of Rights of Man and Citizen (1789) which was the inspiration for the struggle of the liberation of people for centuries include women's rights.<sup>8</sup>

- 
5. The Age of Enlightenment, also known as the Age of Reason was a movement in the 17th and 18th centuries, of European and later American intellectuals. Their aim was to bring about a social culture based on reason and scientific knowledge rather than on intolerance, tradition, faith or superstition. They opposed some of the abuses by the Church and State.
  6. Arat, Z., 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights,' *Human Rights Quarterly*, 28.2, 2006 p 416-437
  7. Arat, Z., 'Women's Rights as Human Rights,' *UN Chronicle* Vol. XLV No. 2 & 3, 2008, available online <http://unchronicle.un.org/article/womens-rights-human-rights/>
  8. *Ibid*

# I. The Role of Women and Women's Organizations

## HUMAN RIGHTS AS THE 'RIGHTS OF MEN'

In this historical context, the struggle for the recognition of women's rights was embodied in the work of women such as the French playwright Olympe de Gouges (1748)-1793) and English Philosopher Mary Wollstonecraft (1759-1797) who issued the Declaration of The Rights of Women (1790) and A Vindication of the Rights of Women (1791) respectively. In the next century Harriet Taylor Mill (1807-1858) with her husband John Stuart Mill (1806-1873) wrote collaboratively to advocate women's rights and equality.<sup>9</sup> Despite these efforts, gender inequality continued to be the norm throughout the world.

The United Nations' commitments to the advancement of women began with the signing of the UN Charter in San Francisco in 1945 which contained an inclusive statement regarding women. The UN Charter in its preamble reaffirms:

"Faith in fundamental human rights, in the dignity of the human person, in the equal rights of men and women and of Nations large and small."

But this was not achieved without struggle. In the beginning, the Commission that drafted the UN Charter used the word "man" as the holder of rights. A small number of women on the government delegations managed to get women's rights acknowledged as part of the UN commitment to human rights.<sup>10</sup> This was facilitated by the so called traditional women's organizations which advanced women's rights at the UN until 1975. They were:<sup>11</sup>

- The International Council of Women (ICW)
- The International Alliance of Women (IAW)
- Women's International Democratic Federation (WIDF)

9. Ibid

10. Ibid

11. Ibid, de Haan, F., 'A Brief Survey of Women's Rights', UN Chronicle, Vol. XLVII No. 1 2010 available online, <http://unchronicle.un.org/article/brief-survey-womens-rights/> Citing several other authors, de Haan states that significant contributions were made by Bertha Lutz, IAW vice president (1952-58), Minerva Bernardino, ICW vice president (1947-57), Amelia Caballero de Castillo Ledon, Isabel Sanchez de Urdaneta, Isabel P de Vidal and Jessie Street. These women drew on their experiences of the contributions of women during the war and worked on the conviction that women had much to contribute in the post war period.



Their representatives were all active in the League of Nations, the predecessor of the United Nations. They established that the discourse on women's status belonged at the international level.<sup>12</sup> They were on the Committee of Experts on the Legal Status of Women in 1937, later to become the UN Commission on the Status of Women (CSW).

But gender bias continued to prevail and of the 160 signatories to the UN Charter, only four were women – Minerva Bernardino (Dominican Republic), Virginia Gildersleeve (United States), Bertha Lutz (Brazil) and Wu Yi-Fang (China) – but they succeeded in inscribing women's rights in the founding document of the United Nations.<sup>13</sup>

In December 1948, the UN adopted the UDHR. In spite of the inclusion of women in the UN Charter, the early drafts of the UDHR referred to "man" as the holder of rights. Eventually the final draft mostly employed the gender-neutral terms of "human being", "everyone" and "person", and the Preamble included a specific reference to the "equal rights of men and women". Two female Commission members, Hans Mehta of India and Minerva Bernardino of the Dominican Republic, were the inside voices requesting that gender be included in this Declaration.<sup>14</sup> The list of prominent ICW and IAW women involved with the UN includes Helvi Sipilä, who in 1972 was the first woman Assistant Secretary-General, and at the time of her appointment, was the ICW vice president as well as the president of the Finnish National Council of Women.<sup>15</sup>

The UDHR has been the standard framework for human rights for the United Nations and is complemented and referenced within existing international human rights instruments, in particular the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>16</sup> Together, all three constitute the International Bill of Human Rights.

These developments in the field of human rights did not necessarily benefit women. The two Covenants remained androcentric in their interpretation and application and lacked a gender perspective.<sup>17</sup> In spite of the fact that major human rights instruments also prohibit discrimination on the basis of sex, the framing of rights is referenced on the human rights needs of men and the experiences of violations endured by men. While these rights pertain to all humans, including women, they do not necessarily reflect the conditions that women confront. The interpretation of the prohibition of discrimination on the basis of sex is often too narrow and its frame of reference excludes women's needs and experiences. All it may mean is that women will be protected from discrimination only in circumstances where they are situated similarly as men.<sup>18</sup>

Protection of this nature is grossly inadequate when women face a problem larger than discriminatory treatment compared to men. Due to historical and social discrimination, women as a category are *de facto* in an inferior position and exercise very little power in the public or private sphere.<sup>19</sup> There is systemic discrimination against them that requires change at a broader level.

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12. de Haan, *Ibid*

13. Pietilä, H, *The Unfinished Story of Women and the United Nations*, United Nations Non- Government Liaison Service, New York, 2007, p10

14. Arat, Z, *Op cit*

15. de Haan, *Op cit*

16. *Ibid*

17. Charlesworth, H., 'Human Rights as Men's Rights', in *Women's Rights, Human Rights: International Feminist Perspectives*, ulie Peters and Andrea Wolper, eds., New York: Routledge, 1995, p 107

18. Facio, A., *feminists@law*, Vol 1, No 1, Kent Law School, 2011

19. Charlesworth, H., 'What are "Women's International Human Rights?," in *Human Rights of Women- National and International Perspectives*, Edited by Rebecca J Cook, University of Pennsylvania Press, 1994, p 60

### Then came the World Conferences on Women

A fresh stimulus was provided when the UN General Assembly passed a resolution in December 1972 declaring 1975 International Women's Year and 1975 to 1985 as the Decade for Women.<sup>20</sup> Since then four UN Conferences on women have been held starting with the World Conference of the International Women's Year in Mexico in 1975.<sup>21</sup> The conference's theme was "Equality, of Women and their Contribution to Development and Peace"<sup>22</sup> and reflected that despite the global recognition of the human rights of people as evidenced by the adoption of the International Bill of Human Rights:

- women in developing countries and industrialized countries were carrying out 66% and 75% of all necessary work in the world;
- women's income globally made up 10% of men's wages;
- and the UN estimated that women owned approximately 1% of all private property worldwide.

### The adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The World Plan of Action adopted at the Mexico Conference in 1975 gave high priority to the adoption of a Convention on the Elimination of All Forms of Discrimination against Women.<sup>23</sup> There was a realisation of the need for a special international instrument prohibiting *de jure* and *de facto* discrimination against women with a special monitoring mechanism. A precursor to this Convention was the non-binding Declaration on the Elimination of All Forms of Discrimination against Women adopted by the General Assembly in November 1967.

The CSW, which was tasked with the preparation of the Convention, pressed for the Convention's development because it believed that neither the Declaration nor the legally binding human rights treaties had advanced the human rights of women and "that universally-recognized human rights are still not enjoyed equally by women and men."<sup>24</sup>

CEDAW was adopted by the General Assembly in December 1979. This instrument incorporated the principles of women's rights and equality from a gender perspective into international law.<sup>25</sup> The principle of the equality of women as an exercisable right was to be the goal of CEDAW. Article 3 of CEDAW embodies this goal:

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20. It was WIDF President Herta Kuusmen from Finland who in 1972 proposed to the CSW to hold an international Women's Year. See Pietilä, Hilikka, *The Unfinished Story of Women and the United Nations*, United Nations NGLS Development Dossier, 2007, p39

21. The other World Conferences include Copenhagen held in 1980, Nairobi in 1985, and culminating in the Forward Looking Strategies and the fourth in Beijing in 1995 which produced the Beijing Declaration and Platform for Action.

22. The subsequent four world conferences had the theme "Equality, Development and Peace" making the point that the equality of women, development and world peace were interconnected.

23. Burrows, N., 'The 1979 Convention on The Elimination Of All Forms Of Discrimination against Women', *Netherlands International Law Review*, 1985

24. de Haan, F., *Op cit.* Writers and scholars such as Catherine Mckinnon, Hilary Charlesworth, Andrew Byrnes, Christine Chinkin, Charlotte Bunch among others have also made similar criticisms.

25. Pietilä, H, *Op cit.* p29



"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>26</sup>

The equal rights of women and men to enjoy their human rights is one of the principles upon which the United Nations is based and was created, as reflected both in the UN Charter and the UDHR.<sup>27</sup> Article 3 of the ICCPR and the ICESCR guarantee the equal rights of men and women "to the enjoyment of all related rights," but there was still a need for a separate treaty on women's right to equality. In all other international human rights approaches the guarantee of equality has failed women because of their abstraction from the reality of women's lives and their neutrality, which had the effect of privileging a male model of existence. Because of biological differences in the area of reproductive functions, and the dominance of men in social and political life as well as their socially sanctioned absenteeism from responsibilities in the private sphere of the family, there were differences in the lives of women and men which created inequalities legitimizing hierarchical relationships with males being dominant. These inequalities were ignored in the conceptual understanding of equality that constructed men and women to be the same in the interests of neutrality.

## The Concepts of Equality and the Meaning of Discrimination

This section will provide an elaboration of the prevailing concepts of 'equality' and the true meaning and manifestations of 'discrimination'. It begins with a discussion of the concept of 'formal equality', its operationalisation through an anti-discrimination approach and its implications. It will further explain why formal equality and an anti-discrimination approach, while needed, are insufficient and at times ineffective. Moreover, the section will discuss the merits of substantive equality and the goals that must be achieved by equality measures.

### Formal Equality: equal to whom

A common understanding of 'equality' is understood as the 'formal approach to equality' which is operationalized through anti-discrimination legislation. It requires policy or legal measures to "treat likes alike," or in other words, individuals with similar attributes or who are similarly positioned to be given equal, identical or consistent treatment. However, if someone had different attributes, it was considered that there was no discrimination and they were thus treated unequally.<sup>28</sup> The comparison for favourable or unfavourable treatment was only between individuals who shared the same characteristics of merit or accomplishment, and inconsistent treatment could be shown only if someone who was similarly positioned was treated unfavorably. This approach did not question the social contexts and history that created the differences or how the differences were treated.<sup>29</sup> When the difference was a socially constructed disparity

26. Elimination of all Forms of Discrimination Against Women (CEDAW), Article 3, 1979

27. The UN Charter provides that "equal rights of men and women and of Nations large and small" in its Preamble and the UDHR in Article 1 states that "all human beings are born free and equal in dignity and rights."

28. Mackinnon, C., 'Reflections on Sex Equality under the Law', *The Yale Law Journal*, [Vol.100.1281] 1991

29. *Ibid*



creating inequality in capability, resources etc., these "differences" were reinforced by the formal equality measures and even compounded, and those who were already advantaged were further advantaged. MacKinnon questions this by asking "why equality is consistent with systemic advantage as it is with systemic disadvantage when both correlate with difference?"<sup>30</sup> She also raises the question of 'who developed the point of reference or standard for being the same?' To her, it was unacceptable that men only had to be themselves to merit equality but that women had to act like men or there was no concern for the need to change the inequality that pre-existed before the application of the law. The effect of this was that for women to be equal to men, they had to be like men. Being equal to men entrenched the "male norm,"<sup>31</sup> and equality in its operations was masculine.<sup>32</sup>

The 'formal approach to equality' that requires that the law be applied in the same manner or in neutral terms – also referred to as the anti-discrimination approach – therefore bears scrutiny. Since the function of equality measures is to prohibit unequal treatment or non-identical treatment of the individual that limits his or her choices, remedies are provided for the individual who claims unfair treatment. There is an assumption here that the individual is unaffected by her circumstances and everyone is on par with regard to the ability to make use of opportunities. Feminists have pointed out that a woman's starting point is inferior to that of men,<sup>33</sup> women have less mobility and fewer options for skills development. Or women have no access to child care facilities, which disadvantages them. But anti-discrimination measures disregard group identity and see the individual as autonomous and equally capable of accessing opportunities as long as obvious policy impediments have been forbidden.<sup>34</sup> The individual is abstracted from her context and history and pitted against others who have a head start.

Sandra Fredman (2002) explains that the formal approach was an attempt at fairness and the notion was that this required a consistency of approach.<sup>35</sup> She also explains that its intention was the dismantling of prejudicial treatment of individuals on the basis of ascribed attributes of the group that one belongs to. So group identity should not matter, only merit should be considered. But she also points out that providing equal opportunities on a strictly merit based approach will continue to disadvantage certain groups or individuals as no distinctions will be made on the effect of disadvantage in the acquisition of "merit".<sup>36</sup> Since the formal approach to equality reiterates that opportunities should not be provided on the basis of group identity such as race, religion, ethnicity or sex, it is meant to place a "negative restraint" on the State and others on using "illegal criteria" established as prohibited grounds to deny benefits.<sup>37</sup> Fredman points out that this was one of the biggest advances in the history of human rights in the 20<sup>th</sup> century<sup>38</sup> She says, the notion of equality was legitimized in the early 20th century by feminists who argued that women should enjoy the same rights as men and took the libertine view that there should be no bias – a negative approach of anti-discrimination – and that law should not be applied inconsistently, but be applied in the same manner to all. Hilary Charlesworth explains the narrow-mindedness of this approach when she states "the law should support freedom from systematic subordination because of sex, rather than freedom to be treated without regard to sex."<sup>39</sup> The neutral approach does not consider that group identity may need to be taken into consideration when analyzing the disadvantageous effects on people as a result of belonging to particular groups. Consistency of approach or neutrality does not take into consideration disadvantage and lack of power and does not attempt to transform group disadvantage.

30. Ibid.

31. Ibid

32. Nunziato, D., 'Gender Equality: States as Laboratories', *Virginia Law Review*, 1994, p 3

33. Nunziato, D., *Op cit.* p 3

34. Charlesworth, H, 1995, *Op cit.* p 64

35. Fredman, S., *Discrimination Law* Oxford University Press, 2002, p7

36. Fredman, S., *Ibid*, p 15

37. Nunziato, D., *Op cit.* p 3.

38. Fedman, S *op cit.* Also see Nunziato, D, *ibid*

39. Charlesworth, H., *Op cit.* p.67



## Equalizing at the lower level

Sandra Fredman (2002) expands on the specific consequences of treating "likes alike" and on equality as consistency.<sup>40</sup> The first is that there is a danger that treating likes alike need not necessarily see equality as a positive value having the goal of enhancing the worth and dignity of individuals. People only have to be treated alike. So the emphasis is on treatment and not on the effect of the treatment. This could mean that if they were treated equally badly, then there would be no discrimination.<sup>41</sup> Women then could be made to "suffer equality" through equally bad treatment. Equality can also be achieved by removing benefits from a relatively privileged group. Equality can thus be achieved by equalizing people at the lower levels of benefits.<sup>42</sup>

## The Anti-Discrimination Approach

Formal equality is often associated with the anti-discrimination approach through the use of anti-discrimination law. The aim of the law is to ensure what Sandra Fredman calls the "symmetrical application of the law" or in other words to ensure treating likes alike.<sup>43</sup> This approach restrains the powers of the State and removes contextual prejudices based on the individual's sex or race or any other specified grounds on which discrimination is prohibited. This focus fails to ensure equality because of its narrowness in testing the legality of the outcomes. The focus on restraining the State assumes that the State is a potential "threat to liberty, rather than a potential force for enhancing freedom through the provision of social goods."<sup>44</sup> This fails to harness the positive power of the State to be proactive, to prevent inequality by enhancing the capabilities of individuals to access opportunities and imposing obligations on all concerned actors to remove institutional and systemic barriers to equality.

## The problem of finding a comparator

A further drawback of anti-discrimination is that there is a need to find a comparator. Many anti-discrimination laws state that discrimination occurs when:

"A person discriminates against a woman if on the grounds of her sex he treats her less favourably than he treats or would treat a man."<sup>45</sup>

In looking at sex-based discrimination, only the sex of the person is taken into consideration for scrutiny to assess discriminatory treatment. This requires finding someone similarly situated of the same sex and with the same attributes and then to compare whether the two were treated differently. It is not always

40. Fredman, S., Op cit

41. For example, there have been debates about whether the CEDAW Committee should take up the issue of the abuse and discrimination against migrant women workers because male migrant workers are also abused.

42. Fredman, S., Ibid, p 8

43. Fredman, S., Ibid

44. Fredman, S., 'Changing the Norm: Positive Duties in Equal Treatment Legislation', *Maastricht Journal of European and Comparative Law*, Vol. 12, 2005 p.371

45. Fredman, S., Ibid Definition of discrimination in the UK Sex Discrimination Act 1975, s, 1(1a)

possible to find a suitable comparator because women and men are situated differently. Pregnancy based discrimination is a classic example. Since men do not get pregnant, complaints of discrimination on the basis of pregnancy have no merit. In a case from the Netherlands, brought to the CEDAW Committee under the Optional Protocol, the author alleged sex based discrimination regarding reduced maternity benefits, and the State Party among other arguments responded that:

"The entitlement (maternity benefit) is exclusively given to women and is specifically designed to give women an advantage in relation to men. It is, therefore, impossible to see how it can lead to more unfavorable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause."<sup>46</sup>

Hence they were of the view that there was no discrimination on the basis of sex. In another pregnancy case in Malaysia a flight attendant relied on Article 8 of the Constitution that guarantees equality, to challenge in court, the terms of a collective agreement that required her to resign once she became pregnant.<sup>47</sup> However, the court's opinion was that:

"In the circumstances, in construing Article 8 of the Federal Constitution, our hands are tied. The equal protection in Clause (1) of Article 8 thereof extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. In this case the appellant because of maternity status could not claim to be equal to non- pregnant persons."

So if there is no similar male comparator, then equality rights do not exist.<sup>48</sup> If the point is that 'equality' means to be equal to a man, then equality standards are simply male standards.<sup>49</sup> Dawn C. Nunziato describes this as the "male nature of equality."<sup>50</sup> In relation to this, Catherine MacKinnon states that "concealed in is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man. Gender neutrality is thus simply the male standard."<sup>51</sup> Neutrality of approach in equality measures will then not benefit women if they cannot under all circumstances, be like men and equality can only be tested or achieved among similarly situated individuals.

46. CEDAW Committee, Communication No. 3/2004, 'Ms. Dung Thi Thuy Nguyen vs The Netherlands', 2006

47. 'Beatrice A/P A.T. Fernandez v. Sistem Penerbangan Malaysia et al,' Civil Appeal Beatrice A/P A.T. Fernandez v.1. Sistem Penerbangan Malaysia 2. Kestauan Sekerja Kakitangan Sistem Penerbangan Malaysia Semenanjung Malaysia. Civil Appeal No. W-02-186-1996

48. MacKinnon, C., *Op cit.* p. 1287

49. Fredman, S., *Discrimination Law*

50. Nunziato, D., *Op cit.* p 3

51. MacKinnon, C., *Feminism Unmodified*, Harvard University Press, 1987, p. 34. Cited in Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, p 9.



The issue of equality becomes more complex when we look at work place discrimination. In circumstances where there is occupational segregation of women into sectors or positions that pay less, the resulting wage gaps will not be seen as discriminatory against women as it is in the nature of the job and because everyone will receive the same treatment. The prospects of finding a comparator in these circumstances are even more difficult. Sandra Fredman cites an example from the UK in the 1980s and 1990s where the public service outsourced sections of work where workers had been previously directly employed. The bid was granted to the lowest bidder. These areas of work, primarily cleaning and catering, were dominated by women owing to pre-existing job segregation. Once their areas of work was outsourced to the private sector, the women were now paid less than their counterparts left in the public sector, men or women, because the bidding process encouraged competition to bring down the costs of the services. In this case there can be no comparator for the women in the outsourced sections to show discrimination and the law would not provide for comparison between those working in the private sector and those in the public sector as they were not similarly situated.<sup>52</sup>

The fact that stereotypically most women are in jobs that pay less will not be taken as discriminatory. Nor will it be discriminatory that more women are in part time jobs and have less earnings because of the absence of affordable day care centres which often leads to women having sole responsibility for child care, or the lack of flexible work arrangement policies for all workers. Hence structural discrimination cannot be challenged. In these circumstances, if no obviously exclusionary treatment can be shown, then it is assumed that the disparity between women and men, is due to other causes such as personal choice.<sup>53</sup> Legislation guaranteeing equal pay for equal work does not then benefit women.

### **The falseness of neutrality: Group categorical versus group salient distinctions**

There are lessons from the attempts in the United States to use neutral approaches to eliminate discrimination made on the basis of racial identity. Reva Siegel noted that when the law claims that there is no discrimination on the basis of race, it is using a formal approach to racial discrimination and often the whole story is not told.<sup>54</sup> For example, the formal approach is to de-legitimize decisions made on the basis of race, or on the basis of "group categorical distinction"<sup>55</sup> such as race. But it does not mean that equality is achieved. It only means that race neutral opportunities are provided based on individual merit achieved. This does have some value on its face as it attempts to treat the individual based on her individual merit and not on the basis of a prejudicial view of the group she belongs to.<sup>56</sup> However there may be a range of other factors such as economic capability, or educational access, that qualifies or disqualifies an individual that may be correlated with race or sex. A racial grouping is more than just a biological group. There are advantages and disadvantages that accrue to members of the group because of social stratification, into which the racial group is caught and some groups bear the historical and cumulative effect of having been discriminated against in the past while other groups have been historically advantaged. This is

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52. Fredman, S, Op Cit, p 97

53. Fredman, S, Ibid, p12. When the writer served on the CEDAW Committee (refer to supra note 35), many government delegates, including those from the most developed countries, would state that women predominantly worked in part-time jobs because they chose to do so. They did not problematize this phenomenon.

54. Siegel, R., *Discrimination in the Eyes of the Law: How Colour Blindness Discourse Disrupts and Rationalizes Social Stratification*, California Law Review, Vol. 88, No. 1, p. 98.

55. 'Group categorical distinction' is a term used by Siegel, R Ibid. See explanation in note 57.

56. Fredman, S., Op cit.p 16.



termed "group salient characteristics".<sup>57</sup> So, although "equal opportunities" may be facially neutral, there could be other requirements that disqualify members of a particular group. A case that Reva Siegel cites is of a defendant that practiced racial segregation and placed all black employees in one department that had the lowest paying jobs.<sup>58</sup> When dismantling this discriminatory practice, and opening up "equal opportunities" to all races, the defendant required all applicants of formerly whites-only departments to have a high school diploma, which many of the black employees did not have because of the historical deprivation of educational opportunities. They were therefore disqualified from being recruited into the previously whites-only departments. The company complied with the law by abandoning "group – categorical"<sup>59</sup> distinctions but adopted "group- salient"<sup>60</sup> employment criteria. Under these circumstances, social stratification will remain untouched in spite of anti-discrimination legislation.

Legal grounds for prohibiting discrimination based on race, ethnicity, sex or religion are limited because they do not cover other group-salient factors that could lead to discrimination. The problem with such an approach is that it considers the individual in the abstract barring race or sex and ignores many other traits that may bring a disadvantage or an advantage. For example, a woman who has taken time off to raise her children may not find it easy to find formal work as she has to compete with men and women who have worked continuously without a break. Those who never had children or those who had the resources to outsource child rearing are not similarly situated as someone who took time off for child upbringing and privileging them will not be seen as discrimination.<sup>61</sup> For those who have not had the same life chances to acquire merit, equality that requires merit is as Sandra Fredman puts it, "an empty promise."<sup>62</sup> Equality legislation has to broaden its scope to enhance access to equal opportunity for all and break the cycle of disadvantage.

### The Individualizing of Rights

A related effect of the formal equality's anti-discrimination approach and another angle to the group salient distinction is that it individualizes rights. Rights accrue to the individual. The focus is on proving whether the individual has been unfairly treated and therefore discriminated against in a particular context. The aim of the law is to make the individual autonomous, to be able to choose options free of the negative impact of prejudices of group identity such as sex or race, her personal merit being the

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57. Siegel R (OP cit) Siegel elaborates at some length on the significance of group categorical distinction and group salient characteristics. People are categorized or acquire a group identity on the basis of race, or ethnicity or gender among others. Anti-discrimination measures proscribe differential treatment of an individual on the basis of their group identity or category. The intention is that all individuals must receive same or neutral treatment. Presumed group category attributes are irrelevant. This way, every one is judged as an individual and by the same criteria or on the basis of individual merit. This supports a view of distributive fairness which is made on the basis of merit or qualification acquired by the individual rather than on ascriptive characteristics of the group the individual belongs to. However, such neutral treatment, strictly applied, will not eliminate discrimination. The "qualifications" of the individual is affected by the history and discriminatory or advantageous treatment experienced by his or her group over time. These are group salient characteristics. Siegel cites a situation in the US where it would be deemed inappropriate to consider a person's group such as race for admission into the university but perfectly legitimate to discount the person's grade point average by taking into consideration the fact that the person attended a community college which was less competitive but more affordable. If this is not done, discrimination will still persist "reproducing and perpetuating inequalities" among groups. Given the fact that educational opportunities are unevenly distributed between rich and poor, requiring the same admission criteria to all would be applying what is called "group salient criteria" that builds on preexisting advantage of some groups and vice versa. While "group-categorical distinction" is socially irrelevant, "group salient characteristics" cannot be ignored if equality is to be achieved.

58. *Griggs v Duke Power*, cited in Reva. B Siegel, Op cit . p 94

59. Siegel, R. Op cit

60. Ibid

61. Fredman, S. OP cit. p12

62. Fredman, S. Ibid. p19



only criteria of eligibility. As mentioned earlier, this was an important development in the evolution of equality rights. But equality rights as has been discussed earlier may not be achieved just by a neutral focusing on the merit of the individual as abstracted from her group and the disadvantages associated by group membership. Iris Marion Young also points out that the "individual is partly constituted by group affinities" and comes bearing the effects of such an affinity.<sup>63</sup> Therefore, the assumption that the individual is autonomous and has capabilities to choose freely is based on a false premise. This abstract individual does not exist. Neutral treatment in terms of negating obvious bias often ignores social disadvantage that comes with group affinity. For instance, in an Asian country where the rural population is rather conservative, the government decided to improve access to education by building schools in the villages and expected girls to attend. But when the schools opened very few girls enrolled. Upon investigation, the authorities discovered that the teachers who had been recruited were predominantly men. Because of cultural constraints that restricted male and female interaction, the parents of the girls did not send their daughters to school. There was no bias against boys being taught by female teachers but the girls faced a social constraint that only affected the girls.<sup>64</sup> The result of such situations is that the women in question do not benefit from the opportunity purportedly open to them and their disadvantage continues. Here it is not whether the individual has autonomy to make decisions for herself but more of a question of what the community sees as appropriate for women.

### The need for an individual perpetrator

It becomes imperative to show a person who has engaged in unfair treatment that the rights in question have been breached on the basis of grounds established in the law. The victim has to claim remedies through self-initiated court procedures and invariably this is obtained retrospectively after the breach or fault has occurred. Sandra Fredman and Sarah Spencer point out that not everyone has the capacity to initiate court proceedings, and they can be costly and prolonged.<sup>65</sup> Proceedings are also ad hoc and are left to the discretion of an individual judge to make a decision. As decisions are made on a case by case basis, there may not be enough consistency to set standards or precedents. Further, the remedy is for the individual in her present circumstance and is not aimed at dismantling the structural impediments that have caused the discrimination. Claiming rights through court procedures is antagonistic and usually ends up creating animosity and resentment.

In fact when there are structural impediments to equality, such as in the case of the girls not being able to go to school in the previous section, there is no single perpetrator on which to pin liability. Rights can be breached by an institution and even through processes such as collective bargaining.<sup>66</sup> In the case of Beatrice A/P A.T. Fernandez v. Sistem Penerbangan Malaysia et al, cited earlier, the collective bargaining done by the trade union was responsible for the discriminatory provision that flight attendants would have to resign after becoming pregnant. So there was no individual perpetrator. When the plaintiff filed her case under the equality provision of Article 8 of the Constitution, the case was dismissed. Among the different arguments given the court in dismissing the case was that the constitutional guarantee of equality would not capture collective bargaining. In this regard the court said:

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63. Young, I., *Justice and the Politics of Difference*, Princeton University Press, 1990. Cited in Sandra Fredman. Ibid. p16

64. This was a genuine issue that was brought to the attention of the writer while in an Asian country several years ago.

65. Fredman, S. and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes,' *Equality and Human Rights Law Report*, 2006 Also see Sandra Fredman, 'Changing the Norm,' 2005.

66. Sandra Fredman, 'Changing the Norm,' 2005



"It cannot be seen how the case is caught by Article 8 of the Federal Constitution. Clause (1) declares that all persons are equal before the law and entitled to equal protection of the law. A collective agreement is not "law" in the context of Article 8. It is a contract when taken cognizance of by the Industrial Court, is enforceable as an award of that court. In other words, it is similar to a court order. Even a court order is not "law" in the context of Article 8."

Because the collective agreement was not law, it did not have to comply with the equality guarantee of the Constitution. The law could discriminate against certain categories of people and there would be no remedy.

While there has to be the possibility of litigation depending on the situation, it is also essential to provide for proactive measures that can dismantle structural impediments embedded in institutional procedures and practices such as collective agreements.

### The Merits of Substantive Equality

Substantive equality is equality that focuses on the equality of outcomes. Formal equality is a significant step in the history of equality rights and has resulted in constitutional provisions and other statutory guarantees for the equality of women and men. But as explained, the focus of formal equality on treatment and not on the effects or the outcome of the treatment has contributed to the current environment where equality for women has not been fully achieved. We still witness the persistence of discrimination against women and their inequality despite the existence of legal provisions prohibiting discrimination and guaranteeing equality.<sup>67</sup>

This leaves the question open of what equality should aim for and what it should achieve. In talking about human rights, Louis Henkin states that such rights must have societal ends such as peace and justice and individual ends such as dignity, happiness and fulfillment.<sup>68</sup> Equality must also have substantive goals.

The final desired outcome in the quest for equality between women and men is the elimination of discrimination, so it is useful to discuss the scope of discrimination. Discrimination is not a random phenomenon. It is often group-based and linked to negative perceptions or recognition of the value or worthiness of different groups divided according to their ethnicity, religion, minority status, sex or any of a

67. The Global Gender Gap Index produced by the World Economic Forum examines the gaps between men and women in four fundamental categories: economic participation and opportunity; educational attainment; political empowerment; and health and survival on the basis of several sub-indicators under each category. According to the review of the Beijing Platform for Action, the progress of women is mixed. The highest gains have been made in education and globally education has increased, particularly in primary education. In 2006, 95% of girls were in school compared to 92% in 1999. More women are now in the labour market but work under harsher conditions and have jobs that are insecure and pay poorly. In spite of the gains in education, women are still disproportionately poor and illiterate. Two thirds of adults who can't read are women, more than half a million women die in childbirth every year, and 70% experience some form of violence in their lifetimes. Women's groups feel that progress has been very slow. The review findings are cited in Shanthi Dairiam, 'Background Paper- Human Rights and Gender Equality,' Proceedings of the 10th Informal Asia-Europe Meeting (ASEM) Seminar on Human Rights, Manila Philippines, 7-9 July 2010. See also the Concluding Observations of the UN CEDAW Committee.

68. Henkin, L. OP cit



number of other factors. This results in what Fraser calls status hierarchy with very material consequences.<sup>69</sup> Women are affected by status hierarchy being at the lower end of the hierarchy, but the discrimination that a woman faces is rarely perpetrated against her as an individual. It is because she belongs to the category of women and bears disadvantages associated with the group all of which is the result of past or social disadvantage and subordination. Increasingly in the modern world direct discrimination against women is being eliminated,<sup>70</sup> but women frequently face indirect discrimination. Each woman comes bearing the stigma of being the 'collective woman' and is disadvantaged by it. This is the social construction of gender. As a consequence, the neutral approaches that have been discussed earlier have the effect of denying women the exercise and enjoyment of rights as they are disqualified by criteria that they are unable to fulfill because of social disadvantage historical or present. In Australia, women retrenched from a steel mill because of the ruling "last hired, first retrenched", filed a case of discrimination successfully. While it is true that the women concerned were hired last, the fact was that these women had applied for jobs at the mill ten years ago. At that time, it was considered inappropriate for women to work in steel mills and had been turned down. The fact that women were the last to be hired was the consequence of historic discrimination, and applying the rule of "last hired, first retrenched" neutrally was considered discriminatory against them although it was unintentional or was indirect discrimination.<sup>71</sup>

The approach to equality and non-discrimination has to be multifaceted and treatment has to be both identical and symmetrical when relevant, as well as asymmetrical when appropriate. Under the substantive model of equality, both direct and indirect discrimination must be eliminated. The meaning of direct and indirect discrimination can be highlighted by the following examples:

- different treatment leading to non-recognition of human rights of women both in the private and public sphere (direct discrimination). For example, the nationality law in many countries prohibits women from transmitting citizenship to their children but men can;
- different treatment preventing women from exercising their human rights both in the private and public spheres (direct discrimination). For example, through an administrative ruling in a particular country, only women are prohibited from going abroad to work because of the risk of exploitation of foreign workers in many countries;
- identical treatment that prevents women from exercising their human rights in the private and public spheres (indirect discrimination). For example, in a particular institution, playing golf gives individuals a certain number of points towards a promotion at work. However, men receive an advantage because it is mainly men who play golf. Even professional women seldom have the time for such recreational activities because their time is spent caring for their families.<sup>72</sup>

Groups that are low in the status hierarchies are usually among the poorest and the most marginalized. Opportunities are denied often indirectly and vulnerabilities are intensified. Therefore they also experience socio-economic disadvantage.<sup>73</sup> As such, the elimination of discrimination against women and the achievement of equality can only be brought about through a multi-faceted approach.

69. Fraser, N. and A. Honneth, *Redistribution and Recognition*, (Verso 2003) p. 13. Cited in S. Fredman, 'Redistribution and Recognition: Reconciling Inequalities,' in *South African Journal on Human Rights*, Volume 23 Part 2, Ravan Press, 2007, p. 215

70. Direct or intentional discrimination is that which is deliberate and has the purpose of discriminating against women.

71. 'Australian Iron and Steel Pty Ltd v Banovic' HCA56 [1989] 168 CCR 163,5 December 1989. Cited in IWRAP Asia Pacific, 'Building Capacity for Change: A Training Manual on the Convention on the Elimination of All Forms of Discrimination against Women,' International Women's Rights Action Watch (IWRAP) Asia Pacific, 2001. Updated version November 2008.

72. IWRAP Asia Pacific, Op cit

73. S. Fredman, 'Redistribution and Recognition: Reconciling Inequalities,' in *South African Journal on Human Rights*, Volume 23 Part 2. p. 218 (Ravan Press 2007).



## Goals of Substantive Equality

### *Why talk about goals?*

Sandra Fredman defines several interrelated goals for substantive equality. She states that at its apex, the goal of equality has to be the promotion of the dignity and self-worth of the individual and of all regardless of differences in circumstances. This has to be articulated as a value, a principle and a right. Fredman believes that the recognition of the individual should not be as an abstract individual but related to the community and as committed to the community, without losing value as an individual. The community too must recognise that strong individuals make strong communities and that societal goal of peace and justice will be furthered through the fulfillment of the potential of all its members. The individual and society are interdependent, and the goal of equal value and the preservation of the dignity of the individual is critical if we are to avoid a false sense of equality by equalizing bad treatment.<sup>75</sup>

A second aim of substantive equality is to ensure equality of outcomes. Equality measures must be constructed to break the cycle of disadvantage. Catherine MacKinnon explains that an analysis of context is essential using an anti-subordination framework rather than an anti-discrimination framework.<sup>76</sup> This approach will not just focus on eliminating current discrimination but will consider equally the cumulative effect of past discrimination resulting in current social disadvantage. The aim as Fredman and Spencer observe is to facilitate "genuine choice"<sup>77</sup> which they say is a more "detailed concept of equality of opportunity". This can be achieved by recognizing the correlation between status hierarchy and socio-economic disadvantage and being committed to redistribution.

The goal of equality can only be achieved if the norm of accessibility for those who have different abilities is widened to provide extra resources, such as training, additional opportunities, or other forms of investments necessary to redress past disadvantage. Resources/opportunities/power/ must be redistributed, making the individual productive as a rights bearing citizen.<sup>78</sup> The individual must be empowered to break cumulative disadvantage.

The test of equality measures will then not be merely how people are being treated, but whether there is evidence of the equal representation and participation of women in the sector being addressed such as education, employment or political representation in qualitative terms.<sup>79</sup> It is a positive sign that courts in some jurisdictions are beginning to recognize this. Justice L'Heureux-Dubé of the Canadian Supreme Court has argued that proof of whether an individual was able to meet a particular criteria is immaterial and that rather, the court should consider whether the law in question breaches the equality guarantee, namely, 'the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally deserving of concern, respect and consideration.'<sup>80</sup> This requires the recognition of the equal status and value of the subordinate group, as well as the creation of a

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74. Fredman, S. and Sarah Spencer, 'Beyond Discrimination,' 2006

75. Fredman, S. Ibid

76. MacKinnon, C., Op cit

77. Fredman, S. and Sarah Spencer, 'Beyond Discrimination,' 2006

78. Ibid

79. Ibid

80. *Andrews vs Law Society of British Columbia* [1989] 1 SCR 143, cited in Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002. p82



policy or programme of redistribution of resources and benefits. While much has been done to bring about the former through equality legislation, the latter is often problematic. Left to the arena of policy, not supported by law, and subject to the discretion of policy makers, redistribution is therefore rarely justifiable as a right.<sup>81</sup>

The third goal of equality is accommodating differences and disadvantages. To demand that an individual conform to the dominant group as the price for acceptance or inclusion would undermine the principle of 'recognition'.<sup>82</sup>

Central to this is also the recognition of the root causes of disadvantage or vulnerability or the environment that perpetuates this. Conditions for accessing opportunities must be created not only through redistribution and differential treatment but also through correcting the environment that supports the disadvantage of some. This will bring about social change or transformation and correct institutional and systemic discrimination. This will benefit all.<sup>83</sup>

The last goal of equality is to address under-representation in decision making leading to equalizing of power.<sup>84</sup>

Substantive equality is therefore multi-dimensional. At its core, it strives for:

- equality of opportunity under the concept of 'formal equality,' meaning requiring the equal value of all;
- equal access to the opportunities through pro-active policy and programmatic measures and redistribution;
- equality of outcomes;
- Sustaining equality of outcomes by institutional reform and creating enabling environment.<sup>85</sup>

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81. Fredman, S. 'Redistribution and Recognition,' 2007

82. Fredman, S. *Discrimination Law*, Op cit. p13

83. Fredman and Spencer Op cit

84. Ibid

85. IWRAP AP. Op cit

## II. Impediments to the Concept of 'Substantive Equality'

This section will discuss a few specific areas that will inevitably pose constraints in achieving the goal of equality. They include conflict of rights and interests underpinning the social and economic value system, the public/private dichotomy and social norms, and cultural values that need to be transformed for the achievement of the goal of equality. This section will only provide a brief overview.

### Conflict of Rights

In spite of decades of work promoting the equal rights of women, there are several areas of concern. To name a few: preference given to the rights of men in cases of conflict of rights; the non-application of equality guarantees to the private sphere; and market oriented concerns or exemptions to the guarantees for equality on the basis of culture, history or religion. Sandra Fredman observes that such impediments exist due to a conflict in values, particularly between equality and liberty.<sup>86</sup> Should the State intervene to put in place affirmative action policies to increase women's political representation in the interests of substantive equality or should it adopt a *laissez-faire* attitude and allow citizens to be free to choose their representatives as a democratic principle? But then what about women's rights to be represented politically? If the existing structures and systems and electoral rules allow an embedded preference for men to dominate in political power, political decision making bodies cannot claim to be democratic. Again what about bans on pornography? Would this be imposing restrictions on freedom of expression? Conflicts such as these need to be discussed and consensus obtained.

### Public/Private Dichotomy

A more complex issue is the lack of the extension of equality guarantees to the private sphere. Many feminist writers have critiqued the separation of the private and public spheres as being responsible for the exclusion of the private sphere from the philosophical, social and political change brought about in the public sphere through modernization, democratization and adherence to human rights principles over the last two centuries.<sup>87</sup> Hilary Charlesworth explains the historical divide between the public and the private sphere and how this has disadvantaged women. She points out that historically and culturally, women were viewed as inferior to men. Men's authority over women in the private, familial sphere was seen as natural and assigning women to home and hearth was seen as the most suitable and appropriate

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86. Fredman, S. 'Discrimination Law,' 2002

87. Charlesworth, H., 'The Public/Private Distinction and the Right to Development In International Law,' Australian Year Book of International Law, 1988-1989; Hilary Charlesworth, 'What are "Women's International Human Rights?," in *Human Rights of Women- National and International Perspectives*, Edited by Rebecca J Cook, University of Pennsylvania Press, Philadelphia, 1994; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law,' *The American Journal of International Law*, Vol. 85, No. 4 (October 1991), pps. 613-645.



measure for the functioning of society.<sup>88</sup> Gurpreet Mahajan also posits that the public area was the area of collective activity, where the public good is determined and where international norms could be applied and freedoms exercised so that all who had legitimacy could participate, contribute and benefit.<sup>89</sup> The State had an obligation not to interfere in this sphere to ensure political and civil rights so every individual could be free to take action for himself. Mahajan states that in the private sphere however, there was no individualizing of rights, which results in that not everyone has equal autonomy and freedom. Authority was given to the male as master, justified by the particularities of culture, tradition or religion legitimizing a hierarchical relationship detrimental to women. Therefore it was not recognized or seen as useful that the private sphere could be regulated by universal standards or that this sphere could be even regulated at all by law in some aspects.

The law itself creates a disconnection between the public and private spheres. The law operates in the public sphere to regulate work, political representation and other forms of public life but chooses not to regulate power relations within the family, purportedly to protect the right to privacy of the family. It sees no connection between the two spheres. The effect of this lack of State interference or neutrality is that women are left vulnerable to sexual and physical abuse in the private sphere of the family which gives men power over women.<sup>90</sup> The point is that the public and private spheres cannot be dichotomized. Male power over women in the private sphere also serves to diminish women's capacities to play significant roles in the public sphere. They cannot make choices freely about their public life. The significance of this is that women are excluded from the public world of business and politics. This phenomenon of relegating women to the private sphere of home, hearth and family is easily explained as a matter of nature, convenience or individual choice denying its real significance.<sup>91</sup>

The law builds on the sexual division of labour that has been culturally and socially imposed, entrenching men as income earners, leaders and decision makers. It does this by not providing positive measures such as affirmative action that would break the entrenched male preference in high ranking and high income earning positions in the work place or in political decision making bodies or by not ensuring adequate provisions through the law to facilitate the function of child upbringing. The absence of these positive measures reduces women's equality in the public sphere and maintains their economic and social dependence on men in the private sphere of the family.<sup>92</sup> Hence the sexual division of labour is not only descriptive of who does what but is also normative as it reinforces women's subordination on all fronts.<sup>93</sup>

Because of this, the CEDAW Committee has declared that any reservations to Article 16 of the CEDAW Convention which requires equality in marriage and family relations are in conflict with the very object and purpose of CEDAW.<sup>94</sup>

The stereotyping of women as care givers and homemakers and its social compulsion has not only reduced women's options for formal work but has also made their economic contribution to the care of the family

88. Charlesworth, H., 'What are "Women's International Human Rights?," 1994

89. Mahajan, G. 'Reconsidering the Private-Public Distinction,' *Cultural Review of International, Social and Political Philosophy*, Vol. 12, No. 2, Routledge, June 2009, pps. 133-143

90. Charlesworth, H., 'What are Women's International Human Rights?,' 1994

91. Charlesworth, H., 'The Public/Private Distinction,' 1988

92. Charlesworth, H., 'Worlds Apart: Public/Private Distinction in International Law,' In *Public and Private: Feminist Legal Debates*, M Thornton (ed), .1995

93. Charlesworth, H. Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law,' 1991, pps. 613-645

94. "The Committee also remains convinced that reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn." United Nations, 'Report of the Committee on the Elimination of All Forms of Discrimination against Women,' A/53/38/Rev.1 [47] para 17



through informal subsistence work invisible. Such work is not included in the National Accounting Systems and remains unmeasured, meaning that women's economic contributions remain unrecognized and not seen as worthy of technical support through development assistance, including education and training that is given to men. Women's unpaid work in the home or community is categorised as "unproductive", and women are labelled as "unoccupied, and economically inactive."<sup>95</sup>

The endorsement of the public/private distinction in international economic measurement excludes women from many aid programs because they are not considered workers or at best, only secondary workers. Industrialisation patterns motivated by global competition encourage job segregation with women in low skilled, low paid jobs.

As Noreen Burrows succinctly puts it, "for most women, what it is to be human is to work long hours in agriculture or in the home, to receive little or no remuneration and to be faced with legal and political processes which ignore their contribution to society and accord no recognition of their needs."<sup>96</sup>

### Culture as an impediment to equality

A closely related issue is cultural and societal value systems that operate to limit the human rights of women, especially in the private sphere of the family. The fact that article 16 providing for equality in marriage and in the family is one of the CEDAW articles on which States make the most reservations on the basis of culture and religion testifies to this.

Some of these contested rights within family relations include the right to economic resources such as the right to equal inheritance. This area of rights contested on the basis of culture or religion prescribes what is seen as socially-appropriate economic entitlements to women and men, and perpetuates stereotypical roles for women and men in the family. It denies women the capacity for autonomy and control over their lives which would enable them to access economic opportunities, facilitate social inclusion, have rights over their children and raise their value as equal citizens. In reality, it is the balancing of power between women and men that is contested in the name of culture and religion. Discrimination against women is seen as necessary for the well-being of the family and society.<sup>97</sup> Such social inequality, often inherited from the past, is defended by States and maintained as markers of cultural and religious identity and seen as essential for preserving social integrity. Thus social change is practically prohibited or at least the time has not come for change. Under these circumstances, women are conditioned into giving up their individual rights in the interests of preserving the social and cultural and even at times the perceived economic cohesion of the community or society.

But the interests of groups with a community vary and culture is not static either. Culture and social value systems constantly undergo changes and various forms of culture are also contested within the

95. Charlesworth, H., Op cit. 1988-1989 pp.199. Citing Dreze J and Sen A. Hunger and Public Action.1989. Chapter 4, and Waring M, *Counting for Nothing* (1988) p 34.

96. Burrows, N., 'International Law and Human Rights: The Case of Women's Rights,' in *Human Rights: From Rhetoric to Reality*, T. Campbell et al. (eds.), 1986

97. Pradhan-Malla, S., *Inheritance Rights of Nepali Women: Journey Towards Equality*, Forum for Women, Law and Development (FWLD) and IWRAP Asia Pacific, 2004. In 1993, a case was filed in the Supreme Court of Nepal, challenging the discriminatory inheritance law which did not entitle women to inherit parental property until the age of 35 and only if she remained unmarried. The court, in spite of recognizing the discrimination in the law, gave a directive to the government to introduce an appropriate bill in Parliament but cautioned that sudden change in social norms might destabilize society. Part of the court's decision reads, "in making sudden changes in traditional social practices and in matters of social norms pursued by the society since a long time ago, the society happens to become unable to adopt several matters, and if so happens, a different situation beyond perception would emerge."



community. Culture in practice is fluid and even contradictory, but when culture clashes with women's rights, culture is defended as 'fixed and sacred'.<sup>98</sup> Strong arguments emerge against the universality of rights as ideas imposed by the West, even today. What is astonishing about this is that all of the Member States of the United Nations declared at the World Conference on Human Rights (1993) that:

"All human rights are universal, interrelated, interdependent and indivisible."

And

"It is the duty of States, regardless of their economic, political and cultural systems to promote and protect all human rights and fundamental."<sup>99</sup>

Regardless of agreements at the international level, it is obvious that there is a constant power struggle at the national level between those who wish to retain power and privilege and those challenging the systems that deny them dignity and redress for grievances.<sup>100</sup>

The State, as the arbiter of contested claims within a country, is not neutral in its decisions on claims challenging "traditional" systems. Who represents the community and is successful in promoting a certain form of culture is determined by who has the power to demand the attention of the State.

The lesson for advocates of women's rights to equality is to have a cohesive strategy for legitimizing international human rights agreements and the principle of the universality of rights as well as to obtain legitimacy for widening the sources of rights. For this consensus has to be obtained among those holding differing views to be committed to the human rights concerned by developing cogent arguments that demystify the rationale behind the cultural value or practice.<sup>101</sup> To achieve this, a broad political support for the State to effect social change in the face of conflict with culture or religion is essential. Women's groups who are significant stake holders in such a project need to be well organized and able to mobilize political support for bringing about social change.<sup>102</sup>

### The Promise of CEDAW

CEDAW is the international human rights instrument that provides a theoretical framework as a counter to the limitations of formal equality and to the vagaries of the application of the law, as well as the social and cultural underpinnings that prevent women from exercising their right to equality. CEDAW requires the equal valuing of all individuals and groups as required by formal equality, but CEDAW emphasizes that all women are entitled to the benefits of equality and not just to have their right to equality in the law. CEDAW is therefore not aspirational. Its aim is to abolish status hierarchy, and in Article 2, it enjoins all States' parties to pursue without delay a policy for the realization of women's rights by enshrining these policies in national constitutions and other national legislation. In the legal framework it prescribes,

98. Mehra, M., 'Women's Equality and Culture in the Context of Identity Politics,' *Journal of Comparative Law*, Volume 2.2, 2007

99. United Nations General Assembly, 'The Vienna Declaration and Platform for Action,' 1993 Paragraph 5.

100. An-Na'im, A., 'State Responsibility to change Religious and Customary Laws,' in *Human Rights of Women: National and International Perspectives*,. Rebecca Cook, ed., University of Pennsylvania Press, 1994.

101. Abdulah Ahmed An-Na'im. *Ibid*

102. An-Na'im, A., *Ibid*

CEDAW underscores the perils of the consistency approach. The law cannot be applied in the same way to women as they might be to men and equal or identical treatment of women and men is not in the best interests of women's right to equality. In Article 1, CEDAW proposes that the test for discrimination be whether the legal measure has the effect of nullifying or impairing the exercise and enjoyment of all rights by women. Treatment does not count, only outcomes do, meaning that institutional rules must change and institutions must be transformed to accommodate differences and disadvantages and legitimize differential treatment where warranted.

Article 4.1 imposes on States to implement redistributive policies and programmes and provide enabling conditions that give women a head start and to level the playing field. Neutrality is not a virtue with CEDAW. Further, CEDAW also recognizes the need to cater to the special needs of women such as providing maternity leave and child care so that women are not disadvantaged by the functions of maternity and reproduction. It also recognizes that in the long term, social transformation is essential and the social relations of gender must change. In this regard, it calls for the elimination of cultural patterns of conduct that place women in an inferior position and sets an obligation on the State to eliminate the stereotyping of women and men (Article 5).

The CEDAW Convention shows a sharp insight into the realities of women's lives. CEDAW goes beyond the international and domestic norm of eliminating discrimination on the basis of sex, a norm that applies to both women and men and requires States' Parties to eliminate discrimination against women. This means all rights for women according to the context of their experience and need and not necessarily in comparison with men. CEDAW thus entrenches and expands the international protection of women rights.

### **The Situation in South East Asia**

SEA countries are diverse economically, socially and politically. They ratified CEDAW at different moments. The Philippines was the first country to ratify CEDAW in 1981 followed by Lao People's Democratic Republic (PDR), Viet Nam, Indonesia and Thailand, all of whom did so in the early 1980s. In the 1990s Cambodia, Malaysia, Singapore and Myanmar ratified CEDAW in that order. Timor-Leste was the last country to ratify CEDAW in 2003. Brunei, Singapore and Malaysia are the only countries with reservations currently to article 16. Apart from Timor-Leste, it has been decades since SEA countries ratified CEDAW. This is a considerable amount of time with which to ensure compliance with the legal standards contained in CEDAW, but achievement in these countries has not been satisfactory. This is not to deny incremental or piecemeal gains made to advance women's rights through the reform of law, policy or the implementation of programmes, but these gains are fragmented and have not contributed to the *de facto* equality of women in a coherent manner. The critical issue is that the international standards for equality as provided in CEDAW are not applied consistently in all areas of State endeavour. When Lao PDR was reviewed in 2009, the CEDAW Committee expressed its concern that:



"There is inadequate knowledge of the rights of women under the Convention, its concept of substantive gender equality and the Committee's general recommendations, in society in general, including among all branches of the Government and the judiciary at all levels, as indicated by the absence of information on any court decisions that refer to the Convention. It is further concerned that women themselves, especially those in rural and remote areas, are not aware of their rights under the Convention and thus lack the capacity to claim them."

The Committee urged the State party to "take all appropriate measures to ensure that the Convention is sufficiently known and applied by all branches of Government as a framework for all laws, court verdicts and policies on gender equality and the advancement of women."<sup>103</sup>

The concerns expressed to Lao PDR are applicable to all SEA parties to CEDAW. The legal framework to mandate and demand such a coherent, holistic and consistent application of CEDAW is not available in these countries with any level of certainty.

This section will not examine the status of CEDAW implementation comprehensively, but will look generally at adherence of the law at the domestic level in ensuring a legal framework for substantive equality. The questions that will be raised are to what extent CEDAW is applicable in the domestic legal order so that CEDAW standards should apply in courts. In the event that CEDAW has not been integrated into the national legal system, the question is whether an understanding of substantive equality is embodied in the Constitution or in other legislation such as a gender equality law, so there is a constitutional or statutory guarantee for substantive equality. A related issue is whether there is a legal definition of 'discrimination' as per Article 1 of CEDAW in the national legislation. This section will also examine whether there is a legal basis for the redistribution of resources, opportunities and political decision making positions in these countries favoring women, as required under Article 4.1. of CEDAW. Lastly, it will examine the fulfillment of the obligation to eliminate stereotyping or to modify or abolish cultural patterns of conduct that are premised on the inferiority of women as required under Article 5.1. This assessment will rely on Concluding Observations of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) in relation to the following countries: Cambodia (2006 and 2013); Indonesia (2102); Lao PDR (2006 and 2009); Malaysia (2006); Myanmar (2008); Philippines (2006); Singapore (2011); Thailand (2006); Timor-Leste (2009); and Viet Nam (2007).

103. Concluding observations: Lao PDR, CEDAW/C/LAO/CO/7, 2009, para11

All of the SEA countries have been reviewed more than once with the exception of Malaysia and Timor-Leste which have been reviewed only once. The latest review of each country is as follows:

| SEA Country | Date of Review |
|-------------|----------------|
| Cambodia    | 2013           |
| Indonesia   | 2012           |
| Lao PDR     | 2009           |
| Malaysia    | 2006           |
| Myanmar     | 2008           |
| Philippines | 2006           |
| Singapore   | 2011           |
| Thailand    | 2006           |
| Timor-Leste | 2009           |
| Viet Nam    | 2007           |



### III. Applicability of the Convention in the domestic courts, legal provisions for substantive equality and the definition of 'discrimination'

According to reviews by the CEDAW Committee, the status of treaty law is unclear in all SEA countries. While according to their legal system, treaty law may be recognized as part of domestic law in Cambodia, Lao PDR, Indonesia, Philippines, Timor Leste and Viet Nam, it is not clear whether treaty law is self-executing.<sup>104</sup> When the treaty is self-executing, the law provides adequate rules by which rights given in the treaty may be enjoyed or duties may be enforced. If the treaty is self-executing, just becoming a party to a treaty imposes immediate obligations on the State and one can invoke the treaty in the court as an actionable source of rights, so the treaty has the force of the law. It is generally not self-executing when the Constitution merely indicates the principle that treaty law is recognized as part of domestic law without providing rules giving them the force of law. Such treaties would still need to be integrated into further legislation to be effectively implemented.

For example, there is no clear guidance in the Constitutions of all the SEA countries mentioned on what will prevail if domestic law is in conflict with international treaty law. Further, the Committee has pointed out to these countries, that there is not enough jurisprudence in their countries to show that the Convention is self-executing and can be invoked in the courts. Hence the CEDAW Committee has recommended that States Parties to the Convention stipulate in their respective Constitutions or other appropriate legislation that the provisions of international human rights treaties and conventions are directly applicable and prevail over conflicting legislation. Such constitutional guarantees have not been added in any of these countries.

In the case of Malaysia, Singapore and Thailand, treaty law is not automatically recognized as part of domestic law; hence enabling legislation needs to be adopted in order to make the Convention applicable and enforceable, but such steps are yet to be taken.

Secondly, with the exception of the Philippines, none of the countries have a legal framework for substantive equality or an adequate legal definition of 'discrimination' as per Article 1 of CEDAW. Hence the problem is that the Constitution is unclear on the applicability of the standards of the Convention and there are no precise provisions in the Constitution or other laws that embody substantive equality. While discrimination on the basis of sex is prohibited in the Constitutions of all of the countries, the CEDAW Committee in its Concluding Observations has pointed out to all of the South East Asian States Parties that their Constitution or other appropriate legislation does not include an effective constitutional guarantee of substantive equality and neither does it 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.

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104. Dairiam, S. The Status of CEDAW Implementation in ASEAN Countries and Selected Muslim Countries. *IWRAW Asia Pacific Occasional Paper Series 1*. Kuala Lumpur 2004. P.7.



The examples given below and taken from the latest Concluding Observations of SEA countries illustrate the point.

**Cambodia:** *"The Committee reiterates its previous recommendation CEDAW/C/KHM/CO/3, para. 12)<sup>105</sup> and recommends that the State party consider adopting comprehensive legislation governing gender equality, which should include a definition of discrimination against women that encompasses both direct and indirect discrimination in line with article 1 of the Convention."<sup>106</sup>*

**Indonesia:** *"While noting that discrimination on the basis of sex is prohibited in article 8 of the Constitution and in Law No. 39/1999, on human rights, the Committee reiterates its concern that there is no clear definition of discrimination modelled on article 1 of the Convention in the Constitution or in other legislation."<sup>107</sup>*

**Lao PDR:** *"The Committee reiterates its concern that the status of the Convention vis-à-vis domestic legislation is unclear. While noting that a definition of the term "discrimination against women" has been included in the Prime Minister's Decree No. 26/PM of 6 February 2006 on the Implementation of the Law on Development and Protection of Women, the Committee remains concerned that the Constitution or other appropriate legislation 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."<sup>108</sup>*

**Myanmar:** *"While noting the statement by the delegation that the Convention is directly applicable, the Committee is concerned that the new State Constitution, which was approved in May 2008, does not include a provision concerning the applicability of international treaties, including the Convention. The Committee notes that the Constitution formally indicates women's equality with men and includes sex as a ground of discrimination. However, the Committee is concerned that the Constitution does not include an effective constitutional guarantee of substantive equality and that the definition of discrimination is not in accordance with the definition of discrimination contained in article 1 of the Convention, which prohibits direct and indirect discrimination and discrimination in the public and private spheres."<sup>109</sup>*

**Thailand:** *"The Committee is concerned that, although article 30 of the Constitution guarantees equal rights for women and men, there is no explicit definition of discrimination against women, in accordance with Article 1 of the Convention, which prohibits direct and indirect discrimination, in the State party's legislation."<sup>110</sup>*

**Timor Leste:** *"The Committee is concerned that, although Article 16 of the Constitution affirms the principle of non-discrimination, neither the Constitution nor other laws include a definition of discrimination against women in accordance with article 1 of the Convention, which prohibits direct and indirect discrimination. The Committee is also concerned that, although article 6 (j) of the Constitution declares the State responsible for promoting and ensuring "effective equality of opportunities between women and men", the principle of "equality of opportunities" does not amount to the notion of "equality" in its fullest sense, in accordance with article 2 (a) of the Convention."<sup>111</sup>*

105. "The Committee urges the State party to include in domestic law a definition of discrimination against women that encompasses both direct and indirect discrimination in line with Article 1 of the Convention. It encourages the State Party to take advantage of the ongoing legal reform process to achieve the full compatibility and compliance of all laws with the provisions of the Convention." CEDAW/C/KHM/CO/3. 2006. para 12

106. Concluding observations: Cambodia, CEDAW/C/KHM/CO/4-5, 2013., para 11

107. Concluding observations: Indonesia, CEDAW/C/IDN/CO/6-7/R.1 2012., para 13

108. Concluding observations: Lao PDR, CEDAW/C/LAO/CO/7 2009., para 9

109. Concluding Observations: Myanmar, CEDAW/C/MMR/CO/3 2008., para 8

110. Concluding Observations: Thailand, CEDAW/C/THA/CO/5 2006., para 15

111. Concluding Observations: Timor Leste, CEDAW/C/TLS/CO/12009., para 17



The outcome of the inadequacy of the law at the domestic level to meet the Convention's standards for equality and non-discrimination 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.

For instance, the CEDAW Committee to Malaysia stated that "while appreciating that the State Party amended Article 8 (2) of the Federal Constitution in 2001 to prohibit discrimination on the basis of gender, the Committee is concerned about the narrow interpretation given to this article by Malaysian courts."<sup>112</sup>

To offset this possibility, the Committee has recommended to Malaysia that it implements a comprehensive law (such as a gender equality law) reflecting substantive equality of women with men in both public and private spheres of life. This has not yet been done in Malaysia. It is also noteworthy that while Viet Nam has adopted a gender equality law and Singapore has adopted a Women's Charter, both these instruments do not have a definition of discrimination as per Article 1 of the Convention.

In the case of Myanmar, the Committee expressed concern regarding Chapter 8 of the newly adopted Constitution which includes a prohibition of discrimination on the basis of sex in the appointment of Government posts or duties but adds that "nothing in this section shall prevent appointment of men to the positions that are naturally suitable for men only." The Constitution has actually entrenched stereotyping that is prohibited in Article 5 of the Convention.<sup>113</sup>

Only in the case of the Philippines is there now an adequate legal guarantee of substantive equality, with the adoption of the Magna Carta of Women in 2010. The Magna Carta guarantees a framework of rights for women based directly on international law, and particularly the CEDAW Convention. It also recognizes human rights guaranteed by the ICCPR, the Convention on the Rights of the Child (CRC), and the ICESCR. It holds the definition of discrimination as required under Article 1 of the Convention. While the State bears the primary responsibility for the implementation of the Magna Carta, the obligation to fulfill equality for women is also binding on private individuals and the private sector. It also has provisions for temporary special measures in line with Article 4.1 of the Convention.

Significantly, the Magna Carta guarantees the civil, political, social and economic rights of women in marginalized sectors and designates the Commission on Human Rights as the Gender and Development (GAD) Ombudsman to ensure the promotion and protection of women's rights.

In addition to guaranteeing substantive rights, the Magna Carta clearly establishes the duty of the government to take steps to end discrimination against women within a specific time frame. It states that the Philippine government must "ensure the substantive equality of men and women" and mandates the State to take steps to review, amend or repeal existing laws that are discriminatory towards women within three years of the Act entering into force.

While the Philippines must be commended for the adoption of this law, it must also be noted that it took 29 years for it to fulfill its obligation to provide an adequate legal framework for women's equality. Furthermore, it is still too early to assess the effect of this law on women, particularly if the provisions for substantive equality in the Magna Carta will prevail if they are in conflict with existing laws. Ensuring the unambiguous applicability of treaty law in national legislation would be a much needed step.

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112. Concluding Observations: Malaysia, CEDAW/C/MYS/CO/2 2006., para 7. The Committee was referring to the case of flight attendant Beatrice Fernandez, please refer to note 47.

113. Concluding Observations: Myanmar, CEDAW/C/MMR/CO/3.,2008., para 8



### Provisions for temporary special measures or guarantees for redistribution of opportunities and resources

In all of the countries, women are underrepresented to varying degrees in political and public life and in senior management positions. In some instances, the CEDAW Committee expressed concern that the State Parties' understanding of the concept of 'temporary special measures' is not in accordance with the Committee's interpretation of those measures as set out in its General Recommendation 25 and that such measures are not systematically applied as a strategy to accelerate *de facto* or substantive equality between women and men in all areas of the Convention.

Uniformly, the Committee recommended the implementation of temporary special measures, in accordance with Article 4, Paragraph 1 of the Convention, as a means to accelerate compliance with the provisions of Article 7, (women's participation in public and representation in political life) together with the establishment of timetables and targets for women's equal participation at all levels of decision-making. The Committee recommends that the State party apply temporary special measures in areas where women are underrepresented or disadvantaged and allocate additional resources where needed to accelerate the advancement of women. The Committee also recommends that the States parties include in their legislation specific provisions on the application of temporary special measures that encourage their use in both the public and private sectors.

### Negative cultural practices and stereotyping

The Committee expressed its concern to all of the countries regarding gender stereotyping, the effects of which would be to impede women's full enjoyment of their human rights. Generally, the Committee pointed to the persistence of adverse cultural norms, practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in the family and in society. It noted that stereotypes contribute to the persistence of violence against women and practices harmful to women and girls, such as female genital mutilation, early marriage, arranged marriages and polygamy in some of the countries. The Committee expressed its concern that State Parties had not taken sufficient, sustained and systematic action to modify or eliminate stereotypes and harmful practices. Some of the relevant Concluding Observations are high-lighted below:

**Cambodia:** *"While noting the value of the cultural heritage of Cambodia, the Committee is concerned about strong gender-role stereotyping, in particular that reflected in the traditional code of conduct known as chbab srey, which legitimizes discrimination against women and impedes women's full enjoyment of their human rights and the achievement of equality between men and women in Cambodian society."*<sup>114</sup>

**Indonesia:** *"The Committee is deeply concerned about the failure to consistently implement the provisions of the Convention at the provincial and district levels, even though the Constitution empowers the central Government to do so. The Committee notes that, owing to the policy of decentralization (Law 32/2004), many regions have increasingly implemented laws and policies that severely discriminate against women, and therefore women have lost fundamental rights that they had previously been able to exercise freely. The Committee is also deeply concerned about the increased influence of fundamentalist religious groups advocating restrictive interpretations of sharia law, which has resulted in discrimination against women."*<sup>115</sup>

114. Concluding Observations: Cambodia, CEDAW/C/KHM/CO/4-5, 2013., para 17

115. Concluding observations: Indonesia. CEDAW/C/IDN/CO/6-7/R.1 2012., para 15



**Indonesia:** "While noting that the State Party has taken measures to eliminate stereotypes, such as the periodical review of school curricula, the introduction of a gender perspective in education and religion and the conduct of public and media awareness campaigns, the Committee remains deeply concerned at the persistence of adverse cultural norms, practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in the family and in society. It notes that stereotypes contribute to the persistence of violence against women and practices harmful to women and girls, such as female circumcision, early marriage, arranged marriage and polygamy. The Committee expresses its deep concern that the State party has not taken sufficient sustained and systematic action to modify or eliminate stereotypes and harmful practices."<sup>116</sup>

**Lao PDR:** "While noting that the Ministry of Education is developing an educational curriculum that incorporates the teaching of gender roles and gender equality, the Committee is concerned at the persistence of adverse norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life, especially within some ethnic groups. The Committee is also concerned that such customs and practices perpetuate discrimination against women and girls, and that they are reflected in the disadvantageous and unequal status in many areas, including in education, public life, decision-making and the persistence of violence against women and that, thus far, the State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative traditional values and practices. The Committee is further concerned at the reported practice of raping girls before puberty in certain ethnic groups."<sup>117</sup>

**Malaysia:** "While noting the work of the Ministry of Education in providing guidelines to writers and publishers of school textbooks to eliminate gender stereotypes from school books, the Committee is concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and society. These stereotypes present a significant impediment to the implementation of the Convention and are a root cause of the disadvantaged position of women in a number of areas, including in the labour market and in political and public life."<sup>118</sup>

**Myanmar:** "While recognizing the importance of the activities of MAAF related to the appreciation of cultural diversity and cultural solidarity, the Committee is concerned about the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life, especially within some ethnic groups. The Committee is concerned that such customs and practices perpetuate discrimination against women and girls, as reflected in their disadvantageous and unequal status in many areas, including in public life and decision-making and in marriage and family relations, and the persistence of violence against women and that, thus far, the State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and practices."<sup>119</sup>

**Thailand:** "The Committee expresses concern at the persistence of strong stereotypical attitudes about the roles and responsibilities of women and men in the family and in society. Such stereotypes undermine women's social status, present a significant impediment to the implementation of the Convention and are a root cause of the disadvantaged position of women in a number of areas, including in the labour market and in political and public life."<sup>120</sup>

116. Concluding observations: Indonesia. CEDAW/C/IDN/CO/6-7/R.1 2012., para 2

117. Concluding observations. Lao PDR, CEDAW/C/LAO/CO/7 2009., para 21

118. Concluding observations: Malaysia. CEDAW/C/MYS/CO/2 2006., para 15

119. Concluding Observations: Myanmar, CEDAW/C/MMR/CO/3 2008., para 20

120. Concluding Observations: Thailand, CEDAW/C/THA/CO/5 2006., para 25

**Timor Leste:** *"The Committee is concerned about the prevalence in the State party of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep rooted adverse cultural norms, customs and traditions, including forced and early marriage, polygamy and bride price or dowry (barlake), that discriminate against women, result in limitations to women's educational and employment opportunities and constitute serious obstacles to women's enjoyment of their human rights."<sup>121</sup>*

**Viet Nam:** *"The Committee reiterates its concern about the persistence of patriarchal attitudes and deep-rooted stereotypes, including the preference for male offspring, regarding the roles and responsibilities of women and men within the family and society at large. These stereotypes present a significant obstacle to the implementation of the Convention, are a root cause of violence against women and put women in a disadvantaged position in a number of areas, including in the labour market and in political and public life."<sup>122</sup>*

During the review of State Party reports, the Committee clarified that cultures should be regarded as dynamic components of a country's social fabric and are therefore subject to change. It urged the State Parties to put in place without delay a comprehensive strategy, including the review and formulation of legislation, to modify or eliminate traditional practices and stereotypes that discriminate against women, in conformity with Articles 2 (f) and 5 (a) of the Convention.

Such measures should include concerted efforts, with a clear time frame and in collaboration with civil society, to provide education and raise awareness about the harmful impact of gender-based stereotyping, and should target women and men at all levels of society, and should involve the school system, the media and community and religious groups and leaders.

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121. Concluding Observations: Timor Leste, CEDAW/C/TLS/CO/1, 2009., para 27

122. Concluding Observations: Vietnam, CEDAW/C/VNM/CO/6, 2007., para 12





## IV. Conclusion

As laws confer formal equality on groups, it disturbs the institutions and practices that maintain social stratification, and to the extent it does so, incremental changes in the relative social position of groups may result.<sup>123</sup> This is the definition of 'formal equality,' but formal equality also promotes individualization and neutrality and masks a bias towards the dominant.

Equality can have varied meanings, treatment, opportunity and results. The redistribution of resources and the enhancement of the capabilities of women as a marginalized group are essential. The social transformation of a society that appreciates women's equality is an important ingredient and the State is obliged to start the process for this transformation. Jurisprudential developments around the world promoting substantive equality are encouraging. Sandra Fredman cites the decision of Canadian Chief Justice Beverley McLachlin who she says has put distance between Section 15 of the Canadian Constitution (the equality clause of the Canadian Charter of Rights and Freedoms) and formal equality.<sup>124</sup> In the "Andrews" decision, the Chief Justice pointed out the "potential vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment impacts on the lives of members of stigmatized groups. The purpose of the Canadian Charter guarantee of equality, the Court affirmed, was not to guarantee some abstract notion of similar treatment for the similarly situated, "[but] rather to better the situation of members of groups which had traditionally been subordinated and disadvantaged."

Finally, CEDAW is an instrument that ideally promotes substantive equality like no other. Its promotion and the facilitation of its implementation is an important national and international tool. Evidence from the review of States' Parties by the CEDAW Committee reveals that an adequate legal framework to ensure applicability of the substantive equality standards of the Convention is still not the norm. Hence the potential of CEDAW is not effectively exploited in the countries of South East Asia.

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123. Fredman, S., 'Discrimination Law,' 2002

124. Fredman, S., *Ibid.*



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