

July 2008

DOSSIER 29

A Collection of Articles

Mechanisms and Structures to Promote and Protect Women's Human Rights and Gender Equality

Contents:

What is WLUML?

Introduction

by Rashida Manjoo and Kristen DeRemer

A History of United Nations Developments Relating to Gender Equality Mechanisms and Structures

by Rashida Manjoo & Kristen DeRemer

Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women: Potential and Actuality

by Anuradha Rao and the International Women's Rights Action Watch

Structures and Mechanisms for the Attainment of Gender Equality: The African Experience

by Pethu Serote

Legislation and Mechanisms for Promoting Gender Equality: The Australian Experience

by Sara Charlesworth

Implementation of Gender Equality Standards in Central and Eastern Europe – Mission (Im)possible?

by Anna Wilkowska-Landowska

Legal Mechanisms towards Gender Equality in Germany and the European Union

by Professor Dr. Dagmar Oberlies

The Hong Kong Position on Gender Equality

by Anna Wu

Mechanisms to Promote Gender Equality in Malaysia: The Need for Legislation

by Zarizana Abdul Aziz

Strengthening the National Commission on the Status of Women: A Consultative Process

Report by the Aurat Publication and Information Services Foundation and Shirkat Gah – Women's Resource Centre

Mechanisms to Promote and Protect Women's Human Rights in South Africa

Editor: Jessie Rossman

The National Machinery for the Protection and Promotion of Women's Rights in Sri Lanka

by Chulani Kodikara

عوائق في حياة مسلمات

Women living under muslim laws
النساء في ظل قوانين المسلمين
Femmes sous lois musulmanes

WLUML Dossiers:

The Dossiers explore and synthesize a broad range of feelings, interpretations and strategies of women on issues of feminism, nationalism, internationalism, and religion.

The Dossiers are an occasional publication of the international solidarity network of Women Living Under Muslim Laws. Conceived as a networking tool, they aim to provide information about lives, struggles and strategies of women living in diverse Muslim communities and countries.

Women's groups may freely reproduce material, however we would appreciate acknowledgements. For those articles previously published in other journals, permission should be sought directly from them.

Information contained in the Dossiers does not necessarily represent the views and positions of the compilers or of the network Women Living Under Muslim Laws, unless stated. The Dossiers are meant to make accessible the broadest possible strands of opinion within varied movements/initiatives promoting greater autonomy of women. The Dossiers seek to inform and share different analysis and experiences.

WLUML runs a very popular website in English, French and Arabic which is updated regularly with news and views, calls for action and publications. For more information please visit www.wluml.org

Regional Coordination Offices are in Nigeria and Senegal (Africa and Middle East) and Pakistan (Asia) and are responsible for coordinating network activities in their respective regions:

Africa & Middle East Coordination Office

Groupe de Recherche sur les Femmes et Lois au Senegal (GREFELS)
PO Box 5330, Dakar Fann, Dakar, Senegal
Email: grefels@sentoo.sn

Asia Coordination Office

Shirkat Gah Women's Resource Centre
PO Box 5192, Lahore, Pakistan
Email: sgah@sgah.org.pk

The International Coordination Office (ICO) facilitates coordination between networkers:

International Coordination Office

PO Box 28445, London, N19 5NZ, UK
Email: wluml@wluml.org
Website: www.wluml.org

WLUML would like to acknowledge and thank the following foundations and corporations for their support: HIVOS, NORAD, Sigrid Rausing and Swiss Development Cooperation.

Page v	What is WLUML?
ix	Introduction <i>by Rashida Manjoo and Kristen DeRemer</i>
1	A History of United Nations Developments Relating to Gender Equality Mechanisms and Structures <i>by Rashida Manjoo & Kristen DeRemer</i>
13	Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women: Potential and Actuality <i>by Anuradha Rao and the International Women's Rights Action Watch</i>
21	Structures and Mechanisms for the Attainment of Gender Equality: The African Experience <i>by Pethu Serote</i>
39	Legislation and Mechanisms for Promoting Gender Equality: The Australian Experience <i>by Sara Charlesworth</i>
49	Implementation of Gender Equality Standards in Central and Eastern Europe – Mission (Im)possible? <i>by Anna Wilkowska-Landowska</i>
59	Legal Mechanisms towards Gender Equality in Germany and the European Union <i>by Professor Dr. Dagmar Oberlies</i>
71	The Hong Kong Position on Gender Equality <i>by Anna Wu</i>

contents continued overleaf...

Page	
79	Mechanisms to Promote Gender Equality in Malaysia: The Need for Legislation <i>by Zarizana Abdul Aziz</i>
95	Strengthening the National Commission on the Status of Women: A Consultative Process <i>Report by the Aurat Publication and Information Services Foundation and Shirkat Gah – Women's Resource Centre</i>
107	Mechanisms to Promote and Protect Women's Human Rights in South Africa <i>Editor: Jessie Rossman</i>
119	The National Machinery for the Protection and Promotion of Women's Rights in Sri Lanka <i>by Chulani Kodikara</i>
	Annexes
125	Introduction
126	Annexe I
131	Annexe II
136	Annexe III
138	Annexe IV
139	Annexe V
142	Contributors

What is WLUML?

Women Living Under Muslim Laws is an international solidarity network that provides information, support and a collective space for women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.

For more than two decades WLUML has linked individual women and organisations. It now extends to more than 70 countries ranging from South Africa to Uzbekistan, Senegal to Indonesia and Brazil to France. It links:

- Women living in countries or states where Islam is the state religion, secular states with Muslim majorities as well as those from Muslim communities governed by minority religious laws;
- Women in secular states where political groups are demanding religious laws; women in migrant Muslim communities in Europe, the Americas, and around the world;
- Non-Muslim women who may have Muslim laws applied to them directly or through their children;
- Women born into Muslim communities/families who are automatically categorized as Muslim but may not define themselves as such, either because they are not believers or because they choose not to identify themselves in religious terms, preferring to prioritise other aspects of their identity such as political ideology, profession, sexual orientation or others.

Our name challenges the myth of one, homogenous 'Muslim world'. This deliberately created myth fails to reflect that: a) laws said to be Muslim vary from one context to another and, b) the laws that determine our lives are from diverse sources: religious, customary, colonial and secular. We are governed simultaneously by many different laws: laws recognised by the state (codified and uncoded) and informal laws such as customary practices which vary according to the cultural, social and political context.

How did WLUML start?

WLUML was formed in 1984 in response to three cases in Muslim countries and communities in which women were being denied rights by reference to laws said to be 'Muslim' requiring urgent action. Nine women from Algeria, Morocco, Sudan, Iran, Mauritius, Tanzania, Bangladesh and Pakistan came together and formed the Action Committee of Women Living Under Muslim Laws in support of local women's struggles. This evolved into the present network in 1986. The network is guided by Plans of Action which are reviewed periodically. For more information please see the WLUML website at www.wluml.org

What are WLUML's aims and focus?

The network aims to strengthen women's individual and collective struggles for equality and their rights, especially in Muslim contexts.

It achieves this by:

- Breaking the isolation in which women wage their struggles by creating and reinforcing linkages between women within Muslim countries and communities, and with global feminist and progressive groups;
- Sharing information and analysis that helps demystify the diverse sources of control over women's lives, and the strategies and experiences of challenging all means of control.

WLUML's current focus is on the three themes of, fundamentalisms, militarization, and their impact on women's lives, and sexuality. As a theme, violence against women cuts across all of WLUML's projects and activities.

How is WLUML organised?

WLUML's open structure has been designed to maximize participation of diverse and autonomous groups and individuals as well as collective decision-making. WLUML does not have formal membership and networkers are a fluid group of individuals and organisations who maintain regular two-way contact with the network.

The Board of Director and Council comprises 20-30 women and men involved in aspects of cross-regional networking within WLUML for a significant period of time. They take primary responsibility for developing and implementing the Plans of Action.

The International Coordination Office (ICO) has primary responsibility for facilitating coordination between networkers. Regional Coordination Offices are in Pakistan (Asia) and Senegal (Africa and Middle East) and are responsible for coordinating network activities in their respective regions. Although legally and financially autonomous, they are key components of WLUML. Based on their connections with networkers, and their knowledge and understanding of networkers' activities and contexts, the ICO and Regional Offices ensure that the relevant people in the network are meeting, strategizing, planning and acting so as to support each other and thereby strengthen local, regional and global effectiveness.

What are WLUML's principles?

WLUML focuses on laws and customs and the concrete realities of women's lives. This includes the often diverse practices and laws classified as 'Muslim' (resulting from different interpretations of religious texts and/or the political use of religion) and the effects these have on women, rather than on the religion of Islam itself.

The network consciously builds bridges across identities - within our contexts and internationally. We are especially concerned about marginalized women. This includes non-Muslims in Muslim majority states, especially where spaces for religious minorities is rapidly dwindling; Muslim minorities facing discrimination, oppression, or racism; women whose assertions of sexuality - including but not limited to sexual orientation - are either criminalized or are socially unacceptable.

WLUML recognises that women's struggles are interconnected and complementary, and therefore has a commitment to international solidarity.

WLUML actively endorses plurality and autonomy, and consciously reflects, recognises and values a diversity of opinions. Individuals and groups linked through the network define their own particular priorities and strategies according to their context.

The personal has always played an important part in the work of WLUML, which values the solidarity and active support that the networkers extend to each other by way of personal links.

What does WLUML do?

Solidarity & Alerts

WLUML responds to, circulates and initiates international alerts for action and campaigns as requested by networking groups and allies. WLUML also provides concrete support for individual women in the form of information on their legal rights, assistance with asylum applications, and links with relevant support institutions, psychological support, etc.

Networking & Information Services

WLUML puts women in direct contact with each other to facilitate a non-hierarchical exchange of information, expertise, strategies and experience. Networking also involves documenting trends, proactively circulating information among networkers and allies, generating new analysis, and supporting networkers' participation in exchanges and international events. While WLUML prioritises the needs of networkers, it also selectively responds to requests for information from, for example, academics, activists, the media, international agencies and government institutions.

Capacity Building

WLUML consciously builds the capacity of networking groups through internships at the coordination offices, and exchanges, trainings and workshops.

Publications and Media

WLUML collects, analyses and circulates information regarding women's diverse experiences and strategies in Muslim contexts using a variety of media. It translates information into and from French, Arabic and English wherever possible. Networking groups also translate information into numerous other languages.

An active publications programme produces:

- A theme based Dossier, an occasional journal which provides information about the lives, struggles and strategies of women in various Muslim communities and countries;
- A quarterly Newsheet on women, laws and society by Shirkat Gah, WLUML Asia Regional Coordination Office;
- A bi-annual Newsletter on women, laws and society by WLUML International Coordination Office (ICO);
- Occasional Papers - specific studies and materials which, for reasons of length or style, cannot be included in the Dossier series and;
- Other publications on specific issues of concern such as family laws, women's movements, initiatives and strategies, etc.

For more information and to download WLUML publications, please visit www.wluml.org/english/publications.shtml

WLUML runs a very popular website in English, French and Arabic which is updated regularly with news and views, calls for action and publications: www.wluml.org

Collective Projects

Collective projects have included topic-specific initiatives that arise out of the shared needs, interests and analysis of networkers. Networking groups and individuals are free to participate, or not, according to their needs and capacity, and collective projects have involved from three to over twenty networking groups and lasted from a few months to ten years. Projects are principally coordinated and implemented by networking groups or individual networkers in their respective countries or communities; the coordination offices provide facilitation when necessary.

Collective projects have included training sessions, workshops, research for advocacy, meetings and exchanges around specialised topics.

Previous projects include:

- Exchange programme (1988)
- Qur'anic interpretations meetings (1990) and for West African networkers (2002) and Francophone West Africa (2004)
- Women and Law in the Muslim world programme (1991-2001)
- Feminism in the Muslim World Leadership Institutes (1998, 1999 and 2007)
- Gender and displacement in Muslim contexts (1999-2002)
- Initiative for Strengthening Afghan Family Laws - INSAF (2002 - present)
- The Feminist Dialogues (2006 – present)
- The Global Campaign to Stop Killing and Stoning Women! (2007 – present)

Introduction

by Rashida Manjoo and
Kristen DeRemer

***“Appropriate governmental machinery for monitoring and improving the status of women should be established where it is lacking. To be effective, this machinery should be established at a high level of government and should be ensured adequate resources, commitment and authority to advise on the impact on women of all government policies. Such machinery can play a vital role in enhancing the status of women, inter-alia, through the dissemination of information to women on their rights and entitlements, through collaborative action with various ministries and other government agencies and with non-governmental organizations, and indigenous women’s societies and groups.”*¹**

In addition to the work of multi-national institutions, the theory is that national gender machinery can play an important role in the struggle to protect and promote women’s rights. Catherine Albertyn argues that national machinery for the advancement of women “... consists of structures, mechanisms, and strategies for achieving equality for women as participants, decision makers and beneficiaries in the political, social, economic and cultural spheres of life.”² Throughout the past several decades, the concepts of both women’s rights and gender equality, has been gaining social and political attention, in the quest to advance the interest of women. Both international and local institutions, and other governance structures, have been developing gender-based strategies for improving their legitimacy, efficacy and capacity. At the same time, United Nations declarations, conventions, and resolutions have increasingly focused on gender equality and the promotion of women’s human rights.

The papers in this Dossier provide an overview of different country and regional experiences in the quest to achieve the promotion of both women’s rights and gender equality. Varying from country to country, initiatives include laws, policies, structures and mechanisms. In almost all countries, existing mechanisms tend to be incorporated as part of government structures. Whether functioning within an established ministry or given a more autonomous position, the role of these machineries, and the mechanisms they put into place, maintain similar goals. However, the mandates, responsibilities, and resources available to each, vary. The papers raise many questions, including: Are separate structures for the advancement of women necessary? Who makes the decision to set up machineries at a national level? What are some of the reasons for doing so? Through what mechanism is the machinery created? How do women’s machineries vary from context to context? In what ways do they impact society? What are the successes and challenges in the different contexts?

In response to numerous requests, from members of the Women Living under Muslim Laws Network (WLUML) for best practices and practical guidance on machinery for the advancement of women, an internal working group was set up to address the call for information. Desktop research was undertaken by students enrolled in the Human Rights Clinical Advocacy course at the Human Rights Program at Harvard Law School. The students who worked on the project under the supervision of Rashida Manjoo are: Mary Ann Franks, Alexis Loeb, Jessie Rossman and Erin Thomas. The research project was undertaken on behalf of WLUML and included an in-depth case study of South Africa’s efforts at promoting and protecting women’s human rights. The

research findings have served two purposes: firstly, it was shared with relevant stakeholders within South Africa as an analysis of the successes and challenges that exist in the promotion and protection of women's human rights in that country. In addition, a synopsis was presented at the international conference in Malaysia. The International Conference on "Mechanisms and Legislation to Promote and Protect Gender Equality" was jointly organized with the Women's Centre for Change, Penang (WCC). It was held in Malaysia in August 2006. This conference was financially supported by WLUML, the WCC and the Asia Foundation. The logistics for the conference was undertaken by the staff of the Women's Centre for Change. Special thanks are due to them for their professionalism and caring, both prior to and during the event. The conference would not have been a success without their assistance. We appreciate the assistance received, and are truly grateful for the collaboration.

The contributing papers to this Dossier were originally presented at the international conference. Subsequent to the conference, their content has been edited by both the authors of papers and editors of this Dossier. In many papers, changes have been made to reflect current policies and status of their countries' gender legislation and mechanisms. The conference offered a unique cross-regional perspective and exchange on gender equality legislation and mechanisms with a particular focus on lessons learned through the process of designing and implementing national machinery for the advancement of women. Participants and contributors included experienced practitioners and their contributions reflected geographic diversity ranging from information on machineries in Africa, Australia, Central and Eastern Europe, Germany, Hong Kong,

Iran, Malaysia, Pakistan, and Sri Lanka. This conference provided a forum for participants to share and learn from the successes and challenges experienced in other countries through insightful presentations and innovative discussions. In addition, a brief discussion was held at the conference, on the development of women's charters as a tool for the advancement of women's rights. This is a particularly useful tool in contexts where there is a lack of political will to set up women's/gender machineries. It is also a useful tool that can be used to mobilize women and help start a women's movement. The work on women's charters will be pursued by WLUML in the coming year. Due to financial and time constraints, contributors from North and South America were not included in the international conference. Despite this shortcoming, we hope the following papers will offer a rich discussion and snapshot into the similarities facing mechanisms for the advancement of women.

This Dossier will begin with a paper that sets out the role of the United Nations (UN) in developments that have significantly impacted the establishment of national women's machineries. By mapping key measures throughout the decades, this brief history sets the groundwork for more in depth discussions that follow in the individual country papers. For the sake of completeness in relation to the UN, we have included a paper that presented a review of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Delving into the regional papers, we begin with an overview of African continent-wide mechanisms with a particular insight into the Southern African Development Community. This is followed by a paper on developments in Central and Eastern Europe where we learn how cultural perceptions and past political experiences

influence the nature of gender equality, and how this translates into meeting necessary requirements for joining the European Union. Lessons are then shared by countries with long established histories of gender equality such as Australia, where despite its long history of mechanisms to advance women's rights, the author shares the challenges that continue to exist. In Germany we see the inclusion of anti-discrimination legislation and how being a member of the European Union has influenced the development of its legislation. Presented from Hong Kong is a discussion on the need for upholding equal opportunities and the rise of gender equality mechanisms. Participants from Malaysia shared their work-in-progress on the drafting of equality laws and mechanisms. The paper from Pakistan shares the steps they have taken for improving their current machinery through sharing best practices at an international conference, and also through provincial level dialogues. From South Africa, where the history of activism has engaged women's movements since the 1950's, the author shares how the creation of a Commission on Gender Equality has impacted the push for women's rights. Lastly, from Sri Lanka, is a review of key provisions from the draft National Commission for Women Bill that is currently under negotiation.

At the International Conference on "Mechanisms and Legislation to Promote and Protect Gender Equality", the Most Honourable Tan Sri Dato Siti Norma Yaakob, Chief Judge of Malaya, stated in her opening speech that, "Law and justice forms the threads that weave our social fabric together. It provides us with standards of conduct and behaviour. It binds the people as well as the governments." In many contexts, national machineries for the advancement of women are set up through laws and policies, with

the goal of achieving gender justice. To advance the rights of women, the success of mechanisms supporting women's human rights requires the political will of a nation, as well as social support for such mechanisms.

The experiences shared in this Dossier reflect the influence of global and local developments, both in relation to mechanisms and structures; and also methodologies used. The 1970s saw, at a global level in general and in developing countries in particular, efforts at integrating women into development using a welfare and anti-poverty paradigm. The objective was largely to make more resources available and to create more access to economic opportunities for women - in other words, the "women in development" approach. The 1980s saw a paradigm shift to a "gender and development" approach that worked towards mainstreaming or institutionalizing gender concerns. This was in response to the recognition that unequal power relations structure the lives of women, and that there had been a failure to address this at the political, legal, economic or social levels. The transformation of society required the improvement of women's position, relative to men, in order to achieve equity and respect for the human rights of both women and men. The empowerment of women was a crucial component of a model that challenged the system of power, status and privilege in the quest for justice and equity for women.³ During the 1990's, the methodology changed to gender mainstreaming, i.e. women's issues became more mainstream rather than discussed as separate issues.

The concept of gender mainstreaming is a complex and controversial one. Gender mainstreaming sought to introduce change and reform into state structures themselves.

According to the UN Office of the Special Adviser on Gender Issues:

The mainstreaming strategy does not mean that targeted activities to support women are no longer necessary. Such activities specifically target women's priorities and needs, through, for example, legislation, policy development, research and projects/programmes on the ground. Women-specific projects continue to play an important role in promoting gender equality. It is crucial to understand that these two strategies - gender mainstreaming and women's empowerment - are in no way in competition with each other. The endorsement of gender mainstreaming within an organization does not imply that targeted activities are no longer needed. The two strategies are complementary in a very real sense, as gender mainstreaming must be carried out in a manner that is empowering for women.⁴

However, many legal scholars and activists argue that gender mainstreaming has failed to genuinely institutionalize gender equality into state practices.⁵ Hilary Charlesworth offers a strong critique of the concept of moving gender into the fundamentally conservative and compromised "mainstream," and advocates for a more radical approach to gender issues.⁶ Charlesworth argues that the positive effects of gender mainstreaming are notoriously difficult to document, and that in the absence of solid evidence, institutions are all too quick to assume the best – and use this as a justification for cutting resources for (necessary) women-specific initiatives.⁷

Scholars, such as Jacqui True, argue that gender mainstreaming is a "potentially transformative project that depends on what feminist scholars, activists and policy makers collectively make of it."⁸ Conversely, Gouws' concern "is with the depoliticization of the

feminist project as a consequence of buying into the gender mainstreaming project when the necessary resources are not available to make mainstreaming a reality."⁹ Gouws argues that women's equality is being institutionalized in exchange for the depoliticization of gender.¹⁰ She expresses the concern that gender mainstreaming may turn women's experience "into a technocratic category for redress that also suppresses the differences between women" and thus repeats the essentialist problem of not accommodating or accounting for difference.¹¹ While the language of gender mainstreaming appeases the international community, its connection to real results has become ever more tenuous.¹² Gouws maintains that gender mainstreaming puts almost exclusive focus on the state, at the cost of confronting the private sphere, where so much gender oppression and inequality thrives.¹³

It is clear that there are numerous positions and debates in relation to mechanisms, methodologies and strategies in the quest to find relevant and appropriate mechanisms and structures for the advancement of women. We hope that this Dossier will contribute to some extent, to that debate. At the International Conference, the Most Honourable Tan Sri Dato Siti Norma Yaakob acknowledged, "women's issues are everyone's issues". The papers in this Dossier bring together discussions on mechanisms and structures to advance gender equality and underpin the principle that "women's issues should be everyone's issues." Through tracing historical measures that have enabled the advancement of the equality of women, current discussions from both contributors and participants provide a rich overview of national women's machinery for the advancement of women.

Rashida Manjoo and Kristen DeRemer

Endnotes

- 1 Council of Europe Report. CDEG (2004) 2 (para.57). Available online at, [http://www.coe.int/t/e/human_rights/equality/04._national_mechanisms/097_CDEG\(2004\)19.asp](http://www.coe.int/t/e/human_rights/equality/04._national_mechanisms/097_CDEG(2004)19.asp)
- 2 Catherine Albertyn, National Machinery for Ensuring Gender Equality, in *The constitution of South Africa from a Gender Perspective* (1995) at 12 (Sandra Leibenberg, ed.)
- 3 Suzanne Williams. *The Oxfam Gender Training Manual*. Oxfam Publications: 1994.
- 4 Office of the Special Advisor on Gender Issues and the Advancement of Women. *Important Concepts Underlying Gender Mainstreaming* (Fact sheet 2). Available online at, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>
- 5 See Christine Warioba, "The role of national mechanisms in promoting gender equality and the empowerment of women: SADC experience," for an interesting discussion of the success (in South Africa and other countries, such as Zambia and Angola) of such mechanisms following a gender mainstreaming policy. (Unpublished document on file with author).
- 6 Hilary Charlesworth, "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations." *Harvard Human Rights Journal*, Spring 2005.
- 7 See id. at 13.
- 8 True, Jacqui. 2003. "Mainstreaming Gender in Global Public Policy," *International Feminist Journal of Politics*, 5:3, pp. 368-296. (p.368).
- 9 Amanda Guows (Un)thinking Citizenship: Feminist Debates in Contemporary South Africa. Ashgate Publishing (2005) at 77
- 10 Gouws, 78.
- 11 Gouws, 78-79
- 12 Gouws, 79.
- 13 Ibid.

Abstract

The United Nations has supported the progression of national women's machineries through various conferences, conventions, and consultations regarding gender equality mechanisms and structures. These measures have influenced the development of and offered a guiding framework for women's machineries within national contexts. This paper intends to familiarize the reader of such UN mechanisms and events throughout the past several decades.

Introduction

It has been argued that it is crucial to examine the historical and political contexts under which national structures for women and/or gender were set up, as it has relevance for the consequences and the shaping of views on the goals of gender equality.² At a global level, the establishment of separate structures to promote and protect gender equality and improve the status of women was raised at the United Nations (UN) in 1962 by the Commission on the Status of Women. Subsequently, 1975 was declared "International Women's Year" with the first world conference on women taking place at that time. The next decade was declared the "Decade for Women" and a UN "Declaration on Women" encouraged member states to set up national women's machinery to improve the quality of life and status of women. The Platform for Action document which emanated from the 1995 UN conference in Beijing, again emphasized the importance of national women's / gender machineries to be given "primary responsibilities for ensuring the integration of gender into the policies, programs and plans of government at all levels."³

This paper provides a schematic history of the role of the UN in the establishment of national machineries to promote women's rights and gender equality. It will focus on internal developments within the UN system to a limited degree, but will not evaluate the successes and failures of the activities of current UN women's/gender agencies. Rather, we will examine how the UN system has provided guiding policies for the development of national women's machineries. However, due to internal discussions currently taking place regarding the restructuring of the UN gender machinery, this aspect will be briefly discussed. The support from UN women's/

gender structures has implications for the future development of national women's machineries, and it is hence necessary to provide some information on this aspect.

Pre-1945 Developments

The international push for women's equality and rights began after the First World War at the 1919 Paris Peace Conference. Representatives of newly formed women's international organizations advocated for the inclusion of women in the establishment of both the League of Nations and the International Labour Organization (ILO).⁴ These women founded the Inter-Allied Suffrage Conference (IASC), which was granted the right to participate in certain peace conference commissions. Also in the year 1919, women's organizations held the first parallel non-governmental organizations (NGO) conference to coincide with a major inter-governmental conference. During the 1920s and 1930s, women's organizations began observing the work of inter-governmental organizations and collaborating with the League of Nations to monitor the inclusion of women and their rights.⁵

In 1937, the League of Nations established the Committee of Experts on the Legal Status of Women, which was the predecessor of the Commission of the Status of Women (CSW) established in 1946 by the UN.⁶ The relationship between women's organizations and the League of Nations can be characterized by two major achievements: first, "women created a model for cooperation and interaction between non-governmental organizations and inter-governmental organizations," effectively winning the right to lobby these organizations at every level. Second, "through their well-prepared proposals and what were perceived as credible actions, women's international

organizations were able to establish so-called women's issues on the agenda of international cooperation."⁷

Though the League of Nations ceased to exist when the Second World War began, the experience that women activists had gained served them well at the founding conference for the United Nations in 1945. Four women were signatories to the UN Charter, and women delegates succeeded in reaffirming "the equal rights of men and women" in the Preamble.⁸ At the inaugural session of the UN General Assembly in 1946, women delegates prepared and delivered "An Open Letter to the Women of the World," calling upon women to take advantage of the promise and goals of the United Nations.

According to the UN Blue Book series, volume six on the United Nations and the Advancement of Women⁹, UN efforts focusing on equality and the advancement of women can be divided into four periods: securing the legal foundations of equality (from 1945-1962); recognizing women's role in development (from 1963-1975); the UN "Decade for Women" (1976-1985); and "Towards Equality, Development and Peace" (from 1986 onwards)."¹⁰

Developments 1945- 1962: Legal Foundations of Equality

In 1946, the Economic and Social Council of the UN (ECOSOC) set up the Commission on the Status of Women. Originally, this branch was classified as a sub-commission of the Commission on Human Rights. However, the first chair of this sub-commission, managed to establish the Commission as an autonomous body and it began its operations as such in 1947.¹¹ The CSW's first major undertaking was a global survey on the status of women's rights, which the League of Nations had begun

ten years prior. Seventy-four governments, some of whom were not even members of the UN, responded to the questionnaire. The responses to the questionnaire revealed four primary areas of concern: women's political rights; the legal rights of women; girls' and women's access to education and training; and women's working life.¹²

Developments 1963-1975: Recognizing Women's Role in Development

The second major period of UN efforts regarding women's equality focused on development, a concern that was to receive even more attention in the third period of the history of the UN and women's rights, the "Decade for Women" (discussed in the next section). Much of the energy of international feminism in the early 1970s was focused on the proposals and plans for this Decade. A new trend emerged in the 1970s in which women began to be treated not just as *objects* of legislation, but also as active *subjects* and *actors*.¹³ Marking the 25th anniversary of the Commission on the Status of Women, the General Assembly declared 1975 "International Women's Year". The objective was to focus attention on the status of women both within the UN system and in the Member States. The Commission, along with the General Assembly, established a three-tiered agenda for the advancement of women during this time. The agenda focused on the promotion of equality between men and women, recognition of women's contributions to development, and recognition of women's increasing contribution to the strengthening of world peace.¹⁴ Among the major issues that emerged was a general concern regarding food, water, and population development.

In 1974, the General Assembly also decided that the First World Conference on Women would be held in Mexico in June/July of 1975.

This sparked a flood of events and initiatives regarding women's issues.¹⁵ The search for data and information in preparation for the conference revealed that there was a widespread deficiency in obtaining such information and also a limited analysis of women's issues. In direct response to this experience, the "World Plan of Action" which was formulated at this conference, discussed the need of establishing national mechanisms to promote the status of women and offered guidelines for the advancement of women. The World Plan of Action called for the "establishment of national machinery, such as commissions or women's bureaux, as a means for accelerating the implementation of the plan at national level. Such machinery was intended to study the situation of women, to develop policies, and to make programme and legislative recommendations, thereby translating the national goals into reality for women."¹⁶ The World Plan of Action was designed to guide and encourage the international community to achieve three main objectives: (1) full gender equality and the elimination of gender discrimination; (2) the integration and full participation of women in development; and (3) an increased contribution by women in the strengthening of world peace.¹⁷ The First World Conference on Women called upon governments to develop national strategies and mechanisms to promote the equal participation of women.

Developments 1976-1985: The UN "Decade for Women"

The third major period of UN efforts with regard to gender equality revolved around the Decade for Women. This period saw several important conferences on women's equality, as well as the creation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979¹⁸. Often referred to as the international

women's bill of rights, CEDAW was adopted by the General Assembly, and came into force two years later. This gave renewed political legitimacy to the issues of equality between women and men and to the need for Member States to adopt legislation and policies to combat such discrimination. The issue of national mechanisms for equality also became particularly relevant, as being essential instruments to carry out such tasks and responsibility. The CEDAW Committee, which watches over the implementation of the Convention, regularly enquires about the national mechanisms or national machinery existing in the Member States, their nature, mandate, functions, resources, power and visibility.¹⁹

Halfway through the Decade for Women, Copenhagen hosted a mid-term Conference in 1980 to assess progress in the implementation of the World Plan of Action. The Conference acknowledged the progress that was being made towards actualizing the goals set out in Mexico City, especially the General Assembly's adoption of CEDAW. However, participants also noted the disparity between the formal rights granted to women and the actual exercise of these rights. The Conference highlighted three specific areas that required attention: equal access to education, enhanced employment opportunities, and adequate health services.²⁰ The Conference's Programme of Action cited numerous factors to explain the discrepancy between the legal attainment of rights and the day-to-day exercise of women's rights. This list included factors such as the lack of sufficient involvement by men in improving women's situation, a lack of resources, and a lack of awareness regarding women's rights on the part of women themselves.²¹ This conference also explicitly linked the worldwide economic crisis to the situation of

women. Governments were encouraged to set specific targets for the second half of the decade.²² The Copenhagen Programme of Action included a call for stronger national measures to ensure and protect women's property, inheritance, child custody, and nationality rights, and encouraged an end to female stereotypes.²³

The Decade for Women concluded with the third world conference on women. It was held in Nairobi in 1985. The Nairobi Conference has been referred to as the birth of global feminism, largely due to the solidarity of the struggling global women's movement uniting behind the common goals of equality, development, and peace. The Conference included an acknowledgement that the international community had fallen short of meeting the objectives set out in Copenhagen. At the end of a two week negotiation, members from the 157 states represented, agreed to adopt a blueprint document on women's issues. Thus, the Nairobi Conference began a new mandate and employed new strategies set out in a document entitled, 'The Nairobi Forward-Looking Strategies' (NFLS). This document stated that "... all issues to be women's issues"²⁴ and "it represented in many ways a turning point concerning the history of women in the UN. The NFLS recognizes women as 'intellectuals, policy-makers, decision-makers, planners and contributors, and beneficiaries of development' and obligates both Member States and the UN system to take this into consideration in policy and practice."²⁵ The NFLS explicitly linked development with the advancement of women.²⁶ Furthermore, the NFLS reiterated the importance of developing national machineries to promote gender equality.

Another important series of UN conferences

during this period was focused on population and development. In 1984, almost 180 countries attended the UN International Conference on Population and Development (Cairo Conference) held in Cairo, Egypt. The Cairo Conference was the third in a series of conferences on the world's growing population (it followed the 1974 Conference in Bucharest and the 1975 Conference in Mexico City). This Conference, however, was marked by the fact that it was attended by the largest contingency of NGOs involved in women's rights. Although the Conference focused generally on the rapidly increasing world population and the implications of this, it also had a particular focus on the empowerment of women.

Developments 1986-Present: Equality, Development and Peace

This period of UN efforts, "Towards Equality, Development and Peace," addresses the issue of violence against women, as well as focusing on structural changes to the multilateral and national machineries dedicated to promoting gender equality. During this time, several major events are worth noting: (1) internal UN reform and progress regarding the mechanisms for women's equality, (2) the Beijing Conference, (3) the introduction of gender mainstreaming as a new strategy for the promotion of women's rights, and (4) the development and organization of funding systems within the UN for gender equality projects.

Starting in 1986, the UN instituted a series of structural changes that affected various mechanisms relating to the promotion of women's rights. The Commission on the Status of Women mandate was expanded in 1987 to include the promotion of equality, development, and peace, as well as the monitoring of the implementation

of the NFLS.²⁷ The Commission prioritized the theme of national machineries during two of its sessions: in its 32nd session in 1988 and again in its 35th session in 1991. The Division for the Advancement of Women (DAW) has also played a large role in fostering the proliferation of national machineries for gender equality. DAW's 1997 Geneva Workshop on Gender Mainstreaming concluded that national machineries would be the "main mechanism through which gender mainstreaming would be pursued."²⁸ In 1998, DAW, in cooperation with the Economic Commission for Latin America and the Caribbean, held an expert group meeting on "National Machineries for Gender Equality."²⁹ This meeting aimed to facilitate a better understanding of the institutional factors involved in national machineries and how they could be used to produce more efficient and effective resource allocation and policies.³⁰ Among other things, the expert group recommended that the UN create a "good practices" publication on strengthening national machineries. The book *Mainstreaming Gender, Democratizing the State? Institutional Mechanisms for the Advancement of Women*, cited in this report, is the product of that recommendation.³¹ Also, the UN Fourth World Conference on Women, which was held in Beijing in September 1995, developed an action plan relating to twelve critical areas that impacted women and also the girl child. This meeting contributed greatly to global gender equality through its focus on the role of national machineries in the promotion of equality rights and also its focus on violence against women.

Beijing (1995)

The Beijing Platform for Action (Beijing PFA), delivered at the Fourth World Conference on Women provided the energy for further progress on many issues, including on the

issue of violence against women. It compiles previously adopted decisions into a coherent action plan. The PFA's mission statement declares that it is an agenda for women's empowerment. The mission statement signifies a shift away from an emphasis on mere equality and the eradication of discrimination, towards the broader goals of empowerment, and women's full, equal partnership in policies and decision-making.³² It is argued that "...Equality with men in a male-dominated culture and society alone is not enough. Women need to be empowered to bring their own views to policy-making and the development of society, and to set their own priorities in accordance with their inherent values."³³ This conference was the largest UN meeting to date. Participants at the Conference numbered 6,000 delegates from 189 governments; more than 4,000 accredited NGO representatives; and about 4,000 journalists and media representatives. The Beijing PFA document was unanimously adopted by 189 countries.

One of the key objectives of the PFA is "the elimination of all forms of violence against women". It provides an assessment of the global situation regarding gender-based violence from women's perspectives. It then details twelve critical areas of concern and sets strategic objectives and proposals to achieve improvements in these areas. These areas of concern include: poverty; education and training; health; violence against women; armed conflicts; the economy; power and decision making; institutional mechanisms; human rights; the media; the environment; and, the girl-child.³⁴

In addition to explicitly addressing the issue of violence against women, the Beijing Conference also provided one of the most definitive moments in the theory and

practice of gender equality by introducing the concept of 'gender mainstreaming'. This concept defines the main role of the national machinery as being the central policy-coordinating unit inside the government - whose main task is 'to support government-wide mainstreaming of a gender-equality perspective in all policy areas.'³⁵ This notion quickly spread to other international organizations in the wake of the Conference. Following the Beijing meeting, the UN once again revised the CSW's terms of reference to include mainstreaming as a major strategy in the achievement of women's equality.³⁶ Governments that adopted the Beijing PFA committed themselves to mainstreaming a gender perspective throughout their operations, policies, planning and decision-making in an effective manner.³⁷

The Beijing PFA emphasized the importance of national women's/gender machineries to be given "primary responsibilities for ensuring the integration of gender into the policies, programs and plans of government at all levels".³⁸ The section below sets out the relevant provisions of the Beijing PFA that address institutional mechanisms for the advancement of women.

A national machinery for the advancement of women is the central policy-coordinating unit inside government. Its main task is to support government - wide mainstreaming of a gender-equality perspective in all policy areas. The necessary conditions for the effective functioning of such national machineries include:

- a. Location at the highest possible level in the Government, falling under the responsibility of a Cabinet minister;
- b. Institutional mechanisms or processes that facilitate, as appropriate, decentralized planning, implementation and monitoring

with a view to involving non-governmental organizations and community organizations from the grass-roots upwards;

- c. Sufficient resources in terms of budget and professional capacity;
- d. Opportunity to influence development of all government policies.

The task of gender mainstreaming, now considered as the main focus for institutional mechanisms, is further explained in three Strategic Objectives. Objectives H1 and H2 are set out as government actions to be taken, while H3 is aimed at national, regional and international statistical services, and relevant governmental and UN agencies in cooperation with research and documentation organizations. Key points from each of the objectives are set out below.

Strategic Objective H.1.

Create or strengthen national machineries and other governmental bodies.

Based on a strong political commitment, create a national machinery, where it does not exist, and strengthen, as appropriate, existing national machineries, for the advancement of women at the highest possible level of government". It should have clearly defined mandates and authority. Critical elements would be adequate resources and the ability and competence to influence policy and formulate and review legislation. Amongst other things, it should perform policy analysis, undertake advocacy, communication, coordination and monitoring of implementation.

Strategic Objective H.2.

Integrate gender perspectives in legislation, public policies, programmes and projects.

Seek to ensure that before policy decisions

are taken, an analysis of their impact on women and men, respectively, is carried out.

Give all ministries the mandate to review policies and programmes from a gender perspective and in the light of the Platform for Action. Locate the responsibility for the implementation of that mandate at the highest possible level. Establish and/or strengthen an inter-ministerial coordination structure to carry out this mandate, to monitor progress and to network with relevant machineries.

Strategic Objective H.3.

Generate and disseminate gender-disaggregated data and information for planning and evaluation.

Ensure that statistics related to individuals are collected, compiled, analysed and presented by sex and age and reflect problems, issues and questions related to women and men in society.³⁹

Beijing +5 (2000)

In 2000, the General Assembly held a twenty-third special session to assess progress made on the implementation of the Beijing PFA, with a particular focus on the commitment to the establishment of national women's machineries. Beijing +5 offered the first global review on the challenges and successes experienced by national machineries to date. The special session reaffirmed the importance of developing strong, effective and accessible national machineries for the advancement of women.⁴⁰ The Political Declaration and the Outcome Document, both results of the twenty-third session, strongly confirm that the Beijing PFA remains the reference point for governmental commitment to women's advancement and gender equality.⁴¹ The Outcome Document also reaffirmed the role of national machineries as the main institutional

frameworks, with primary responsibility for leading the process of transformation towards greater equality.⁴²

The UN Division for the Advancement of Women (DAW) held a consultation on the 'Role of National Mechanisms in Beijing +5' to monitor progress made in the past five years and to set an agenda for the next five. The consultation revealed that as of 2000, 161 national mechanisms had been established across the globe. This number reflected the willingness of governments to engage in the creation of women's mechanisms, yet the consultation highlighted that once such mechanisms have been put in place, the challenge remains to build an effective, manageable, and consistent structure. The exchange of experiences uncovered shared challenges and concerns regarding the implementation of the Beijing PFA. Key areas highlighted included: the importance of consultation with civil society organizations for sustainability and legitimacy of national mechanisms; clarification of mandates (most national women's mechanisms reported being overloaded and unable to meet their agendas); funding and budget concerns (the lack of funding from government was resulting in donor driven programming); lack of political commitment; the need for improved capacity for monitoring and evaluation; the challenges relating to the sustainability of national mechanisms, and the dissemination of sex-disaggregated data.

In 2004, DAW conducted a review on improvements and shortcomings of national women's mechanisms. Responses were drawn from 134 Member States concerning their implementation of the Beijing PFA. Some of the main challenges raised included: resource constraints, both human and financial; weak capacities of national

mechanisms; lack of coordination between ministries, government departments, NGOs, and women's movements; unclear, shifting, and overburdened mandates; political manipulation by governments and leaders; absence of sex-disaggregated data; competition for resources; weakening of feminist movements; and the emergence of market liberalism and social conservatism.⁴³ These points reiterate many of the same challenges highlighted during the Beijing +5 session.

Beijing +10 (2005)

The ten-year review of the Beijing PFA was held in 2005 at the Commission on the Status of Women's forty-ninth session in New York. This session allowed for both a follow-up review and also a critique of progress made by national women's mechanisms, in the decade since 1995.

Many of the obstacles and challenges reported at the Beijing +5 session in 2000 were again highlighted at this session. However, significant achievements were also noted. These included an increase in the establishment and further development of national mechanisms for the advancement of women. By 2005, most governments had either established new or strengthened existing mechanisms, and/or adopted national gender equality policies and national action plans. In many countries national mechanisms had made significant advances. They exhibited a greater understanding of effective structures, strategies, and methodologies. Furthermore, national mechanisms appeared to be developing a growing body of good practice.⁴⁴

Restructuring the UN gender machinery

The UN's women/gender machinery is weak,

fragmented and under-funded. It is stated that any discussion on how the machinery should be organized, must be based on the functions the women/gender machinery needs to fulfil. The machinery needs to perform the advocacy/watchdog function; drive implementation and innovation; and contribute to the gender mainstreaming process in the UN as a whole. When it comes to implementation and innovation, the women/gender machinery must be able to address issues and take on tasks relating to women's empowerment and gender equality, that other UN organisations do not. This applies to both the policy level as well as the implementation level.⁴⁵

In November 2006, a proposal for the creation of a new UN women's agency was made. In conjunction with the United Nation's reform initiative, an overhaul of the UN women's machinery has been called for. Amongst other claims being articulated, there are calls for the replacement of existing structures with a 'women's agency' that would serve as the only gender oriented structure within the UN. In terms of political and strategic power, there are calls for the new agency to be headed by an Under-Secretary-General, and staffed in every country with the expertise to carry out targeted programmes and to provide the assistance that governments and the UN system require, to effectively implement gender into policies, plans and programmes. Those lobbying for this new agency are asking the UN to push for a stronger commitment to women's issues by establishing an autonomous body with the ability to monitor progress and focus its attention on the development of machinery for the advancement of women.

One of the goals of the new women's agency is to strengthen the existing gender equality

architecture and consolidate three gender offices into one body by merging the United Nations Development Fund for Women (UNIFEM), the Division for the Advancement of Women (DAW), and the Office to the Special Advisor on Gender Issues (OSAGI). Currently, women's issues are dispersed among several UN bodies; these mainly include UNIFEM, DAW, OSAGI, the International Research and Training Institute for the Advancement of Women (INSTRAW), and the UN Population Fund (UNFPA). The call for a United Nations women's agency is currently a work in progress.

Conclusion

Since 1995 national machineries in general have been expanded and restructured. Despite the attempt at good practices, a number of challenges still face national women's machineries and the implementation of measures to promote and protect the advancement of women. As awareness increases, new and improved mechanisms are emerging across the globe, and the hope is that this will progressively lead to more sustainable, independent, and effective mechanisms and structures. With continued dedication, both at the international and at the national levels, to the improvement of national machineries for the advancement of women, such mechanisms will hopefully achieve greater outcomes towards the promotion and protection of gender equality. However, in order to appropriately address these shortcomings, the efficacy of current machineries will need to be assessed. Looking forward, countries will need to take steps to adjust and strengthen policy frameworks and mechanisms if these challenges are to be overcome.

It is clear that the UN has played an important role in providing policies, frameworks,

guidance and support through the development of state level machineries. The importance of strengthening the structures for gender equality, and the continued dedication to their progression, is aptly captured in the words of former Secretary General, Kofi Annan:

I would urge the entire international community to remember that promoting gender equality is not only women's responsibility - it is the responsibility of all of us. ... Since then, study after study has taught us that there is no tool for development more effective than the empowerment of women. No other policy is as likely to raise economic productivity, or to reduce infant and maternal mortality. No other policy is as sure to improve nutrition and promote health -- including the prevention of HIV/AIDS. No other policy is as powerful in increasing the chances of education for the next generation. And I would also venture that no policy is more important in preventing conflict, or in achieving reconciliation after a conflict has ended. But whatever the very real benefits of investing in women, the most important fact remains: women themselves have the right to live in dignity, in freedom from want and from fear.⁴⁶

Endnotes

- 1 We would like to thank Mary Anne Franks, a former student at the Human Rights Program at Harvard Law School, for research assistance provided. She worked on a larger project on this topic in 2005/6. The project was conceptualized and supervised by Rashida Manjoo.
- 2 Mama A (2000b) National Machinery for Women in Africa: Towards an Analysis, National Machineries Series no 1, Third World Network — Africa (Ghana).
- 3 Ofei-Aboagye E (2000) "The Role of National Machineries in implementing the Beijing Platform for Action" National Machinery Series No. 2, Third World Network - Africa (Ghana) at 14
- 4 Hikka Pietilä, Engendering the Global Agenda: The Story of Women and the United Nations, 2 (Undated CD rom).
- 5 id. at 5
- 6 id. at 6
- 7 id. at 6.
- 8 id. at 9-10. Pietilä indicates that there were 14 female delegates in all, and two assistant delegates. See also Devaki Jain, Women, Development, and the UN: a sixty-year quest for equality and justice, Indiana University Press: 2005. .
- 9 The United Nations and the Advancement of Women, 1945-1995 New York: Department of Public Information, United Nations, 1995. United Nations Blue Book Series, Volume 6
- 10 Pietilä, 19
- 11 id. at 13
- 12 id at 19
- 13 Id at 29
- 14 Available online at, <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>
- 15 Pietilä, 30
- 16 Christine Brautigam, International Human Rights Law: The Imposition of Gender. Unknown source and date.
- 17 Division for the Advancement of Women – The Four Global Womens' Conferences 1975-1995. Available online at, <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm>
- 18 Convention on the Elimination of All Forms of Discrimination against Women information available online at, <http://www.un.org/womenwatch/daw/cedaw/>
- 19 (Info from COE report CDEG (2004) 19)
- 20 See <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> , last visited March 12, 2006.
- 21 See id.
- 22 Brautigam 17.
- 23 See id.
- 24 <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> , last visited March 12, 2006.

- 25 Pietilä, 45
- 26 Jain, 8
- 27 Brautigam 5; see also Pietilä 15-16.
- 28 Ibid.
- 29 See *ibid.*
- 30 Ibid.
- 31 Rai, 4.
- 32 Pietilä, 60.
- 33 Pietilä, 61.
- 34 Pietilä, 59.
- 35 *The Role of National Mechanisms in Promoting Gender Equality and the Empowerment of Women*. Report of the Expert Group Meeting. EGM/National Machinery/2004/REPORT, 31 January 2005, 6.
- 36 See Brautigam 6
- 37 Pietilä 61, Brautigam 19-20.
- 38 Ofei-Aboagye (2000), p 14.
- 39 Division for the Advancement of Women. The United Nations Fourth World Conference on Women. Available online at, <http://www.un.org/womenwatch/daw/beijing/platform/institu.htm#object1>
- 40 Division for the Advancement of Women. Beijing +5 Process and Beyond. Available online at, <http://www.un.org/womenwatch/daw/followup/beijing+5.htm>
- 41 Available online at, <http://www.un.org/womenwatch/daw/followup/ress233e.pdf>
- 42 Report of the Consultation on the Role of National Mechanisms in Beijing +5 Follow-up and National Agenda Setting. Available online at, <http://www.un.org/womenwatch/daw/news/consultation.html>
- 43 EGM/National Machinery/2004/BP.1. United Nations, Division for the Advance of Women. Background Paper on The Role of National Mechanisms in Promoting Gender Equality and the Empowerment of Women: Achievements, Gaps and Challenges for the Future: 31 January 2005. Available online at, <http://www.un.org/womenwatch/daw/egm/nationalm2004/docs/background%20paper%20rev,RJ%2012.12.04.pdf>
- 44 E/CN.6/2005/2. Commission on the Status of Women. Available online at, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/636/83/PDF/N0463683.pdf?OpenElement>
- 45 From the Norwegian Mission to the UN – statement from Ambassador Johan Løvald on Mandate Review: "UN needs to deliver on gender mainstreaming" 01/06/2006. Available online at, http://www.norway-un.org/NorwegianStatements/PlenaryMeetings/20060601_gender_mandatereview.htm
- 46 Former Secretary General, Kofi Annan at the opening of the forty-ninth meeting of the Commission on the Status of Women, marking the ten-year review of the Beijing Platform for Action, Beijing +10). Press Release SG/SM/9738 WOM/1498. Available online at: <http://www.un.org/News/Press/docs/2005/sgsm9738.doc.htm>.

Abstract

The Convention on the Elimination of All Forms of Discrimination against Women has significantly impacted laws and jurisprudence on gender equality across the globe. Through a variety of procedures, states are implementing the principles of CEDAW into their own structures and making it operative at the ground level. This paper reviews these principles and provides an overview of state obligation to the treaty, and how it can be woven into national laws and policies in order to have a practical impact.

Introduction

I will examine CEDAW as a normative framework – its principles, procedures and monitoring mechanisms for promotion of State obligation – and then give a broad overview of the status of treaty law at the domestic level. I will conclude with some thoughts on the extra-legal strategies necessary for making CEDAW operative at the ground level.

Overview of principles to CEDAW

CEDAW came into force in 1981 as the first international human rights treaty and principal legal instrument to systematically and substantively address the needs of women. CEDAW legitimises women's claims for rights and equality, and is a positive legal framework that can be used to define norms for constitutional guarantees of women's human rights, to interpret laws, to mandate proactive, pro-women policies and to dismantle discrimination. CEDAW's uniqueness lies in its mandate for the achievement of substantive equality for women, which requires not only formal legal equality but also equality of results in real terms. By recognising that discrimination is socially constructed and that laws, policies and practices can unintentionally have the effect of discriminating against women, the Convention sets the pace for a dynamic, proactive approach to women's advancement. It is no longer possible to say that there is no discrimination against women if laws and policies do not overtly discriminate against women. Under the Convention, neutrality has no legitimacy. Positive actions are required of the State to promote and protect the rights of women.

CEDAW has a near universal mandate with 185 ratifications to date.¹ Such an international mandate is a strong counter

to the claim that equality between women and men should be made subject to culture and tradition. Non-discrimination is now a principle of international customary law.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), the treaty body that oversees States parties' compliance with the Convention, can mandate but not directly enforce such compliance – implementation of Committee's directives is dependent on national governments and political will. The existence of a positive legal framework for women's rights does not automatically confer rights on women. It does, however, legitimise women's claims for rights and makes possible women's transformation from passive beneficiaries to active claimants. It creates the space for women's agency. These gains made on paper at the international level set the stage for the real work: the implementation of CEDAW and other human rights instruments at the national level.

The key principles of CEDAW are substantive equality; non-discrimination and State obligation. *Substantive equality* differs from formal equality in that it mandates States to ensure: Equality of opportunity through law, policy, programmes and institutional arrangements; equality of access by (a) eliminating all obstacles that prevent access to the opportunities as well as (b) institution of positive measures/enabling conditions, including temporary special measures, to level the playing field between men and women; and through equality of results that entitles women to outcomes and social goods (education, employment etc) on an equal basis with men.

In thus defining substantive equality, CEDAW recognises the embedded nature

of discrimination, acknowledging necessity for differential treatment of men and women which is enabling and not protectionist. In designing remedial programmes, States must target women experiencing intersectional discrimination whose access to opportunities is especially limited by the multiple barriers they face. A key indicator of progress is improvement in the circumstances of such women.

The results-oriented nature of substantive equality is reflected in the CEDAW Convention's Article 2, which requires states "to ensure... the practical realisation" of the equality principle. To give a concrete example, a company may claim that it is giving equal treatment to men and women in instituting a procedure in which consideration for promotions factors in the amount of overtime done by employees, regardless of whether those employees are male or female. While this may look fair on the surface, it does not take into account that married women or women with children may not be able to do much overtime work since they typically bear the responsibility of domestic work, which is generally not shared equally between men and women. Therefore, unless domestic work and childcare are also equally divided between men and women, thereby enabling women to work overtime and get promoted, this is an unequal stipulation.

The second principle of CEDAW is *non-discrimination*, which takes into account structural discrimination – social, economic or cultural conditions that disadvantage a particular group in society. These background conditions are created historically through past discrimination, which in turn, has become entrenched in institutions. Laws, policies and practices can unintentionally have the effect of discriminating against

women. Discrimination operates in private and/or public spheres, including, for example, domestic violence and the undervaluing of domestic labour. Discrimination can be direct (different treatment leading to non-recognition of human rights of women or preventing women from exercising their human rights) or it can be indirect (same treatment preventing women from exercising their human rights in the private and public spheres). Once entrenched, these past practices of discrimination often become masked as part of the neutral baseline of these institutions. Due to its invisibility, its pervasiveness and its firm hold on the structures governing economic, social and cultural life, this form of discrimination is particularly difficult to remedy.

Article 1 defines discrimination as: “any *distinction, exclusion or restriction* made on the basis of sex which has the *effect or purpose of impairing or nullifying the recognition, enjoyment or exercise* by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms *in the political, economic, social, cultural, civil or any other field*” (emphasis added). The CEDAW Convention provides us with a framework holistic enough to recognise multiple forms of discrimination and to make a distinction between immediate relief aimed at ameliorating the conditions of women and long term measures that will elevate the position of women in society. It introduces the concept of corrective measures to overcome the effect of past discrimination that leaves women handicapped vis-a-vis the men. For example, if a development initiative is offered to women on the same footing as the men, according to the principle of equal rights or equal opportunity, it might still turn out that men benefit more than women, because men

have more experience, confidence or simply because the environment is male dominated and is more conducive to male participation. This is the effect of past discrimination. Article 4 of CEDAW provides that temporary special measures or affirmative action and women centred development policy measures are legitimate means to ensure *de facto* equality for women.

CEDAW's definition of discrimination also provides a guide for assessing when the different treatment accorded to women is permissible. For example, protective measures like barring women from some forms of work could be construed as discrimination as these measures could work against women's interests in the long term and may nullify or impair the enjoyment of rights.

As General Recommendation 25 states, “*the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality*”. An example of acceptable differential treatment is the quota system in political participation where a certain percentage of seats in parliament or local government are reserved for women. This is seen as temporary affirmative action until such time when larger numbers of women are able to stand for election due to increased capability and other factors enabling such participation.

The third important principle under CEDAW (and international treaty law) is the principle of the **obligation of the state** to implement the treaty and thus give effect to the treaty at the domestic level. An international human rights treaty creates obligations on States

parties to the treaty that are binding. States enter into this obligation through the legal process of ratification and hence are obliged to implement the provisions of the treaty according to its spirit. Article 26 of the Vienna Convention on the Law of Treaties (1969), which sets the parameters of international treaty law, states: *“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”*. Article 27 states: *“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”*.

In other words, a State must modify its domestic legal system or take any other steps necessary so that it is in compliance with the principles of the treaty it has ratified – internal law cannot be an excuse for non-compliance. By ratifying CEDAW, a State is offering itself to scrutiny on the basis of standards set forth in the Convention.

The question then arises – who is the State Party that must comply with the terms of the treaty? According to CEDAW, the State comprises all its constituent units – legislative, judicial and executive.

In general, under CEDAW the State is obligated to ensure practical realisation of rights through:

- Incorporating the principle of equality of men and women in their legal and administrative systems, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women;
- Establishing tribunals and other public institutions to ensure the effective protection of women against discrimination;
- Ensuring elimination of all acts of discrimination against women by persons,

organisations or enterprises; and

- Accelerating de facto equality by implementing affirmative action (Article 4), including Temporary Special Measures to address structural discrimination.

More specifically, Articles 2-4 spell out the broad State obligations, while Articles 5-16 provide the substance and context in which the principle of State obligation must be applied.

Overview of procedures and monitoring mechanisms for promotion of State obligation

As we have seen, ratification of an international human rights treaty creates legally binding obligations on States parties to the treaty. They are obliged to implement the provisions of the treaty according to its spirit. In reality, however, few States do this automatically – supremacy of national law is considered operative in many countries. Treaty bodies have no direct powers of enforcement, but its monitoring mechanisms and procedures scrutinise compliance and give direction. They set standards on women’s human rights on a continuing basis; monitor implementation by individual States; and require action by States on their directives. The monitoring mechanisms of CEDAW consist of the CEDAW Committee, the Reporting Process, and the Optional Protocol to CEDAW.

Members of the CEDAW Committee, which comprises 23 experts from various regions who are nominated by their respective governments and serve in their personal capacity, are elected for four-year terms. The Reporting Process consists of ratification; preparation of State party report; submission of report; the pre-session; and the CEDAW session itself (Constructive Dialogue and

Concluding Comments). Individual States are required to report one year after ratification, then once every four years thereafter. The CEDAW Committee also calls for alternative information from a range of other stakeholders – NGOs (in the form of shadow reports); United Nations (UN) agencies; national human rights mechanisms; other treaty bodies; special mechanisms of the UN Human Rights Council (Special Rapporteurs), etc. The Concluding Comments that are issued to reporting countries at the end of the reporting process include observations of non-compliance and directives for compliance based on interpretation of principles.

The Optional Protocol to CEDAW is another means of monitoring compliance, although it requires separate ratification by States parties to CEDAW. The Optional Protocol allows the Committee to conduct inquiries and provides for the filing of individual complaints after exhaustion of domestic remedies.

The Committee has generated several interpretative tools that constantly evolve standards and define action to be taken. These include the Concluding Comments, mentioned above, and General Recommendations that are authoritative interpretations of the Convention and means for the CEDAW Committee to address contemporary issues, develop standards and provide guidance for implementation. There are twenty-five general recommendations adopted to date addressing both technical aspects of reporting to the Committee as well as substantive issues such as violence against women (GR 19), equality in marriage and family relations (GR 21), women and political and public life (GR 23), women and health (GR 24) and temporary special measures (GR 25).

CEDAW at the national level: A broad overview of the status of treaty law at the domestic level with illustrative examples

At one level, ratification of CEDAW imposes obligations on the States parties involved. At another, this treaty is an advocacy tool that can be used to interpret equality, as well as to implement and evaluate action. Doing so leads to the mobilisation and development of informed and committed constituencies of government functionaries as well as of women at all levels, local and global.

That being said, there are several operative factors at the national level that have to be taken on board:

- Treaty Bodies have no direct powers of enforcement.
- States that ratify the Convention are obligated to enforce. However, there are no ready institutional mechanisms for operationalising treaties.
- Despite the principles of State obligation under international law, the Constitution and customary and religious laws are deemed supreme in many countries.
- Most countries have very little jurisprudence citing CEDAW.
- The capacity of stakeholders – government, judiciary, institutional mechanisms, NGOs/ civil society – varies greatly among countries, and is generally low.
- Incorporation and enforcement of the treaty is dependent on political will – few Governments are proactive.
- Political action has to be generated through public demand and advocacy.

National constitutions, laws and government policies

When women's human rights are included in a national constitution, they become part of a country's baseline for rights protection and Government obligations. The ways in which constitutions incorporate women's human rights vary a great deal from country to country. In some countries, international treaties are "*self-executing*" i.e. there is a constitutional provision stating that international treaties once ratified are deemed the law of the land. In others, CEDAW principles have been integrated into new constitutions and added to more established constitutions through amendments and enabling legislation. CEDAW principles can also gain 'constitutional' status in a less direct fashion, when the courts are persuaded to apply the principles of CEDAW in specific cases, thus giving existing constitutional guarantees of equality and non-discrimination a more detailed and concrete meaning.

In some cases, CEDAW has been incorporated into specific national and state laws. There are also instances of development of policy guidelines based on treaty principles, even where there is no explicit statutory or constitutional mandate. Hence CEDAW has been applied in a variety of ways and at different levels among countries that have ratified the Convention. Nepal for example has a constitutional provision stating that international law automatically supersedes national law upon ratification. In Cambodia, Laos, Philippines, Indonesia and Vietnam, treaty law is supposedly recognised as part of domestic law, but there is no clear statement that it is self-executing, or clarity on what prevails if domestic law conflicts with international law. A prime example of incorporation of CEDAW principles at the time of drafting a

constitution is South Africa. Some examples of countries that have incorporated CEDAW while re-drafting a constitution are Colombia, Uganda and Brazil. Several countries (India, Pakistan, Malaysia, Singapore, and Thailand) follow the British principle of Parliamentary supremacy in enacting laws, and in these countries international treaties have no legal status until directly transformed through enabling legislation. This is often called a "dualist" regime (as opposed to a "monist" regime in which international treaties are self-executing once ratified), in which international and national laws are seen as two separate systems that must be explicitly reconciled through such enabling legislation. Few countries have passed enabling legislation. Despite this, precedents in incorporation of CEDAW have been set through filing of test cases. Even though according to principles of dualism, the application of international law is limited by the necessity for enabling legislation, national courts in several countries have in practice progressively sought the assistance of international human rights laws and standards as interpretive guides.

Despite some cynicism about the Convention, especially in countries where the principles of the Convention have not been incorporated into domestic legislation, there are many examples of constitutions and domestic laws being reformed on the basis of the principles of the Convention. Discriminatory laws have been challenged; the Convention has been used to interpret ambivalent provisions of the law or where the law is silent to confer rights on women. Development policies have also been formulated using the framework of the Convention.

Extra-legal strategies for making CEDAW operative at the ground level

Laws can remain paper laws with little real

impact on women's lives unless actively used to claim rights. Some of the most significant constitutional gains have been won in countries where there has been a broader national move for constitutional renewal, a recent ratification of CEDAW and/or an interest from women's NGOs in using CEDAW as an advocacy tool. Realising that the impact of law goes beyond enactment to implementation at ground level, women's NGOs have done important work since CEDAW was opened for ratification in 1979 to make sure that its provisions are incorporated into their States' constitutions.

There often does not seem to be any discrimination against women since the protection of women's rights is codified in many of the laws such as the family code, penal and criminal procedure codes, labour law, etc., and these laws appear gender-neutral on their face. But these laws do not always benefit women because of cultural attitudes, inappropriate rules of implementation and bias against women, inefficiency or corruption within the legal system, or the impunity with which the law is flouted in some countries when it comes to women's rights. It is important that public education accompany the effort to pass or amend legislation. Women must be informed about new legal entitlements that have been created, before they can be expected to claim them. Government bureaucracies, local administrators and police departments must also recognise and respect these new entitlements in order for these claims to be enforced.

As almost all the illustrative examples above have shown, popular education has to be part of any litigation strategy. Good arguments can persuade a court to rule in favour of women's human rights, but decisions still

have to be implemented. If enough work has not been done to inform and educate the Government and the general public, there is a real possibility that a court's decision will not be properly enforced or even that the decision might be overturned by new legislation.

For there to be progressive changes in law and policy and for them to have a real and practical impact on the daily lives of women, advocacy and action must be based on:

- A real, concrete and substantive vision of women's equality.
- Building constituencies by showing the effects of discrimination on women's lives.
- Political organising and strategising.
- Training of key players/catalysts.
- Wide dissemination of information through various means – public hearings, media, policy dialogues, judicial colloquiums, street plays, etc.
- Mass mobilisation of public support.
- Engagement at the grassroots level.
- A combination of adversarial and co-operative approaches.
- Advocacy, sensitisation, education of all stakeholders – public, constituencies of women, government, judiciary, media.
- Development of jurisprudence through progressive interpretation and application of CEDAW.
- Campaigns for legal reform by women's groups.
- Political campaigns that turn issues of women's human rights into demands for political reform – landmark cases are a handle for doing this.

Conclusion

In conclusion, this paper merely gives an overview of CEDAW and how it can be used across the world to steadily build up progressive laws and jurisprudence around its principles. For this law and jurisprudence to change women's lives in a significant way, extra-judicial strategies such as public education, mobilising grassroots support, dialogue with government and judiciary, etc., continue to be necessary to strengthen the demands for mechanisms for implementation. It is a continuing and challenging process as what is being attempting here is the reversal of centuries of discrimination!

Selected References

1. *BRINGING EQUALITY HOME: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women*, edited by Ilana Landsberg-Lewis, United Nations Development Fund For Women (UNIFEM)
2. "Impact of the Convention at the Domestic Level", paper presented by Shanthi Dairiam Director, IRAW Asia Pacific, at the seminar "CEDAW AT 25: ARE WE MOVING FORWARD" on the occasion of the twenty-fifth anniversary of the adoption Convention on the Elimination of All Forms of Discrimination against Women, 13 October 2004, United Nations Headquarters, New York.
3. "Addressing Intersectional Discrimination with Temporary Special Measures", IRAW Asia Pacific Occasional Paper Series No. 8.
4. "The Status of CEDAW Implementation in the ASEAN Countries and Selected Muslim Countries", paper presented by Shanthi Dairiam, IRAW Asia Pacific, at the Roundtable Discussion on Rights and Obligations Under CEDAW organised by the Human Rights Commission of Malaysia (SUHAKAM) on 17 March 2003, Kuala Lumpur, Malaysia.
5. Deepika Udagama, Research Paper on Sri Lanka, in *The Vertical Application of Human Rights: Incorporation of international human rights standards in the domestic legal framework (Treaty Incorporation Research Project)*, edited by Andrew Byrnes, upcoming publication to be published by IRAW Asia Pacific.

Endnote

- 1 Further information available online at, <http://www.un.org/womenwatch/daw/cedaw/states.htm>

Abstract

The author outlines the overarching mechanisms, laws and policies that have developed throughout the African Continent. Included are strategies for the attainment of gender equality within the African context and an evaluation of constraints and challenges experienced while building viable and sustainable gender structures. Particular attention to the Southern African Development Community provides an in depth view of the gender mechanisms through institutions, organizations, laws and policies.

1. Introduction

The development and evolution of structures for the attainment of gender equality are a new phenomenon in Africa, especially Sub-Saharan Africa. Historically, women's issues were subsumed under political patronage through the Women's Leagues/Wings of political parties and liberation movements, Presidential Offices or Office of the First Lady, and political advisers on gender and associations. In terms of government functions, they were mainly the responsibility of the Welfare and Social Development ministries or departments.

The backdrop of efforts toward gender equality in the Continent, were the political conditions that allowed space for women to meet and chart the way forward. Many of the wars that ravaged the Continent had been brought to an end, the dictatorships (including one-party and military states) were being resolved through processes of democratic elections, and most of all, the last bastion of colonialism, South Africa, had fallen. These political conditions opened up the space for women of the Continent to meet and discuss the overdue subject of gender equality and made it possible and easier to reach agreements.

All African countries have, to date, put in place national structures, starting from the highest levels of government, and extended to the wider society, to empower women and advance their status.¹ The institutional mechanisms for the advancement of women (also called National Gender Machineries), chosen by the different African countries vary in form and effectiveness. Most of these are created by governments and include participation by both civil society and the private sector. Government structures that

deal with gender or women's issues such as: ministries of gender or women's affairs; and/or national women's bureaus or commissions of women in development; gender focal points in all ministries relevant to the advancement of women - including education, planning, health and environment; legal/regulatory frameworks within constitutions, laws, budgetary and auditing systems, which are part and parcel of institutional mechanisms in the public arena; and international instruments, conventions, declarations and other agreements which by implication constitute institutional (regulatory) frameworks for dealing with gender issues.²

2. Broad African gender institutional structures

Policy environment

The African Union (AU), followed on the dedication made by its predecessor, the Organisation of African Unity that committed itself to the African Platform of Action, through the Declaration of African Heads of States in 1995. The African Union was inaugurated in Durban in July 2002 and committed itself to the principle of gender equality in Article 4(1) of its Constitutive Act. Within the AU, there is absolute gender parity in the appointment of Commissioners, senior, professional and technical appointments.³ The AU issued the Solemn Declaration on Gender Equality in Africa at the Third Ordinary Session of the Assembly of Heads of States and Governments, held in Ethiopia in 2004. This followed closely on the African Union's adoption of the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa, which was approved at its summit in Mozambique in 2003. The protocol was only able to come into effect after being ratified by fifteen countries. On November 25, 2005, the

protocol came into force and as of May 2007, twenty-one African states have ratified the protocol, twenty-three have signed but not ratified, and seven have not signed.⁴ It is still early to determine what effect it will have, but the implementation of the protocol places an obligation on governments to establish institutional mechanisms to ensure protection of women from practices and attitudes that allow continuation of discrimination, including differential opportunities in access to justice.⁵

Institutional arrangements.

The AU Directorate of Gender is responsible for assisting both the AU and its Member States with gender mainstreaming.

The Economic Commission for Africa (ECA) has a mandate to promote social and economic development in the Africa Continent. It has established two structures focusing on women and gender, the Committee on Women in Development (CWD) and the African Centre for Women (ACW). The CWD is a committee made of representatives of ECA Member States, civil society and experts. Its role is to,

- Assist and advise ECA on the integration of women in development.
- Mobilise resources for the integration of women in development.
- Follow up and evaluate sub-regional activities for the integration of women in development.

The ACW was established to service the ECA internally, across the Continent, regarding gender mainstreaming and women's empowerment. The ACW aims to:

- Assist Member States, as well as divisions in the ECA, to mainstream gender in programmes, policies, projects and laws;

- Undertake advocacy, networking, training and coordination in order to facilitate the advancement of women in Africa.

In 2001, the African Centre for Women changed its name and became the *African Centre for Gender and Development*. In 2003, it produced the African Gender and Development Index (AGDI), which was applied to Benin, Burkina Faso, Cameroon, Ethiopia, Egypt, Ghana, Madagascar, Mozambique, South Africa, Tanzania, Tunisia, and Uganda. The utility of the AGDI is that it:

- Provides African policy-makers and partners with appropriate tools to measure gender equality and equity, women's empowerment and advancement.
- Helps monitor progress made in implementing ratified conventions.
- Democratizes statistics and quantitative monitoring tools that are easy to use and effective.
- Stimulates inter-departmental cooperation within the ministries.

The AGDI has two components:

1. The Gender Status Index: applies quantitatively measurable issues related to gender equality. It is based on three blocks, including; social power capabilities, economic power opportunities, and political power agency.
2. The African Women's Progress Scoreboard: measures government policy performance regarding women's advancement and empowerment. It focuses on qualitative issues to fill the gap between quantitative indicators and country specific or sector specific indicators, or those related to decision-making and well-being at the

household/individual level. It is made up of four blocks, namely, women's rights, social power capabilities, economic power opportunities and political agency.

The African Development Bank is an institution mandated to assist in the development of African countries and has committed to addressing concerns raised by the Beijing and the Africa Platforms of Action.

3. Pan-African Civil Society institutions and organizations

The organizations and institutions selected for this part of the paper are all from sub-Saharan Africa.

*Gender and the Economic Reform in Africa*⁶ is a pan-African research and advocacy programme, established in 1996, in order to influence policies and decision-making processes so as to contribute to gender equality and economic justice.

*Women in Law and Development in Africa (WiLDAF)*⁷ encourages women to obtain decision-making positions; and states and civil society have responded to WiLDAF by the provision of policy statements, and expanded legal instruments, etc.

*African Women's Development and Communications Network (FEMNET)*⁸ was established in 1988 for the purpose of sharing information, experiences, ideas and strategies among African women's NGOs. Their programmes include:

- Projects for the implementation of CEDAW.
- Monitoring the implementation of the Dakar and Beijing Platform of Action.

- Disseminating information and building the capacity of African women to participate in the process and structures of the African Union.
- Lobbying and advocating for gender mainstreaming in the Poverty Reduction Strategy Documents and national Macroeconomic Policies.
- Men to men: Men against GBV Network, whose main objective is to mobilise male supporters for the long-term campaign to eliminate gender-based violence in Africa.

*The African Gender Institute*⁹ and *Gender and Women Studies for Transformation*¹⁰ has been working in academic institutions to strengthen studies for the production of knowledge and theory on the Continent.

African Progressive Communications and Flamme are examples of organizations that have been working in the area of Information Communication Technology (ICTs), to assist individual women and women's organizations to work effectively with new technologies. One of the growing areas in the use of ICT is with the numerous initiatives that have started to conduct debates and discussions on gender issues online. This has somewhat transcended the vast distances of the Continent and made communication easier.

The presence of these pan-African organizations focusing on one or the other aspects of gender equality has been critical for the structures meant to advance gender equality. They have produced volumes of research report on various gender subjects and issues facing Africa and Africans. They have played a lobbying role in relation to governments, while at the same time supported positive initiatives. Indeed, most of the advances made in the field of gender

equality on the Continent have mainly been initiated through collaborative actions by governments and civil society organizations.

4. African sub-regional structures

The East African Community sub-regional structure

The East African Community is made up of three countries, Kenya, Uganda and Tanzania. In 1972 this Community collapsed following political differences between the Member States. The countries that constitute the Community are regarded, in Africa, as very strong on gender issues and have set many examples for countries in the SADC sub-region. The problems that have beset the region and the Community have slowed down possibilities of the establishment of a common gender equality structure. The individual countries have, however, developed their own structures and civil society organizations in both Kenya and Uganda. They have done this through producing women's manifestos to ensure that women's issues are taken into account of by their governments. In addition, a Gender Budget Network was also established among civil society groups in these three countries.

The Economic Community of West African States sub-regional structures

The West African sub-region is organized under the Economic Community of West African States (ECOWAS), whose purpose is to promote co-operation and integration in economic, social and cultural activity. Ultimately, ECOWAS hopes for the establishment of an economic and monetary union through the total integration of the national economies of Member States: Benin,

Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS has developed a gender policy in order to involve more women in development. The twenty-sixth session of the Authority of Heads of State and Government held in Dakar in 2003, created a structure responsible for gender equality, in the form of a "Gender Unit" at the Executive Secretariat in Abuja and a "Centre for Gender Development" in Dakar, to replace the General Secretariat of the West African Women Association "WAWA".

The main role of the Centre for Gender Development is to establish, develop, facilitate, coordinate and follow up the strategies and programmes aimed at ensuring that matters related to the disparities between men and women are in the integration programmes of the Community. They are also responsible for the promotion of women, and are incorporated within the framework of objectives of the ECOWAS Treaty. Its mission is to:

- Implement the ECOWAS policy and system of gender management.
- Strive for the increase in the performance of women in their fields of activities such as seminars, round tables, and study trips in order to stimulate the spirit of entrepreneurship and enjoy better exchange of experience.
- Ensure the apprenticeship and development of skills needed to execute the Millennium Goals on sex equality in the sub-region and in programmes.
- Build networks and partnerships with relevant Agencies and Institutions for financial, technical and statutory support to the activities of the Centre.

The ECOWAS Center for Gender and Development works closely with the following partners: departments handling women programmes in the Member States; civil society (NGOs, Associations and women organizations in West Africa and elsewhere); ECOWAS' specialized agencies; international institutions and organizations; development agencies; and the private sector.

The Southern African Development Community regional structures and mechanisms

The Southern African Development Community (SADC) is made up of the following Member States, Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, South Africa and Tanzania.

Policy environment

SADC's work with gender issues began in 1990 when its Council of Ministers resolved to give priority to issues of gender and development. In 1996, a SADC Conference on Social Development held in Mbabane, Swaziland, recommended to the Council of Ministers that the SADC Secretariat should coordinate gender issues at the SADC Sub-Regional level. This recommendation was approved by the Council of Ministers during its meeting held in Maseru, Lesotho in August 1996.¹¹ SADC Heads of State and Governments signed the Declaration on Gender and Development on 8th September 1997, in Blantyre, Malawi. Article H of the Declaration commits Heads of State and their respective countries to a programme aimed at achieving gender equality in the SADC sub-region.

In September 1998, Heads of State and Governments signed the "Addendum on

the Prevention and Eradication of Violence against Women and Children", in Grand Baie, Mauritius. They resolved to adopt measures, which will contribute to the prevention and eradication of violence towards women and children. They undertook measures to make interventions in legal, social, economic, cultural and political areas, adopted integrated approaches to combat violence against women and children, made budgetary allocations to combat violence against women and children as well as adopt policies, programmes and mechanisms to enhance the security and empowerment of women and children.

As part of the SADC restructuring, a team comprised of experts from various fields, including gender, was formed to facilitate the development of the Regional Indicative Strategic Development Plan (RISDP). The objective of RISDP, among others, was to provide strategic direction on the key priority issues that SADC should address in the next fifteen years. Gender is identified as one of the critical crosscutting issues to achieve poverty reduction; improvement in the quality of the standard of living for the majority of the citizens in the region; prevention and eradication of HIV & AIDS, and regional integration.

In August 1999, the SADC Council of Ministers approved a Plan of Action for gender in SADC. The Plan aimed to bring about gender equality by using the approach on mainstreaming gender into SADC Policies, Programme of Action and Community Building Initiative; as well as through the approach on empowerment of women in the region.

A SADC Gender Policy Framework was created by Article 21(3) of the SADC Treaty, and the Protocol on Gender and Development

concerns were provided for in Article 22 of the Treaty. The purpose of the policy is to provide guidelines for the institutionalization and operationalization of gender mainstreaming, women's empowerment, and capacity building, as key development strategies for gender equality and equity within SADC.¹²

Institutional arrangements

The SADC Institutional Framework for Advancing Gender Issues includes: a Standing Committee of Ministers; an Advisory Committee of NGOs and government officials; a Management Committee consisting of three member countries and one serving as a secretariat; gender focal points in all coordinating units and regional commissions; and a Gender Unit in the Secretariat.¹³

The SADC Gender Unit (SADC-GU) was established by the Ministries responsible for Gender and Women's Affairs in the Member States. The overall objectives and mandate of the SADC Gender Unit is to facilitate, coordinate, monitor and evaluate the implementation of the objectives of the SADC Declaration on Gender and Development, the Addendum on the Prevention and Eradication of Violence Against Women and Children, as well as regional and global gender instruments which SADC Member States are a party to. The Gender Unit is also mandated to raise awareness, and build capacity of staff members at the Secretariat, to articulate gender issues in its policies, programmes, projects and activities. Furthermore, the Unit is required to monitor progress made by the Secretariat and Member States in addressing gender and women's concerns.¹⁴

SADC-GU programmes

One of the biggest achievements of the SADC-GU programme is that the SADC region has had the highest increase in women

in decision-making than any part of the world.¹⁵ This is a result of concerted effort to ensure 30% representation of women in decision-making in all structures by 2005. Although not all the Member States have complied, this is one area where there has been heightened awareness and marked progress. It has also spearheaded the implementation of the Beijing Platform of Action among the SADC Member States. Its intervention areas in 2005/6 are: the development of a regional gender policy framework and harmonisation of gender policies; gender mainstreaming of SADC structures and institutions; development and implementation, at the regional level, of women's empowerment in various sectoral areas; communication, information sharing, coalition-building and networking; training and capacity-building of national machineries personnel, national and regional trainer, decision-makers and other critical stakeholders on concepts, analysis, sensitisation and empowerment skills; monitoring and evaluation of the Beijing Platform of Action, SADC Declaration on Gender and Development and its addendum, CEDAW, and the African Charter on Women.

The SADC-GU has also worked internally with the SADC Directorates and other SADC structures. Their programme for gender mainstreaming started with the training of personnel in 2003. Supported by monitoring and evaluation, especially of the implementation of the Beijing Platform of Action, this training programme has conducted a continuous review of policies and protocols for its gender sensitivity.

National gender machineries in the SADC Member States

One of the interventions of the SADC-GU has been the process of strengthening gender institutional mechanisms in the sub-region.

This process began in 2002 and came about as an instruction from Ministers of Women and Gender from the Member States.

A profile of the Member States with regards to the structures and mandates of the national gender machineries is attached at the end of this paper. In scanning the mandates of the machineries, it is clear that they cannot make much impact in changing the institutions of government and other institutions of society, because most of them are not clearly defined and those that are, seem too weak to achieve the objectives of gender equality. For the gender machineries to be effective, it is important for them to have mandates supported by legislation defining their powers and roles.¹⁶

SADC regional Civil Society institutions and organisations

Most of the SADC Member States have a proliferation of civil society organizations focusing on the attainment of gender equality. The role played by the SADC-based regional organizations in achieving gender equality has been critical in the achievements of the region.

Women in Law in Southern Africa (WLSA) focuses on advocacy work which culminated in the adoption of the African Charter on Human and People's Rights on the Rights of Women in Africa; they lobbied for Swaziland's adoption of CEDAW until it was ratified; helped gender-sensitive legal reforms in Botswana, Zimbabwe, Malawi and Mozambique; and support cases about the abduction of young girls in Swaziland and Zambia.

*Gender Links*¹⁷ works in partnership with the Media Institute for Southern Africa and conducted the first Gender and Media Baseline Study for the SADC region.

Today they campaign on gender violence, disseminate a bi-monthly journal, and have piloted gender mainstreaming within three media training institutes.

*Gender and Media Southern Africa*¹⁸ is an umbrella organisation of individuals and institutions that work to promote gender equality in and through the media. Its programmes include research and monitoring of news, advertising and entertainment from a gender perspective they conduct audits on how gender is integrated into policies and laws that govern media in the region; provide training and capacity building on how to integrate gender into media education; and develop advocacy through campaigns promoting equal rights.

5. Strategies for the attainment of gender equality

Research

Many institutions and organizations in Africa, and its sub-regions, have used research as a basis for lobbying and advocating for women's empowerment and gender equality. The fact that in most African countries it is now commonplace to find disaggregated gender data is the achievement of gender specialists and researchers. The changes in policy and legislation to take into account the rights-of-women are another area where research has contributed greatly to the course of gender equality.

Women's manifestos and charters

Some countries have the method of compiling the needs and demands from women in the form of a manifesto or charter. Examples of countries that have developed Women's

Manifestos are: Ghana, Uganda, Kenya, Namibia, Zambia and Botswana. This has been an effective lobbying tool that has brought about some results. For example, the South African Charter for Effective Equality, which details women's demands for the SA government, was adopted by the first South African democratic government as a document that they would consult to guide them on the needs of women in SA.

Lobbying and advocacy

This is the most popular strategy that has been used by women's and gender organizations throughout the Continent to gain ground for gender equality in all the important structures and institutions in Africa. This strategy has also been effectively used by women in state structures. The position taken by the African Union, for gender parity in all decision-making positions, came about because of the strong lobby of African women for a 50/50 representation. As a result of lobbying by African women, politicians, and NGOs, 50% of the new Commissioners for the New Partnership for Africa's Development (NEPAD), are women¹⁹

The SADC decision to have a 30% female representation in political decision-making positions also came about as a result of the strong lobby of women politicians from the SADC sub-region and women from civil society. The lobby drafted and presented the Draft Declaration on Gender and Development to the heads of states with such determination that the heads of state decided to sign the document, which in future would guide SADC in its gender equality work.²⁰

Alliance-building and partnerships

The use of donor partners has been an effective strategy employed with much effect, especially in the countries that are donor

dependent. The danger has been for the governments to see the issue of gender equality as a donor-driven agenda, and therefore comply most minimally. However, it has brought about some changes, the biggest being the creation of heightened awareness of gender issues.

In the recent years, there is a growing alliance-building between gender activists, who have mostly been women, and men seeking a constructive engagement with issues of gender equality. A network for men in constructive engagement in Africa is hosted by FEMNET, and different countries have their own organizations and networks. An initiative to establish a SADC network was started in 2004 but it does not seem to have taken off effectively. The areas of focus for the men's groups and organizations have mainly been in the reduction of gender-based violence, violence against women, and the reduction of the spread of HIV/AIDS.

Mainstreaming gender concerns in Poverty Reduction Strategy Programmes

Several countries in Africa, especially in the SADC sub-region, have had to adopt a poverty reduction strategy in order to qualify for donor funding and relief from debt from international agencies. At the time of the development of the strategies, gender issues were not taken into consideration. It was after the release of the programme that activists and advocates for gender equality began to do a gender analysis of their poverty reduction programmes and realised that these would impact negatively on the women, who are already in the majority of the poorest individuals. The problem with integrating gender concerns *after* the adoption of a programme by the government is that the gender concerns become an afterthought

and are treated as unimportant.

Gender budgeting

The initiatives of the gender analysis of government budgets, popularly known as Gender Budgeting, as a strategy to lobby for the allocation for resources for work towards gender equality, have increased in Africa; these initiatives are mainly supported by the United Nations Development Fund for Women, UNIFEM. Previously, the organizations that worked on gender budgeting concentrated on analysis of the budget only *after* it was presented by the government. The new move is to work with government officials to ensure that gender considerations are inserted *before* the budget is released.

The East African network of organizations working in the area of gender budgeting, leads the other African sub-regions in innovative and consistent initiatives. Ugandan and Tanzanian organizations have managed to work directly with their Ministries of Finance to enable the officials to acquire skills for gender budgeting.

6. Achievements

One of the biggest achievements of the gender struggle in Africa has been the proliferation of different structures and mechanisms for the advancement of gender equality. This has challenged both gender activists and states to find best ways to bring gender issues into the running of governments.

The fact that gender issues are raised in most major conferences and meetings as well as in the establishment of important institutions and structures at Continental, sub-regional and country levels, is the achievement of both structures and individuals involved in

gender equality work. There is a heightened awareness of gender issues in the Continent. This awareness has also led to an increased presence of African women in many decision-making structures and institutions.

The increased calls for a move from concentrating on numbers of women in positions, to a more substantive transformation of institutions and gender relations, suggests a growth in the struggle for the emancipation of women. This cannot be credited only to the gender machineries, as individual gender researchers and activists have been raising this issue over a long period of time; but the creation and development of the machineries has led to debate being taken into state institutions.

7. Constraints and challenges

Capacity

Some African countries have had a long struggle to try and establish viable and sustainable structures for gender equality. Gender structures are regarded as being responsible for formulation of policy, projects and programmes for gender equality. They are also expected to monitor, evaluate, and coordinate policies, projects and programmes of government. One of their challenges has been identified as the lack of capacity to coordinate machineries that include government, civil society organizations (CSOs) and the private sector.

In many instances, the individuals concerned lack the knowledge, skills and attitudes required to make the machinery work effectively. There are numerous training programmes that have been set up by the Africa regional and sub-regional structures,

as well as international structures and agencies such as the Commonwealth and UNIFEM. Most of the programmes are short and focus on specific areas, such as gender management systems, gender mainstreaming or gender budgeting. There are also numerous and increasing country-based training courses being offered. Although most of the training courses are valuable, their effectiveness is tempered by the complexity of the requirements for the individuals and the gender machineries to be effective.

Mandate

States and governments mainly function on the basis of laws. The fact that the overwhelming number of gender machineries in Africa is not supported by legislation means that they would find it difficult to be effective, even in cases where there seems to be political commitment at the highest level.

Broad and unclear mandates accompanied by overloaded responsibilities have been identified as one of the challenges facing SADC gender machineries. Most of the gender machinery mandates have evolved out of agreements or treaties signed by the state, without the creation of a proper country base for the domestication of the agreement.

Location

The location of a structure determines what influences it can have on the processes of the institution. Most of the structures for the attainment of gender equality are located in a unit or sub-unit of an institution in the state or government. Usually, the units have little or no access to the critical processes that run the government. This has a negative impact on the effectiveness of the gender structures to achieve the objectives they have been set up for.

Resources

The question of very limited human and material resources allocated to the gender structures, is problematic of all countries in Africa. Most gender structures are thinly staffed and under-resourced financially yet the impact of their work is expected to extend to most institutions in government and civil society. Although it is clear that resources in every country are limited, this under-resourcing of the gender structures is mostly due their low-priority status.

Status and authority

Most structures geared towards the attainment of gender equality have been subjected to low status and therefore do not command the sort of authority they require in order to transform institutions of the state and society. The low status is a result of a combination of the above and other challenges facing these structures. The lack of authority and status become stumbling blocks when the machineries are confronted with resistance to change. Therefore, they remain unable to effectively temper institutional cultures that perpetuate inequalities.

Balancing the expectations with what is possible.

The gender structures in Africa, find themselves having to balance the great expectations of the women in their countries. Most of the women working in these structures are employed as civil servants, with civil service job requirements, but are expected to perform the additional task of being “women leaders”.

The other big expectation is that the presence of these structures will have an immediate positive impact on the lives of ordinary women. The understanding is that there would be a positive impact on the quality of lives of women, especially with regards to poverty alleviation.

Although this is one of the ultimate desired impacts, the responsibility for this impact lies squarely with the state or government itself, not with the gender structure.

Absence of a women's movement

The absence of effective women's movements is one of the biggest challenges facing the gender structures in Africa. This deficiency has meant that the push for the substantive transformation of gender relations and institutions is weak. Coalitions and networks have done sterling work but a Women's Movement (in the classical sense of social movements) would make the push stronger.

Donor agendas

Most of the gender work done both by governments and civil society organizations is funded by donors, and in most cases external international donors. This action tends to make the governments stand back and abdicate their obligations to see gender work as their responsibility. On other hand some governments have accused gender activists of pursuing foreign interests and agendas. In yet other cases, some countries, especially those that are donor-dependent, have been “coerced” into complying due to their reliance on donor funding to sustain their economies. In such cases, the internal support for gender equality becomes weak.

8. Conclusion

The Fourth World Conference on Women, which produced the Beijing Platform of Action, has been critical in galvanising countries in the African Continent towards concerted efforts of trying to achieve gender equality. The Africa Regional Conference, held in Senegal in 2004, produced the African Platform of Action

and a position on what needs to happen for the attainment of gender equality in the Continent, a position that almost all countries could rally around and support. The Beijing and African Platforms have been accepted as guiding documents for gender equality in Africa. Civil society organizations have played a very important role in ensuring that governments adhere to the commitments that are contained in the two Platforms. They have done this through research, lobbying, training and other numerous ways and methods. The shift towards democratic governments has also created conditions to argue for gender justice. Although the mechanisms created to attain gender equality seem beset by many challenges, they have made some important gains that can only be built upon.

References

1. African Center for Gender and Development, Gender and Development, Assessing Institutional Mechanisms for the Advancement of Women. Undated.
2. Chingamuka S, Protocol on the rights of women comes into force, thegadexchange, WIDSAA. A Gender and Development Newsletter for Southern Africa, Issue 36. Oct-Dec 2005.
3. Lowe Mome Colleen (Ed), Ringing up the changes, Genderlinks. Johannesburg. 2004.
4. Lopi Barbara, A regional Gender Policy for SADC on the Way, thegadexchange, WIDSAA. Issue 36 Oct-Dec 2005.
5. Hassim Shireen and Meintjies Sheila, OVERVIEW PAPER, Expert Group Meeting on Democratic Governance in Africa: Strategies for Greater Participation of Women. Arusha (Tanzania), 6 – 8 December 2005
6. Mng'anya Priscilla, Southern Africa Must Address Challenges Facing Gender Machineries. thegadexchange, WIDSAA. 34 July-Sept 2004.
7. Mulikita Nakatiwa, Road Map towards a SADC Protocol on Gender. thegadexchange, WIDSAA. A Gender and Development Newsletter for Southern Africa, Issue 38. Apr-June 2006.
8. Rao, Aruna, Gender Equality Architecture and UN Reforms, 2002.
9. SADC Gender Monitor, Strengthening Institutional Mechanisms, WIDSAA-SADC. 1999
10. SADC, Gender and Development. The Official Trade, Industry and Investment Review. 2006.
11. SADC, Beijing + 10 Report. 2005.

Websites

12. African Union: <http://www.africa-union.org/>
13. East Africa Community (EAC) Official Website: <http://www.eac.int/>
14. Economic Community of West African States (ECOWAS) Official Website: <http://www.ecowas.info/>
15. Southern African Development Community (SADC) Official Website: www.sadc.int/

Endnotes

- 1 African Center for Gender and Development, Gender and Development, Assessing Institutional Mechanisms for the Advancement of Women. Undated.
- 2 African Center for Gender and Development, Gender and Development, Assessing Institutional Mechanisms for the Advancement of Women. Undated.
- 3 Hassim Shireen and Meintjies Sheila, OVERVIEW PAPER, Expert Group Meeting on Democratic Governance in Africa: Strategies for Greater Participation of Women. Arusha (Tanzania), 6 – 8 December 2005
- 4 African Commission on Human and Peoples' Rights: Special Rapporteur on Women's Rights. Available online at, http://www.achpr.org/english/_info/index_women_en.html. (Viewed on 13/11/2007).
- 5 Chingamuka S, Protocol on the rights of women comes into force, WIDSAA, thegadexchange, A Gender and Development Newsletter for Southern Africa, Issue 36. Oct-Dec 2005.
- 6 Available online at, <http://www.twanafrica.org/gera.asp>
- 7 Available online at, <http://www.hri.ca/partners/wildaf/>
- 8 Available online at, <http://www.femnet.or.ke/>
- 9 Available online at, <http://web.uct.ac.za/org/agil/>
- 10 Available online at, <http://www.gwsafrica.org/>
- 11 SADC-GU, Report: Beijing +10, 2005.
- 12 Lopi Barbara, A regional gender policy for SADC on the way, thegadexchange, A Gender and Development Newsletter for Southern Africa. WIDSAA. Issue 36 Oct-Dec 2005.
- 13 African Center for Gender and Development, Gender and Development, Assessing Institutional Mechanisms for the Advancement of Women. Undated.
- 14 SADC Report: Beijing + 10.
- 15 SADC, The Official Trade, Industry and Investment Review, Gender and Development. 2006.
- 16 Byrne Bridget and Koch Laier Julie with Baden Sally and Marcus Rachel, National Machineries for Women in Development: Experiences, lessons and strategies for institutionalising gender in development, policy and planning. Bridge (development – gender). Brighton. 1996.
- 17 Available online at, http://www.genderlinks.org.za/page.php?p_id=1
- 18 Available online at, http://www.gemsa.org.za/page.php?p_id=1
- 19 Genderlinks, Ringing up the changes, Gender in Southern African Politics., Johannesburg. 2004.
- 20 Details of the lobbying activity are found on Page 14 and 15 of the Genderlinks publication quoted above.

Structures and Mandates of the Gender Machineries in the SADC Member States

Country	Gender Machinery	Mandate	Gender Policy and Action Plans
ANGOLA	<p>Ministry of Family Affairs and Women's Promotion.</p> <p>The structure of the Ministry is decentralized to the provincial level. There are gender focal points appointed to co-ordinate gender/ women's issues in all the Ministries.</p> <p>The Ministry collaborates very closely with NGOs, which work with gender/ women's issues under the co-ordination of the women's umbrella, Rede Mulher.</p>	<p>Co-ordination of gender and women's issues;</p> <p>Capacity building for gender competencies;</p> <p>Advocacy and lobbying.</p>	<p>The Director of Research in the Ministry and NGOs proposed way forward towards the National Gender Policy, which is in the process of being developed.</p> <p>The National Constitution has enshrined equality clauses.</p> <p>Angola is a signatory to a number of international and regional gender equality and equity instruments. It has signed the SADC Declaration on Gender and Development and its Addendum on the Prevention of Violence against Women and Children.</p>
BOTSWANA	<p>Department of Women's Affairs. The Women's Affairs Department links with other departments through a system of Gender Focal Persons (GFPs) that exists in all line Ministries.</p> <p>Other mechanisms for the promotion of women include the Botswana National Council on Women (BNCW) that was formed in 1999.</p> <p>A Gender Project Planning Committee (GPPC) has also been formed in the University of Botswana.</p>	<p>Promotion of gender sensitive policies; provision of technical advice on gender planning and budgeting; gender advocacy and dissemination of information coordinating and facilitating capacity building efforts.</p> <p>The Council (BNCW) functions as the highest advisory body to government on policy matters relating to gender and development issues, and reports to the Minister Responsible for Women's Affairs.</p>	<p>Signatory to International and Regional instruments.</p> <p>National Gender Policy on Women in Development, and with five-year plan.</p> <p>National Gender Programme Framework formulated in 1998.</p> <p>The government has also developed a short-term strategy for gender advocacy and social mobilisation.</p>
DEMOCRATIC REPUBLIC OF CONGO (DRC)	<p>In 2003, the DRC created the Ministry of Women's Condition and the Family</p> <p>A Commission has been established and acts as the gender focal point within the transitional Parliament. The Commission collaborates with the Ministry Responsible for Women's Affairs and civil society organizations working for the empowerment of women.</p> <p>The government also formed the National Programme for the Empowerment of Congolese Women (PNPFC) and the National Council for Women.</p>	<p>Responsible for coordinating and managing all issues relating to promotion and integration of gender; central role in the formulation of the national gender policy; facilitation and the provision of technical support; monitoring and evaluation of the diverse activities related to gender and development.</p> <p>The Commission is responsible for reforming legislation that discriminates against women and the integration of gender during the formulation of law.</p> <p>The Council is a consultative organ on the empowerment of women chaired by the Minister Responsible for Women's Affairs. Its membership includes experts from Provincial Councils, public and private institutions, NGOs, women's and religious organizations and Commissioners.</p>	

Country	Gender Machinery	Mandate	Gender Policy and Action Plans
LESOTHO	<p>In 1998, the Ministry Responsible for Gender/Women's Affairs was established.</p> <p>A system of Gender Focal Points (GFP) was established within all Government departments, the University and NGOs.</p> <p>A Gender Management Forum functions at central and district levels.</p> <p>The Basotho Women's Parliamentary Caucus (BWPC) has brought together women from different political parties.</p> <p>The government harmonises the plans and programmes of government with those of CSOs, allocating resources to CSOs, monitors and evaluate their programmes</p>	<p>The specific roles of GFP are to propose appropriate and effective gender mechanisms; and to provide support and direction for gender mainstreaming in all aspects of planning and programming in their respective organizations.</p> <p>BWPC sensitises policy-makers and traditional leadership on current and emerging gender issues.</p>	<p>National Gender and Development Policy, based on the Beijing Platform of Action, CEDAW and SADC and Commonwealth Declarations</p>
MALAWI	<p>Ministry of Gender and Community Services.</p> <p>Gender Focal Points (GFPs) are identified by the Ministry in all stakeholder organizations.</p> <p>The Gender Policy Implementation Committee was formed by networks representing six critical areas of concern.</p> <p>At the local level, the District Assembly, consisting of the Area and Village Development Committees, is responsible for ensuring that gender is mainstreamed within District programmes.</p>	<p>The Ministry is mandated to spearhead the production, coordination, collaboration, implementation and monitoring of the National Gender Policy; and provides backstopping services on gender analysis and mainstreaming to all its stakeholders.</p> <p>The District Assembly is responsible for ensuring that gender is mainstreamed within District programmes.</p>	<p>After the Beijing Conference, Malawi developed a National Platform for Action (MNPFA) to operationalize the Beijing Platform for Action</p> <p>The government developed a National Gender Policy in 1998</p> <p>To facilitate the implementation of the Gender Policy, the Ministry responsible for women's affairs has developed a National Gender Programme.</p>
MAURITIUS	<p>Ministry of Women's Rights, Child Development and Family Welfare. Within the Ministry, a Women's Unit serves as a focal point for women's issues</p> <p>A system of Gender Focal Points has been established in all ministries to mainstream gender into policies, programmes and projects.</p> <p>To promote the development and advancement of women, a National Women's Council was set up by an Act of Parliament in 1985.</p>	<p>The Women's Unit implements policy and projects in collaboration with other government institutions, NGOs and bilateral and multilateral organizations.</p> <p>The GFPs are responsible for making available related documents, reports studies, policies and disaggregated statistical data; informing of existing gender biases or policies and strategies that need to be developed; assisting in the implementation of gender policies and programmes in their respective organizations; and monitoring the key decisions related to gender.</p>	<p>Among the key challenges for the government of Mauritius is the formulation of a National Gender Policy (NGP).</p> <p>In 2000, Mauritius released the National Gender Action Plan (NGAP).</p>

Country	Gender Machinery	Mandate	Gender Policy and Action Plans
MOZAMBIQUE	<p>The Ministry for the Coordination of Women and Social Action (MMCAS) was formed in 2000.</p> <p>Coordinating mechanisms have been set up by the government and parliament.</p> <p>In 2001, MMCAS's National Directorate of Women was formed.</p> <p>The National Council for the Advancement of Women, an inter-sectoral co-ordination organ consisting of government and civil society representatives to supervise, direct and follow up the implementation of policies and approved gender programmes.</p>	<p>The Ministry executes and coordinates policies towards women's emancipation, development and social welfare. The MMCAS's National Directorate defines and promotes the implementation of support programs for the development of women and family.</p> <p>The National Council for the Advancement of Women directs and follows up the implementation of policies and approved gender programmes. It also advises government and develops proposals to guide the management of public issues related to gender and women.</p>	<p>The execution of the national strategy to advance women and gender equity is the responsibility of the Government of Mozambique.</p> <p>A National Plan for the Advancement of Women was drafted in 2002.</p> <p>In 2003, a Draft National Gender Policy and Strategy was produced.</p>
NAMIBIA	<p>Ministry of Women Affairs and Child Welfare (MWACW). A Minister and Deputy Minister, who are political appointees, head the Ministry and they are also members of the Cabinet as well as members of Parliament.</p>	<p>The MWACW's purpose is to mainstream gender programmes, advocate for law reforms and coordinate gender activities at the national and international levels.</p> <p>It is mandated to develop, promote, facilitate, coordinate, implement, monitor and evaluate the process of legal, political and socio-economic development of women, men and children equitably in all spheres and to ensure gender equality.</p>	<p>National Gender Policy adopted in 1997</p> <p>In addition, the National Gender Plan of Action was developed to support the policy's implementation. The National Gender Plan of Action, which was approved by Cabinet in 1998, is a Programme of Action aimed at speeding up the implementation process of the National Gender Policy.</p>
SWAZILAND	<p>Coordination Gender Unit in the Ministry of Home Affairs</p> <p>GFPs in Ministries and Departments</p> <p>The government also created the Swaziland Committee on Gender and Women's Affairs (SCOGWA) consisting of representatives from government, NGOs and the private sector.</p>	<p>The main objective of the Unit is to facilitate the mainstreaming of gender into all areas of national development. It also coordinates national, regional and international gender activities and works with partner NGOs and UN Agencies to implement sectoral activities and mainstream gender.</p> <p>The SCOGWA is responsible for developing a gender programme.</p>	<p>Draft National Gender Policy</p> <p>In tandem with the National Gender Policy, the government will formulate a Gender Action Plan and Strategy.</p>

Country	Gender Machinery	Mandate	Gender Policy and Action Plans
SOUTH AFRICA	<p>Office of the Status of Women (OSW)</p> <p>Joint Monitoring Committee on the Quality of Life and Status of Women (JMC)</p> <p>Commission on Gender Equality (CGE)</p> <p>Civil Society Organizations</p>	<p>The OSW is an administrative body that monitors the accountability of the government's gender commitments; formulates national gender policy; ensures consistency between government policy and gender policy; implements policy; arranges gender trainings for governmental departments.</p> <p>The JMC's main tasks are to monitor and evaluate the status of women; facilitate public views into legislative processes; act as an accountability mechanism within parliament to ensure a gender focus in legislation; and to assess the government's compliance with national commitments.</p> <p>The CGE is an independent, non-governmental, commission.</p>	<p>The "Draft National Women's Empowerment Policy" was initiated and drafted in 1995 by the gender office; however, this was never finalized nor put into action.</p> <p>The OSW developed the "National Policy Framework for Women's Empowerment", in 2000, to achieve gender equality throughout SA. The aim was to create a framework to guide the development of laws, policies, procedures and practices to ensure equal rights in government structures. This Policy intends to put in place mechanisms that are pervasive reaching from the governmental to the provincial levels. The overarching principles of the Policy are that they can be applied by all sectors to their policies, programs, and practices.</p>
TANZANIA	<p>The Ministry of Community Development, Gender and Children</p> <p>The Revolutionary Government of Zanzibar created the Ministry of Youth, Employment, Women and Children Development (MYEWCD) to coordinate women's affairs in Zanzibar.</p> <p>Gender Focal Points (GFP) has been institutionalised in all central ministries, government departments and in the local government structures.</p> <p>Parliament has established a Parliamentary Standing Committees on Community Development.</p> <p>Parliamentarians have formed a caucus - Tanzania Women Parliamentarians Group (TWPG).</p> <p>Umbrella NGOs play a big role in advocacy, networking and complementing the government's initiatives geared towards women advancement and gender equality.</p>	<p>MYEWCD coordinates women's affairs in Zanzibar.</p> <p>The GFPs coordinate and monitor, as well as ensuring that all sectoral policies and programmes are gender sensitive.</p>	<p>National Action Plan on Women's Empowerment and Gender Advancement (under review)</p> <p>The government also reviewed its Women in Development Policy of 1992. This review led to the development of the National Gender Policy</p> <p>The Revolutionary Government of Zanzibar formulated and adopted a policy on Protection and Development of Women (2001), which provides a framework for promoting gender equality in Zanzibar.</p>

Country	Gender Machinery	Mandate	Gender Policy and Action Plans
ZAMBIA	<p>The Gender In Development Division (GIDD) located in the Cabinet Office.</p> <p>A Committee on Good Governance, Legal Affairs and Gender has been established in Parliament.</p> <p>In line with the National Gender Policy, the government established a Gender Consultative Forum</p> <p>At the sectoral level, gender focal points (GFPs) have been designated in all government ministries, Provincial Administration and other public sector institutions.</p> <p>At District level, the District Planning Officers have been appointed as Gender Focal Points.</p> <p>GIDD has been working in close collaboration with NGOs and CSOs</p>	<p>The main responsibilities of GIDD are: to facilitate the integration of regional and international instruments on gender into national laws, policies and programmes; to coordinate, monitor and evaluate the implementation of the National Gender Policy; to facilitate institutional capacity building; to coordinate the mainstreaming of gender into macro and sectoral policies and programmes; and to disseminate information in order to increase gender awareness.</p> <p>GIDD's specific Terms of Reference include advising the government on emerging gender issues. Also, to ensure that policies are gender sensitive; and to provide advice on any other gender issues.</p>	<p>National Gender Policy was adopted in 2000</p> <p>The government embarked on a consultative process of formulating a National Gender Policy Plan of implementation in 2001.</p> <p>Strategic Plan for the Advancement of Women 1996-2000</p>
ZIMBABWE	<p>The Gender Department, in the Ministry of Youth Development, Gender and Employment Creation</p> <p>Gender Focal Points (GFPs)</p> <p>District Gender Councils</p> <p>Provincial Gender Councils.</p>	<p>The National Gender Machinery responsible for the promotion of gender issues.</p> <p>The key task of the GFPs is to facilitate the implementation, monitoring and evaluation of the National Gender Policy (NGP) and mainstreaming gender in their respective organizations.</p> <p>The responsibilities of Councils include: coordination of activities of government and departments, NGOs and other organizations; facilitating local level discussions; identifying local practices and customs that hinder gender equality; developing local sanctions against perpetrators of GBV; initiating women's empowerment projects; and monitoring the National Gender Policy.</p>	<p>National Gender Policy adopted in 2001</p> <p>A National Plan of Action is being developed.</p>

Abstract

For over twenty years Australia has been building and revising mechanisms to promote gender equality. This paper discusses the path taken towards developing these structures and its successes and challenges with implementation and enforcement. Offered are clear lessons learned and how the Australian experience can provide insight for the development of similar mechanisms in other countries.

Introduction

Australia has a number of laws and mechanisms that were, at least in their inception, designed to promote gender equality. Most have been in place for more than 20 years.

This paper will briefly address the background to our key gender equality mechanisms and laws; the main features of these mechanisms and laws and the concepts of “equality” and “discrimination” on which they draw; how these mechanisms and laws are implemented and enforced; the key strengths and weaknesses of the Australian sex discrimination framework; and finally, the main lessons learned from the Australian experience.

First, this paper will focus on gender equality in employment, as it has been the chief focus of the promotion of gender equality in Australia. Second, Australia has a federal system of government with equal opportunity laws and mechanisms both at the state level and at the national or federal level. Here we will focus on the federal level.

Background

The United Nations declaration of 1975 as International Women’s Year was an important catalyst for the ultimate enactment of the federal *Sex Discrimination Act* in 1984. While women had steadily increased their participation in employment since the 1960s, they were faced not only with lower rates of pay because they were women but also with a “marriage bar”, which meant they had to resign their jobs upon marriage. The 1970s saw the arrival of a new wave of the women’s movement and the creation of Women’s Electoral Lobby (WEL), which made sex discrimination, particularly in employment, a major campaign issue.¹ At the same time the new Labour Government introduced

a number of social justice initiatives including free tertiary education and the first national anti-discrimination law, the *Racial Discrimination Act 1975*. It also moved quickly to ratify *ILO Convention 111 on Discrimination in Employment and Occupation*. The new government importantly provided support for the promotion of gender equality *within* government with the appointment of an adviser to the Prime Minister on Women's Affairs. This position led to the establishment of a women's policy unit in 1974, the Office of the Status of Women (OSW), located in the Department of Prime Minister and Cabinet. Together with the emergence of a group of articulate senior women within government bureaucracy ("femocrats" as they were called) avenues were created for women both within and outside government to lobby for sex discrimination legislation.

Even after the change of government in 1976, WEL and other women's groups managed to gain support from their conservative sisters who joined the push for a sex discrimination law. Indeed, the ongoing campaign on both sides of politics for equal pay made such legislation a pressing issue. Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* in 1983 provided direct impetus for the preparation of a new sex discrimination Bill after the failure of an earlier private members Bill in 1981. There was much contentious community and political debate around the principles of eliminating discrimination against women. Those opposed to the legislation predicted dire consequences with the passage of the Bill. One such claim was that the Bill was "the brainchild of radical feminists... intent on destroying the nuclear family, creating a unisex society and, most dangerous of all, defying the laws of nature."²

Partly because of the controversy and the difficulty in getting the original Sex Discrimination Bill passed, when the new Labour government was elected in 1983 a reworked Bill was put to Parliament. The *Sex Discrimination Act 1984* was stripped of the contentious affirmative action provisions, which were later placed, in a watered down form, into another piece of legislation, the *Affirmative Action (Equal Opportunity for Women) Act 1986 (AAA)*.

Australian gender equality legislation

Sex Discrimination Act 1984 (SDA)

The main objectives of the *Sex Discrimination Act 1984 (SDA)* are to: promote recognition and acceptance of the principle of equality between men and women; and eliminate, *as far as possible*: discrimination on the basis of sex, marital status, pregnancy or potential pregnancy in employment, educational institutions, in the provision of goods and services, in the provision of accommodation, and in the administration of federal programs; sexual harassment in employment, in educational institutions, in the provision of goods and services, in the provision of accommodation and the administration of federal programs; and lastly, discrimination involving dismissal of employees on the ground of family responsibilities.

The emphasis on "as far as possible" makes the SDA somewhat narrower in its aims than CEDAW. CEDAW provides that "discrimination against women" shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status,

on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”³

Unlawful Discrimination

The approach adopted in the SDA, as in other Australian discrimination laws, is the identification of specified conduct as “unlawful discrimination”. Discrimination on the following grounds is illegal under the SDA: sex, marital status, pregnancy and potential pregnancy, dismissal on the grounds of family responsibilities, and sexual harassment.

Not all such discrimination is illegal under the SDA, just that which relates to certain areas in the public sphere. These include the areas of: employment, industrial awards and enterprise bargaining, insurance and superannuation, education, goods, services or facilities, accommodation and housing, buying or selling land, and within Commonwealth laws and programs. Both direct and indirect discrimination are covered by the SDA.

Direct Discrimination

In the SDA *direct discrimination* is defined as having occurred if either the aggrieved person is treated less favourably because of that person’s sex or marital status, or a characteristic appertaining to or generally imputed to person of that sex or marital status. The concept of direct discrimination reflects a “formal” understanding of equality, which can be characterised as an “identical treatment with biological exceptions” model of equality.⁴ Unlike the “strictly identical treatment” model, this acknowledges the impact of women’s child bearing and the impact of potential pregnancy on their participation in certain areas of the public sphere.

In simple terms then, direct discrimination occurs when someone is treated unfairly or badly compared to others, often because they are seen as different. This happens because people can have unfair, stereotypical, old-fashioned or prejudiced ideas or beliefs about others because they happen to belong to a particular group of people or because they have certain personal characteristics or attributes. For example, a woman is overlooked for management training because of assumptions that women cannot manage men.⁵

Indirect Discrimination

While direct discrimination is concerned with less favourable treatment in the same or similar circumstances, *indirect discrimination* is defined in the SDA as having occurred where a condition, requirement or practice is imposed that has, or is likely to have, the effect of disadvantaging persons of the same sex or marital status as the aggrieved person, or where the aggrieved woman is pregnant or potentially pregnant. In simple terms, indirect discrimination is where the same rules or requirements are applied to everyone and appear to treat everyone equally, but where these rules or requirements make it difficult for members of a group, such as women, to comply with them. For example, if the manager of a company said that employees who had worked continuously for the company for twenty years would receive a wage increase, it is likely that many more women than men would miss out on the increase. Many women interrupt their working lives to have children and would not have worked continuously in one company for twenty years.⁶ Unless such a rule is necessary or reasonable in all circumstances, it will be indirect discrimination and against the law. The concept of indirect discrimination thus incorporates recognition that discrimination can be structural, rather

than individually based, and connotes a more substantive understanding of equality.⁷

Special Measures

The SDA also provides for “special measures” to address systemic discrimination. Systemic discrimination against women refers to a complex of directly and/or indirectly discriminatory practices, which operate to produce general disadvantage for women as a class or a group of women.⁸ Special measures are measures specifically designed to address systemic discrimination and taken for the purposes of achieving substantive equality. Within sex discrimination law, special measures have ranged from establishing specific women’s legal services and women’s health centres to allowing women-only advertisements to be placed for employment in a women’s refuge.⁹

Sexual Harassment

The SDA also prohibits sexual harassment in the designated areas. Sexual harassment is defined as any *unwanted* or *unwelcome* sexual behaviour that makes a person feel offended or humiliated and that reaction is reasonable in the circumstances.

Affirmative Action (Equal Opportunity for Women) Act 1986 (AAA)

After the passage of the SDA, the broader promotion of positive measures to address the systemic barriers facing women workers was ultimately set out in the *Affirmative Action (Equal Opportunity for Women) Act 1986* (AAA). The AAA was amended in 1999 and is now the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWWA). While arguably weaker than the AAA, the EOWWA also covers private sector organisations,

higher education institutions, community sector employees, non-government schools and group training companies of more than one hundred employees.

Under the EOWWA, employers are obliged to develop equal opportunity for women in the workplace program; and report annually to EOWA on the program and its effectiveness.

This report typically contains statistics and other relevant information on the gender composition of their workforce as well as reporting on steps taken to develop and implement their equal opportunity for women in the workplace program. Sanctions can be imposed as a last resort for failure to lodge a report by naming the transgressor in Parliament. On the other hand, those employers deemed to be actively working towards the advancement of women can be waived from reporting to the EOWA for up to 3 years.

Redressing discrimination: implementation and enforcement

Individual Complaints

As set out above, the SDA establishes a limited framework within which a person or a group of people have the right to lodge a complaint in certain circumstances. The legislation is essentially reactive rather than proactive and seeks to provide a redress and a remedy.¹⁰

A key feature of the SDA is the focus on dispute resolution of a written complaint made by an individual or group of individuals through conciliation. Conciliation aims to bring the parties together to achieve a settlement

of a complaint. Under the SDA, conciliation is undertaken by the Human Rights and Equal Opportunity Commission (HREOC). A person who believes they have been discriminated against on one of the grounds and in one of the areas specified under the SDA is required to provide a written complaint to HREOC, which is then charged with investigating and endeavouring to conciliate the complaint. If conciliation is not possible or it breaks down, then a complaint may be referred to the Federal Court, which conducts a hearing and makes a decision. Thus a complaint can be substantiated with the Court making enforceable orders as to redress or it can be dismissed. It is estimated that less than five percent of complaints go to hearing.¹¹

The range of formal complaints made under the SDA in 2004-2005 is set out in Tables 1-3 below.¹² As can be seen, the majority of complaints under the SDA are made in the area of employment. Sex Discrimination, sexual harassment and discrimination on the grounds of pregnancy or potential pregnancy are the main grounds of complaint.

It should be noted that complainants might also be able to lodge complaints about sex discrimination and related grounds under state anti-discrimination laws. However, a total of just 348 individuals making complaints on one or more grounds over the course of 2004-2005 could be considered to be a relatively low level of formal complaints.

Table 1: Sex Discrimination Act - complaints received and finalised

Sex Discrimination Act	Total
Received	348
Finalised	375

Table 2: Sex Discrimination Act - complaints received by ground

Sex Discrimination Act	Total	Percentage
Sex discrimination	218	36%
Marital status	22	4%
Pregnancy	158	26%
Sexual harassment	167	28%
Parental status / family responsibility	20	3%
Victimisation	17	3%
Aids, permits, instructs discrimination (section 105)	2	-
Total¹³	604	100%

Table 3: Sex Discrimination Act - complaints received by area

Sex Discrimination Act	Total	Percentage
Employment	516	85%
Goods, services and facilities	40	7%
Land	-	-
Accommodation	1	-
Superannuation, insurance	3	1%
Education	12	2%
Clubs	2	-
Administration of Commonwealth laws and programs	24	4%
Application forms etc	2	-
Trade unions, accrediting bodies	4	1%
Total¹⁴	604	100%

Research, policy and educative work¹⁵

Within HREOC, specific commissioners undertake responsibility for different areas of discrimination. The Sex Discrimination Commissioner undertakes research, policy and educative work designed to promote greater equality between men and women. Recent projects have concentrated on equal pay for male and female workers, the career options for women in the finance industry, and eliminating sexual harassment from the workplace.

The Commissioner has a broad educational role to highlight the rights of individuals, as well as the responsibility of all members of the community to respect the rights of others and to work cooperatively in developing a fair and cohesive society

Inquiries

Under the SDA, the Sex Discrimination Commissioner is also able to initiate inquiries around issues of public concern. Various federal Sex Discrimination Commissioners have undertaken a number of important reviews related to gender equality issues. For example, in 1991/92 the *Inquiry into Sex Discrimination in Overaward Payments*¹⁶ focused on the impact of overaward payments on gender pay equity. In 1998/1999 there was an inquiry into pregnancy discrimination in employment¹⁷ and in 2002 another wide ranging inquiry involving extensive community consultation and research canvassed options for a national paid maternity leave scheme.¹⁸ The recommended national paid maternity leave scheme was not taken up by the federal government and Australia remains one of only two OECD countries without a national system of paid maternity leave. However the consultation process in this inquiry highlighted the need to consider the roles of both women and men as care givers

and to challenge the gender stereotypes that prescribe “women’s work” and “men’s work” in both the paid workforce and in unpaid care giving work.¹⁹ This has led to the current inquiry being undertaken by the Sex Discrimination Commissioner.

This inquiry, entitled *Striking the Balance: women, men work and care*, is an ambitious one and is “...fundamentally concerned with the choices men and women make about how they spend their unpaid work time and the effect this has on their choices and opportunities in paid work”.²⁰

Other policy mechanisms

Apart from HREOC, two other federal government agencies are charged with the promotion of women’s issues and more broadly equal opportunity for women. The Office of the Status of Women, now the Office for Women, has a number of roles.²¹ It:

- Provides high level (policy and other) advice to the Minister Assisting the Prime Minister for Women’s Issues
- Administers programmes, including most significantly programmes to combat domestic violence and sexual assault
- Advises on legislative issues relating to women
- Provides the principal focus on consultation between the women’s sector and government; and
- Represents government at national and international forums on women’s issues, such as the United Nations.

The EOWA, apart from monitoring the submission of annual reports to the Agency, has also promoted the advancement of women in the workplace through education, research and the development of resources

to assist employers in developing an equal opportunity workplace. While it has been criticised for focusing too much on women in management, the EOWA has produced important industry benchmarking reports and continues to provide a rather embarrassing account of women's poor representation in Australian senior and executive management when compared to the US and Canada.

Strength and weaknesses of the Australian legislative and policy framework

There is no doubt that Australia has a comprehensive policy, education and legislative framework to address the promotion of gender equality, particularly in employment. At times it is easy to be a little cynical about the effectiveness of this framework. Sex discrimination persists in almost every sphere of public life. However, it is important to acknowledge that the SDA and other state anti-discrimination laws have removed most formal legal barriers to women's choosing what they want to do. This has ensured women greater access to employment, and they have moved into the workforce in much greater numbers and we now take for granted many basic rights that did not exist before sex discrimination laws.²² Considerable advances have also been made, particularly in the community acceptance of at least formal equality for women.

Strengths

In my view, some of the key strengths of the Australian legislative and policy framework for promoting gender equality include the following:

- The multi-pronged focus on both redressing individual instances of discrimination under the SDA and addressing more structural or systemic discrimination under the EOWWA.
- There are a variety of fora in which to pursue complaints of sex discrimination, not only in the federal SDA and the state anti-discrimination jurisdictions, but also in state and federal industrial relations jurisdictions.
- Employer liability for discrimination. In the area of employment under the SDA, employers are liable for discrimination and sexual harassment unless they can show they have taken reasonable steps to ensure sex discrimination or harassment does not occur. Particularly in the larger enterprises, the threat of vicarious liability has worked to encourage employers to put Equal Employment Opportunity (EEO) policies in place and to train and educate their workforce about sex discrimination.
- The legal recognition of sexual harassment. The naming of sex harassment as a gendered harm has been one of the most important contributions of Australia's sex discrimination laws. Indeed the inclusion of the term sexual harassment in the SDA was the first time that the words had been used in a legislative formula anywhere in the world.²³ It is now widely accepted that sexual harassment has no place in the modern workplace.

Weaknesses

In my view some of the main weaknesses of the current system include:

- The focus on individual complaints. The individual complaint process in the SDA remains in practice the main mechanism to address gender inequality. Because the SDA is complaint-based, the enforcement of the provisions of the Act depends on an individual's willingness to lodge a complaint. The individual complainant bears the onus of proving discrimination even if the harm is of a broader structural

or institutional nature. Moreover, with the increasing legalism of anti-discrimination conciliation processes, the use of the SDA is also dependent on access to legal resources and/or union and other support. The emphasis on conciliation and settlement rather than on public hearings also means the enforcement system has failed to ensure that there is sufficient decision-making to develop the law adequately.²⁴

- The limited reach of the legislative recognition of indirect discrimination. Indirect discrimination is only unlawful in Australia if the requirement or condition in question is not reasonable in all the circumstances.²⁵ Not surprisingly what is reasonable is much contested. The reasonableness test thus significantly undermines the progressive possibilities of indirect discrimination in addressing systemic discrimination.
- The continued exemptions under the SDA. One important and contentious example is the SDA's exemption that allows discrimination by religious bodies in ordaining, appointing and training priests, ministers and participants in religion. Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".²⁶
- Under the EOWWA, the lack of effective sanctions and auditing of actual practice (rather than paper reports) in workplace programs has been a major weakness in addressing systemic discrimination. As Beth Gaze notes, this law has virtually no teeth, little resourcing, and has had to rely on persuasion and encouragement for its

implementations. This means its impact has been muted and patchy.²⁷

- The lack of active government support for the promotion of gender equality.

Concluding comments

In conclusion, I think there have been a number of key lessons learned to come out of Australia's experience with its gender equality legislation and mechanisms over the last 20 years that may be relevant in considering the design of Gender Equality Laws.

1. The need for a multi-pronged approach. While laws work in different ways in different places, what is clear is that in any jurisdiction equality laws need to cover a range of functions and work on a number of levels at once. These include:²⁸
 - The need for sanctions and judicial processes. There needs to be sanctions which apply when there has been a breach of anti-discrimination law. Sanctions can be remedies applied for a party seeking redress for discrimination. Australia, as most countries, provides for a range of civil or administrative penalties for breaching its sex discrimination legislation including financial compensation, which can be enforced by the Federal Court
 - The need for a "watch dog agency" to oversight, monitor and enforce both legislation and policy. Such agencies need to have sufficient "teeth" and resources to enable them to carry out their function and need a certain level of independence from government. In Australia, HREOC, a statutory agency, has that role and is responsible both for dealing with complaints under the SDA and monitoring and promoting

awareness of gender equality.

- National policy machinery to direct, drive and influence support government policy and legislation is also critical.
2. Policy support is at least as, if not more important, than legislation in promoting gender equality. While the SDA has been arguably strengthened by a number of amendments over the last 20 years, it is clear that government support for gender equality has waned. Indeed any focus on EEO or gender equity for women, at its height in the 1980s and early 1990s, has gradually receded from policy and political discourse. We have seen the Office of the Status for Women, once located in the Prime Ministers Department, relegated to a more junior status as the Office for Women in the Department of Family and Community Services, Indigenous and Youth Affairs. There has been a related slide from a more substantive understanding of gender equality as equality of result or as treatment according to all differences, to an understanding of equality as “strictly equal treatment” — treating all people the same no matter what — which fails to account for the ways in which informal barriers operate to prevent or undermine sex equality. This then makes it easy to construct the promotion of women’s equality as “more favourable” and hence “unfair” treatment.
 3. Ongoing evaluation, reinvigoration and renewal of efforts to promote gender equality are critical. One mechanism to achieve this is through broad ranging public reviews or inquiries. In Australia, inquiries undertaken by the Sex Discrimination Commissioner under the SDA have not only placed gender equality issues on the public

agenda, but they have also influenced what is seen as discrimination and as gender equality. The increase in pregnancy and “motherhood” related complaints following the pregnancy discrimination inquiry and the community debate that followed HREOC’s PML proposal are testament to that.²⁹ The current *Striking the Balance* inquiry promises to provide a blue print or framework for action to address an issue that lies at the heart of gender inequality; the relationship between, and the gender relations in, the private sphere of unpaid care giving work and the public sphere of paid employment.

Endnotes

- 1 Marian Sawyer (2004) *The Commonwealth Sex Discrimination Act: Aspirations and Apprehension* Paper given at the *Women Work & Equity Forum*, University of Sydney 2004
- 2 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* (Research Paper No 16, Department of the Parliamentary Library, Information and Research Services). p11.
- 3 Art 1, CEDAW
- 4 Elizabeth Sheehy (1987) *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Background Paper, Canadian Advisory Council on the Status of Women, Ottawa). P5.
- 5 http://www.hreoc.gov.au/sex_discrimination/guide/index.html
- 6 Ibid.
- 7 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* Research Paper No. 16, Department of the Parliamentary Library, Information and Research Services: Canberra.
- 8 Rosemary Hunter (1992) *Indirect Discrimination in the Workplace* Federation Press p.13.
- 9 Kristi Guest (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* p8
- 10 Chris Ronalds & Rachel Pepper (2004) *Discrimination law and practice*, Sydney: The Federation Press. p7
- 11 Rosemary Hunter and Alice Leonard (1995) *The Outcomes of Conciliation in Sex Discrimination Cases* Working Paper No 8 Centre for Employment and Labour Relations Law, Faculty of Law, The University of Melbourne. p1.

- 12 Human Rights & Equal Opportunity Commission (2005) *Annual Report 2004/2005*, HREOC: Sydney
- 13 Individual complainants may make more than one complaint on different grounds
- 14 Individual complainants may make more than one complaint on different grounds
- 15 http://www.hreoc.gov.au/sex_discrimination/guide/index.html
- 16 Human Right Australia (1992) *Just Rewards: A Report of the Inquiry into Sex Discrimination in Overawed Payments* AGPS: Canberra.
- 17 Human Rights & Equal Opportunity Commission (1999) *Pregnant and Productive: It's a Right not a Privilege to Work While Pregnant* HREOC: Sydney.
- 18 See Human Rights & Equal Opportunity Commission (2002) *Valuing Parenthood: Options for Paid Maternity Leave Interim Paper 2002*, Sex Discrimination Unit, HREOC: Sydney; Human Rights & Equal Opportunity Commission (2002) *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, Sex Discrimination Unit, HREOC: Sydney.
- 19 Human Rights & Equal Opportunity Commission, (2005) *Striking the Balance Women, men work and care: A Discussion Paper*. Sex Discrimination Unit, HREOC: Sydney p. 2.
- 20 *Striking the Balance* Launch Speech by Pru Goward, federal Sex Discrimination Commissioner, 22 June 2005.
- 21 <http://ofw.facs.gov.au>.
- 22 Beth Gaze: *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives* Paper given at the *Women Work & Equity Forum*, University of Sydney 2004.
- 23 Chris Ronalds & Rachel Pepper (2004) *Discrimination law and practice* p19
- 24 Beth Gaze *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives*
- 25 The "reasonableness" test is relevant to proving indirect discrimination in all Australian jurisdictions. CCH Australian & NZ Equal Opportunity Commentary. Para 4-700.
- 26 See Hilary Charlesworth & Sara Charlesworth (2004) 'The Sex Discrimination Act and International Law' *University of NSW Law Journal* 27 (3), 858-865
- 27 Beth Gaze: *The SDA after 20 years: Achievements, Disappointments, Disillusionment & Alternatives*.
- 28 The following draws substantially on Sally Moyle, Director Sex Discrimination Unit HREOC Presentation to the *International Workshop on implementation and enforcement mechanisms for gender equality legislation* 12-13 December 2005, Ha Noi Vietnam.
- 29 Sara Charlesworth "Contributions and Limitations of the Sex Discrimination Act at the Workplace Level" Paper given at the *Women Work & Equity Forum*, University of Sydney 2004.

Abstract

As states in Central and Eastern Europe become members of the European Union, their attention to gender equity policies must meet EU standards. Through a discussion of how culture and history shape the expectations and perceptions of gender equality, the author highlights the struggle in achieving and maintaining these standards. A snapshot of the Polish experience provides a perspective of how some states are working towards addressing inequalities.

Introduction

In 2004 a group of ten countries¹ from the region of Central and Eastern Europe became members of the supranational organisation called the European Union (EU). For women's groups that was supposed to be a positive step, especially with regard to gender equality standards, as these had been receiving much attention throughout the whole process of accession, both from policy makers and from the general public. Although it had been noticed that the new EU members were undertaking considerable efforts to align the European Community law (EC law) with regard to gender equality standards, it had also been stated that these issues should continue to receive high priority. The necessity of establishing the institutional framework for implementing and enforcing the laws in the area of equal treatment for women and men, as well as providing effective instruments to combat different forms of discrimination, had been regularly highlighted. The fact of accession was also welcomed by neighbouring countries as they were expecting to be included into the programmes of promoting gender equality, and through that, gain further support for their local or regional initiatives. Now, after more than two years from the main wave of accession, the first conclusions are being drawn based on the experiences of not only new member states, but also other countries from the region of Central and Eastern Europe. Therefore, the aim of this paper is to focus on the laws and mechanisms established to promote gender equality standards in different countries of the CEE region (and not only EU member states). The paper will also briefly analyse the Polish situation in that regard, as here we have an interesting example of how the political circumstances may endanger the implementation of previously adopted regulations and limit the development of anti-discrimination policies.

The title of this paper is slightly provocative, and answering this question is not an easy task at all. First of all, the process of implementation of any standards is difficult, time-consuming and requires forward planning. Secondly, the empowerment of women and promotion of women's human rights are very often perceived as the most controversial concepts in our societies. Also, what makes the whole process even more difficult is that national institutions tend to be reluctant to adopt new strategies and introduce new policies. However, the more this mission seems impossible, the more it is a challenge.

Societies are increasingly aware that promotion of gender equality and women's empowerment is not just important for women themselves, but it is critical for effective development in all areas. Various international actors have highlighted that policies, programmes and activities that fail to take gender inequality into account, and fail to empower women, will have limited impact and can lead to serious cost to societies.

Over the past decade, there have been significant advances for women in many parts of the world in relation to health, education and employment. Even in areas where progress has been made, there is still much work to be done in order to improve the situation. In many countries, as in the CEE region, the gains made in terms of improved access of women to education have not contributed to their increased employment opportunities. While access to health services has improved in many countries, in other countries women are still denied their reproductive rights (such as in Poland).

There are numerous obstacles women encounter on their way to achieving gender

equality. Deeply rooted negative attitudes and stereotypes are among those which are the most visible and difficult to tackle and still existing in most of the societies. Women's main role is understood as holding responsibility for domestic affairs. Home and family are seen as women's domain. Therefore, as long as these attitudes are prevailing and working against women, gender equality will never be fully achieved. Another serious constraint is the lack of political will to ensure the necessary political changes and allocation of sufficient resources. Gender equality standards are not being included into the priority areas within the governmental policies. As experience of CEE countries shows, without at least limited support for introducing equality laws, progress cannot be made and equal opportunities cannot be secured for both women and men. The state is thus obliged to ensure that all members of society will exercise rights and that women will not be discriminated on the basis of their sex.

Central and Eastern Europe – historical background

The countries in the CEE region have made significant improvements in the past fifteen years in terms of strengthening a democratic approach and respect for individual liberty, personal freedom and human rights. Many countries made important progress towards creating effective institutions in support of a new market economy, as well as towards ensuring much greater participation of citizens in governance.

Despite those undeniable achievements of the transition process, concerns had been increasingly expressed as to gender inequalities and the deterioration of women's human rights. The advent of more democratic regimes has paradoxically led to lower

percentages of women in political decision-making positions and decreasing participation in public life. Violence against women has been also on the rise, including increasing numbers of women and girls becoming victims of crime and trafficking.

The unique feature of the CEE region is related to the fact that even before the transition began, the issues connected with gender equality had been present within the governmental policies. Many still claim that protections women acquired at that time were broader and more effective than those guaranteed nowadays. But it needs to be understood, that the reasons for adopting those equality policies were different than the arguments put forward now.

In most of the CEE countries, the key provisions declaring gender equality were contained in constitutions and labour codes. Constitutional provisions prohibited discrimination, and provided women and men with equal rights in all areas of public, political, economic, social, and cultural life. The constitution gave citizens the right to work, and required equal remuneration for equal work. It provided for a broader protection for mothers and children, especially during pregnancy and childbearing period.²

During the communist regime, many CEE countries did not establish special institutions to deal specifically with gender equality, as it was believed that existing ministries could also handle women's issues.³ Some CEE countries had a labour inspectorate to assist with the enforcement of equality issues.⁴ Specialized labour courts were established to deal with issues relating to employment relations.⁵

Gender equality legislation in CEE countries

In recent years, a number of countries in the CEE region have adopted Gender Equality Laws (GELs), Anti-discrimination laws, or amendments to their family, criminal or labour codes with an intention to improve women's access to their rights. Several countries have been considering enacting similar legislation. There may be numerous explanations for the recent occurrence of the GELs throughout the region of Central and Eastern Europe. Among others, there are at least two dominant political and social dynamics that make this an opportune time to promote gender equality through introducing new legislation. The first is a strong interest in accession and integration to the European Union, and the second is the recovery and stabilization in South Eastern Europe following violent conflict while in a period of continued instances of instability. CEE countries that aspired or still are to join the EU had to demonstrate that they had taken action to eliminate discrimination against women and were making efforts to ensure gender equality consistent with EU legal standards.⁶ Other factors include an interest to align with international donors' priorities, perceived need to have a respectable human/women's rights record and the fact that there are growing numbers of nascent "gender experts" in the region who are willing to work, usually with donor support, to draft and enact legislation.

As mentioned previously, many of the CEE countries have adopted or are considering adoption of gender equality legislation. Equal Opportunities Law/Gender Equality Laws have been adopted in Albania, Bosnia and Herzegovina, Croatia, Lithuania, Slovenia, and Ukraine. The countries that are still in a process of preparation include Serbia,

Montenegro and FYR Macedonia. In some countries the provisions against discrimination on the basis of sex have been included into anti-discrimination legislation like that in Bulgaria, Romania, and Slovakia. In Poland and other countries, there is not a separate law on gender equality, but relevant provisions are incorporated into labour codes.⁷

The existing gender equality laws cover certain spheres of public and private life, but most commonly they focus on eliminating discrimination in employment. The other areas of concern include education, health care, access to public offices, media, sexual harassment, and gender based violence.

While gender equality laws present an excellent opportunity to provide an antidote to the poor performance of the regional governments catalogued by the CEDAW Committee,⁸ the initial analysis of these laws and experience in enforcing them is not encouraging. The gap between the laws and the reality of women's lives continues largely unaffected by these legal documents. There is scant evidence that these laws are being implemented. Hence, implementation of these and related laws is proving problematic and disappointing. Why are the laws poorly enforced and implemented? A combination of reasons is the common answer – including deficiencies in formulation of the law, but also, lack of knowledge of these laws among the ministerial, legal and judicial bodies as well as among the general public, weak capacity among designated implementing bodies, absence of political will, and limited resources. These are the reasons the laws are not reaching their intended use. Therefore, partly due to the process of drafting the laws, partly due to the shortcomings in the laws themselves, partly to the failures of responsible government

entities, and partly to ignorance of the laws among those who should enforce them and those who should benefit from them, we still face a lack of sufficient gender equality protection mechanisms. Criticisms of the current legislation can be drawn in the areas discussed below.

Drafting the laws

The drafting committees lack appropriate expertise. The lack of lawyers on the committees and the lack of constitutional and legislative expertise among the lawyers resulted in problems ranging from vague and unenforceable provisions to dysfunctional implementation mechanisms.⁹

These laws are modelled on the foreign gender equality acts and these acts are ill adapted. In many cases, the development of the GELs was financially supported and guided by multilateral and bilateral organizations. This resulted in introducing the influence of legal systems different from most in the region. Indeed, many of the models that inform the CEE laws originate in the West. Whether Swedish, Norwegian, Finnish, EU, or even CEDAW – such models are commonly based on a human (individual) rights approach. The idea that the model can and should be “adapted” to suit the local context is good in theory, but presents two problems. First, the functional success of these models is dependent on civil and judicial systems vastly different than those in the region. Secondly, the drafters tend to pick and choose language from the models as it appeals to them, and this piecemeal approach understandably results in incoherent and unenforceable provisions.^{10 11}

Drafting and enacting gender equality legislation has had low priority compared with economic and structural reforms in the

region. In the process of transitioning from a centralised or planned economy, to a market economy with more democratic forms of governance, external pressure and support has focused on economic and monetary policies or broader public sector reforms. Enacting strong and enforceable gender equality legislation has not attracted the same level of resources and commitment

Shortcomings in the laws

Frequently, the laws are not structured well and do not clearly state the prohibition of discrimination and promotion of equality. The statement of purpose of the law does not reflect the CEDAW model as very often they fail to stipulate the need and necessity for the elimination of gender stereotypes.

Contrary to the EU regulations and definitions embodied in the EU directives, the definition of discrimination, within most laws of the CEE, does not cover both direct and indirect discrimination and very often the laws do not provide for special temporary measures.¹²

There is no clear and accessible system that includes procedures for complaints, investigation, arbitration, court action and remedies. Liability for discriminatory actions is not clearly established. Very often it is not clear what kind of action will be taken or which remedies are available to the victims.¹³

Governmental failures

There is a strong historically based reliance on the government to promulgate and particularly to enforce the law in the CEE countries. The weak political will of governments with respect to gender issues presents an ongoing challenge to ensuring that resources are allocated and that there is respect for the intent of the law. Very often the government decides on weakening the

institutional base designated to promote gender equality, which in turn has a negative impact on the overall enforcement of these legal standards.

Lack of awareness

It is commonly agreed upon throughout the region that very few people within the government and even fewer in the general population are aware of the Gender Equality Laws. Faced with proposals for legislation that promotes gender equality, representatives of ministries and/or Parliament very often either insist that their Constitutions are adequate to provide men and women with equality or deny that there are any issues of gender-based fairness in the country.

National gender equality machinery

The implementation of gender equality laws is problematic due to the ineffective performance of government agencies and other institutions responsible for promotion of these legal standards. Some of the mechanisms created to deal with gender equality lack clearly defined roles, or do not have the capacity, skills and resources to undertake the prescribed functions. National structures are not sustainable and also extremely vulnerable to political changes and pressure from their governments. Lack of autonomy and independence undermines the capacity of these mechanisms to implement their mandates. Among various effects, this can considerably weaken their reporting capacities, which is an essential element of their accountability system.

Existing national structures dealing with gender equality that are covered by the laws could be divided into several types:

- Departments/offices/councils/sectors in the Ministry of Labour and Social Affairs

in Bulgaria, FYR Macedonia, Romania, Serbia and Montenegro, Slovakia.

- Ministry of Health, Family or Welfare such as in Latvia, and the Ukraine; and under the Prime Minister or in its office like in Albania, and Croatia.
- Ombudsperson/commissioner/advocate, this position was created to handle complaints as to violations of the law and/or to monitor progress of gender equality this is found in the Ukraine, Croatia, Macedonia, Montenegro, and Lithuania.

Moreover, there have been equal opportunity parliamentary commissions established in a few countries. In Croatia, Czech Republic, and Latvia it is a Parliamentary Sub-committee on Gender Equality; in Serbia and Montenegro, a Committee on Family Affairs, Health, Social and Ecology Protection in Parliament; and Slovakia developed a Commission for Equal Opportunities and Status of Women. In other countries female MPs set up forums for cooperation. In the FRY Macedonia a Women's Parliamentary Caucus for the empowerment of female deputies was organized and in Poland a Parliamentary Group of Women working for advancement of women was established.

Despite the progress in introducing legal provisions against discrimination and adopting or developing gender equality acts, there are still no legal guarantees for the continuous existence of national machineries and/or for their status and position in the government. The only positive exceptions are Croatia, Lithuania, and Slovenia.

Croatia

The Governmental Office on Gender Equality was established in July 2003 on the basis of the Gender Equality Act. It is

an independent body responsible primarily to the Government. It formulates the government policy concerning equal gender status, and initiates legislative actions. The Office on Gender Equality also performs policy analysis and the coordination and monitoring for the implementation of gender policy. Other gender equality bodies include the Parliamentary Committee on Gender Equality that was established in 2000 and mainly deals with how gender equality is implemented in legislation. Furthermore, Croatia has an Ombudsperson who takes on cases where the public authority has endangered citizens' rights. Although in this instance, no specific reference is made to gender discrimination.

Lithuania

The Office of Equal Opportunities Ombudsman, functioning since 1999, is an independent state institution answerable to the Parliament. It is one of the key institutions within the gender equality machinery and takes overall responsibility for the supervision and implementation of the Law on Equal Opportunities for Women and Men in Lithuania (adopted in 1998). The Equal Opportunities Ombudsman is appointed by the Parliament for a four-year term. The Ombudsman investigates individual complaints on gender discrimination and sexual harassment; submits recommendations and proposals to the Parliament, governmental institutions on gender equality policy, and recommendations for amendments to the existing legislation. The Ombudsman has a right to investigate administrative cases and impose administrative sanctions in case of violations of the GEL. The Ombudsman has also a right to refer the complaint to the pre-trial investigation bodies and to send recommendations to the institutions that are claimed to have breach the law.

Slovenia

The Gender Equality Ombudsman office was established in 2003 as a result of the Equal Opportunities Act, an umbrella law providing a common basis for creating equal opportunities for women and men, which came into force in July 2002. The Act defines and prohibits both direct and indirect discrimination. Moreover, the Act allows for positive measures to ensure equality and provides for the introduction of gender equality into education in order to tackle stereotypes of gender roles reinforced by society. Currently the main governmental body dealing with gender equality is the Office for Equal Opportunities established in 2003. The Office functions under the State Secretary, responsible to the Government not attached to any specific ministry. Its tasks include monitoring and coordinating gender equality issues towards all the ministries and to participate in the preparation of laws and regulations. It also performs policy analysis, advocacy. Gender focal points are established within several ministries.

The gender equality legislation, even if adopted and put in force, in almost all the countries is far from being effectively implemented in practice. In all of the countries, institutional mechanisms have objectively proven that they are inadequately equipped to work for the advancement of women.

In the light of the fact that conservative forces are gaining increased power, the sustainability of national machineries is still threatened. Therefore, women's NGOs believe that national machineries ought to be strengthened by providing them with a stronger legal basis, the mandate to formulate the governmental gender policy, and the authority to initiate legislative action. National machinery must be either independent from the government or placed at the highest level within the

government and have a clear mandate for gender equality. The recent changes in the Polish political sphere clearly show that the institutions dependent on the government cannot play their role of standard-setting bodies as their existence is under threat of liquidation every four years. Last year, when the conservative party "Law and Justice" came into power, its first decision concerned closing the Office of the Plenipotentiary for Equal Status of Women and Men.

The Polish example

Gender equality was not placed high in the hierarchy of policy issues implemented by the Polish Ministry of Labour and Social Affairs between 1997 and 2001. There was lack of political will to conduct a pro-equality policy in the integration of international standards. In 1997, the national gender equality machinery was transformed into the Government Plenipotentiary for the Family.¹⁴ As a result, gender equality issues were dropped from the scope of interest of this office and it began to perceive women only in the context of the family.

However, after parliamentary elections in 2001, a new Government established an Office of the Plenipotentiary for the Equal Status of Women and Men. This, of course, was an indirect consequence of the EU negotiation process and the pressure put on Poland by the EU authorities. The Office was a higher-level institution, directly subordinate to the Prime Minister. Hence its only perceived major weakness is that it was not an independent public institution. The Plenipotentiary did not have its own legislative initiative and could only present draft legislation that had been previously accepted by the Prime Minister. In 2002 the Government enlarged the Plenipotentiary's scope of competence by adding such

tasks as combating discrimination on the grounds of race, ethnic origin, religion and beliefs, age and sexual orientation. It soon became evident that the existence of the Office and its ability to fulfil the mandate was subject to the political will of the governing party. In October 2005, the newly elected Government immediately decided to dismiss the Plenipotentiary and the Office ceased to exist.

Since November 2005, issues related to discrimination are dealt with by the Department of Women, Family and Counteracting Discrimination, which is placed within the Ministry of Labour and Social Policy. The Department, as stated on its website, is responsible for coordinating actions pertaining to the status of women and family in society, and fulfils tasks pertaining to counteracting discrimination for any reasons in all domains of social, economic, and political life, except for issues related to counteracting ethnic discrimination. The Department clearly focuses on women in the context of their position within the family and the labour market, while lacking a feminist approach to highlight the importance of ensuring equality of men and women in all spheres of life. Liquidation of the Office of the Plenipotentiary constituted a step back on the way towards empowering women and ensuring their participation in a public life on an equal footing with their male counterparts. The main problem remains, that is, to guarantee stability of the results that have been accomplished. Whether that mission will be successful, is again, difficult to predict.

Conclusion

Obviously, good laws and strategies are not enough to change or improve gender inequalities. The CEE countries should establish a new legal culture by adopting laws

that shape society to view equal rights and opportunities as a legitimate and essential component of the overall legal framework. Equal opportunities legislation should be supplemented by the development of an independent monitoring mechanism, such as ombudspersons or similar institutions, with the power to recommend corrective actions concerning any existing or anticipated shortcomings.

Access to justice for women is deficient in the region, as well as the information on the rights and legislation. There is a huge gap between theory and practice of implementation of basic equality standards. The limited number of court cases concerning sex discrimination illustrates the lack of adequate enforcement by government bodies and the reluctance of women to bring charges to the courts. In general, one may claim that there is a considerable resistance across the region of CEE to a gender equality issue and its implementation. The reason for that most likely stems from a long-standing tradition of a verbal commitment to equality inherited from the Soviet times. Most people are confident that equality between women and men has been achieved and is an integral part of their life. In this respect, national mentality and societal stereotypes are the main barriers to overcome.

Here, civil society has a critical role to play. Moreover, since the reality in the region is that the institutions responsible for implementation of the laws are gender blind and patriarchal, thereby political will and the commitment to the allocation of resources will not come on its own, any attempt to press for implementation of gender equality laws would have to rely on support and full engagement from civil society groups. Non-governmental organisations and civil society groups

and networks have already contributed to increasing the visibility and recognition of the importance of gender equality and women's empowerment. Their role in advocating for, and monitoring implementation of, the commitments made by governments has been particularly significant. Establishing stronger partnerships among civil society and between governments and civil society could inevitably enhance implementation.

The accession process and requirement to implement the EU equality standards contributed to adoption of important policy instruments for increasing equality between women and men. If it were not for the harmonisation process, the legal regulations existing in many countries of the region would have remained the same, and the debate, though it was not taken seriously by all the partners, would not have taken place at all. The positive impact of the enlargement process could be seen through adoption of new gender equality legislation and setting up a base for establishing gender equality machinery. Because of EU regulations, awareness of equal opportunities is increasingly present within governmental bodies.¹⁵ Therefore, it is not so crucial to adopt new laws anymore, as it is more important to develop strategies to ensure that the adopted standards will be enforced.

That mission is, without any doubt, possible. It cannot be announced successful yet as there is still a lot to be done and the situation varies depending on the country. However, there have been certain steps undertaken and positive changes have appeared so that mission definitely has to be continued.

Endnotes

- 1 These countries include Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia, as well as Cyprus and Malta. Bulgaria and Romania are to become EU members in 2007.
- 2 Sloat, A., *Legislating for Equality: The Implementation of the EU Equality Acquis in Central and Eastern Europe*, Jean Monnet Working Paper 08/04, New York 2004.
- 3 The first separate institution dealing with gender equality was created in Poland, quite early, in 1986. The Government's Plenipotentiary for Women was established as a result of implementing the recommendations of the World Conference on Women in Nairobi. It was originally attached to the Ministry of Labour and Social Welfare. Ibid.
- 4 In Hungary, for example, the central office of Labour Inspection was given the power to handle general discrimination-related problems that were reported to them by workers in individual factories. Ibid.
- 5 Labour courts still exist in many countries, and the assessment of their work is positive.
- 6 The EU's commitment to promote gender equality constitutes an integral part of the EU legislation since 1957. The countries applying for EU membership are obliged to respect equal treatment legislation and to harmonise their own legal framework with the equality regulations adopted by the Union. The process of harmonization in the area of gender equality covered several major directives describing primarily various spheres of employment. Right now the European Union legislates also in other spheres and ensures equality in treatment also in political life, as well as insurance or taxes.
- 7 Currently the Polish Labour Code prohibits any form of discrimination, both direct and indirect, in the area of employment, in particular on grounds of sex, disability, race, and nationality and political or religious opinions. Amendments to the Labour Code introduced also a new evidentiary principle (shifting burden of proof on an employer, so s/he must prove that the distinction s/he made or other behaviour was not discriminatory).
- 8 All 28 governments in Central and Eastern Europe and the Commonwealth of Independent States (CEE/CIS) have ratified the Convention for the Elimination for All Forms of Discrimination Against Women (CEDAW). CEDAW itself imposes the responsibility on its signatories to prevent discrimination on the basis of sex and to promote de facto equality between men and women and to take affirmative steps to eliminate sex-based stereotypes. The legal mandate for effective gender appropriate legislation is thus clear.
- 9 For example, in Bosnia and Herzegovina, according to the 2003 Gender Equality Law, two Gender Centres are authorized to investigate claims brought by the citizens. However, despite the clear language of the statute stating that right of the Centres, they lack the legal authority to conduct investigations, as there are no secondary laws

specifying that authority.

- 10 UNDP-UNIFEM Regional Programme, Concept Note. *Advancing Implementation of Gender Equality Legislation in Central and Eastern Europe and the CIS*, page 3. Bratislava, 2005.
- 11 For example, the prohibitions of sexual harassment, harassment, and "gender-based violence" found in the texts of GELs are far broader in scope and more idealistic in intent than their EU counterparts.
- 12 The exceptions are the Slovenian Act on Equal Opportunities for Women and Men (specifies the types of special measures which could be adopted), Gender Equality Act in Croatia or draft law for Montenegro.
- 13 In Bosnia Herzegovina's law publication or presentation of "*any person in an offensive or demeaning manner with regard to gender is prohibited.*" Advertising or features depicting sexually explicit material might well be considered offensive or demeaning, yet it is undefined whether the publisher, the advertiser, or the author is responsible for an alleged violation and unclear who will hold the perpetrator accountable and what the consequences of the violation might be.
- 14 Changes of the position and tasks of the office responsible for the Government's policy on gender equality and significant changes of the name of the Plenipotentiary office reflected the ideological dispute taking place in Poland since 1986 (in 1986 – it was Government Plenipotentiary for Women, in 1991 – for Women and the Family, in 1995 – for the Family and Women, and in 1997 – for the Family).
- 15 One of the best examples is Slovenia with its well-prepared civil servants and detailed equal opportunities programmes. There is a general understanding in Slovenia that to make the gender equality work in practice, legislation has to be accompanied by relevant action plans and educational activities.

Abstract

This paper traces Germany's history of gender equality through the lens of discrimination, equal opportunity, and within the framework of national policies and legislation. Also, based on measures imposed by the European Union, the paper illustrates Germany's attempt at compliance. The author has included guided steps on how these institutions have implemented gender mainstreaming as a means to eliminate inequality.

Introduction

About twenty years ago I published a study on homicide between men and women and the legal categories used. I found that battered women were more often convicted for murder than violent men. The reason was: equal application of the law. Women, who suffered violence for many years, premeditated the killing of their partner; violent men, who did not have to fear anything, simply battered their wives until they were found dead.

You might know the saying by Anatole France: *"The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."*

The question is, do we focus on the law, or do we focus on life? Do we take as a starting point from what men have, or what women need? By taking women as a starting point you might come to different perspectives as shown by the late Tove Stang Dahl in 1974, who identified five areas of "feminist jurisprudence": money law, housewives' law, paid-work law, criminal law and birth law.¹ On the other hand, formal equality is a good (mainstream) tool to address inequalities and injustices produced by the law. As Catharine MacKinnon has pointed out,² it would not be law, if it wouldn't attempt to treat likes alike; it's just not enough if there are underlying asymmetries. Defining sameness in the light of existential differences is mission impossible if somebody always points at the other truth.

In this paper I will first introduce the concept of equal rights in the German Constitution and its interpretation by the Constitutional Court. I will then turn to the European regulations, mainly concerning the labour market, and the respective jurisdiction of the European Court of Justice. This includes a brief description

of the gender mainstreaming policy in the European Union and in Germany. I will conclude by outlining some statutory laws that specifically address problems faced mainly or solely by women. This includes legal actions taken to stop violence. After all: gender-based violence is the most oppressing form of discrimination, and discriminated groups are the most vulnerable to violence.

History of gender equality in Germany:

Equality and non-discrimination, constitutional rights and jurisdiction

In 1918 Germany introduced equal citizenship, the right to vote and be elected, at the same time as the UK. This came twenty-five years after New Zealand granted women's suffrage, but only one year before New Zealand allowed women to stand for elections.³

After the fall of Nazi-Germany, a provision was introduced into the German Constitution stating: "Men and women shall have equal rights" (Art. 3 II), and in addition: "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions" (Art.3 III). Equality before the law prohibits arbitrary differentiations [*Willkürverbot*] whereas the non-discrimination clause prohibits any differentiation on the indicated grounds such as sex, race, nationality etc. [*Differenzierungsverbot*]. This means no legal provision can endure that which is solely based on an unequal treatment of men and women. You can already sense that problems will occur if you want to prefer women to men, in order to reverse inequalities and past injustices. Giving priority treatment to one sex necessarily discriminates against the other. To address this problem, an amendment was introduced after the reunification saying: "The

state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." [Art. 3 II, 2]

There are cases such as that of Beatrice Fernandez,⁴ which brings up the fact that since only women can get pregnant therefore only women will lose their jobs. Similarly, take the case that university regulations allow anybody to apply, but limit master courses to evening hours. This might discourage mainly female students to apply; without explicitly saying so. This problem, where the discrimination is not explicit but rather empirical, is covered by the concept of indirect discrimination, which will be discussed later. Another issue in this context that is linked to the Beatrice case asks the question whether constitutional and fundamental rights are only binding for state institutions. For Germany this view is made explicit; the constitution says, "The fundamental rights bound legislation, executive power and jurisdiction as immediate law" [Art.1 III] - thus not private parties. The same is true for CEDAW, where "state parties (...) agree to pursue (...) a policy of eliminating discrimination against women" [Art.2].

The Constitutional court jurisdiction of Germany is an interesting case in so far as any person alleging that one of his basic rights (...) has been infringed upon by public authority he/she can file a constitutional complaint [Art.93, 4a GG]. Therefore the constitutional court had ample opportunity to discuss the impact and scope of gender equality and non-discrimination. Here we can focus on two areas: family law and legal protections in the work place.

Family Law

In 1953 family law had to be abolished because the legislation violated the principle of equality between men and women. A new family law was introduced, but in one of the famous decisions, the constitutional court rejected regulations that granted the father the right of the final decision in cases of disagreement between the parents. Such a regulation violated equal rights between men and women. After that, the family courts had to decide these cases, although not many appeared.

Problems of formal equality, that is, non discriminatory laws, were dominant for many years such as having the choice between the husband's and the wife's name as family name. (Imagine you could be the daughters ('binte') of your mothers!) But the court also held that the lawgivers could not prescribe a model, that was men being the breadwinner and women being the housewives, but had to legislate marriage as a partnership of equals. The reason given was that doing housework is not 'biologically' affiliated to women only. The basis for these decisions was a concept of non-interference (by state-law) rather than the promotion of equal rights between spouses. Therefore, the court also insisted that the state has to give equal value to the work of men and women in the family, a concept which then heavily influenced on tax schemes and social entitlements for child care. Basically, all social and tax laws have to treat housework as on par with employment.

Statutes to address unequal living conditions

Within German legislation are some areas that are closely linked to gender equality, they include: protection against violence against women; financial assistance and social services, especially for single mothers; and state intervention in cases of gender-based

violence. Gender-based violence remains one of the major obstacles to achieving gender equality. As long as men dominate over women by physical means, even the most fundamental respect for the other person is denied. Legislation has to address this problem on several different levels:

- Criminal and police laws and their enforcement have to draw the demarcation lines between tolerated and non-tolerated social behaviour. Violence against women is non-tolerable behaviour.
- Only police law can end a violent situation. Criminal law is made to react after a criminal offence has been committed and proven beyond doubt.
- Civil and family laws can empower women to act. In addition, it needs social changes to enforce the "right to exit" a violent relationship. Civil law treats the objects of male violence as legal subjects by law.
- Social laws can provide for victim's individual entitlements to adequate help and necessary support.

Family and Childcare

Germany is a comparatively rich country. It provides a number of social services and financial assistance to families and children, and subsequently to women who are often the sole caretakers. The following services are currently accessible:⁵

- Maternity allowance, paid by the employer for the duration of maternity leave.
- Entitlement to attend kindergarten, nursery school and day care.
- Child raising allowance or parental leave, which allow parents to leave work – and get paid – whilst retaining full protection against dismissal.

- Family allowance, supplementary child allowance, and tax reductions.
- Maintenance payment by spouse/parent, and advance child maintenance payment or social assistance payments in case the other parent/spouse fails to make monthly maintenance payments.
- Assistance for education and vocational training allowance, which grant special treatment for students with children.
- Child rearing periods in the statutory pension insurance and state subsidies for private old-age pension, free family co-insurance in the statutory health insurance, and reduced contribution to the long-term care insurance.

This system has been in place since Bismarck introduced a social insurance system to prevent social uproar. Today, economists tell us that you need as many instruments as you pursue targets. Obviously, Germany has a number of targets; one of them might be to encourage women to have children. But the line between encouragement to have children and encouragement to stay home is thin.

Legal protections in the work place

Some of the more recent decisions have to deal with the ambiguous effects of legal protections. In German laws some explicit provisions existed to protect women at the work place. One was the prohibition on women to work at night, which not only protected them from sickening work conditions but also from higher paid jobs. The court held the prohibition unconstitutional, since a gender biased differentiation was not considered imperative. Just lately it had to consider another tricky argument complaining, that (mandatory) maternal leave does not only function as legal protection for pregnant women, but as employment

obstacles for all women in the first place. The constitutional court ruled that it is the discretionary power of the lawgiver how to pursue equality between men and women. If it does fulfill maternal rights by imposing obligations on employers they must - at the same time - make sure these regulations do not have a discriminatory effect on women. It is possible that this seems to you like a luxurious discussion on our part, but let me stress the fact that protective laws also have the reverse effect of patronizing and victimizing women.

The interpretation of the constitutional court ultimately led away from a merely formal understanding of equality towards a more substantial understanding. In modern management speak we would say, the court is now applying an outcome oriented approach as opposed to the input oriented approach of formal equality. Thus, in one of its decisions the court states that equality has to be "imperative" towards the social reality and allows to "compensating for factual disadvantages, which typically affect women". Even if the law compensates for past disadvantages, and even if not every woman faces these typified obstacles. This is why the constitutional court did not object to regulations that stipulated different pension ages for men and women, which are meant to compensate for what are called "double burdens" (job and family), but called on the lawgiver to adjust them over time. Only afterwards this was included in the constitutional wording by adding that the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. This imposed a proactive role on the state to actually promote gender equality, eliminate disadvantages, and to focus on the actual implementation and on disadvantages that now exist.

Moving towards gender equity legislation

This development ultimately encouraged legislation that not only aimed at eliminating discriminatory laws but implemented new legislation to actively promote gender equality. This coincides with a theoretical discussion of fundamental rights as “social rights”, not just civil rights, or – as in the German discussion – the right to participate.⁶ Even a right for special protection and promotion was derived from the very telling example of this new approach on an international level, the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, made explicit that “In order to secure the right to equality for persons with disabilities, States Parties will undertake all appropriate steps, including by legislation, to provide reasonable accommodation, defined as necessary and appropriate modification and adjustments to guarantee to persons with disabilities the enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.” [Art. 7 (4)]

The obligation was to ensure equality between men and women, as long as the protection does not have reverse effects on women. What is important to note here is, that after formal equality was achieved and the law moved into affirmative action, more and more men filed claims alleging that their equal rights were violated. So from being an instrument to promote women's rights, gender-equality and non-discrimination turned into an instrument to object any special treatment for women. This was especially true, when the legislator started to introduce quotas to overcome existing disadvantages.

Affirmative Action and quotas

Beginning in the 1980's the German (State) governments began to introduce Civil Service Laws to promote women in the public service and to reduce the under-representation of women, especially in managerial positions. I will focus on the question of quotas before I outline the general scope of these laws by using the respective federal law as an example.

The regulations to address under-representations of women in the public service followed two different logics. One emphasised the priority promotion for women on a case-by-case basis, but with regards to qualification. A typical example is found in Paragraph 25(5) of the law in the Land⁷ (region) of Nordrhein-Westfalen, the westernmost and largest region in Germany, “Where (...) there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.” The second one, promoted by Hessen, a region in central Germany, focused on agreed upon targets that were included in a women's advancement plan. These targets were binding for the respective public bodies such as ministry, commune, court, university, etc. Each administrative body had full responsibility of how to achieve the targets according to their own two-year plan; if they did not comply they were excluded from appointing any further men [Par 10 (5)]. Like in many other laws, performance was not limited to job performance [Par 10(1)]. “When qualifications are assessed, capabilities and experience which have been acquired by looking after children or persons requiring care in the domestic sector (family work) are to be taken into account, in so far as they are

of importance for the suitability, performance and capability of applicants. That also applies where family work has been performed alongside employment” [Par 10: Selection decisions].

A strict quota only applied to collective bodies such as public commissions, advisory boards, boards of directors, and supervisory boards. In these bodies “at least half the members should be women” [Par. 14]. These provisions were assessed by the German courts and the European Court of Justice⁸ in Luxemburg, any priority treatment of women ultimately “discriminated” against competing male candidates. The court approved provisions that ensured an objective assessment of all candidates. The judgments took into account criteria specific to the candidates and those which allowed overriding the preference of female candidates when one or more of those criteria was tilted in favour of the male candidates. The Court did not approve automatic preference of female candidates, yet it did approve of measures based on the agreed upon targets in the women’s advancement plan.

Equal opportunities between men and women

All state laws contain further provisions to promote gender equality. I will give a short overview on the Federal Act on Equal Opportunities between Women and Men⁹ in order to show what problems are addressed in these laws. The area of application covers the Federal administration, the courts of the Federation and the private law facilities of the Federal administration. In addition, the institutional recipients of Federal benefits are contractually obliged to apply the basic tenets of the Act. Even in the event of privatisation, a contractual obligation has to be striven for to ensure that the equality regulations continue to apply. The Act follows the logic of

the individual case quota (see above) in the fields of training, appointments, recruitment and promotion. One important target is to reconcile family and work, including a right/entitlement to part-time employment or leave for reasons of child-care.¹⁰

The Act also included a planning exercise (called “equality plans”) to form effective tools for modern human resource management and development. Equality commissioners are elected from amongst the staff. Their mandate is regulated in the Act; amongst other things they have the right to object management decisions and even take legal action in order to assess the compliance of a decision with the Act. The policy tool of gender mainstreaming is being anchored in the Federal service as an ongoing guiding principle. Lastly, all communications have to be written in gender-neutral/inclusive language, which can pose quite some problems in German.

Since I was responsible for drafting and implementing one of the state laws, I wanted to share one experience with you. In my state, the percentage of women in higher positions went up, not because they were promoted to these positions but simply by not refilling the positions of the older men who retired. However, this percentage looked good in the report to the Parliament. Advocating, planning, monitoring, and reporting meant a lot of work with little effect: between today and the 1990’s – when affirmative actions were introduced in the civil service – the proportion of women increased from 43% to 52%. The increase before 1990 was higher.¹¹ These numbers are also misleading insofar as they do not aggregate occupational status and positions. If you do so you will find that most women were working as clerks. In Germany there are a number of structures to

address equality issues: there are women's or equality ministries on Federal and State levels which are mirrored by respective commissions in all parliaments; in addition, many parliaments have commissions and commissioners on the rights of persons with disabilities or migrants, and the Federal level has a human rights commission; all public administrations have to appoint or elect women's/equality commissioners and representatives for staff with disabilities; in addition, some communities and some states appoint commissioners (or dedicate staff) for persons with disabilities, gays and lesbians and seniors; and based on the General Equality Act, a new anti-discrimination office will be created. In the private sector, worker's councils are involved in the promotion of equal rights in the work place.

Between 1960 and 1990 the share of women in the civil service increased by more than 12%, whereas from 1990 to 2004 the increase amounted to 8% only and half of these women are in part-time positions. Less than 25% of the managerial positions in Germany are held by women; even less in the private than in the public sector. There is a well known income gap between men and women in Germany which amounts to an average of 25%, despite this high disparity you never know how things would stand without these laws.

Equal opportunity and legislation within the European Union

Equal employment opportunities have been core areas of European policies since the 1970's. The EU-Commission reports on a regular basis on improvements in this area. Since the European Constitution is in a coma, at best, if not dead, I will refer to the treaties, which are actually in force. The Treaty of Amsterdam¹² covers equal rights in several

Articles [Art. 2, 3, 13 and 14]. Based on the treaty, several directives were passed to elaborate on the obligations of the member states.¹³ The one that was contested in the European arena is Article 141 EU [former Art. 119 EC] stating that, each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The cases which arouse under this regulation were with regards to two phenomena: work classifications, which – in effect, but not in words - aggregated female and male labour; and the treatment of part-time employees as opposed to full time employees. Both questions resulted in the development of the concept of 'indirect discrimination' by the European Court of Justice. According to the Court's case-law, national provisions or rules discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless they are justified by objective factors unrelated to sex groups.¹⁴ Thus a data based comparison between men and women is required, which must cover enough individuals that does not illustrate purely fortuitous or short-term phenomena, and appears, in general, to be significant.¹⁵ This definition is now integrated in the European Anti-Discrimination directives. Germany implemented a number of labour legislations in order to fulfill its obligations arising from European directives. Direct and indirect discrimination on grounds of sex, also prior to the establishment of an employment contract, have been prohibited by law (Par. 611 a/b Civil Code). A statutory prohibition on sexual harassment is also in place, and the employer is obliged to protect female as well as male employees. If the employer does not take suitable measures, the employee may refuse to work without losing his/her claim to wages (Employees Protection Act).

The Works Council, a gender-balanced representation of employees in private companies, is included in the supervision of equal opportunities. It is given an express right to make proposals, demand to be informed and give advice to promote the implementation of de facto equality and the reconciliation of family and work. Despite the fact that unequal payment was prohibited in the EU since the mid seventies, and despite the fact that a lot of effort is invested to promote the economic and social situation of women, there are still huge gaps between men and women.¹⁶

Across Europe, fewer women participate in the labour market and they hold more part-time positions and lower paid jobs. The pay gap remains stable at about 15%, though it varies across the EU with Germany at the top end reaching 25%. This disparity ultimately results in lower pensions for women, and leads to a higher risk of poverty. Unemployment has slightly increased in 2004 but the gender gap in unemployment remains significant. However, women still outnumber men in education, though not as PhD graduates.

Reconciliation between work and family life remains a challenge for both women and men. Interestingly enough, women with small children continue to show lower unemployment rates than women without children, while men with small children show higher employment rates than men without children. The Commission considers this the result of limited access to childcare and gender stereotyped family patterns. I wonder whether it is not just due to old age, unemployment, and the statistical problem of "average". But women catch up rapidly, a new study suggests that it will only take 150 years until women might earn as much as men

do.¹⁷ Some studies suggest that women do have access to higher positions and better-paid jobs, but do not want them. Whoever works with these statistics is at risk to see the problem in women and not in the way we work, or in the way we balance our life with our work. Again, I would like to emphasise that taking men as a "statistical" standard, and trying to level women up to this standard, is dangerous. Statistical comparisons to prove indirect discrimination are helpful to prove discrimination against women, they are not helpful if they put pressure on women, and are directed against their way of living. This is, as long as it is insured, that the choices women make are actually choices and not coercions.

Directives on discrimination

European institutions are discussing whether to bring together five existing directives in a single text in order to clarify the principle of equal treatment. The directive shall include definitions for direct and indirect discrimination as well as (sexual) harassment regulations on the principles of: equal pay for equal work or work of equal value; equal treatment in occupational social security schemes; and equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions. To do so, the directive will also regulate job classification systems and evaluations; define pay with regard to different forms of benefits; clarify the special protection of pregnant workers; and in addition, regulate procedures and sanctions, establish special monitoring bodies, and encourage social dialogue.

The definitions of discrimination are based on the jurisdiction of the European Court of Justice and subsequently the Anti-discrimination Directives of the European Union.¹⁸ The Directives cover direct and

indirect discriminations, defined as: the Definition of Discrimination held by the European Courts and Directives Direct Discrimination where one person is treated less favourably on grounds of sex than another has been or would be treated in a comparable situation, or that persons of one sex are placed at a particular disadvantage compared with persons of the other sex.

The directive also defines harassment as discrimination. Harassment is unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment [Art. 2 II]. Sexual harassment is any such conduct “of a sexual nature”. The concept that sexual harassment constitutes discrimination was developed by the early feminists, in particular Catharine MacKinnon,¹⁹ in the 1970’s. No (direct or indirect) discrimination on the grounds of sex is allowed in both the public and the private sector in relation to the conditions for access to employment, training, working conditions and membership in professional organizations. Systems to protect workers, provisions for remedies, legal representation and complaint procedures have to be implemented.

Protections against discrimination

An interesting new area is now opening in the field of social security [insurances, welfare laws]. The EU passed another directive to ensure non-discrimination in access to various services and goods; including private insurances, which often discriminate along gender-lines because of the higher life expectancy of women [in Germany] or higher risk behaviour of men (causing more traffic accidents for example).

Based on these directives all European countries must transpose these regulations into national law.²⁰ The German General Equality [Equal Treatment] Act was promulgated on August 18, 2006 after several years of heated debate and political struggles, and after being on the verge of sanctions for non-compliance imposed by the European Court of Justice. The Act transposes several EU directives into one bill, and thus exceeds the minimum standards required. The new bill prohibits discrimination based on race or ethnic origin, gender, religion, disability, age, or sexual identity. Legal provisions against discrimination apply not only in the sphere of labour law, but also of civil law (e.g. access to goods and services).

The protection against discrimination in the workplace is one of the core areas of the law. It builds widely on the regulations that were applicable in the past to ensure equal rights between men and women. Cases of unequal treatment are not tantamount to illegal discrimination; this is with reference to the existing case law of the European Court of Justice. If employees are discriminated against they will have a right to complaint (to the Labour Court), and to demand compensation. There also will be a restructuring of legal relationships in certain areas of life. This will affect contracts with suppliers, service providers, and landlords. The Bill only applies to bulk businesses, i.e. landlords owning more than fifty rental units. The Bill also prohibits discrimination on the part of retail outlets (e.g. supermarkets). It will not – for whatever reasons - apply to private transactions, such as selling a used car. The following EU directives have been implemented: field of application of the principle of equal treatment; equal treatment in the workplace; equal treatment for men and women as regards access to employment,

vocational training and promotion, and working conditions; and equal treatment as regards access to and supply of goods and services.

Private insurance companies were under attack from all sides as they often refused to insure persons with disabilities or HIV/AIDS patients. Their risk assessment is based on gender-disaggregated data, which involve higher fees for women in health and life insurances. These companies will have to adjust their policy conditions, but not too much. Here too, discrimination will be compensated for with a payment for damages by the Civil Courts.

Victims of discrimination will be required to assert their claims within a period of two months and to present proof, that is, circumstantial evidence, to substantiate their claims. The Bill provides for the creation of an independent office of anti-discrimination affairs, where victims of discrimination will be able to obtain advice on their situation and avenues of legal recourse open to them. The office will offer mediation between the parties involved and be able to request position statements from them as well as from federal authorities.

Towards mainstreaming gender

Both the German and European institutions have moved in the direction of gender mainstreaming. The treaty to establish the European Community, as well as the German Constitution state that, "It shall in all activities (...) aim to eliminate inequalities and to promote equality, between men and women" [Article 3 (2) of the Amsterdam Treaty]. Based on this provision, the European Commission adopted a "dual approach", combining gender mainstreaming with specific actions to promote gender equality and women's rights.

It defines the obligation to mainstream gender as the process of assessing the implications for women and men of any planned action including legislation, policies or programmes, in all areas and at all levels.

Interestingly, gender mainstreaming also becomes a means of gender-responsive decision-making in the social laws. The unemployment insurance is obliged to overcome existing disadvantages due to a gender biased labour market [Par. 8 Abs. 1 SGB III]. Another law requests to take the special needs of disabled women into account [Par.1 SGB IX]. The Children and Youth Service must take into account the different life situations of girls and boys, remove disadvantages, and advance equal rights for girls and boys [Par. 9 (3) SGB VIII].

Conclusion

Summarized here are lessons learned from the German and European experience. The laws and regulations on gender equality, and the jurisdiction around them, need encouragement (if not coercion) by women's organizations. After all, law is a dialog between officials and their constituencies.

It remains a question of how much one wants to rely on states and state actors to advance the causes of women. Women and their daily life, not their political aspirations or human rights activism, should be the starting point for any assessment and suggestion. By its pure definition, law is an instrument of dominance, yet don't underestimate that there are many players and many interests in the game. Therefore, law also marks a compromise reached in a power-struggle.

When beginning, and throughout, your journey towards attaining gender equality, it is key to find allies; look for people who

want the same thing, even if not for different reasons. Look for strategic entry points: timing is often everything! Legal changes can move a society towards social change. Changes that come too fast and go too far might face a backlash; often you only realize this in hind sight. This battle over the law of a land is not just about legislation, it is also about interpretation. Since many laws present a compromise, they are necessarily open for interpretation (the best example here is human rights). Sometimes it is easier to fight for changes in the court than in the political arena: there are less people, but a common logic. That is: if you speak the language of the judges.

All of this brings me to the bottom line. Advocacy needs qualified lawyers to take up the case of women's rights and concerns. Enforcing a women's rights perspective is a good thing to do in societies where women are not treated as subjects with rights or a genuine will. But rights of women all too often end in the hands of fathers, states or international agencies – where they are exploited and easily forgotten. Taking formal equality between men and women as a reference point is a challenge to the ideology of the law as being blind towards the social status of the plaintiffs. But, formal equality is not enough to promote social change and to overcome a long history of inequalities and discrimination. Measures to legally protect and promote women, on the other hand, are ambiguous in nature. There is a paternalistic touch to it, and it gives way to victimizing women. Social change should take women as a starting point and reject to accept men as the standard. Legal change has to cater to the needs, concerns, wishes and desires of women; they are the experts of their lives. Listen to their voices. Last but not least: the perspective you take on social issues

might depend on your personality, but your approach also shapes your return. What I mean is: complaining influences your mindset, encouraging and enjoying does too. I personally am not yet ready to surrender. Success is possible, but sometimes it is also a matter of definition.

Endnotes

- 1 Stang Dahl, Tove (1986): "Taking women as a Starting Point: Building Women's Law." *International Journal of the Sociology of Law* 14 (1986): 239-247, and „Women's Law: An Introduction to Feminist Jurisprudence", Oslo: Norwegian University Press 1987.
- 2 MacKinnon, Catherine: *Towards a Feminist Theory of the State*, Cambridge: Harvard University Press 1989.
- 3 <http://www.ipu.org/wmn-e/suffrage.htm>
- 4 Abdul Aziz Bari: *The Right to Equality under the constitution: The implication of the Federal Court decision in Beatrice Fernandez*, *The law Review* 2005, 373 - 381
- 5 http://kinder-jugendhilfe.org/e_kjhg/downloads/KJHG/KJHG_englisch.pdf
- 6 <http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>
- 7 Here and below, the term "Land" is used to refer to a region within Germany. It is similar to what one may think of as a province, or a state in the United States.
- 8 For more information please refer to the European Court of Justice online at, <http://curia.europa.eu/>
- 9 Between 1960 and 1990 the share of women in the civil service increased by more than 12%, whereas from 1990 to 2004 the increase amounted to 8% only. <http://www.bmi.bund.de>
- 10 Act on Part-Time Working and Fixed-Term Employment Contracts and Amending and Rescinding Labour Law from 1 January 2001
- 11 Between 1960 and 1990 the share of women in the civil service increased by more than 12%, whereas from 1990 to 2004 the increase amounted to 8% only. <http://www.bmi.bund.de>
- 12 For more information refer online at, <http://europa.eu/scadplus/leg/en/s50000.htm>
- 13 The most important ones are directives 75/117/EEC (February 19, 1975) on equal payment, directive 76/207/EEC (February 9, 1976) on equal opportunities between men and women in the workplace and directive 79/7/EEC (December 19, 1978) on social security; assisted by several recommendations and declarations.
- 14 <http://www.gender-mainstreaming.net/gm/Wissensnetz/rechtliche-vorgaben.html> [in German only]
- 15 UNIFEM briefing kit. <http://www.unifemesiasia.org/resources/others/domesticviolence/PDF/Legal%20>

strategies.pdf

- 16 See Case C-127/92 (Enderby)
- 17 Women will earn the same as men - if they wait 150 years, The Times, July 28, 2006
[<http://www.timesonline.co.uk/article/0,,2-2288680.html>]
- 18 See directive 2002/73/EC on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- 19 Catharine MacKinnon: Sexual Harassment of Working Women 1979.
- 20 See: http://ec.europa.eu/employment_social/fundamental_rights/legis/lgms_en.htm

Abstract

This paper focuses on the mechanisms developed over the past ten years to address issues of gender equality in Hong Kong, and how the need for upholding equal opportunities led to the establishment of the Equal Opportunities Commission to administer the relevant law. Also discussed are the challenges of maintaining the independence of the commission that is tasked with protecting the right to equality. This paper also looks at the social impact of upholding these rights.

Introduction

An English professor once wrote the words, "A woman without her man is nothing" on the blackboard and asked his students to punctuate the phrase. All of the men in the class wrote, "A woman, without her man, is nothing." The women in the class wrote, "A woman: without her, man is nothing." We know men and women are different, yet that does not make one less equal than the other.

This paper will discuss the growth of equal opportunity law in Hong Kong and mechanisms developed over the course of the past ten years to address issues of gender equality.

History

In 1976, the British government extended both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to Hong Kong. However, it was not until the 1984 signing of the Joint Declaration, by which sovereignty over Hong Kong reverted to the People's Republic of China on July 1, 1997, that the public became widely aware of the existence of these covenants. It was only in 1989 that the British government began to implement the obligations of the Covenants.

The June 4th, 1989 Tiananmen Square tragedy in Beijing disrupted the apparent tranquility of Hong Kong. To shore up confidence in Hong Kong, the British government decided to entrench the International Covenant on Civil and Political Rights, which includes a right to equality, through domestic legislation in the form of a Bill of Rights Ordinance (BOR). This was enacted in 1991.

In 1994, as a member of the Legislative Council, I initiated a Private Member's Bill,

entitled the “Equal Opportunities Bill”, to prohibit different forms of discrimination, including sex, race, age, disability, and sexuality.¹ A Private Member’s Bill, is a public bill put forward by a member of the legislature who is not a government servant and must not require government to provide specific funding after enactment of the bill. The Equal Opportunities Bill was the first time that a Private Member’s Bill was introduced for a whole policy area. After July 1997, such a bill requires executive consent before it can be initiated by a private member, thus making it almost impossible for a Private Member’s Bill to be presented.

The traditional Hong Kong government response to discrimination has been that there is no discrimination, there is no evidence of discrimination, legislation creates friction, we don’t want Hong Kong to become a litigious society, and that Hong Kong should rely on education to change people’s behaviour. The lack of a definition of discrimination before legislation made it easy for government to say that there was no evidence of discrimination, as there was no mechanism for measuring it, and no complaints could be made. Furthermore, the lack of a remedy made it meaningless to lay any kind of complaint.

The process of vetting the Equal Opportunities Bill in the Legislative Council became a consultation and hearing exercise. Many victims and NGOs used this process to submit their views and experiences. The NGOs worked hard to pin down political parties. The Bill created a lot of pressure for government, and the government reacted by providing its own bills in the areas of gender, disability and family status.

In Hong Kong, we have an executive led government and all laws and policies should

be initiated by the government. The initiation of a Private Member’s Bill reversed the role of the legislature and the government. The power of initiation is regarded as an executive prerogative and should be left to government. This initiation did not sit comfortably with the executive and the government became very defensive.

Why do we need equal opportunity?

The basic philosophy behind the concept of equal opportunities is to create a level playing field for every individual. Everyone should have access to education, employment, services and facilities. The right to a fair chance to participate in the social, political and cultural life of a community should also be guaranteed. This right enables an individual to develop his or her potential and to rely on his or her own abilities as far as possible. Such an environment encourages competition and empowers the individual to be self-reliant rather than to become dependent on welfare.

In the employment world, the concept of equal opportunities is about using human resources effectively. It means matching the right person with the right job. By tapping into the largest pool of available talents, employers can enhance the quality of their staff. Successful companies around the world now recognize that equal opportunities enhance their competitive edge and lead to business growth, enhance worker loyalty, reduce turnover and absenteeism, and improve creativity and productivity. Many leaders have come to realize that to survive and excel in today’s world, they must focus on getting the best talents. Nothing is more important than developing the human capital of a community and bias of any kind can hinder that development. This is key to creating a sustainable society and can be a

tool for the alleviation of poverty.

Of all forms of human rights, nothing can be more basic than the rights to life and to survival; the right to development is an extension of these rights. The rule of law requires that every individual is equal before the law and shall not be treated in any lesser way because of his or her gender, disabilities or colour.

The primary sources that support equality laws for Hong Kong are found in: the Basic Law, Articles 25 and 39; the International Covenant on Civil and Political Rights, Articles 3 and 24; the International Covenant on Economic, Social and Cultural Rights as incorporated into the Basic Law, Article 39; the International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Bill of Rights Ordinance; and the Sex Discrimination Ordinance (SDO).

Bill of Rights Ordinance

International treaties are not, by themselves, directly enforceable by ordinary citizens against the Hong Kong government in a court of law because they do not have the status of domestic law. A right which cannot be enforced means nothing and a justice system that is inaccessible or cost prohibitive makes justice illusory.

While the BOR was laudable when introduced, as it ensured that the rights under the ICCPR were justiciable in the courts of Hong Kong, it was lacking in crucial areas. For example, in the area of discrimination, the Bill's broad guarantee only binds the government, not the private sector. The Bill of Rights Ordinance has a general prohibition against discrimination on all grounds but is limited to the public sector, although the original intention was to cover the private

sector as well. The objection at the time was that to enforce the laws in the private sector properly, detailed provisions as distinct from a general prohibition would be required.

The BOR though lacking details and not applicable to the private sector was the first law in Hong Kong to publicly recognize a right to gender equality.²

Sex Discrimination Ordinance

The Sex Discrimination Ordinance prohibits discrimination on the grounds of sex, pregnancy and marital status, while also prohibiting sexual harassment. The areas of activities covered include education, employment, services, housing, elections, government administration and programs. The SDO is relied upon for any discrimination complaints against the Government or the private sector. The significance of the Ordinance is to make protection against discrimination a right, to define discrimination, provide the methodology for its determination, provide remedies and enforcement in court, provide a mechanism for resolving disputes through conciliation, and to establish an independent institution, the "Equal Opportunity Commission", to administer the laws.

The Equal Opportunity Commission (EOC):

Creation of the EOC and its functions

The Equal Opportunity Commission was created by the SDO to administer the law. It is important to have a dedicated body with adequate resources to administer the law, to undertake preventive measures and to promote awareness. In many instances, the cases can become too daunting in terms

of expertise and funding for the individual to take to court and credible institutional support is needed to take on these cases. It is also important to have a body with a sufficiently wide remit to set its own agenda and strategies, and to design comprehensive approaches.

The responsibilities of the EOC include: working towards the elimination of discrimination; promoting equal opportunity; to undertake conciliation of complaints; to undertake research and education programs; to conduct formal investigation and issue enforcement notices; to establish codes of practice; and to litigate in specified circumstances. Within this framework, the core function of the EOC is to receive complaints and to conciliate disputes. There are a number of advantages in using conciliation as the initial settlement mechanism. It is friendlier, more flexible, less costly, and can create win-win situations. As an example, this approach could be useful in sexual harassment cases where parties may want to have an apology, or with changes in corporate procedures and not money. This process brings us closer to restorative justice versus strictly retributive justice.

This is not to say, however, that conciliation should be made the only mechanism available. For those who wish to go directly to court, particularly where major principles of law are involved and for those that failed conciliation, litigation rights must be made available.

Conciliation and litigation

In cases where conciliation fails, the complainant may apply to the EOC for legal assistance. The EOC only grants legal assistance when a question of principle arises or where the evidence is complex. Generally,

these would include systemic discrimination where a large number of people are affected or where public interest reasons exist. Because it is not a legal aid agency, the EOC does not accept all applications, instead, it undertakes strategic litigation. The function of strategic litigation gives the EOC its teeth and provides the bargaining power for respondents to want to conciliate.

Victims can file an action in the District Court without using the EOC. Legal arguments and evidence can be complex and legal representation is often cost prohibitive, therefore a specific provision has been made in the SDO to exempt parties from having to pay the cost when losing a case. A cost order can also be made if there are special circumstances and if the case was maliciously or frivolously brought before the court.

Under the implied and inherent powers of the court, cases may be brought to higher courts under judicial review proceedings. This is an effective route when dealing with major policy and systemic issues involving the government. This process imposes legal accountability on government and, if used well, can create a great deal of impact through educational and deterrent value. In this instance, the court can declare a government policy illegal and require the government to stop a practice. This method of judicial review proceedings was applied in the High School Case discussed below.

Additional capacity of the EOC

In addition to the conciliation and litigation powers, the EOC also has the power to require the production of information and attendance at conferences, to commence general and formal investigation with enforcement notices following a formal investigation, to initiate court actions against

discriminatory job ads without a complainant, and to issue codes of practices. In particular, codes of practices are extremely useful in providing guidance to parties and to provide consistency of behaviour.

The EOC has a dual role, to eliminate discrimination and to promote equal opportunities; elimination is punitive but promotion is proactive. Where we are dealing with paradigm shifts in attitudes, promotion and education are essential and a balanced mix of litigation and education is the most effective. Good investigation and research capabilities, promotion strategy and codes of practice are essential tools in the EOC arsenal.

Why legislate?

The mindset: Social norms and values continue to be defined according to male needs and perspectives. This leads to male values continuing to dominate the decision making process.

Rights: Individuals involved with lobbying for protection of the vulnerable, fair participation, and for enjoyment opportunities, would often say that protection must be rights based. There is no protection unless there is a right, and gender equality must be based on legislation.

Vested interest: Vested interest and status quo create very powerful resistance to change. We say possession is 90% of the law. I have also learned that status quo is 90% of the law. We need law to change prevailing status quo and attitudes.

Many years ago, in Hong Kong, spitting was highly prevalent and linked to the spread of diseases. The Hong Kong government legislated against spitting that resulted in

not only a law enforcing the cessation of a bad habit, but it also created an awareness of public health issues. The law can be a tool for social engineering and helps to fast-track learning. Centuries of prejudices and status quo cannot even begin to shift without application of the law.

We call such laws “empowerment laws” because they give an individual the platform to self-initiate change based on the law. The law distributes protection and rights to the individual and helps the individual to help him/herself. The already disadvantaged individual often has no means or resources at their disposal and the law is the one thing that can empower them. Legality is the means and the resource that can be created for the disadvantaged individual.

Independence of the EOC

The independent status of the EOC does not sit comfortably with some government officials who perceive these laws as interfering with executive prerogative and calling into question long-standing policies and practices. Maintaining independence is the number one challenge for all human rights and equal opportunities institutions around the world and Hong Kong is no different. These institutions have a common predicament; they are critics of their benefactor, the government, and tensions can build up.

The relationship between national human rights institutions and their governments was addressed at a UN sponsored meeting in Paris in 1991. At this meeting, a comprehensive series of recommendations on composition, status, and functions of national human rights institutions were drafted. These recommendations became commonly known as the Paris Principles, and in 1993 they were endorsed by the General Assembly.³ The

key features of the Paris Principles, regarding national human rights institutions, provide for the following: independence and autonomy of national human rights institutions from their government; a broad mandate based on universal human rights standards; adequate powers of investigation; and the provision of sufficient resources.

The attempts of governments to intervene with the independence of national human rights institutions are exemplified by the following cases in Australia and Thailand.

Australia

The Human Rights and Equal Opportunity Commission (HREOC) of Australia was reprimanded by the Howard government after they intervened in, and criticized the government's handling of, an asylum-seeking case, known as the "Tampa Affair." In response to these actions, the government introduced legislation to limit the Commission's power to intervene in court and seek judicial reviews.

Thailand

At a meeting in Islamabad, the National Human Rights Commissioner of Thailand, Professor Pradit Chareonthaitawee, expressed his concern over the killing of over 400 drug suspects in Thailand. The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Execution then contacted the Thai government and advised that they strictly abide by international human rights law and mind the defined limits on the use of lethal force.

The Thai Prime Minister chastised Professor Chareonthaitawee for making a "non-patriotic allegation" to the United Nations. In response to the allegations, the Government also released information to

discredit the Professor's claims. As a result, his family received anonymous, harassing and life threatening telephone calls. The Spokesperson for the ruling party claimed that the Professor had no authority to raise the case with the UN and, as the National Human Rights Commissioner of Thailand; he should have investigated the case domestically. The ruling party then called for the impeachment of the Professor.

Hong Kong

There are several issues of concern for the Hong Kong Equal Opportunities Commission. These relate to the appointment of chairpersons and members and funding for litigation. Lack of transparency, lack of diverse representation in appointment, and unreasonable funding cuts can compromise the independence and credibility of the Commission.

Cases brought before the EOC

The following cases represent the diversity of issues and that have been brought before the Equal Opportunity Commission.

The High School Case

EOC v. Director of Education,
2001 2 HKLRD 690

For the first time, in 1998, the Hong Kong education authorities provided access to admissions scores that affect the entrance of boys and girls into secondary school. The information derived from this access revealed that girls with better scores were unable to get into the same schools admitting boys with lower scores, and that this system had been in place since 1978. An investigation ensued and verified that the system preferred the top 30% of boys and penalized the top 30% of

girls as well as the lower 70% of boys.

This case dealt with systemic discrimination and succeeded in requiring a policy change. The outcome was that it set a precedent and provided the basis of interpreting discrimination, and defined what “special measure” is by taking a purposeful approach and cross-referencing it to CEDAW. It made clear that the law must be construed as intended to carry out the obligations of CEDAW and not be inconsistent with it. In addition, the rights attached to the individual and the government cannot look at “group fairness” and turn a blind eye to the rights of the individual, and that separate treatment of groups (segregation) does not provide equality.

The Mental Illness Case

K, Y and W v. The Secretary for Justice, 2000 3 HKLRD 777

K applied to the Fire Services for the post of an ambulance-man and was rejected because his mother suffered from schizophrenia. Y applied for the post of fireman and was rejected because the fire department formed the view that his father had a mental illness that could be inherited. W applied to the Customs and Excise Department, started working as a trainee and was dismissed when the Department learned of his mother's schizophrenia.

Expert evidence was adduced by the EOC and the court decided that the risk of inheriting the illness, as well as sudden onset, in each of the cases would be very rare. The small risk of developing the illness was cited as not a sufficient threat to safety. The decision to exclude the plaintiffs from employment did not constitute a genuine occupational requirement as claimed. The court awarded the three plaintiffs three million dollars in

damages plus the EOC cost. In this instance, the court felt the government's behaviour constituted special circumstances for a cost order to be made against government, contrary to the normal order of no cost against the defendants. Upon the application of the EOC, due to the stigma that might attach to the plaintiffs, an anonymity order was issued by the court.

The Pregnancy Case

Chang Ying Kwan v. Wyeth, 2001 2 HKC 129

A former marketing manager of Wyeth gave notice of her pregnancy. At the time of notice she was asked to resign or accept a demotion. When she complained to the EOC, she was victimized and the inappropriate treatment continued even after she returned from maternity leave. This treatment led to her eventual resignation.

In this case, the court found that pregnancy was one of the factors causing this discriminatory act, although not the sole factor (this approach is prescribed in Section 4 of the SDO), and determined that there was victimization. There was also vicarious liability on the part of the employer and the resignation was regarded as constructive dismissal.

The Apology Case

Ma Bik Yung v. Ko Chuen, 2002 2 HKLRD 1

In this case, the plaintiff filed harassment under the Disability Discrimination Ordinance. The judge ordered damages, and required the defendant to apologize for the humiliation caused to the plaintiff. The defendant was unwilling to apologize and the Court of Appeal held that it was unable to order an apology against an unwilling defendant. The case went on to further appeal where it was decided

that the Court does have the ability to order an apology against an unwilling defendant; however, in this instance it did not meet the requirements of rare cases with exceptional circumstances.⁴ This case sought to lower the social cost of litigation by maintaining an apology as a remedy and implementing restorative versus retributive justice.

Women's Commission of Hong Kong

In November 1998 the EOC issued a report citing the need for a high-level central mechanism on women's affairs to fulfill its obligations under CEDAW. The importance of this mechanism being a high-level body was emphasized since a Commission outside of the Government cannot coordinate policies and services for women at the governmental level.⁵ In 2001, the Women's Commission was established to promote the well-being and interests of women in Hong Kong.

The Commission is comprised of eighteen non-official and four ex-officio members who are appointed for three-year terms. According to their mandate, the Commission is responsible for advising the Government on women's issues and policy direction. The Commission is comprised of four working groups and functions as an advisory mechanism for longer-term strategies related to the development and advancement of women, reviews all needs and services within and outside of government, is responsible for identifying priority areas, and serves as a conduit between the government and women's groups and NGO's.⁶ However, what is unfortunate is that the Commission is an advisory body and not an accountable high-level central mechanism to take women's issues and policies to the next level.

Endnotes

- 1 HKABPW's History of Campaigns and Legislation in Hong Kong, page 1. Available online at, www.bpw-international.org/word/activities-project-HKABPW-Campaigns-Legislations.doc.
- 2 Carol J. Peterson. *Engendering a Legal System: The Unique Challenge of Postcolonial Hong Kong*. Chapter 2, pages 23-26. Gender and Change in Hong Kong: Globalization, Postcolonialism, and Chinese Patriarchy, Ed. Eliza W.Y. Lee. UCB Press, Vancouver: 2003.
- 3 Office of the High Commissioner for Human Rights, "Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights." Available online at, <http://www.unhchr.ch/html/menu6/2/fs19.htm>.
- 4 Ma Bik Yung and Ko Chuen, In the Court of Final Appeal of the Hong Kong Special Administrative Region. Available online at, http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=33042&AH=&QS=&FN=&currpage=
- 5 Equal Opportunities Commission: NGO Report on the Convention on the Elimination of All Forms of Discrimination Against Women. November 1998. Available online at, http://www.hku.hk/ccpl/research_projects_issues/cedaw/eoccedawreport.html.
- 6 Official Women's Commission Website. Available online at, <http://www.women.gov.hk/eng/home.html>

Abstract

This paper takes a close look at the interpretation, application and adjudication of gender equality in Malaysia today. It begins by defining what we mean by gender equality, based on internationally accepted norms and standards. It then analyzes recent current events, such as the Beatrice Fernandez case and the Malaysian government's reporting before the CEDAW Committee, in terms of how they measure up against these international norms and standards. And outlines and examines the effectiveness of the Malaysian gender policies and mechanisms, as they exist today. Finding that the current system fails to provide full gender equality, the paper cites the need for gender equality legislation to achieve this goal. And it concludes by describing the current steps which are being taken to adopt this legislation, and by outlining in detail the latest draft of the Malaysian Gender Equality Act.

Introduction

Malaysia has yet to introduce legislation on gender equality.

It is not that gender equality was not considered important. Rather it was the fact that the Federal Constitution, while providing for equality under the law as well as prohibiting discrimination on the basis of race, religion, descent and place of birth, was until recently deafeningly silent on any prohibition of discrimination on the basis of sex or gender.

The omission of prohibition of discrimination of the grounds of sex or gender was certainly not unintentional since the Malaysian Constitution was modelled on the Indian Constitution which itself prohibited discrimination on the grounds of sex¹. Thus it was generally accepted that to campaign for comprehensive gender anti-discrimination laws prior to a Constitutional amendment to prohibit gender discrimination, would have been doomed from the start.

In 1985, the women's groups undertook an audit of the laws and submitted a memorandum on review and reform of gender discriminatory laws to the government². From this list, the women's groups, decided to concentrate their limited resources on those urgent reforms required in relation to violence against women (VAW) from a needs and later, rights perspective.

The VAW campaign emphasised providing immediate and effective redress for survivors of sexual and domestic violence. This resulted in a long campaign for legal reforms on rape, domestic violence and sexual harassment which spanned the better part of the 1980s to 1990s. Amendments to the rape laws were introduced in 1989 and the Domestic

Violence Act was passed in 1994 (enforced only in 1997). Although the government has promised amendments to the employment laws to address sexual harassment and many discussions had been held by the women's groups with governmental agencies as well as stakeholders, to date no legal provision on sexual harassment has been proposed in Parliament.

Apart from the VAW campaign, there were also intermittent successes which resulted in amendments made to several legislations to remove provisions that discriminate against women. These included amendments made to legislations pertaining to pensions, inheritance (for non-Muslims) and guardianship (for non-Muslims).

Then, in a seemingly politically opportune law passed in 2001, the Federal Constitution was amended to prohibit gender discrimination.³

The amendment to the Constitution brought hope that discrimination in other legislation would similarly be removed from the statute books. However, since the amendment to the Constitution in 2001, no attempt had been made by the government to audit the laws in Malaysia to ensure that they are non-discriminatory towards women despite promises from politicians to undertake this task.

Finally it was the occurrence of 2 separate events that dramatically showcased the urgent need for gender equality legislation.

The first was the *Beatrice Fernandez* case. The case traversed the Malaysian courts, ending in the apex Federal Court of Malaysia in 2005, 11 years after its commencement.

The second was Malaysia's submission of

its initial and second report to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women in May 2005⁴ which triggered efforts by the women's groups to produce a comprehensive shadow report.

This paper documents the Malaysian court's interpretation of equality under the law and the effect of constitutional guarantees on equality and fundamental liberties.

Part I lays out the different approaches to equality, namely formal and substantive equality.

Part II takes a detailed look at both the *Beatrice Fernandez* case as well as Malaysia's ratification of CEDAW.

Part III describes the prevailing social and political sentiments influencing gender equality in Malaysia. It also outlines the proposals that require special attention in any gender equality legislation in the Malaysian context, concluding with the framework of the proposed Gender Equality Act presently being prepared by the women's groups.

I. Equality and discrimination under the law: the case for substantive equality

Formal Equality

Equality is premised on the fact that women, like men, are persons to be accorded their full inalienable indivisible and inherent human rights. Human rights demand that women and men, who are alike, be treated equally. Initially this was thought to mean that women and men should be treated alike. That is

like must be treated alike and the similarly situated must be treated the same. In other words, persons who are the same deserve the same treatment. This is known as formal equality.

However this notion of 'like treated alike' has inherent problems where there exist dissimilarities. As men and women are biologically different and socially differently situated, it is almost always possible to justify gender discrimination by emphasising these differences. In those instances, 'like treated alike' has sometimes proven to be an unwieldy tool.

For example, in a segregated labour market the struggle for equal pay for women had proved (and still continues to be), elusive. In this market, women are accepted as a distinct class of workers justifying differentiation of task and remuneration.⁵

Therefore, like treated alike is inadequate as a premise for equality because we can always find dissimilarities to justify discriminatory treatment.

This is not to say, however, that treating people the same will necessarily not result in equality. Sometimes treating people the same is discriminatory and sometimes treating them differently is discriminatory. For example, treating the disabled person and able bodied person the same may result in discrimination against the disabled. At other times treating them differently results in discrimination against the disabled.

Likewise, sometimes to treat women and men the same is discriminatory and sometimes to treat them differently is discriminatory.

Substantive Equality

The Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

In addressing the issue of equality, the Convention firstly addresses formal legal equality by requiring equal treatment of men and women. However, if equal treatment yields disparate results, then the law should look at ensuring equality of opportunity and removing barriers to women's advancement.

This is called substantive equality. Substantive equality is generally referred to as equality of access, equality of opportunity as well as equality of results.⁶

The unequal status of women also has many complex causes rooted in custom tradition and prejudice. Achieving gender equality requires change in institutional structures and systemic prejudices to facilitate the expression of women's capabilities which will result in the full participation of women in society.

II. Events Precipitating the Urgency for Gender Equality Legislation

1. Beatrice Fernandez v Sistem Penerbangan Malaysia⁷

Briefly, the facts of the case are as follows. Beatrice was employed as a flight stewardess by Malaysian Airlines. According to a collective agreement between the airlines and its union in 1988 which applied to Beatrice's employment, Beatrice was required to resign if she became pregnant; failing which she could be dismissed. When Beatrice became pregnant, Malaysian Airlines asked her to resign. Beatrice refused. In 1991, the airline terminated Beatrice's services.

Beatrice applied to the court to have her dismissal declared wrongful and to have the collective agreement provisions requiring her to resign on becoming pregnant, failing which the company could terminate her services, declared invalid.

By the time Beatrice's case was argued before the Courts, the constitutional amendments prohibiting discrimination on the grounds of gender had been passed.

Two articles in the Malaysian Federal Constitution are relevant. Article 8(1) states,

"All persons are equal before the law and entitled to the equal protection of the law"

whilst article 8(2), as amended, reads,

"Except as expressly authorised by this Constitution⁸, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or

in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

Beatrice argued her case on 2 levels. The first level was that the collective agreement discriminated against her as a woman. The second level was that the discriminatory provisions in the collective agreement were unconstitutional.

(a) Was Beatrice discriminated against?

The Court of Appeal answered this in the negative. Said the Court,

*"...we do not think that it can be argued that art. 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men."*⁹

The Federal Court upheld this finding,

"... [T]he job requirements of flight stewardesses,"

said the court,

"are quite different from that of women in other occupations ... We take judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. They have to do much walking on board flying aircrafts. It is certainly not a conducive place for pregnant women to be in".

"The applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work."

The Court also said,

"...our hands are tied. The equal protection guarantees in clause (1) of art. 8, therefore 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. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention."

(b) The comparator

It is curious that the comparison argued before the court and ultimately adopted by the court in the *Beatrice Fernandez* case to determine whether discrimination had occurred was not between a man and woman but between a stewardess and a chief stewardess.

This choice may well find its reasoning in the difficulty of framing a male comparator in a pregnancy situation. In pregnancy, the search for a male comparator had always proved difficult, if not impossible. Pregnancy is a social function which can only be discharged by women. There is no male comparator. There is no similarly situated male equivalent.

It was perhaps this difficulty which prompted the lawyers as well as judges to compare Beatrice not to a male flight steward, but to a female chief stewardess. The absence of a comparator may have also compelled the Court to conclude that female flight stewardesses are a separate class of workers which require separate treatment.

With due respect, courts in other jurisdictions have argued discrimination on the grounds of pregnancy differently. Compare the Malaysian

dicta to that in *Brooks v Canada Safeway Ltd*¹⁰, where the Supreme Court in finding that unequal treatment due to pregnancy offends the principle of equality, said,

"I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask -- how could pregnancy discrimination be anything other than sex discrimination? ... It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.... Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights.... The denial of benefits was the result of her pregnancy. Since pregnancy is a condition to which only women are vulnerable, the denial should have been characterized as sexual discrimination. ...discrimination against some women should not be treated any differently than discrimination against all women.... It may be unduly restrictive and somewhat artificial to argue that a distinction based on a characteristic such as pregnancy, which is shared only by some members of a group, is not discrimination against the whole group. ...for discrimination which is aimed at or has its effect upon some people in a particular group as opposed to the whole of that group is not any the less discriminatory. This

point was made by a board of inquiry under the former Human Rights Code, R.S.B.C. 1979, c. 186, in the case of Zarankin v Johnstone (1984), 5 C.H.R.R. D/2274, at p. D/2276, . . . wherein the board stated: . . . an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely."

Adopting the reasoning in *Brooks*, it can be argued that whilst both men and women can become parents, the manner in which each becomes a parent is different. In this instance we have a contractual term that looks at the differences between people and penalises one group of people because of that difference. Thus under the test laid out in *Brooks*, the airlines' conduct does constitute gender discrimination.

In dismissing another employer's argument that the dismissal of a pregnant employee was not due to her pregnancy but due to her inability to work, the European Court of Justice said,

*"In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged."*¹¹

As the theory of equality requires that nobody be discriminated against because of his/her difference, it similarly recognises that unless provisions are made for pregnancy like childbirth benefits, women would suffer loss of income and also incur extra expenditure.

The fact that maternity benefits are not made available to men is not discriminatory as equality ensures that nobody should be prejudiced because of his/her differences.

(c) Vertical Effect of the Constitution

What is the effect of a constitutional guarantee of equality under the law and prohibition of discrimination on the basis of gender? Quoting with approval from an Indian text book on constitutional law, the Court of Appeal in *Beatrice Fernandez* held that

*"The very concept of a 'fundamental right' involves State action. It is a right guaranteed by the State for the protection of an individual against arbitrary invasion of such right by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but the constitutional remedy would not be available."*¹²

This was confirmed by the Federal Court, the apex court in Malaysia.

*"We found that it is simply not possible to expand the scope of art.8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art.8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual."*¹³

The interpretation accorded by the Malaysian courts on the constitutional effect is called the “vertical effect” which essentially stipulates that constitutional law, as a branch of public law only addresses the contravention of an individual’s rights by a public authority. Where the rights of a private individual are infringed by another private individual, constitutional law (substantive or procedural) will take no cognisance of it. The very concept of ‘fundamental rights’ involves State action. These are rights guaranteed by the State for the protection of an individual against the arbitrary invasion of such rights by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but constitutional remedies will not be available.¹⁴ The opposite view on constitutional effect was adopted in the celebrated Indian case of *Vishaka & Ors v State of Rajasthan & Ors*¹⁵. This case was initiated after an alleged brutal gang rape of a social worker in a village of Rajasthan.

Vishaka was a class action by social activists and NGOs which sought to focus attention on gender equality. The alleged rape exposed the urgency in curtailing the hazards to which a working woman was subjected. The aim of the legal action was to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

There the Indian Supreme Court gave a broad meaning to constitutional guarantees,

“Each incident of sexual harassment of woman at workplace results in violation of the fundamental rights ... Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognised

basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are therefore, of great significance in the formulation of the guidelines to achieve this purpose. ... The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.”
[Emphasis mine]

The case of *Beatrice Fernandez* raised concerns regarding the narrow application of a Constitutional prohibition against gender discrimination. *Beatrice Fernandez* set a precedent which, not only entrenched the vertical effect of constitutional guarantees in Malaysian law, but also a narrow and literal understanding of discrimination.

(d) The Common Law Tradition

The jurisprudence from many common law countries, a tradition shared by Malaysia, shows that countries are developing their jurisprudence towards a strong respect for human rights and international human rights norms, using the common law itself, rather than the Constitution, as its source.

A common law country is defined by the ability of judges not only to interpret legislations but to make law. In India, Australia, the United Kingdom and Hong Kong, judges had drawn upon this tradition to proclaim human rights principles.¹⁶

In some of these countries, the courts have developed and proclaimed fundamental human rights to be inherent in the common law, without reference to parliamentary

instruments.

*"[S]ome rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them."*¹⁷

Not only was *Beatrice Fernandez* a lost opportunity for the Malaysian courts to adopt a more contemporary understanding of gender equality and constitutional effect, it was also a lost opportunity for the courts to explore the extent common law could have been used as the source of fundamental rights.

2. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

In conjunction with the 4th World Conference on Women, Malaysia ratified CEDAW with reservations¹⁸ in 1995.

The original reservations read as follows:

"The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid Convention. In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only."

On 6 February 1998, the Government of Malaysia withdrew its reservation in respect of article 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)

(e) and 16(1)(h). Malaysia also made a commitment to review the other reservations. Yet to date the remaining reservations have not been withdrawn.

CEDAW, although ratified by the government in 1997, has also yet to be made enforceable in domestic courts. Legislation to adopt CEDAW is crucial as Malaysia practices a dualist legal system in that any international treaty entered into by Malaysia, is not self-executing. This requires that a law has to be passed at the national law to give effect to the international commitments entered into.

(a) Dualist Legal System

A treaty is not part of domestic Malaysian law unless and until it is passed as legislation by parliament. Although small windows have opened where Malaysian courts have referred to international human rights treaty obligations¹⁹, this is still a far cry from the courts actually enforcing treaty obligations.

The adoption of a dualist legal system is shared by many common law countries. While the principle is admirable, in that it protects the people and the parliament from executive action, in matters of human rights, the non-incorporation of international human rights norms into domestic law means that human rights treaties cannot operate as an independent source of individual rights and liberties. For this reason, there have been efforts in other jurisdictions to tamper the effects of the dualist legal system theory particularly where human rights are concerned.

Reference to this can be found again the case of *Vishaka & Ors v State of Rajashtan & Ors*²⁰. Said the Indian Supreme Court,

"Independence of the judiciary forms a part of our constitutional scheme. The

international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v Teoh²¹ has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose."

Taking *Vishaka's* case and the Australian case of *Teoh* cited by the Court²², as persuasive precedents, it is possible to argue that upon Malaysia's ratification of CEDAW, a legitimate expectation was created that the government would observe and enforce the basic human right of gender equality, with or without domestic legislation. The courts can then declare the rights articulated in CEDAW as applicable in the domestic Malaysian context.

(b) The Law of Treaties

In any event, it is a well established principle of international law that once a State ratifies an international treaty, the State is bound to implement the treaty provisions in good faith²³. Whether the treaty has been incorporated into domestic law does not alter the State's obligation internationally.²⁴

III. The Malaysian Gender Equality Legislation

Legal precedents in Malaysia conclusively point to the fact that gender equality legislation is imperative. Malaysian courts have yet to take cognizance of legal judicial developments in other States such as horizontal effect of the Constitution, substantive equality, and legitimate expectation of accessibility by citizens to human rights guarantees under ratified international treaties as well as the centrality of human rights including equality and non-discrimination in national jurisprudence.

Further, in considering the Malaysian Government's report at the thirty-fifth session of the CEDAW Committee in 2006, the Committee stressed that Malaysia needed new laws directed specifically at eliminating sex and gender discrimination and recommended that a nation-wide mechanism to guarantee fully the rights of Malaysian women be created.

But before embarking on a new legislation, it is worthwhile to take into account the political climate as well as mechanisms already existing in Malaysia.

Political Will and Religion

Gender has not featured prominently in the political scene of Malaysia. Instead racial or ethnic politics has been the mainstay of post independence politics. Fifty years after independence, political parties are still divided along racial/ethnic lines and there has hardly been any perceptible shift from racial/ethnic politics.²⁵

Gender discourse has also been complicated by conservative religious interpretations which form the next layer of identity politics,

often colouring the arguments against gender equality. Coinciding with the rise of religious revivalism globally, Malay-Muslim²⁶ politics has resulted in a rise in ideological political and legal challenges to the legitimacy of women's claims for equality in the context of Muslim culture and religion.

Although such conservative interpretation has been subject to challenges from voices within and outside the religion, it nevertheless has substantial influence amongst many State religious officials.

Still, few Muslims will deny that Islam upholds justice as well as promotes and protects rights of women.

Retired Chief Judge of Malaya, the Honourable Tan Sri Siti Norma Yaakob, in her opening address underlined the relationship between Islam, justice and equality,

*"It is my belief that Islam accords women equal rights with men. ... Like many Muslims, I do not believe that Islam, which abhors injustices, treats women any less than it treats men. Women, like men are vice-regents on earth; equal in the eyes of Allah and it is our collective responsibility to ensure that principles of justice and equality are reflected in our laws."*²⁷

In October 2003, when Dato' Seri Abdullah Badawi became Prime Minister, he espoused an approach to Islam focusing on 10 fundamental principles, one of which is the protection of the rights of minority groups and women²⁸

"which is authentic and rooted within the tradition, yet human, just and compassionate" and "where women will not feel that statements describing Islam as a religion of justice and

*mercy in reality only speak to women with exceptions – inadvertently or otherwise".*²⁹

Explained Abdullah,

*"Women receive a specific mention because I believe that despite the fact that women in many parts of the world have become more emancipated, women in many Muslim countries continue to be marginalised and discriminated against. I find it most lamentable ... that [women have not] gained the status that they are entitled to, in terms of rights, equality and justice".*³⁰

While Abdullah appears to advocate a progressive interpretation of Islam, even questioning the applicability of Muslim legal principles purportedly final and complete fourteen hundred years ago in solving the problems that contemporary Muslim societies are confronted with today, there has been little change in the implementation of Muslim laws to the daily lives of Muslims, demonstrating once again the disconnection between political rhetoric and parliamentary and bureaucratic implementation.

Existing Policies and Mechanisms

Any gender equality legislation, to be effective, must provide for a framework or mechanism to promote gender equality.

Throughout the years, the government had established advisory councils³¹, secretariats, government affiliated NGOs and most recently a Cabinet Committee on Gender Equality to take forward women's issues.

In 1989, the government formulated the National Policy on Women as a guide for women's participation in the development process and thereby overcoming challenges

through poverty eradication and education. In the 6th of the national five year plans (1991 – 1995)], a chapter on women in development was introduced for the first time. However in its tone and language, the national plan, while constituting women as vital economic resource, clearly still perceived women's crucial role to be in family development.³²

In January 2001, the Government established a Women's Affairs Ministry which was subsequently (after a very short time period) changed to the Ministry of Women, Family and Community Development.

Upon her appointment, the Minister declared a policy of co-operation with women's NGOs to promote women's issues. This raised hopes that women's issues would receive the focused attention it needed to fuel a more holistic and integrated approach to expedite equal opportunity for women's full participation in the social and economic development of the country.

In line with this, several taskforces followed by national steering committees and thereafter, technical working groups were established by the Ministry (whose members included women's NGOs representatives) to look into key areas of concern including legal reform. The mechanisms initially functioned but gradually ceased operating, culminating in a withdrawal of women's NGOs from these mechanisms.

A Cabinet Committee on Gender Equality was also set up by the Cabinet of Ministers to advise the cabinet on policies and monitor activities pertaining to women and family development.

In 2004, a Parliamentary Caucus on Gender Equality was formed. However as the furore

over sexist remarks by parliamentarians in May of 2005 illustrated, political affiliations trumped gender concerns.³³

A Human Rights Commission was also established under the *Human Rights Commission Act 1999*. The Commission's functions are to promote human rights, advice, assist and make recommendations to the government as well as inquire into complaints. In relation to its powers of inquiries, the Commission is given power to inquire but not the power to compel attendance of witness or production of documents at its inquiries. Nor is the Commission empowered to enforce its findings. An annual report is to be submitted to Parliament each year but Parliament is not bound to table or debate the report, as a result of which none of the Commission's reports and recommendations had been debated by Parliament.

In August 2004, the government adopted a policy of 30% women in decision-making levels in the public sector. However, to date, the policy remains unimplemented. Neither the ruling political parties nor the opposition parties fielded even 15% women in their list of electoral candidates. The Ministry for Women Family and Community Development has presently commissioned national research to analyse and recommend the best practices and the way forward with regards to this policy.

On the international stage, the Government of Malaysia set up the Non Aligned Movement (NAM) Institute of Women's Empowerment (NIEW) in Kuala Lumpur which has different functions including conducting training on women's empowerment and gender equality to participants from NAM nations. The establishment of NIEW coincided with Malaysia's hosting the meeting of the Non-Aligned Movement (NAM) in 2006.

In launching the Institute, Abdullah Badawi, the Prime Minister of Malaysia gave an inspiring and forward looking speech, calling on all NAM nations to take firm and unequivocal steps to achieve humanity's vision for equality, peace and development and reminding them that

"it takes a great deal of moral courage and fortitude to be able to challenge long-held and deeply ingrained societal beliefs about the role of women in society, particularly if religion is cited as the main reason for their subjugation."

Indeed Malaysia's desire to leave a legacy of its chairmanship of NAM had propelled Malaysia to take a normative stance on gender equality, even if at the national level, there is opposition against and challenges to gender equality.

The Proposed Gender Equality Legislation

While it is important to refer to the Constitution as a source of protection of individual rights and freedom, as shown in the *Beatrice Fernandez* case, the Constitution in itself does not afford sufficient protection of women against discrimination. Neither the Courts nor the government of Malaysia has committed itself legally to guarantee women protection from or redress for discrimination on the basis of gender.

Under such circumstances it is imperative the gender equality legislation be promulgated. Equality in both the public and private sphere should be implemented through comprehensive laws with effective remedies if violated. The proposed gender equality legislation must unequivocally make it clear that the objective of gender equality shall be applicable in all circumstances.

In its promulgation, the legislation must pay special attention to address the legal issues raised in *Beatrice Fernandez* as well as pre-empt any attempt to refer to extraneous sources to whittle away the effect and purpose of the legislation.

Chief amongst the concerns to be addressed is the definition and understanding of gender equality, both formal and substantive (equality of opportunity, access and results). Special attention must also be given to the definition of discrimination, both direct and indirect. Discrimination itself must be defined in broad terms and must exclude special provisions on pregnancy childbirth and breastfeeding from the definition of unlawful discrimination.³⁴

The legislation must categorically make unlawful discrimination on the basis of gender, irrespective of whether gender forms the sole ground for discrimination or otherwise, and irrespective of whether the discrimination is direct or indirect. This protection must apply regardless of who the perpetrator of such discrimination may be.

The legislation must adopt CEDAW and grant it the force of law in Malaysia, and for that purpose the legislation must be construed in accordance with the provisions of CEDAW. The gender equality legislation cannot merely refer to CEDAW³⁵ but it must actually categorically state that the purpose of the legislation is to adopt and implement the provisions articulated in CEDAW.

The implementation of the gender equality law cannot be restricted by societal beliefs, even if religion is cited as the reason for such beliefs. The rejection of religion as a ground for denying gender equality is supported by many traditional and contemporary religious intellectuals and scholars. In

deciding between conflicting opinions, it is important to keep in mind that most religious philosophies uphold justice, equality and equity. Furthermore, many countries of different religious persuasions have found ways to reconcile custom and religion with gender equality.

The legislation must also provide for temporary special measures to facilitate the objective of gender equality where systemic biases exist.

Past or existing mechanisms have proven unable to deliver gender equality. A dynamic, independent and effective national mechanism like a Gender Commission must be set up guarantee women's rights. The mechanism to be set up must be transparent, independent and free from political influences. The mechanism must be vested with sufficient authority and power to enforce the provisions of the legislation and be accountable to Parliament with its reports and recommendations tabled, considered and debated by Parliament³⁶.

The gender equality legislation must also provide that the legislation shall prevail in the event of conflict with any other law. This will avoid the necessity of auditing and amending all laws and regulations. However, as legislation cannot prevail where it conflicts with the Federal Constitution, which is the supreme law of the federation, simultaneously with the tabling of the gender equality legislation, amendments to the Federal Constitution must similarly be tabled to remove all discriminatory provisions in the Constitution.

Draft Gender Equality Act

In fact, the women's groups in Malaysia have prepared an initial draft of the proposed

Gender Equality Act and are in the process of finalising the proposed Act.

Briefly, the proposed Act is divided IX parts.

Part I contains the preliminaries which incorporates the policy of the government on gender equality and gender discrimination, the basic objectives of the Act, the applicability of international human rights treaties, in particular CEDAW and the relationship between the proposed Act and other laws in the event of conflict in that the provisions of the Act shall prevail.

A broad definition of equality and discrimination is also included, taking into account the legal theories and jurisprudence in this area.

Part II establishes the Gender Equality Commission with emphasis on the independence of the Commission. The objective of the Commission is to promote gender equality and eliminate gender discrimination. The Gender Equality Commission shall consist of independent members and the Commission itself shall have access to statutory funds. The Commission has advisory, monitoring, and investigative functions. The Commission may also intervene in cases involving gender discrimination. The Commission is answerable to Parliament and shall submit a report listing its activities and recommendations to Parliament annually for debate. The report shall be made available to the public.

Part III regulates the executive staff of the Commission.

Part IV sets out the meaning of discrimination and equality to include formal and substantive equality. Direct and indirect discrimination

is prohibited. Motive and knowledge is irrelevant.

This part also discusses sexual harassment and provides for exemptions and exceptions whereby protection of women because of pregnancy, childbirth or breastfeeding and special temporary measures do not constitute unlawful discrimination.

Part V prohibits victimisation of complainants and witnesses. It also prohibits authorisation of discrimination and establishes the vicarious liability of employers and principals for discrimination committed by their employees and agents unless reasonable precautions have been taken by the employers and principals.

Part VI sets out the inquiry procedure and **Part VII** provides for conciliation for those who favour such procedure provided that such conciliation must be undertaken freely and without coercion by any party.

Part VIII sets up the Gender Equality Tribunal. Recognising that the court process is formal, cumbersome and unfriendly; and following from the successful industrial court process as well as other newly formed adjudicative boards; the Act sets up a tribunal as an alternative mechanism to expedite adjudication of discrimination cases in a less formal and less technical setting. A specialised tribunal will also help develop the jurisprudence on gender discrimination.

Part IX contains general provisions such as power to make regulations and prevention of anomalies.

Conclusion

The proposed legislation has yet to be discussed with the government and also

disseminated to other political parties for discussion. Initial attempts to propose gender equality legislation has been rejected by the Prime Minister.

Still, the power of persistence and a good argument cannot be underestimated. Equality and equal opportunity are central in a democracy. Gender equality legislation is but a small step towards strengthening our democracy and engendering respect for human rights that is universal inalienable and indivisible.

In concluding, I would like to refer to the decision by Hartmann J in the Hong Kong case of *Equal Opportunities Commission v Director of Education*³⁷ as a reminder of the importance and pivotal status of protection of human rights in a legal system,

"In my judgment, if there is a central pillar around which the edifice of Hong Kong's legal system is built, it is respect for the rights and freedoms of the individual. That is manifest in our instruments of constitution, in our adherence to various international conventions and in our domestic law... These guarantees of equality – the antithesis of discrimination – call for a generous and purposive interpretation by our courts... It is not disputed that the right to equal treatment free of sex discrimination is in our society a fundamental right; as Lord Lester expressed it, a right of high constitutional importance."

In principle, Malaysia has proclaimed its adherence and commitment to the ideal of gender equality to both the international community as well as to its citizens. It is now time to realise and implement that ideal through legislative and policy means.

Bibliography

1. The Malaysian Federal Constitution
2. The Indian Constitution
3. Speech delivered by Dato' Seri Abdullah Ahmad Badawi, Prime Minister of Malaysia at the Non-Aligned Movement Ministerial Meeting on the Advancement of Women at Putrajaya 9th May 2005.
4. Inaugural lecture by the Dato' Seri Abdullah Ahmad Badawi, Prime Minister of Malaysia at the annual Abdullah Ahmad Badawi Women's Institute of Management annual lecture series, 15 January 2005, Kuala Lumpur
5. Ng, Mohamad & tan beng hui, *Feminisms and the Women's Movement in Malaysia*, Routledge 2006
6. Malaysian Government Combined Initial and Second Periodic Report to the CEDAW Committee, 24th May 2005 (CEDAW/C/S.R. 731)
7. Introduction of Combined Initial and Second Periodic Report to the CEDAW Committee, 24th May 2005 by Datuk Faizah Mohd Tahir, Secretary-General of the Ministry of Women, Family and Community Development
8. *Abdul Malek Hussin v Borhan Hj Daud* [2007] 1 LNS 460
9. *Jakob Renner v Scott King*, Chairman of Board of Directors of Kuala Lumpur International School [2000] 3 CLJ 569
10. *Mohd Ezam v Inspector General of Police* [2002] 4 CLJ 309
11. *Vishaka & Ors v State of Rajashtan & Ors* (1997) 6 SCC 241
12. *Minister of Immigration and Ethnic Affairs v Teoh* (128) ALR 353
13. *R v Secretary of State for Home Department ex parte Mohamed Hussain Ahmad* <http://www.bailii.org/ew/cases/EWCA/Civ/1998/1345.html> (accessed on 24 Jan 2008)
14. Sri Ram, *Human Rights: Incorporating International Law into the Present System* at <http://www.mlj.com.my/free/articles/gopalsriram.htm>
15. *Beatrice AT Fernandez v Sistem Penerbangan Malaysia* [2004] 4 CLJ 403 (Court of Appeal) and [2005] 2 CLJ 173 (Federal Court)
16. Garbaum, *The "horizontal effect" of constitutional rights*, Michigan Law Review, Dec 2003 v102 i3 p.387(73)
17. *R v Secretary of State for the Home Department, ex parte Daly* [2001] <http://www.bailii.org/cgi-in/markup.cgi?doc=/uk/cases/UJHL/2001/26.html&query=ex+parte+Daly&met hod=all> (accessed on 15 Nov 2005)
18. Sandra Fredman, *Women and the Law*, Oxford University Press, 1997
19. *Carole Louise Webb v EMO Air Cargo (UK); Ltd. (Social policy)* [1994] EUECJ C-32/93 (14 July 1994) <http://www.bailii.org/eu/cases/EUECJ/1994/C3293.html> (accessed 15 Nov 2005)
20. *Brooks v Canada Safeway Ltd* (1989) 1 SCR 1219
21. *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 (HCAL15555/2000)

Addendum

This paper was revised and updated for the purposes of publication and refers to events occurring and cases decided after the *Conference on Mechanisms and Legislation to Promote Gender Equality* held in Kuala Lumpur in August 2005.

Endnotes

- 1 Article 15(1) of the Indian Constitution reads, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."
- 2 See 1985 Memorandum submitted by the National Council of Women's Organization on Discriminatory Laws against Women
- 3 Article 8(2) of the Malaysian Constitution now reads, "Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law ..."
- 4 In June 2005, less than 2 weeks after Malaysia having submitted its report to the CEDAW Committee, the author presented a paper entitled *Gender Equality – the Need for Legislation* at a conference jointly organised by the Swedish Embassy and the Ministry for Women, Family and Community Development. The Minister promised to undertake a study and appoint a committee to look into this. The result of this study, or even whether a study was conducted, was not made public.
- 5 Development in this area was accelerated during the First World War when women workers engaged to do jobs of male workers drafted into the army, were employed on equal pay. However after the war, many women were removed from the workforce and equal pay was again ignored. Webb and Webb, *Industrial Democracy* (Longmans, 1897) as quoted in Fredman, *Women and the Law* (Oxford University Press, 1997)
- 6 See Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New definition of Equal Rights* in Borefin, Coomans, Goldschmidt, Holtmaat & Wellenswinkel (eds), *Temporary Special Measures – Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia 2003)
- 7 [2004] 4 CLJ 403 (Court of Appeal) and [2005] 2 CLJ 173 at 719 (Federal Court)
- 8 The Constitution itself authorises a diverse array of gender discrimination. Discrimination is allowed under the Constitution in any "practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion", in education, in the right of parents to decide on the religion of a minor as well as in the right of a women to confer citizenship on their children or in the right of foreign husbands to receive permanent residence status

- in Malaysia. Discrimination is also specifically authorised in the regulation of personal law, effectively leaving Muslim personal law unaffected by the amendment.
- 9 [2004] 4 CLJ 403 at 408
 - 10 (1989) 1 SCR 1219
 - 11 *Carole Louise Webb v EMO Air Cargo (UK); Ltd. (Social policy)* [1994] EUECJ C-32/93 (14 July 1994) <http://www.bailii.org/ew/cases/EUECJ/1994/C3293.html> (accessed 15 Nov 2005)
 - 12 [2004] 4 CLJ 403
 - 13 *Beatrice AT Fernandez v Sistem Penerbangan Malaysia* [2005] 2 CLJ 173 at 719
 - 14 Ibid. The opposite, which is that the constitution affects private dealings between individuals, known as the horizontal effect has been adopted to varying degrees, in other common law and civil law jurisdictions. See also Gardbaum, *The "horizontal effect" of constitutional rights*, Michigan Law Review, Dec 2003 v102 i3 p387(73)
 - 15 (1997) 6 SCC 241
 - 16 At the same time, common law judges are mindful not to 'usurp' the lawmaking functions of parliament, creating for themselves areas in which judge law making is acceptable.
 - 17 *R v Secretary of State for the Home Department, ex parte Daly* [2001] per Lord Cooke
 - 18 Reservations are declarations made by State parties to a treaty that they do not accept certain provisions as binding on them. Reservations are allowed so long as they are not incompatible with the object and purpose of the treaty. Incompatible reservations may be challenged by other State parties.
 - 19 See *Abdul Malek Hussin v Borhan Hj Daud* [2007] 1 LNS 460 where the Judge held, "I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilized nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948". See also *Jakob Renner v Scott King, Chairman of Board of Directors of Kuala Lumpur International School* [2000] 3 CLJ 569
 - 20 id 15
 - 21 128 ALR 353
 - 22 See also *R v Secretary of State for Home Department ex parte Mohamed Hussain Ahmad* <http://www.bailii.org/ew/cases/EWCA/Civ/1998/1345.html> on the 'legitimate expectation' principle in *Teoh* (accessed on 24 Jan 2008) and Gopal Sri Ram, *Human Rights: Incorporating International Law into the Present System* at <http://www.mlj.com.my/free/articles/gopalsri.htm>
 - 23 Article 26 of the Vienna Convention on the Law of Treaties 1969 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
 - 24 Article 27 of the Vienna Convention on the Law of Treaties 1969 states inter alia, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
 - 25 Ethnically Malaysians comprise 65% Malays and 'original inhabitants', 25% Chinese and 10% Indians. The formation of Malaysia post colonial rule is by 'social contract' between the 3 major ethnic groups with the Malays being guaranteed special rights under the Federal Constitution. Some would argue that the results of the recent General Election on 8 Mac 2008 is the first significant indication of the nation overcoming ethnic politics when Malaysians voted across ethnic divide.
 - 26 A Malay is defined under the Federal Constitution as also a Muslim, creating a unity of identity of a Malay with Islam.
 - 27 Opening speech at the International Conference on "Legislations and Mechanisms to Promote Gender Equality", Kuala Lumpur, 28 August 2006
 - 28 The 10 principles are :- faith and piety in Allah, just and trustworthy government, independent citizenry, mastery of knowledge, economic development, quality of life, protection of the rights of minority and women, cultural moral integrity, restoration of the environmental, strength in defense
 - 29 Inaugural lecture by the Prime Minister at the annual Abdullah Ahmad Badawi Women's Institute of Management annual lecture series, 15 January 2005, Kuala Lumpur
 - 30 Speech given at the Non-Aligned Movement ministerial meeting on the advancement of women at Putrajaya 9th May 2005.
 - 31 A National Advisory Council for the Integration of Women in Development (NACIWID) was established in 1976 to coincide with the International Decade for Women and the call by the United Nations for women to be integrated in development. As an advisory council however, NACIWID lacks implementation powers and was unable to move the women's agenda forward. see Ng, Mohamad & tan beng hui, *Feminisms and the Women's Movement in Malaysia*, 2006 Routledge
 - 32 Ng, Mohamad & tan beng hui, *Feminisms and the Women's Movement in Malaysia*, 2006 Routledge pp68-69
 - 33 In May 2005, in a debate over water leakages in the Parliament building, 2 male parliamentarians from the ruling party made sexist remarks against an opposition woman parliamentarian, saying she too 'leaked every month'. Members of the gender caucus from the ruling party defended or excused their remarks as inconsequential.
 - 34 Ibid 9
 - 35 *Mohd Ezam v Inspector General of Police* [2002] 4 CLJ 309. The Court held that the provision under the *Human Rights Commission Act* which provided that 'regard shall be had to the Universal Declaration of Human Rights' was merely an invitation to consider and be persuaded by the Declaration, if need be.
 - 36 Compare this to the Human Rights Commission. The commission's reports have yet to be debated by Parliament as there is no provision for the reports to be debated in Parliament.
 - 37 Hon Hartmann J in the Hong Kong case of *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 (HCAL15555/2000) at par. 80, 97 and 98

Abstract

This report follows the steps Pakistan took in establishing and strengthening a National Commission on the Status of Women. In 2001, two organizations were instrumental in organizing an international conference that brought together representatives of women's commission from around the globe. This was a consultative process where these representatives shared their experiences and lessons learned. Illustrated in this report, is the need for gathering input and advice on how to ensure Pakistan's gender machinery is effective and influential. Particular attention is paid to consultations with women at the provincial level, and ensuring the responsiveness of government.

1. Background and introduction to the consultative process for strengthening the Pakistan National Commission on the Status of Women

The inequality of women's status and rights at all levels of society and various forms of gender-based discrimination against women continues to be a matter of serious concern for the women of Pakistan. To address these needs, one key demand has been for a permanent commission on women. The demand for such a permanent body was first made some 25 years ago by the first Women's Rights Committee in 1976 and periodically reiterated and conceptualized by various actors since that time, notably by each temporary commission on women. The demand gained momentum in the build up to the United Nation's Fourth World Conference on Women held in Beijing in 1995. It was recommended in several of the Chapters of the Pakistan National Report prepared for Beijing – a document jointly prepared by government and civil society. Recommendations were repeated in the Ninth Five Year Plan (the principle development policy document), the last Commission of Inquiry on Women in 1997, and finally in the government's National Plan of Action for Women launched in August 1998.

Despite these policy statements and documents, no visible steps were taken to establish the Commission until mid 2000 when the Aurat Publication and Information Services Foundation and Shirkat Gah – Women's Resource Centre conceived of a consultative process to take forward the agenda. The idea was to invite members of other commissions from around the world

to share their terms of reference, structures and experiences as a means of focusing government attention and catalyzing action on a women's commission. While the project was still under discussion, on July 17th 2000 the National Commission on the Status of Women (of Pakistan) was set up as a statutory body, ironically enough by the military government of General Pervez Musharraf. The Commission was announced overnight. There was neither transparency nor any visible consultative process to develop the terms of reference for the National Commission on the Status of Women (NCSW) or for its members.

Concerned civil society groups had mixed reactions. Women's rights and human rights organisations pointed out critical lacunas relating to structure, mandate and powers as contained in the Ordinance. Some welcomed the response to a long-standing demand, yet expressed apprehension that if the NCSW was not given a truly independent status with an enforcing authority and a clear mandate, as enunciated in the recommendations of previous official reports and documents, it would become yet another cosmetic body unable to make any significant contribution towards changing the situation of women.

Against this background, Shirkat Gah and Aurat Foundation decided to proceed with the consultative process at the international, national and provincial levels, to help develop a common understanding on the structure, mandate, and powers necessary for an effective commission.

A broad-based consultative process was kicked off by holding an international conference, wherein a global perspective towards women's commissions was evolved and comparisons drawn through experience

sharing. The process was taken forward to the provincial level by holding four provincial consultations gradually becoming Pakistan-specific as planned by the organisers. The consultative process saw healthy interaction between the members of various international commissions, including the Pakistan commission, and representatives of civil society organisations. A number of recommendations on various aspects of women's commissions with a particular focus on the Pakistan Commission emerged as the outcome of these consultations. Finally, a Working Group prepared and submitted final recommendations to the Commission for the consideration of the Commission and government.

2. International Conference on National Commissions on Women

The two-day International Conference on National Commissions on Women was held in July of 2001, in Islamabad. The five women's commissions at the conference were:

- i) The Women's National Commission of Great Britain (WNC): represented by Ms. Eleri Pengelley, Director. Possibly the oldest Commission on women in the world, having been formed some 32 years ago.
- ii) The National Commission on the Role of Filipino Women from the Philippines (NCRFW): represented by its Chairperson, Ms Aurora Javate de Dios. The oldest commission on women in Asia - formed 25 years ago.
- iii) The National Commission on Women of India: established in 1990, the model most closely followed by the NCSW. The three members of the Indian Commission were represented by Dr. V. Mohini Giri, the

ex-Chairperson, and Ms Syeda Hameed Saiyaidain, a former Member.

- iv) The Gender Equality Commission of South Africa: set up in 1996, was represented by its Chairperson Ms Joyce Seroke, and Ms Rashida Manjoo, Member of the Commission.
- v) The National Commission on the Status of Women of Pakistan: established in July 2000, was represented by the Acting Chairperson, Mr Faqir Hussain. Additionally, five non-governmental commission members also attended the sessions.

National participants included NGOs, the media, individual activists, and governmental representatives. Civil society representatives were invited from the Philippines, India and South Africa. These participants included: Ms. Isabelita Solamo Antonio, Executive Director, PILPINALegal Resource Centre (Philippines); Ms. Pam Rajput (India) a veteran women's rights activist; and Ms. Karisha Pillay, a civil society consultant (South Africa).

Topics discussed by panellists

The meeting provided an opportunity to learn about the terms of reference and experiences from five commissions on women/gender equality. The goal of the presentation was to develop a common understanding on the structure, mandate and powers necessary for an effective commission. Commission members were asked to cover the following topics in their presentations previously prioritised by the Aurat Foundation and Shirkat Gah:

- Independence of the Commission
- Membership (criteria and selection process)
- How to ensure responsiveness of the government through,

- a. Collaboration of departments
- b. Parliamentary action on recommendations and reports
- c. Ensuring the role of the NCSW in law and policy-making

- Mandate and Rules of Business

One session elicited the perceptions and concerns of civil society representatives about their country commissions. This session was followed by working group deliberations based upon the four topics mentioned above. Two additional concerns were also addressed: the interaction of commissions with civil society groups; and funding (sources of and control over).

3. Key insights from the International Conference

The conference encouraged extremely candid and open deliberations, allowing for a very positive level of interaction between participants. International representatives of commissions were frank in sharing the obstacles they had faced in addition to their accomplishments. The meeting indicated the importance of active linkages with civil society, women's organisations, and activists of the women's movement. The participants recommended that all commissions should undergo periodic reviews of their role and mandate, with their manner of functioning and issues being discussed, as well as the need to distinguish between the roles of different national machineries for women (if there is more than one).

The five commissions present at the consultations were placed in two broad categories, according to the participants' perceptions following presentations:

Commissions as the only national machinery for women, and Commissions as independent watchdog bodies. A key lesson highlighted by the commissioners was to either (a) to establish and develop single machinery for women/gender in any given country or, (b) to clearly distinguish between the role, functions and authority of commissions versus other national bodies on women/gender equality. The existence of two structures has implications for the composition of Commission members as well as the role, structure and operations of the commissions. The Commissions were then analysed in the light of four pre-determined key areas (themes of working groups).

3.1 Commissions as the only national machinery for women

In Great Britain and in the Philippines, where separate national gender machinery does not exist, women's commissions function as a means of addressing women's strategic needs in government planning and provide a vehicle for civil society's contribution to the process.

Composition and role

In Great Britain, the Women's National Commission was established in 1969 to elicit input from women's organisations on women's needs and issues for the government. It is a Non-Departmental Public Body, meaning it is fully funded by the government yet remains free to comment on governmental policy. This umbrella body was designed to elicit input from partner organisations on women's needs and issues for the government. It has two types of partner membership: organisational and individual. Following a comprehensive review in 1997, membership has been opened to all

women's organisations and those that benefit women. The role of member organisations is to respond directly to the WNC and provide inputs in response to questionnaires, or of their own volition. They do not interact with the government on a face-to face basis.

Individual women make up the fifteen-member Steering Group that converts the government's policy framework for women into concrete Annual Business Plans. The Steering Group is supported by a Gender Unit of civil servants that reports to the Minister for Women who, in turn, is accountable for the WNC to the Cabinet and parliament.

The Philippines National Commission on the Role of Filipino Women, set up in 1975, is more comprehensively integrated into the government structure and operations. Half of the NCRFW members are from civil society the other half government officials. From approximately ten ministries, Government officials are tasked with the responsibility of working together with civil society members who are selected to represent a cross section of women's interest groups. Additionally, the Filipina women's NGO coalition that played a pivotal role in having the Commission established is always represented in the Commission.

The NCRFW plays a central role in setting policy, as well as in planning, implementation of gender focal points and units, and monitoring progress both with respect to national, as well as international, commitments.

Membership

In Great Britain, applications are invited for both member organisations and members for the Steering Group (the latter is only open to women). Organisational membership is

processed through the Gender Unit while appointments for the Steering Group follow the procedures for all public appointments. Application forms commit applicants to the guidelines of the WNC, and an independent observer is present during the vetting and interviews to ensure transparency and proper procedure. The Chairperson is appointed for a three-year-term and other members are appointed for two years. The criteria for membership are comprised of long standing campaigning and activism, commitment to equality of opportunity and underpinning principles.

The Philippines NCRFW is led by a Chairperson from civil society who, though appointed by the President, needs the endorsement of two thirds of the civil society members. Unlike other commissions, there is no term fixed for NCRFW members who continue until the President replaces them.

None of the civil society members of these commissions are full-time, nor do they receive salaries. The government members of the Commission in the Philippines and the Gender Unit in Great Britain are assigned to Commission work on a full-time basis.

3.2 Commissions as independent watchdog bodies

India and South Africa both have separate national machineries that also include a gender/women's commission. Though efforts have been made to distinguish between their respective roles there is still some overlap particularly with respect to planning and monitoring government programmes for women. The need to clearly differentiate between the tasks of the concerned ministry

and the Commission was highlighted in the discussions on both presentations. Neither commission is linked directly to the national machinery i.e., the Office of the Status of Women in South Africa and the Women and Child Development Department of the Human Development Ministry in India.

The Indian Women's Commission, established in 1990, is older than the South African Commission on Gender Equality (set up in 1996). The Indian Women's Commission was established through an Act of Parliament and the South African Commission on Gender Equality was created in the South African Constitution. In India, the original Bill was redrafted by a Joint Committee of Parliament after being rejected by women activists. In South Africa, a study was first made of existing commissions elsewhere and the Commission on Gender Equality (CGE) was established in the Constitution after public debate on the issue.

Mandate

In India, and even more so in the case of South Africa, the Commissions are seen as independent bodies that function as a watchdog body to ensure that: women are equal beneficiaries of government policies, plans and programmes; policies and programmes are properly implemented; and laws are appropriate for women's equality and rights, and effectively implemented. Therefore, they are in place to review and suggest appropriate or required amendments, including new legislation.

To facilitate these functions these two Commissions also have quasi-judicial powers of investigation, search and seizure. The independence of the Commission is specifically stated, and in the case of South Africa, penalties are indicated for

non-compliance with, obstruction in or any hindrance to ensuring the independent status of the Commission.

Both Commissions are mandated to receive and act upon individual and collective grievances and instances of injustice. They carry out specific research to help define existing problems and to formulate appropriate state responses. The South African CGE, unlike other commissions, has the authority to exercise oversight over the private as well as public sector, including customary and indigenous forms of law.

In terms of outreach, India has the advantage of having established State Commissions along the same lines and principles as the National Commission in 20 of their 22 states. The National Commission is thus able to work with State Commissions at the state level. In South Africa, the Commission for Gender Equality has offices in all nine provinces, as of November 2007, but uses the local Office of the Status on Women (OSW) for monitoring and assistance purposes.

India's Commission proposed many amendments to strengthen the Commission's work, independence and authority. Likewise, South Africa undertook a major review of the gender machinery including the Commission and the OSW in August 2001 to which for this task, it invited civil society representatives.

Membership

In India, Commission members are appointed by the incumbent government. This was seen as problematic and led to the recommendation that there be a joint committee alternative that would bring together all parliamentary parties. The National Commission is small, its members serve full-time with a three-year-term (though a five-year-term has

been recommended); the Commission Members have officially designated status: the Chairperson has the status of a Minister of State, and other members that of High Court Justices. All civil society members are paid a salary, provided housing in Delhi, given transport and have staff to assist them. There is only one ex-officio member – the member-secretary, who is deputed from a government post on a full-time basis and assisted by staff.

In South Africa, nominations for the Commission are sought from the public. These are reviewed by a Joint Committee of Parliament that will make the final selection, after an interview process, and submit the list to the Parliament. Commissioners have a five-year term; seven of the CGE Commissioners are full-time while the remaining five are part-time. Full-time Commissioners are financially supported; part-time Commissioners also receive some remuneration.

3.3 Ensuring responsiveness of the Government

Though the South African CGE has more powers and authority, it is clear that both the CGE and Indian Commission have the ability to call for accountability on the part of government departments and persons in public office.

4. Pakistan's National Commission on the Status of Women: in the light of other Commissions

In comparison to other commissions, many questions remain regarding the mandate,

composition and structure of the Pakistan National Commission on the Status of Women. Many of these are derived from a lack of clarity of purpose of the Commission in contradistinction to the Ministry for Women Development (MoWD). The terms of reference of the NCSW also seem to indicate a reluctance to make the Commission a truly independent watchdog body with the authority to hold departments accountable and input into policy formulation.

Independence

Nowhere is it stated that the NCSW is independent. Moreover, four ex-officio members have been included; (in its first term) two other members held government positions (the Chairperson of the Council of Islamic Ideology, and the Secretary of the Pakistan Law Commission), the Additional Secretary of the MoWD is the designated secretary of the NCSW, and the NCSW was housed within the MoWD premises. Finally, the first Chairperson of the NCSW was also a provincial minister.

There is no clear demarcation of the roles and responsibilities of NCSW and the MoWD, some aspects seem to be over-lapping. Why the NCSW was required to report to the MoWD was unclear.

Funds

The fund set up for the NCSW by the federal government is empowered to receive contributions not only from provincial and governmental institutions, but also from national and international agencies. Reservations were expressed on the NCSW receiving donor funds with fears being voiced that this may jeopardise the credibility of the NCSW in the public eye. It was unclear how much independence the NCSW would have over its own funds since it would appear that

funds are to be administered through the MoWD.

Membership and procedure

There is no transparency in the selection procedure and the government unilaterally appointed people without any consultative process, formal interviews, or any inputs from civil society. Members themselves were unable to clarify the procedure for appointing them.

A criterion has been defined for members, but it is questionable whether some members fulfil even this minimal criteria. Another contentious issue discussed was the dual responsibilities of some ex-officio and other members to their government posts and to the NCSW. This duality can lead to a conflict of interest and disagreements on basic policies and principles within the Commission.

All the Commission members from civil society work on a voluntary and part-time basis; ex-officio members are not deputised to the Commission on a full-time basis and have to accommodate the NCSW work on top of their regular responsibilities. In case of priority, it seems inevitable that the "regular" duties of these civil servants will take precedence over the NCSW work.

Mandate

The mandate of the NCSW is weak compared to other independent Commissions and there is no provision that would ensure compliance or even response on the part of government departments. Reports are presented to the President, but there is no clause (such as the case of South Africa) making it mandatory for the President to promptly present this before Parliament. There is no parliamentary committee (or cabinet committee in the absence of a parliament), to ensure

coordination or interaction between the NCSW and Parliament. Nor is there any provision such as exists in India for the government to explain in writing why it has not complied with the NCSW recommendations.

There is virtually no staff support to assist the NCSW at the national level. Moreover, though there appears to be a plan to establish provincial offices there is no provision for the presence of the NCSW at the provincial level, even though ensuring territorial representation seems a high priority in appointments.

5. Achievements and outputs from the International Conference on National Commissions on Women

The Conference on National Commissions on Women was instrumental in providing candid feedback to the NCSW members, probably for the first time. The international conference catalyzed an intensive two-day internal self-reflection and led to an internal review of the NCSW some two weeks later. At the provincial level, it was the first opportunity for many women's organizations and other civil society groups to learn of the NCSW, its mandate and composition. In turn, they were able to provide their feedback in terms of expectations from women and civil society; they also mobilised to provide additional feedback directly to the NCSW. These meetings initiated a consultative process that was missing from the original formulation of the NCSW and it is hoped that it will lead to reviewing the ordinance as well as elaborating more effective Rules of Business.

5.1 Recommendations of the International Conference

Independence

To ensure the independence of the NCSW, the following was recommended:

- The independent status of the NCSW must be specified and it should be housed separately, not in a ministry building
- NCSW should be consulted on all law making as of the drafting stage
- The government should raise funds for the NCSW but donor contributions are acceptable for specific projects
- Evolve best practices for gender mainstreaming
- The NCSW should be an advisory, watchdog body having monitoring and reporting role with reference to government policies, planning and programmes

The NCSW should:

- Hold public hearings
- Build alliances with civil society, especially with marginalised groups and minorities
- Receive/consider recommendations for promotion of gender equality from any source
- Identify a position on specific issues and take a stand on them

Mandate and Powers

- Ensure the Chairperson is a Cabinet Minister
- The NCSW should:
 - Be empowered to summon someone from the government as and when the need arises.
 - Have judicial or quasi-judicial powers.

- Have the power to investigate.
- Include the constitution in purview and compliance with international commitments
- Review budgets
- Have broad investigative powers
- Ensure compliance and take action on non-compliance or violations
- Have a referral mechanism for complaints
- Have a complaints mechanism
- Have an enforcement mechanism

Rules of Business

- Decide how often meetings are to be called and by whom
- Develop performance indicators to evaluate members and the Commission's work
- Provide for a dispute resolution mechanism
- Set up sub-committees and induct technical experts on these
- Develop TORs for member-secretary and others

5.2 Membership and Procedure

Members

Members must be committed to gender equality and have a track record on gender issues. Preferably, all members should be female and full-time; otherwise, at least half should be full-time. There should be no ex-officio members except for the member-secretary who should be on full-time deputisation. Members should represent the

geographical and sectarian spectrum of their constituency.

Selection procedure

Members should be selected by a committee consisting of government, opposition members of Parliament, civil society, and women's and human rights agencies. This process should be transparent and ensure full compliance with the standing criteria for members.

Making the NCSW accountable

There should be a mechanism devised to make the NCSW accountable that provides for an independent review carried out very five years. Performance of individual members and activities should be assessed and developed for this. Suggested criteria include: attendance of meetings, expertise in terms of outputs, and no misuse of power/funds

Making Government responsive

The powers highlighted below must be included in the Ordinance/Act and elaborated upon in the Rules of Business. All policies and plans are to be referred to the NCSW for review and input at the time of their formulation. The following are essential for the NCSW to maintain: the NCSW has veto powers; the power to undertake public interest litigation; the ability to monitor and strengthen institutional mechanisms - such as gender focal points; hold a Member-Secretary's TOR to specify collaboration with governmental departments; and lastly, the NCSW must make strategic use of the media.

5.3 Provincial Consultations

One-day consultations in each province were organised to take forward the consultative process. The objective was to share the

outcome of the International Conference and discuss the recommendations of the meeting in relevance to the Pakistan National Commission on the Status of Women. Concerned government representatives, newly elected councillors of the respective province, NGO/CBO members, civil society representatives and other interested individuals participated in these consultations. In addition, Commission members attended their respective provincial consultations.

During the conference, four thematic areas were identified for guiding the provincial consultations:

- i. Role of the NCSW versus the Ministry of Women's Development (MoWD) and women's development departments.
- ii. Membership criteria, selection process and channels of communication and interaction with civil society.
- iii. Responsiveness of the government:
 - a. How to ensure appropriate response and collaboration of government departments.
 - b. How to ensure parliamentary action upon the Commission's recommendations and reports.
 - c. How to ensure the Commission's role in law and policy-making.
- iv. Mandate and individual and group complaint processes.

Provincial consultations were held in the North West Frontier Province, Punjab, Sindh, and Balochistan. Recommendations from the consultations, addressing each of the above themes, are provided for further reading. These can be found in Annexure V on page 139.

6. Conclusion: update of NCSW

Following the consultative process, the NCSW held many meetings in the different provinces to introduce the NCSW to various civil society organizations and individual women. However, the lack of a physical presence outside of the capital (Islamabad) impedes the access of both civil society and individuals.

The mandate and powers of the NCSW have not been expanded or strengthened. As consistently stressed by civil society representatives during the consultation, one of the biggest challenges the NCSW faced was its bureaucratic and financial linkages to the Ministry of Women Development. For example, while the NCSW mobilised and signed agreements with international donors for research and reports, their ability to open and operate an independent account in order to receive disbursements remained stalled for many months, if not years.

For several years, the NCSW had to operate out of the premises of the MoWD. Subsequent to the consultation, the NCSW requested its own location. The NCSW eventually moved into its own premises during the tenure of Justice (retd) Majida Rizvi. Justice (retd.) Rizvi also submitted revised Rules of Business for the Commission's better functioning in June 2006, but no action has been taken by the government thus far.

The selection of members continues to be done through the same unilateral procedure and the only known input has been from the MoWD. At least one individual invited to be a member declined because of the uncertain status, role and powers of the Commission.

The NCSW was able to generate and undertake several research projects and to formulate its own recommendations. The NCSW did respond to civil society requests to take up the issue of a woman wrongly sentenced to be stoned to death for sexual relationships under the infamous Hudood Ordinances of 1979; which aims to criminalise and punish all sexual relations outside of marriage as well as sexual offences. The woman had actually been a victim of rape and was subsequently acquitted by the Federal Shariat Court.

Importantly, the NCSW established a Committee to review the Hudood Ordinances and put forward its recommendations for a complete repeal of the law. However, in the absence of a procedure that would oblige the government to act upon NCSW recommendations and in view of the state's lack of a response, the Chairperson, Justice Rizvi decided to make the recommendations public. As part of its campaign, the NCSW printed a poster printed with the statement: "Give her space to live...Repeal Hudood Ordinances". The public position adopted by the NCSW was important in influencing opinions of decision-makers and very useful for civil society initiatives and campaigns on the same issue.

The status of the NSCW remains uncertain: the NCSW Ordinance has not been regularized through legislation making it a permanent statutory Commission. The Commission was neither asked for its inputs on, nor consulted about, the Pakistan Initial, Second and Third Report to the CEDAW Committee (submitted in 2006). Also, the Chairperson was not invited to be a member of the delegation that went to the CEDAW meeting in 2007. It should also be noted, however, that the Chairperson of the Parliamentary Standing

Committee on Women Development was also not invited.

There is now a third Chairperson of the Committee, Dr. Arfa Sayeda Zehra, and new Commission Members selected in 2006. The NCSW continues to function as an advisory and examining body, but no regulation ensures that NCSW recommendations are tabled in any official forum within a stipulated timeframe; nor does the NCSW have direct access/liason with the Parliament. Reports are sent to the President *via* the Ministry of Women Development creating dependency, and allowing unwarranted influence of government servants. The rules and mandate do not make it obligatory for the NCSW to be consulted by any ministry, parliamentary Standing Committee etc. while formulating/amending laws and policies affecting women. The selection of candidates for the NCSW lacks transparency, any consultative processes and a procedure for vetting the accomplishment of the members.

Endnotes

- ¹ This paper has been adapted from the report of the same title prepared by Shirkat Gah – Women's Resource Centre and the Aurat Publication and Information Services Foundation on the consultative process held between July and September 2001 that started with an International Conference on National Commissions on Women, held in Islamabad, Pakistan on the 28-29 of July 2001. WLUMI and the editors of this Dossier would like to extend a special thank you to Ms. Farida Shaheed and Ms. Ayesha Mir of Shirkat Gah. Both Ms. Shaheed and Ms. Mir were key organisers of the consultative process and, subsequently, have generously devoted their time to editing and updating the current content. Ayesha Mir was also responsible for the presentation of this paper at the WLUMI/WCC International Conference on "Mechanisms and Legislation to Promote and Protect Gender Equality" held in Malaysia in 2006.

Abstract

Activism and opposition to discrimination have been motivating women of South Africa to demand their equal rights since the 1950's. This paper discusses various mechanisms, including the National Gender Machinery, the Legislature, and the Constitutional Court and analyzes how they work together to achieve greater gender equality. In particular, the development of the Commission on Gender Equality, its role in working with the government, and its impact on the progression of women's rights is discussed.

Introduction

1975 was a momentous year for women's international rights. Designated International Women's Year by the United Nations (UN), 1975 also saw the first World Conference on Women and the adoption of the World Plan of Action for the promotion of gender equality. This Plan was designed to guide and encourage the international community in achieving three main objectives: full gender equality and the elimination of gender discrimination; the integration and full participation of women in development; and an increased contribution by women in the strengthening of world peace. The World Conference on Women called upon governments to develop national strategies and mechanisms to promote the equal participation of women.

South Africa is a useful case study because of the intensity with which women's rights activists in that country took up the UN's call to action. During the late 1980's, in the midst of the already-contentious democratic transition in South Africa, women's rights activists forced the nation's political stakeholders to focus on gender equality as they had never done before, including the creation in the Constitution, of an independent Commission for Gender Equality (CGE). The commission is an independent body with a mandate to protect, develop, promote respect for, and attain gender equality in South Africa. The Commission's enabling statute (CGE Act 1996) authorizes a wide range of actions to fulfill this mandate.

This paper provides an overview of the mechanisms to preserve and promote gender equality in South Africa. In order to provide the requisite context, the paper begins with a synopsis of the history and current status of South African women and a brief description

of the various mechanisms including the National Gender Machinery (NGM), the Legislature, and the Constitutional Court, with whom the CGE works in concert to achieve gender equality. This will be followed by a more in-depth analysis of the history, mandate and functioning of the CGE. There is a particular focus on two of the CGE's best-documented activities: its review of parliamentary legislation and its involvement in litigation relating to gender equality.

It is important to note at the outset, however, that it is still unclear the degree of influence that these structures and interventions have in their quest to promote and protect gender equality. However, an examination of the interactions *between* each of these bodies provides the greatest insight into effective methods to preserve and promote gender equality. Ultimately, the South African case study suggests that it is a mistake to assume that a single body, no matter how effective, can achieve this monumental task on its own. Instead, it is only through a multi-layered approach that utilizes different tactics and institutions placed in key strategic positions throughout society that activists may hope to protect gender equality and women's rights.

Status of South African women

The overarching effect of colonialism and apartheid was to both enhance and entrench gender divisions in South Africa. Black women faced more layers of oppression than did white women.² This was partly due to the fact that most African women were subject to customary law,³ under which they were often denied equal property, marriage, contract and succession, rights.⁴ However, women of all races faced challenges unique to their gender in all aspects of their lives, including: within the political realm, family law arena, and access to education/employment opportunities.

One of the most debilitating obstacles for women during the colonial and apartheid eras was widespread sexual violence. A historical belief that "it's a man's right to rape a woman," patriarchal notions of women as male property, and frustration with unemployment and disempowerment also created a tragic and potent mix that provoked high levels of domestic violence.⁵ An important contributing factor to the continuance of this violence is the fact that this problem remained hidden for so long. Law journals, for example, only began to publish articles on the issue in the late 1970s. Furthermore the marital exemption to rape laws existed into the 1990s, and there was no specialized law to address the problem of domestic violence.

Even in the midst of, and perhaps because of, each of these challenges, women played key roles in several liberation struggle activities and movements, including the anti-pass law demonstrations, the formation of women's organizations, and the creation of the women's Charters. Throughout these struggles, tensions emerged between women's liberation and national liberation; between activism based on Western-style liberal feminism and activism based on notions of motherhood; and between women of different races.⁶ The negotiations to end apartheid both provided new opportunities for women of all races to secure equality and posed numerous challenges to these efforts. Few women were included in the first round of constitutional negotiations in 1992; they ultimately achieved greater participation in the Multi-Party Negotiating Process (MPNP) in 1993.⁷ Their participation helped to secure several key victories, including the removal of a clause that would have excluded customary law from the equality guarantee in the Bill of Rights,⁸ a statement of gender equality in the Preamble,⁹ and a 30% quota for women in the

ANC's nominating list. However, the extent of these successes was limited. The MPNP rejected an explicit wording that would allow the right to equality to trump the protection of cultural rights,¹⁰ and the ANC quota did not require that women be placed in any particular position on the party list.

Ten years since the final constitution was adopted, the status of South African women has improved from what it was, and yet significant room for improvement remains. Women now constitute over 40% of the Parliament and occupy several high-ranking positions including the Office of Deputy President.¹¹ At the same time, individual women in Parliament still face "substantial challenges" when trying to advance their political agendas.¹² As a result, the attrition rates of women in Parliament have been high.¹³ Similarly, while women now account for 55% of all professionals,¹⁴ they still are drastically under-represented in top and senior management (14% and 21% respectively).¹⁵

Perhaps the two most prominent challenges that face South African women today is the HIV/AIDS epidemic and the growing and widespread problem of gender-based violence. The HIV/AIDS epidemic has a disparate impact on women. Of the approximately 5.1 million adults (ages 15-49) with HIV, 57% (2.9 million) were women. The gender imbalance grows in the 15-24 age category, in this group, four times as many women as men are HIV positive.¹⁶ In addition, sexual violence stands out as one of the most acute problems women experience today. Some observers conclude, "... on a per capita basis, more rapes are committed in South Africa than in any other country in the world."¹⁷ Indeed, the South African Police Service (SAPS) reported 55,114 rapes in

South Africa for the period April 2004-March 2005, 59.2% of which were committed against women, and 40.8% of which were committed against girl children.¹⁸ At the same time, domestic violence continues to occur at high levels.¹⁹ In 1999, the BBC reported that in South Africa, a husband killed his wife every six days; in a survey of 1,394 men in Cape Town conducted that same year, 44% of the men admitted that they had abused their female partners.²⁰

Mechanisms working with the CGE to achieve gender equality

The CGE works with, parallel to, and separate from, several institutions to fulfill its mandate. The CGE, the National Gender Machinery, the legislature, the Constitutional Court and the Chapter 9 Institutions (six constitutional institutions designed to promote democracy) are each charged with the responsibility and authority to preserve and promote equality in South Africa.

The National Gender Machinery (NGM)

In designing the NGM, South African activists hoped to create "a set of mechanisms and procedures that would ensure both women's participation in decision making in the newly democratic state and the accountability of state structures to women."²¹ The components of this machinery include the Office on the Status of Women (OSW) in the Presidency, the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women (JMC) in Parliament, the CGE which is an independent constitutional body, and lastly, civil society individuals and organizations.²² The OSW's mandate is to work with governmental and non-governmental bodies to conceptualize and

implement a national gender policy. Since its inception, the OSW has been plagued by understaffing, lack of cooperation on the part of government employees, and insufficient budget.²³ The JMC is charged with monitoring the improvement of the quality of life and status of South African women, providing an access point for public input on legislative activity relevant to the status of women, and serving as an internal accountability mechanism within Parliament.²⁴ According to South African gender expert, Rashida Manjoo, the JMC has been more successful in fulfilling its mandate than has the OSW with its promotion of important gender-related legislation and the holding of public hearings on a wide variety of issues.²⁵ The CGE will be further discussed below.

The Legislature

The South African Constitution is unique in the positive duty that it places on the Legislature to eradicate discrimination and to alleviate its affects. The Constitution not only prohibits the government from engaging in discriminatory practices; it also requires the government to affirmatively prevent discrimination. §9(4) of the Constitution requires that “national legislation must be enacted to prevent or prohibit unfair discrimination.”²⁶ In pursuit of this mandate, the Legislature has passed several Acts designed to promote gender equality in South Africa, including: the Promotion of Equality and Prevention of Unfair Discrimination Act, the Employment Equity Act, the Domestic Violence Act, and the Recognition of Customary Marriages Act.

The Constitutional Court

The Constitutional Court is another institution that plays an important role in promoting gender equality in South Africa. The Court interprets and implements a Constitution that has been described as containing a

“pervasive and overriding commitment to equality.”²⁷ Indeed, the right to equality is the first substantive right enshrined in the Bill of Rights.²⁸ It explicitly prohibits unfair discrimination on several grounds, including gender, sex, race, colour, sexual orientation, pregnancy, and marital status. The Court has interpreted the Constitution to include an implied supremacy for the equality clause.

South African constitutional jurisprudence recognizes that the protection of equality is not merely a formal, but also a substantive, right. The Court has rejected a rigid application of the equality provision, and instead, performs a contextual analysis that considers the effects of past discrimination and focuses on the actual impact of the action in question.²⁹ As a corollary to the understanding that some “discriminatory” actions actually promote the right to equality, the Court also recognizes that certain facially “neutral” activities must be regulated in order to protect substantive equality. An example of this practice is found in a case where the Court has addressed the issue of domestic violence within the context of the equality clause, finding that one must be free from the fear of physical violence in order to achieve true equality.³⁰

Chapter 9 Institutions

Chapter 9 of the South African Constitution establishes six independent institutions designed to strengthen democracy, including: the Commission on Gender Equality (CGE), the Public Protector, the South African Human Rights Commission (SAHRC), the Commission for the Promotion and Protection of the Right of Cultural, Religious and Linguistic Communities, the Auditor General, and the Electoral Commission. The SAHRC is the Chapter 9 institution that cooperates most often with the CGE on the issue of gender equality. Its mandate is to promote

the respect, protection, development, and attainment, of human rights in South Africa.³¹ The SAHRC is endowed with a host of tools to achieve these goals, including the power to: investigate and report on human rights observance, redress human rights violations, conduct research, and educate the public about human rights.³² The Constitution also requires state organs to provide the SAHRC with information regarding the measures they have taken to actualize the rights enumerated in the Bill of Rights.³³ In addition, the SAHRC may initiate court proceedings, either on behalf of an individual, group of individuals, or in its own name.³⁴

The Commission for Gender Equality

History

The convergence of several factors, from the personal to the global, helped to create the impetus to establish the CGE, including: the express support of Nelson Mandela, the political activism of South African women during the negotiation process, and an increased international attention to gender equality.³⁵ Once activists decided to create a mechanism to promote gender equality, however, issues of structure and mandate remained. The key debates focused on whether the CGE should take the form of a women's ministry and how it should interact with the South African Human Rights Commission which was established before the framework for the national gender machinery was finalized.³⁶ After intensively studying the Australian and Ugandan structures, the Constitution's drafters ultimately chose to depart from the conventional model of the women's ministry utilized by other African countries.³⁷ Instead, they crafted a multi-pronged approach where the CGE represents

gender concerns from the perspective of an independent body that collaborates with the various governmental and non-governmental institutions described in Section III above.³⁸ It was hoped that this choice would prevent women's issues from being ghettoized in a separate ministry.³⁹

Mandate and function

Together, the Constitution and the Commission on Gender Equality Act ("Act") establish that the goals of the CGE are to promote respect for, and attain, gender equality.⁴⁰ The CGE's mandate, as established by Chapter 9, §187 of the Constitution, is "to promote respect for gender equality and the protection, development and attainment of gender equality." To this end, the Constitution authorizes the CGE to "monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."⁴¹ The CGE must closely liaise with institutions, governmental authorities, and civil society organizations with similar objectives "in order to foster common policies and practices and to promote cooperation in relation to the handling of complaints in cases of overlapping jurisdiction."⁴² The Act greatly expands upon these constitutional functions of the CGE. It requires the CGE to conduct educational programs that promote the understanding of gender equality and to evaluate the gender practices and policies of private institutions.⁴³ The CGE also must monitor these practices and policies within state organs, and evaluate laws that could affect gender equality or the status of women.⁴⁴ Additionally, the CGE must monitor South African compliance with international conventions relating to gender equality and submit regular reports to Parliament on compliance.⁴⁵

Perhaps the Act's most important expansion of the CGE's functions is the development

of its investigative powers. The CGE may investigate any gender-related issue on either its own initiative or the basis of a particular complaint.⁴⁶ It may also require any person to produce evidence or to provide testimony.⁴⁷ Under the correct circumstances, and with the appropriate authorization, the CGE may instigate the search of particular premises and the seizure of articles that are related to an investigation.⁴⁸ While the CGE may resolve disputes independently through mediation, conciliation, and negotiation, the Act also enables it to refer the matter to either the SAHRC or the Public Protector.⁴⁹

The establishment of the CGE was a significant victory for South African women's rights activists. However, certain elements within the Commission's founding documents may hamper its efforts to achieve its full potential as a mechanism to promote gender equality. For example, the Act does not clarify how the CGE is meant to effectuate each of its broad functions and does not identify funding sources (outside of Parliament), for the CGE's activities. At the same time, the Act neglects to incorporate specific provisions included in other organic statutes that could help the CGE achieve its objectives: it neither explicitly authorizes the CGE to use the court system nor requires state organs to regularly provide information regarding their measures to realize gender equality to the CGE.⁵⁰ Finally, the CGE's appointment process may be more susceptible to politicization than other constitutional institutions, as vague provisions and a neglect to acknowledge a need for the Commission to reflect the general gender/racial composition of South Africa leaves the process vulnerable to manipulation.

Implementation of mandate

This report focuses on two of the CGE's

best-documented activities: its review of parliamentary legislation and its involvement in litigation relating to gender equality.

i. Legislative Interventions

In order to fulfill its mandate to make recommendations to Parliament with regard to any proposed legislation that affects gender equality and the status of women, the CGE issues "legislative interventions." These reports, submitted to the relevant portfolio committee or legislative body, analyze proposed legislation from a gender-sensitive perspective and offer suggestions on how to bring the bill in line with the right to gender equality. Collectively, these interventions reveal several important trends described below. It is important to note at the outset, however, that it is still unclear the degree of influence that these interventions have on the legislature.

- a) Several legislative interventions have forced the CGE to weigh the protection of competing constitutional rights. This tension has arisen most often between (1) a women's right to equality and/or to bodily and psychological integrity and (2) the right to culture or the right to privacy and bodily integrity of men accused of sexual assault. In the face of these conflicting rights, the CGE generally has treated the right to gender equality as a strong right that must be forcefully protected.⁵¹
- b) The CGE's legislative submissions overwhelmingly focus on the interests of South Africa's most marginalized women – those who are poor, African, and/or living in rural communities. In comparison, the CGE has devoted fewer resources to issues such as discrimination based on sexual identity, or sexism in the workplace. This result is not surprising,

nor does it seem especially unjustified, as marginalized women arguably have suffered the most in pre-democratic South Africa and continue to represent a substantial portion of the South African population. At the same time, some see these omissions as a failure to live up to the CGE's initial ambitious goal to transform gender relations, redistribute power and provide equal access to economic, social, and political opportunities.⁵² Moreover, some commentators note that focusing on women as only marginalized and victimized individuals may create an aspirational ceiling.⁵³

- c) In general, the CGE has not constrained its recommendations based on issues regarding limited state resources. Although the CGE operates in a country with limited budgetary resources and tremendous demands on the resources that do exist, it believes that the achievement of gender equality is a state *obligation* that may not be abrogated with claims of scant funds.
- d) At times, both the CGE and the SAHRC submit evaluations on the same piece of legislation. Where there is overlap, the CGE submission dedicates more space to, and provides a more thorough analysis of, the gender issues involved. Interestingly, however, while the SAHRC has addressed several pieces of legislation related to homosexuality and trans-sexuality, the CGE has been virtually silent on these bills despite the fact that they are gender-relevant.⁵⁴ Significantly, there is no current formal mechanism through which the two organizations coordinate their submissions, though informal processes do take place occasionally. Although instances of direct conflict between the two organizations' submissions are rare, it is worth noting that

they do occur occasionally.⁵⁵

ii. Judicial Interventions

The CGE devotes the bulk of its resources to its legislative submissions and is less involved in the judicial system than the SAHRC. However, the CGE also engages in "judicial interventions". These interventions largely take the form of amicus briefs that the CGE files with courts.

The focus of CGE's judicial interventions mirrors that of its legislative submissions. Thus, the CGE almost exclusively intervenes in cases involving victimized or disempowered women in "traditional" roles as mothers, daughters, and/or spouses.⁵⁶ The CGE has never intervened in a case involving employment discrimination, sexual harassment, or access to education. These interventions do not represent a comprehensive, revolutionary challenge to the way gender is experienced in South Africa, but rather are aimed at uplifting women caught in only the most dire situations and which focus on women's traditional roles.⁵⁷ At the same time, where the CGE *has* intervened, it has advanced innovative arguments that support a revolutionary vision for achieving gender equality in South Africa. In this way, these interventions do more than simply highlight the marginalization of certain groups of women by advancing creative and groundbreaking measures to alter the situation.

These judicial interventions seem to possess varying degrees of influence. In several cases, opinions use reasoning that the CGE forwarded in its amicus submission without expressly recognizing its contribution. In these cases, it is difficult to discern the impact that the CGE's submission had on the Court. Alternatively, the Constitutional Court in the

Bhe case⁵⁸ explicitly recognized the CGE's submissions as "helpful" as it granted most of the relief requested by the Commission. At the same time, however, the Court refused to adopt the CGE's suggestion to develop living customary law on a case-by-case basis, identifying the legislature as the proper body for reform in this area.⁵⁹ Finally, the Constitutional Court decision in the *Bannatyne* case⁶⁰ not only adopted a holding and remedy that was directly in line with the CGE's submission, but also acknowledged that the evidence regarding the ineffectiveness of the maintenance system that the CGE provided, "proved most useful and gave the necessary context...The Court is indebted to the CGE for this evidence and its argument."⁶¹

Obstacles to success

Although quite active since its inception, the CGE has faced considerable obstacles in carrying out its mandate. Since its earliest days, the CGE has operated with a budget that it has consistently viewed as insufficient.⁶² Moreover, while the CGE is enshrined in the Constitution and enjoys autonomous status within the government, its activities are not necessarily well-received at all levels of the government. The CGE has consistently reported the inability or unwillingness of local officials and leaders to actually implement the policies that the CGE supports.

This external lack of political will compounds internal factors that also serve to hinder the CGE's success. The CGE consists of appointed members, assigned for a fixed term of years, and also a secretariat of permanent employees. This structure has led to confusion regarding the allocation of responsibility between members of the CGE and its staff. The appointment process has also led several academics to suggest that many appointments to the CGE may be

political rather than merit based, resulting to a lack of competency among such appointees. Overall, this has led to some internal constraints, thus lessening the effectiveness of the CGE. This internal strife, in turn, has hampered coordinating efforts with civil society and other governmental institutions. Numerous organizations lament this paucity of cooperation, noting that internal conflicts and personnel issues currently make the CGE a particularly difficult working partner.⁶³

The CGE has also had an unintended impact on the South African women's right movement. It was hoped that the CGE would become the mediator between what was an exceptionally active movement during the time of transition and the new South African government. Rather than capitalizing on the strength of the movement, however, the movement appears to be weaker than it was before the establishment of the CGE. Several activists suggest that the CGE (along with the rest of the NGM) drains the movement's leadership by taking civil society leaders into government positions and competing with the movement for resources from foreign donors. Additionally, it has been argued that the existence of the CGE may have led certain individuals to feel as though they were exonerated from the duty of fighting for gender equality themselves.⁶⁴

Conclusion

The greatest danger facing the CGE seems to be the possibility that it will become just like many other parts of the government bureaucracy – too large, characterized by unclear lines of authority, and difficult to work with. Alternatively, many individuals indicate that they would prefer that the organization modify its practices and fulfill its constitutionally mandated role rather than disappear or dissolve because of its current

difficulties. Indeed, as the members of the CGE conclude their terms, they could return to civil society along with the new skills and contacts that they made while working with the government. Perhaps then the CGE, even though it temporarily drained the leadership of the women's movement, could ultimately prove to transmit new skills and connections to the activist community.

The South African experience provides a fertile opportunity to engage in the broader debate regarding the use of different mechanisms at both the domestic and international levels for the achievement of gender equality. Analyzing the NGM, the Constitutional Court, the Legislature, and the CGE as individual institutions can reveal best practices and areas for improvement. However, an examination of the interactions *between* each of these bodies provides the greatest insight into effective methods to preserve and promote gender equality. Ultimately, the South African case study suggests that is a mistake to assume that a single body, no matter how effective, can achieve this monumental task on its own. Instead, it is only through a multi-layered approach that utilizes different tactics and institutions placed in key strategic positions throughout society that activists may hope to protect gender equality and women's rights.

Endnotes

- 1 This paper is a synopsis of a report produced by students working on a project under the supervision of Rashida Manjoo at the Human Rights Program at Harvard Law School in collaboration with the Women Living Under Muslim Laws Network (WLWML). The students are: Mary Ann Franks, Alexis Loeb, Jessie Rossman and Erin Thomas. These students were registered in the Clinical Advocacy course at the Human Rights Program, Harvard Law School. They undertook an in-depth case study of South Africa's efforts at promoting and protecting women's human rights. The resulting paper has served two purposes, namely, it was shared with relevant stakeholders within South Africa as an analysis of the structures and mechanisms that exist in the promotion and protection of women's human rights, and in addition, it was presented at an international conference in Malaysia; organized by LWUML and the Women's Centre for Change (Penang, Malaysia).
- 2 This report uses the term "black" to encompass the Indian, Coloured, and African segments of South African society.
- 3 CHERYL WALKER, *WOMEN AND RESISTANCE IN SOUTH AFRICA* 7 (1991); Adrien Katherine Wing & Eunice De Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS J. 57 (1995). In contrast, white women lived under, and gained certain legal rights through Roman-Dutch law.
- 4 WALKER, *supra* note 2, at 7; Wing & De Carvalho, *supra* note 2.
- 5 John Carlin, *After Violence, There Is Only Fear*, INDEPENDENT, May 30, 1992, at 14 (quoting Lloyd Vogelmann) *quoted in* Wing & De Carvalho, *supra* note 2.
- 6 WALKER, *supra* note 2, at xii-xxii.
- 7 Gay Seidman, *Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State*, 13 Gender and Society 287, 294 (1999).
- 8 Catherine Albertyn, *Women and the Transition to Democracy in South Africa*, ACTA JURIDICA 39, 60.
- 9 Suzanne A. Kim, *Betraying Women in the Name of Revolution: Violence Against Women as an Obstacle to Democratic Nation-Building in South Africa*, 8 CARDOZO WOMEN'S L.J. 1, 15 (2001).
- 10 Kim, *supra* note 8 at 15; Albertyn, *supra* note 7, at 60.
- 11 HANNAH BRITTON, *WOMEN IN THE SOUTH AFRICAN PARLIAMENT* 1 (2005).
- 12 BRITTON, *supra* note 10, at 3.
- 13 *Id.* at 3. One third of the ANC's female representatives left after the 1999 election.
- 14 COMMISSION FOR EMPLOYMENT EQUITY ANNUAL REPORT 2002-2003, 14 available at <http://www.labour.gov.za>, last visited January 4, 2006, 14 [hereinafter CEE REPORT].
- 15 CEE REPORT, *supra* note 13, at viii.
- 16 HUMAN RIGHTS WATCH, *DEADLY DELAY: SOUTH AFRICA'S EFFORTS*

- TO PREVENT HIV IN SURVIVORS OF SEXUAL VIOLENCE (2004), available at <http://www.hrw.org> (quoting Rob Dornington et al., HIV/AIDS PROFILE IN THE PROVINCES OF SOUTH AFRICA, NOVEMBER 2002, 4). Regarding the trajectory of infection rates, government statistics show exponential increases in HIV-positive status among pregnant women attending public health clinics from 1990-1998, but a relative leveling off since. DEPARTMENT OF HEALTH, NATIONAL HIV AND SYPHILIS SERO-Prevalence SURVEY OF WOMEN ATTENDING PUBLIC ANTENATAL CLINICS IN SOUTH AFRICA 2000, available at <http://www.doh.gov.za/facts/index.html>.
- 17 See for e.g. Michelle Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789, 790 (2000), cited in Kim, *supra* note 8, at 8.
- 18 SOUTH AFRICAN POLICE SERVICE CRIME STATISTICS, available at http://www.saps.gov.za/statistics/reports/crimstats/2005/_pdf/crimes/rape.pdf
- 19 Amanda Dissel & Kindiza Ngubeni, GIVING WOMEN THEIR VOICE: DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE IN SOUTH AFRICA, paper presented at International Symposium on Victimology, (Stellenbosch, South Africa, July 2003), available at <http://www.csvr.org.za/papers/papadk3.htm>.
- 20 Jane Standley, *South Africa Targets Domestic Violence*, BBC NEWS, Dec. 15, 1999, available at <http://news.bbc.co.uk/1/hi/world/africa/566160.stm>; Lisa Vetten, ADDRESSING DOMESTIC VIOLENCE IN SOUTH AFRICA: REFLECTIONS ON STRATEGY AND PRACTICE, paper presented at UN Division for the Advancement of Women Conference (May 2005) (citing Abrahams, Jewkes, & Laubsher, *I do not Believe in Democracy in the Home*, CERSA WOMEN'S HEALTH MEDICAL RESEARCH COUNCIL), available at, <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>.
- 21 Shireen Hassim, *The Gender Pact and Democratic Consolidation: Institutionalizing Gender Equality in the South African State*, 3 FEMINIST STUDIES 505, 508 (2003).
- 22 Rashida Manjoo, *South Africa's National Gender Machinery*, ACTA JURIDICA, 243, 253 (2005).
- 23 *Id.* at 254, 256.
- 24 *Id.* at 259.
- 25 *Id.* at 259
- 26 S. Afr. Const. 1996. Ch 2 §9(4) (emphasis added).
- 27 Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. H.R. 146, 153-54 (1998).
- 28 South African Constitution 1996 s9
- 29 Saras Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience*, 36 CONN. L. REV. 725, 727-28 (Spring 2004).
- 30 S v Baloyi, 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), para. 7
- 31 S. Afr. Const., 1996. Ch. 9 §184(1).
- 32 *Id.* at §184(2).
- 33 *Id.* at §184(3). Specifically, these organs must address their actions concerning housing, health care, food, water, social security, education, and environmental rights.
- 34 *Id.* at §184 (7).
- 35 Saras Jagwanth & Christina Murray, *Ten Years of Transformation: How Has Gender Equality in South Africa Fared?*, 4 CAN. J. WOMEN & L. 255, 265 (2002).
- 36 Manjoo, *supra* note 21, at 250.
- 37 Seidman, *supra* note 6, at 301; Manjoo, *supra* note 21, at 250. South African women saw that Ministries of Women's Affairs – cabinet-level bodies – often allowed other parts of the government to avoid considering gender issues when making policy. Jagwanth & Murray, *supra* note 32, at 265.
- 38 Manjoo, *supra* note 21, at 251.
- 39 *Id.*
- 40 There was a three year gap between the constitutional creation of the CGE and the actual setting up of the institution. Several reasons may account for this delay, both practical (lack of prioritization and funding by the transformation-focused government and, overextended activists) and ideological ("the age old problem of the gender agenda being more rhetoric than reality; and the continued domination of...old ways of thinking within the bureaucracy") Manjoo, *supra* note 21, at 251.
- 41 S. Afr. Const., 1996. Ch 9 §187(2).
- 42 The Commission on Gender Equality Act No. 39, 1996. §11(1).
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 *Id.*,
- 47 *Id.* at §12(5).
- 48 *Id.* at §§§13(1), (2) and (3).
- 49 *Id.* at 11(1).
- 50 In contrast, the SAHRC Act and constitutional language includes both of these provisions.
- 51 See, e.g., the CGE's submissions for the Communal Land Rights and Traditional Leadership Bill, the Governance Framework Bill and the Compulsory Testing of Alleged Sexual Offenders Bill, which each highlight the Commissions commitment to privilege the right to gender equality over the right to culture, privacy, or a fair hearing.
- 52 COMMISSION ON GENDER EQUALITY, MISSION STATEMENT (1997), in Gay W. Seidman, *Institutional Dilemmas: Representation versus Mobilization in the South African Gender Commission* 29 FEMINIST STUD. 541, 546-47 (2005) [hereinafter Seidman, *Institutional Dilemmas*].
- 53 *Id.*
- 54 While the CGE's submission on the Alteration of Sex Description and Sex Status Bill was very brief; in direct contrast, the SAHRC submitted a detailed paper that challenged the Bill's definition of sex, analyzed the legal status of transsexuals in other countries, and included testimony from numerous transsexuals about the discrimination they experience in South Africa. See

SAHRC SUBMISSION TO PORTFOLIO COMMITTEE ON HOME AFFAIRS ALTERATION OF SEX DESCRIPTION AND SEX STATUS BILL (Sept. 2003).

- 55 For example, the Criminal Law (Sexual Offenses) Amendment Bill provides one example of this situation: the CGE supported criminalizing a three-year age gap in consensual sex between minors, while the SAHRC completely opposed this requirement. In contrast, the SAHRC supported chapter five of the Traditional Leadership and Governance Framework Bill without reservation, while the CGE considered this chapter seriously flawed.
- 56 While the CGE intervened on behalf of prostitutes in *Jordan* (Case CCT 31/01), the Commission characterized these women as vulnerable and marginalized.
- 57 Also similar to its practice with regards to legislative interventions, the CGE has failed to intervene in cases related to sexual orientation, notably *Minister of Home Affairs v. Fourie* (Case CCT 60/04) and *Lesbian and Gay Equality Project v. Minister of Home Affairs* (Case CCT 10/05). The CGE also chose not to intervene in several HIV-related cases, including *Minister of Health v. Treatment Action Campaign* (Case CCT 9/02).
- 58 Bhe case information is available online at, <http://www.cge.org.za/userfiles/documents/cgeobhecase.pdf> and <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20071212135729/SIRSI/0/520/S-CCT49-03>
- 59 See also the dissent in *Jordan* (Case CCT 31/01), which quoted extensively from the CGE amicus brief.
- 60 Bannatyne case information is available online at, <http://www.communitylawcentre.org.za/Childrens-Rights/05Legal-Resources/cases-judgements/constitutional-court-of-south-africa/bannatyne-v-bannatyne.pdf/>
- 61 *Bannatyne v. Bannatyne* (Case CCT 18/02) at 3.
- 62 *Big Hopes, Little Funding*. MAIL AND GUARDIAN, Aug. 3, 2001.
- 63 See amongst others Seidman, Gouws, Hassim, Manjoo
- 64 See generally Shireen Hassim, "Engendering the State: Structures, Mechanisms, and Policies to Advance Gender Equality in the New South Africa," in *Engendering the Political Agenda: A South African Case Study for the United Nations International Institute for Research and Training for the Advancement of Women*, (eds. Catherine Albertyn, et. al, 1999), cited in Jagwanth and Murray 268. Also Gouws Gouws A: *The Politics of State Structures in Feminist Africa*: National Politricks 2004 Issue 3.

Abstract

This paper provides an overview of the legal and policy framework as well as the institutional mechanisms that are in place to promote and protect women's rights in Sri Lanka. Suggesting that the current national machinery remains marginalized and the need for continued promotion of women's rights is necessary, The Sri Lankan government is proposing a new mechanism with greater powers. The paper provides an overview of the key provisions of the draft National Commission for Women Bill.

Introduction

In relation to the legal policy framework of Sri Lanka, the International Women's Year (1975) and the United Nations Decade for Women (1976-1985) inspired the adoption of laws, policies and mechanisms for the promotion and protection of women's rights. These pivotal events set the stage for the adoption of Chapter III of the Constitution on Fundamental Rights, the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981, the establishment of a Women's Charter, and the development of a National Plan of Action for Women in 1996. Currently the government of Sri Lanka is in the process of negotiating the institution of the latest gender equity mechanism, the National Commission for Women.

Legal and policy framework

Chapter III of the Constitution of Sri Lanka provides for the protection of fundamental rights. Article 12 of Chapter III recognizes the right to equality and equal protection of the law as well as the right to protection from discrimination on certain specified grounds, including sex. Any person, whose right to equality is violated, under this Article, by either executive or administrative action, can file a Fundamental Rights Application in the Supreme Court. Article 12(3) also recognizes that a special provision to promote substantive equality can be made by law, regulations, or administrative action for the advancement of women. The only criticism of this clause is that women are not provided the provision independently; instead, it is inclusive of women, children, and disabled persons. The Fundamental Rights Chapter itself has certain inherent limitations. It has no retrospective effect, and there is no provision for judicial

review of past legislations. Therefore, gender discriminatory laws, which were in existence at the time the constitution was adopted, cannot be challenged on the basis of Article 12. This means that any reform of such laws depend on political will.

Unlike in South Africa, the right to culture and religion in Sri Lanka has so far trumped the right to equality. As an example, in 1995 the legal age of marriage for both men and women was raised to the age of 18 years. No corresponding change was made in the Muslim law, as there is no minimum age of marriage for Muslims and child marriages are possible (although rare), under the law. This exclusion was justified on the ground that the, "Muslim community is entitled to be governed by their own laws, usages and customs and it would not be productive to aim at a level of uniformity which does not recognize adequately the different cultural traditions and aspirations of the Muslim community."

Current national machinery for women

Together, the Ministry of Women's Affairs, the Women's Bureau, and The National Committee for Women comprise the national machinery for women in Sri Lanka; however, their roles and responsibilities vary.

Ministry of Women's Affairs

A cabinet portfolio for Women's Affairs was created in 1983 due to lobbying by women's groups and activists. Responsibilities of the Ministry are primarily centered around the implementation of policies, plans and programs with a focus on women's empowerment. This includes the advancement of the quality of life for women, increased participation in national development policies,

and promotion of gender equity and gender justice. The Ministry is also responsible for the implementation the Women's Charter, while the Women's Bureau of Sri Lanka and the National Committee for Women are statutory institutions under the Ministry.¹ Throughout its twenty-five year history, however, it has more often than not been combined with another ministry; at present it functions within the "Ministry of Child Development and Women's Empowerment."

Women's Bureau

Created in 1978, the Bureau was originally housed under the Ministry of Plan Implementation, though it now functions under the Ministry of Women's Affairs. The Women's Bureau is more project-based than the Ministry, and focuses mainly on issues of income generation and raising awareness.

The Women's Charter

As mentioned above, Sri Lanka is a signatory to CEDAW, without reservations, and adopted a Women's Charter in 1993. The Women's Charter was created as a means of translating the CEDAW commitments into a Sri Lankan context. The Charter spells out more detailed steps the State should take in ensuring the equal rights of women. Seven areas of concern specific to women in Sri Lanka are highlighted, they include: civil and political rights; the right to education and training; the right to economic activity and benefits; the right to healthcare and nutrition; rights within the family; the right to protection from social discrimination; and the right to protection from gender based violence. The Charter also provided for the establishment of a National Committee for Women whose formulation was a collaborative effort of the national machinery and women's NGOs. Despite its importance, the Charter remains a document with no legal force.

National Committee for Women (NCW)

The National Committee for Women is comprised of a Chairperson and experts from fourteen sectors, all appointed by the President for a period of four years; ten staff members; a legal officer with eight support staff; an Executive Director, also appointed by the President; and the Secretary of the Ministry of Women's Affairs, who serves as an ex-officio member of the Committee. Together, their mandate is to monitor and ensure the implementation of provisions as stated in the Women's Charter. The NCW accomplishes this through their powers of policy formulation, awareness raising and advocacy. A Gender Complaints Unit has also been established to receive complaints on gender-based discrimination.

National Plan of Action for Women

In late 1995 and early 1996, the Ministry of Women's Affairs and the National Committee for Women formulated the National Plan of Action for Women in Sri Lanka. Through several key measures, the National Plan of Action reflects the critical areas of concern set forth in the Beijing Platform for Action. The Plan identifies problems and issues, sets goals for their solution, recommends strategies and activities, and is responsible for the identification of implementing agencies. There are eight sectors in which programs under the Plan were proposed, they include: violence against women, human rights and armed conflict; political participation and decision-making; health; education and training; economic activities and poverty; media and communication; environment; and institutional strengthening and support. Since its inception, the Plan was revised in 1998 and 2000.

Litigation under current processes

In the last 28 years of the Fundamental

Rights Chapter, there have only been two cases of gender discrimination filed in the Supreme Court. In the first case, a female doctor was subjected to suspension from her internship and later transferred when she made an allegation of rape against a male colleague who worked in the same state hospital. The case was settled out of court and the female doctor obtained the relief she wanted. In the second case, a Sri Lankan woman who was married to a non-Sri Lankan challenged the regulations that discriminated against foreign male spouses obtaining a resident visa. Following the decision in this case, these regulations were amended.

The creation of a National Commission for Women would hopefully establish a clear and accessible pathway of reporting and action if such cases are brought forward in the future.

Establishing the National Commission for Women

Writing of the Draft Bill

The need for legislation to convert the National Committee on Women to a National Commission with greater powers was raised in 1994. At that time, draft legislation was formulated but shelved. The matter was again taken up in February 2004 with the Ministry of Women's Affairs publishing a document titled, "The Draft Bill on Women's Rights (Sri Lanka)." Once the draft was published, the Ministry called for views on the document from women's organizations and the public. A consultation was also held with women's groups to discuss the Bill further. The general consensus coming out of these consultations was that the Bill was not well conceptualized both in terms of its objectives and the institutional framework it

outlined, and therefore should be revised.

As a result, a small Technical Committee was created to review the Bill and prepare a new draft that could then be finalized for presentation to Parliament. The Draft Bill prepared by the Technical Committee was submitted to the National Committee on Women and the Ministry of Women's Affairs in October 2004. The Bill was approved in November 2004 and was subject to a few changes.

Key Provisions of the Draft Bill on the National Commission for Women

The Draft Bill reflects and recognizes Sri Lanka's commitment to women's rights under the Constitution, the Women's Charter, and international instruments ratified by Sri Lanka. In fact, the Women's Charter is an annex to the Bill.

The proposed procedure for appointment of members of the National Commission mirrors the procedure of appointments to other independent commissions in Sri Lanka. The members are appointed by the President upon recommendation of the Constitutional Council.² The Commission consists of nine members who have distinguished themselves as leaders in areas varying from law and development to environment and the media, with a commitment and proven track record of having worked to advance women's rights and gender equality. Each member will hold office for a period of four years and can be eligible to hold office for a further four-year term. Out of the nine appointments, three will function as full time members. The Bill also lays down distinct procedure for the removal of Commissioners; however, there are substantial safeguards in place against arbitrary removal.

Functions of the Commission

The role of the Commission, as envisaged by the Bill, primarily focuses on quasi-judicial responsibilities, research, and education, advising, monitoring, and networking. The ability of the Commission to carry out these duties is only possible with sufficient authority. The proposed "powers" of the National Commission are: to carry out investigations, call for reports, or intervene in any proceedings regarding the infringement or imminent infringement of women's rights; to conduct public inquiries in relation to women's rights; to conduct programs for the empowerment of women and the advancement of women's rights; establish regional offices; take steps as directed by the Supreme Court, or any other court, in respect of any matter referred to it by that court; award in its absolute discretion, to an aggrieved person such sum of money as is sufficient to meet the expenses that may have been reasonably incurred by her through making a complaint to the Commission; to call for annual reports from relevant bodies on measures to implement the Women's Charter and other rights recognized by this Act in areas within their purview; and finally, to forward a report to Parliament at least once in every year on its activities and the achievement of its objectives.

The investigative provisions of the Bill are devoted to spelling out, in more detail, the Commission's powers of inquiry and investigations that relate to the infringement of women's rights. The Bill strives for substantial powers of investigation, including the ability to summon witnesses and to take action against those who do not appear before the Commission or fail to submit evidence. The Bill recognizes a very broad concept of standing. It is envisaged that complaints to the Commission can be made not only by a

person acting in their own interest, but also by anyone acting on behalf of another person, acting as a member of or in the interest of a group or class of persons, acting in the public interest, or, an association acting in the interest of its members. The Commission will be able to investigate complaints against both State and non-State actors. Lastly, it is authorized to enter any place of detention in which a woman is being detained.

In relation to finances, the Bill seeks to establish a fund entitled the “National Fund for Women” which will include allocations from the national budget, independent grants and donations, and proceeds from sale of movable and immovable property.

Remedies for violations and enforcement

When an investigation conducted by the Commission discloses an infringement, or imminent infringement, there are several procedures that can be followed. First, the matter can be referred for conciliation or mediation with the agreement of both parties. Second, referrals can be made to the appropriate authorities to remedy the “violation” and recommendations can be made for prosecution or legal action. Lastly, other appropriate relief may be granted if determined just and equitable.

At this time, the enforcement of recommendations and decisions of the National Commission are through the High Court in the province where the complainant resides or to which the subject matter of the finding relates. The drafters of the National Commission for Women envision this to be a high power, independent Commission.

Current status of the National Commission for Women Bill

As of December 2007, the Draft Bill for the National Women's Commission is still being revised and the new version has not been available for general public discussion.

Conclusion

The need for a National Commission for Women with greater powers is critical for the continued protection and promotion of gender equality and women's rights in Sri Lanka. Within the current gender machinery, there remains an overlap between the Ministry of Women's Affairs, the Bureau, and the National Committee for Women. As a whole, the national machinery for women is still much marginalized from the national decision-making processes to the national planning processes. Gender discrimination remains a category that is not addressed frequently in litigation and hopefully, through the introduction of the National Commission for Women, the focus on and legitimacy of gender equality issues will become more prevalent in the Sri Lankan system of governance.

Endnotes

- 1 The official site of the Government of Sri Lanka: Ministry of Child Development and Women's Empowerment, http://www.priu.gov.lk/Ministries_2007/Min_Child_Dev_womens_empower.html, viewed on November 14, 2007.
- 2 Constitutional Council - The 17th Amendment to Sri Lanka's Constitution was unanimously passed in Parliament in 2001 to stipulate independent supervision over important appointments in public service. This constitutional amendment mandated a process of appointments to several key commissions and offices through approval by a 10-member Constitutional Council (CC).

Introduction

The following five annexes are additional works from contributing authors to this volume of the WLUML Dossier. These documents are meant to serve as easy to read references, which may provide insight, guidance or practical information regarding National Women's Machinery / National Gender Machinery.

Annexe I provides a broad overview of common challenges and obstacles that reportedly face many women's mechanisms. It provides a non-exhaustive list of relevant issues that can be addressed when establishing new machinery or when assessing those that already exist.

Annexes II, III, and IV were extracted from the original paper that was presented by Professor Dr. Dagmar Oberlies. Annexe II provides applicable questions and steps to keep in mind when designing and carrying out research to benefit / support gender mechanisms and legislation. Annexe III is comprised of questions intended for ministries when mainstreaming gender, and, Annexe IV is the European Commission's three-step guide to gender mainstreaming.

Annexe V details the outcome from provincial consultations, held in Pakistan in 2001, to gather data on the perception of the Pakistan National Commission on the Status of Women. This is a useful table that highlights both commonalities and differences in the various Provinces within Pakistan. It serves as an indicator that regional needs and wants may differ, and that measures developed to advance the rights of women, need to take this factor into account.

The topic of mechanisms and structures to advance women's human rights is one that has been discussed and written about, then discussed and written about again. This can become a circular conversation, one that is flooded with lessons learned, failures and accomplishments – yet the demand for further discussion and the need for greater communication and information remains. WLUMI's focus on this issue is but one response to this demand. This Dossier, in attempting to provide a broad overview of measures taken in different contexts, also highlights the challenges that are faced. This annexe briefly sets out some of the more common challenges identified in the papers.

It would be unfair to suggest that there is no growth and little improvement in the development of mechanisms for the advancement of women. Globally, the level of awareness is rising. One can often find the term “gender” or “women's” nestled amongst the titles of government institutions and certainly within the programmatic realm of NGOs, international organizations and UN agencies. The question that arises is: with all of this attention, awareness, and promotion, why are there not more coherent, well resourced, and efficient structures in place?

1. Mandate and Functioning

Overburdened – this word is the common rhetoric when describing the mandates of national women's machineries. The role women's machinery play is unique in many societies. Because of this “unique position” most issues regarding women and the implications of gender are placed within the national women's machinery. These understaffed and underfunded mechanisms are often handed an impossible mandate. In many instances, the mandates lack clarity, have unidentified boundaries, and undefined limits. It has been argued that the mandates for gender equality need to be reviewed and focused, and that the effort to implement the mandates, must be intensified.²

Also their access to influential structures and to power-brokers within government is critical. In many cases, women's machinery is expected to monitor government policies, yet they are housed within the government and often receive government funding. All organizations and units working with issues related to women's empowerment and gender equality must complement each other, not overlap and duplicate their work, in order to secure efficient use of resources and effective implementation.³

2. Independence and Accountability

The independence of women's machinery is crucial to their legitimacy, both at the state and non-state levels. Maintaining independence may require that the NWM/NGM be housed separately, not within a ministry building. This also helps the machinery to have a more objective monitoring and reporting role with reference to government policies, planning, and programmes.⁴ Independence also reduces the risk of commission members holding positions within other

¹ This annexe was prepared by Rashida Manjoo and Kristen DeRemer

² From the Norwegian Mission to the UN – statement from Ambassador Johan Løvald on Mandate Review: “UN needs to deliver on gender mainstreaming” 01/06/2006
http://www.norway-un.org/NorwegianStatements/PlenaryMeetings/20060601_gender_mandatereview.htm

³ id at 1.

⁴ Aurat Foundation and Shirkat Gah. *Strengthening the National Commission on the Status of Women: A Consultative Process*. 2001. Paper presented at the International Conference on “Mechanisms and Legislation to Promote and Protect Gender Equality” Malaysia, 2006.

ministries or government responsibilities. The obstruction to decision making and implementation of policy, and the inappropriate funneling of funds are but a few of the issues that can also be avoided if such structures are able to manage their resources and function autonomously.

How are the responsibilities of the NWM/NGM enforced once the structure is place, and who ensures the machineries act accordingly and effectively? In order to determine the success or failures of the mechanism, a formal system of monitoring and evaluation must be in place as a means of quality control. In some contexts, Parliament is the body that has oversight over such mechanisms. The challenge in such contexts is for the implementation of effective oversight policies. An existing women's movement can also play a role in accountability and oversight functions. As we have learned, NWMs/NGMs have many roles to play and their expectations are vast. The ability to monitor the progression of such mechanisms once they are put in place is vital to their successful implementation. It is important to track progress and determine the weak points in methodology and implementation, this allows for causal links between policies/programmes and their results to be monitored and improved upon.⁵ Both those who are working to design and implement gender equity policies, and those funding these initiatives, need to be able to monitor the impact of their work.

3. Membership Criteria and Selection Process

With regard to appointments, the issue of patronage (both political and social) is a challenge. This can lead to people without appropriate skills being hired to perform what is essentially a specialized task. Without regulation or monitoring of appointment procedures, the selection process can result in unqualified and members who are not committed to the work. Prior to the selection process, criteria for assessing potential members must be determined. This can include, amongst others, past experience, level of commitment to promoting gender equality, maintaining a geographical representation based on their constituency, other appointments/posts the potential member may be holding congruently that could lead to a duality of interests or disagreements on policies and principles⁶, compensation (if any) and benefits should also be determined during this time.

The process under which members are selected is equally important as identifying the criteria to determine their validity. As the Pakistan experience illustrates, there is an urgent need for transparency, as in the absence of this factor, the government unilaterally can appoint people without a consultative process, formal interviews, or civil society influence. It is suggested that members be selected by a committee representing various governmental and civil society representatives, and that an independent observer is present during the vetting and interview process to ensure proper procedure and that transparency is maintained. In the case of South Africa, nominations for the Commission are sought from the public. These are then reviewed by a Joint Committee of Parliament, which makes the final selection after an interview process, and then submits the list to Parliament for a vote on the recommended candidates. The final list is then sent to the President for the purpose of appointment.⁷

5 EGM/National Machinery/2004/BP.1. United Nations, Division for the Advance of Women. Background Paper on The Role of National Mechanisms in Promoting Gender Equality and the Empowerment of Women: Achievements, Gaps and Challenges for the Future: 31 January 2005. Available online at, <http://www.un.org/womenwatch/daw/egm/nationalm2004/docs/background%20paper%20rev,RJ%2012.12.04.pdf>

6 id at 3.

7 id at 3.

4. Resources (financial and human)

Lack of resources, particularly an adequate budget, is perhaps the most common criticism relating to the inability of NWMs/NGMs to fulfil their mandates effectively. Despite efforts in promoting national machineries for the advancement of women, the UN has not been able to hold states accountable for the failure to adequately resource such mechanisms and structures. Furthermore, the UN does not serve as a good role model, as its own gender machinery is 'weak, fragmented and under-funded'.

There are typically two resources for allocating funds that women's machineries rely on: their own government budgets and international donors. At the outset, some national machineries will have a reasonable budget allocated by the government. However, in many instances, over time these resources are slowly tapered (sometimes drastically) leaving the machinery without adequate funding. The reliance on donors for funding can be a significant constraint. Generally, relying on external donors results in certain consequences. It takes ownership away from the state and also sometimes puts the donor expectations and priorities ahead of the needs and plans of the national machinery. Dependence on donors can also lead to uncertainty of long-term programming and the inability to develop sustainable structures. This process also insinuates a competition for resources with other institutions and potentially with women's organizations.

Many types of machinery raise the issue of a lack of capacity of members and staff to cover the huge mandates. This can be partly linked to the lack of funds and political will to strengthen NWMs; and also a lack of skills within such machineries. Often the commissioners/members of these structures are unpaid and not compensated for their efforts. In some contexts, the obligation is viewed as a sense of duty and volunteerism of good will, and the appointment is seen as a sign of honour. Clearly this raises concerns about the commitment of the government, to ensuring mandates are met and implemented. The capacity, consistency and dedication of members and staff of such structures, may also be in question if there is no incentive for effective performance, other than sheer good will.

5. Political Will/ Responsiveness of Government

Despite the attention drawn to the advancement of women, and the support many governments profess in ensuring this happens, there is often a lack of real commitment. Anne Marie Goetz argues that though promises are made, in reality, many [governments] would agree that there is nothing to fear from women, i.e. comparatively, women don't typically represent a highly mobilized, well resourced, nor powerful constituency. Goetz further asserts, that this allows many governments to make important political gains at the international level by espousing their support of increasing gender equality *without* serious risk of being held accountable, let alone being expected to operationalize the promises made in top-level gender sensitive rhetoric.⁸ This is a fairly common argument that is shared globally. Women across the globe have united and pushed for change in world conferences, through state level gender mainstreaming, and community awareness-raising. Yet, the success stories are few and the frustrations are many.

⁸ Anne Marie Goetz. "National women's machinery: state-based institutions to advocate for gender equality". *Mainstreaming gender, democratizing the state? Institutional mechanisms for the advancement of women*. Shirin M. Rai (ed.). Manchester University Press: United Nations, 2003. P. 91.

In situations where there is a lack of political stability, changing of leadership and a gap between commitment and implementation, the challenges of support for national machineryes will increase. The concept of “women’s issues” has often been a superfluous notion – something to be dealt with later when the “serious” political issues have been addressed. The impression is that there are other, more pressing issues that need attention first, placing women’s issues on a backburner to be revisited another time. This view often leads to a failure of long-term commitment by the state.

6. Social, Cultural and Religious Factors

The evolving nature of societies and people therein, requires that mechanisms currently in place must be able to maintain the momentum of societal needs, emerging issues and the impact they will be having on the lives of women and men. The need for a structure that can have the foresight and ability to envision these changes is necessary.⁹ National mentality and stereotypes can be barriers to overcome, as pointed out by the paper from Central and Eastern Europe. In that context, the perception that gender equality was already achieved, and that mechanisms were sufficiently in place, hindered the acceptance of further advancement of women’s rights policies.

In some countries, regulations and awareness of equal opportunities is increasingly present within governmental bodies. But on a social level, dismantling the traditional images of women and men is a process that takes time. This requires the development of both laws and policies, but also strategies of campaigns and awareness raising. The Division for the Advancement of Women highlights that, “with the rise of social conservatism in many countries and a weakening of women’s movements... This again is a constraint on the work of the national mechanisms as the social conservatives promote a vision of gender relations and women’s rights which are at odds with the gender equality perspectives of the women’s movements”.¹⁰

Religion may, in some instances, impact gender equality legislation and structures. In the case of Australia, the Sexual Discrimination Act has an exemption that allows discrimination by religious bodies in ordaining, appointing and training priests, ministers and participants in religion. Religious educational institutions are also free to discriminate on the basis of sex, marital status and pregnancy in employment of staff if the discrimination is “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”.¹¹ The joining of secular and non-secular women’s rights activists can bring about stronger advocacy on the potential harms that ensue when such religious exemptions are granted.

7. Relationship with Women’s Organisations/ Women’s Movements

The impact that national machineryes have on civil society varies widely. In some instances a collaborative relationship is achieved between them, yet in others the relationship becomes

⁹ Id at 7.

¹⁰ Division for the Advancement of Women. *The Role of National Mechanisms in Promoting Gender Equality and the Empowerment of Women: Achievements, Gaps, and Challenges for the Future*. United Nations. EGM/National Machinery/2004/BP.1. 2005.

¹¹ Sarah Charlesworth. *Legislation and Mechanisms for Promoting Gender Equality: the Australian Experience*. 2006. Paper prepared for the International Conference on “Mechanisms and Legislation to Promote and Protect Gender Equality” Malaysia, 2006.

adversarial. A seemingly unintended outcome of many such structures is their negative impact on civil society and women's movements. Rather than working together to build a strategic advocacy agenda, failed communication and a lack of trust take root. The benefit for civil society can be minimal if national machineries are not willing to coordinate and encourage participation and access to key players in the state sector.

In some contexts, for example South African, the NGM actually impacted negatively and hindered the impetus and development of a women's movement. Sometimes such structures are viewed as an alternative to women's movements, instead of being seen as conduits and channels to achieve the goal of advancing women's rights. Also, many women's organizations and movements mistrust the intentions of governments and their policies and hence, they view any alignment with the national machineries, as risky, as in many instances it is unclear whom the machinery ultimately represents. Coordination amongst women's NGOs/movements and the national machinery is essential to the achievement of coherent policies and forward-looking strategies. Having one another's buy in can greatly increase the strength and momentum of policies and mechanisms for the advancement of women.

Turkey in recent times is one of the few examples where the growth of the NWM has spurred increased coordination and stimulation to the continuation and growth of women's groups and lobbies. Because of the implementation of NWMs, women have found their platforms, have established support mechanisms, and are able to lobby the government and donors. This rise in civil society has made space and resources available to the NWM to focus on new and emerging political and social needs of women.¹²

12 Nuket Kardam. *The role of national mechanisms in promoting gender equality and the empowerment of women: Turkey Experience*. Paper prepared for the Division for the Advancement of Women "The role of national mechanisms in promoting gender equality and the empowerment of women: achievements, gaps and challenges" Rome, 2004. Published by the United Nations, January 2005.

Annexe II Designing a Needs Assessment

Below, is a practical reference tool of key questions and steps for conducting gender disaggregated research and the process for developing gender legislation. The following points serve as guidelines for the process of design and assessment.

Preparation of the assessment

- Develop your key question
- Define the research objective and key question
- Identify the existing bodies of research and gaps that need addressing. These can be gender-specific knowledge gaps or a particular need for more extensive information.
- Develop a research concept
- Consult experts [gender parity]
- Express the key research question in concrete terms
- Discuss the research method, keep the key question and objective in mind
- Assess existing, or gather new data through:
 - a. Questionnaires written/oral [people seeking legal advice, practitioners of law, members of the public, etc.]
 - b. Survey: qualitative data [numbers = coded information] quantitative data [text = judgments, files]
 - c. Participatory observation [police intervention, court proceedings, etc.]
- Check the key question and methods for gender specificity

Grant proposals and research

- Formulate a call for research proposals, paying particular attention to gender-specific questions and research methods that involve female perspectives
- Inquire about gender expertise and check proposals to see whether the concept is:
 - a. gender-sensitive
 - b. the recorded data is consistently gender-disaggregated
 - c. gender-specific distortion effects can be detected
- Ensure the participation of women researchers
- Accompany the study
- Discuss the range of research instruments (access to both genders)
- Select target group/material to be assessed

Quality control of data

- Enable special crisis management when there are problems with gender-disaggregated information
- If needed, establish a research advisory board (gender expertise)
- Evaluate and interpret the data, final report
- Check to see whether all data has been [consistently] evaluated from the point of view of the gender groups
- Check to see whether all possible insights are included.
- Are the results presented in a gender-sensitive manner or are they discriminatory?
- Are gender differences portrayed in visual depictions?

Dissemination and implementation

- Publication of results
- Discussion by political experts
- Implement the results through awareness raising, amendments to legislation, etc.

Legislation

Gender impact assessment

- Who is being addressed/benefited?
 - How many of them are women, and how many are men?
 - What basic data do we have?
- What factors lead to the observed gender differences? How can the observed factors and their undesirable consequences be influenced in order to bring about more gender equality?

Consultancy procedure to draft legislation (Perspective of Women's Ministry)

- Determine the subject of regulation.
- Evaluate available data/information and problem analysis.
- Formulate objectives and approaches including all stakeholders (Government representatives, Civil Society, experts).

Determining a policy paper

- Draft legislation based on the policy paper drawn up by a legal expert.
- Hold a cross-departmental consultation on the working level.
- Discuss proposal with experts and representatives of civil society (written statements, hearings, seminars, workshops) and documentation of the objections and results.
- Technical revision of the draft legislation based on the discussions and final decision by senior.

Management of draft legislation

- Present to the cabinet for final consultation (further revision if applicable).
- Submit to Parliament.
- Submit to commissions for consultation (if needed, further revision).
- Discuss and adopt the draft legislation in plenary.

Key questions and strategies for law drafting

- What exactly needs to be regulated? What relation and what significance does the question have to the life situation of men and women and for the relationships, opportunities, and balance of power between the two gender groups in society?
- Why is this legislation being sought and what is its objective? What significance is accorded to gender equality in this respect?
- What expectations will the client be exposed to [interest groups, donor community, the client's own clientele, party interests, etc.]? What fears does the client have? What is the worst-case scenario?
- In what kind of legal/social/cultural contexts will the discussion take place? What is the mood in society with regard to the topic? What is the legal situation? Is there a readiness to include gender issues?
- Where are potential lines of conflict? Who is for and who is against the proposal? What impact do the opponents of this type of proposal have? Is there recognizable/known resistance to the implementation of a gender-balanced solution?
- Who are [potential] allies? Are there opportunities for strategic alliances?
- Is there the implementation of a gender-balanced solution?
- What restrictions can be predicted; for example, lack of funds, unfavourable legal situation, other political frameworks, missing information?
- What is the technical capacity of the project (of the counterpart side in particular)?
- How is gender expertise assured?

Steps for participatory decision-making

Step One

- Identify and record a common goal.
- When formulating the goal, give consideration to the extent to which the legislation can help to address discrimination against women in society and/or increase opportunities for men/women.

Step Two

- Agree upon the problems to be addressed. To achieve this, it is helpful to make a list of the actual state (= problem) and the target state (= solution). The desired target state should be accepted by as many stakeholders as possible. Again, it must be considered how the legislation will impact on women/men. It has been shown to be helpful when problems are - jointly - prioritized. This permits a better assessment of the maximum and minimum demands.

Step Three

- Identify the possible solutions that could lead from the actual state, to a desired target state. In this discussion, it is always important to consider alternative solutions and to document them. Here, gender also plays a role in as far as not all solutions need to be equally good for both genders.
- It is extremely important to sound out the limits of reasonableness for the stakeholders. These limits serve as the “guardrails” of the process. This step, too, has gender relevance: the traditional understanding of gender roles v. the idea that men and women are equal.

Reminders

- In the end, the agreed points should be listed in a framework policy paper. If this is not possible, a statement should be prepared illustrating the various opinions.
- It is very important to document the process the course of the discussion. Including, who was represented by the stakeholders, and the agreements that were reached.

Monitoring and evaluation

- Does the legislation directly/expressly affect women (and/or men)?
- Are the women/men affected only indirectly (i.e., statistically more frequently but not exclusively) by certain provisions?
- In what areas of life [family/work] will the effects or the desired changes take place? Does this indicate that men and women will be affected differently?
- Is the legislation intended to address a social problem that can affect the gender groups differently [e.g., family/work balance, domestic violence]?
- Are the provisions linked to certain behaviour? Could this result in disadvantages for one gender group?
- Does the legislation underscore the traditional roles of men and women [or leave them unchallenged] or is it suited to increase the degree of freedom, especially of women, in society?
- Are the assumptions about the impact of the legislation and the targeted changes based on data, estimates, general experience, or pure speculation? Are these assumptions generally shared or is there disagreement concerning the factual situation or its assessment? Avoid negative effects in laws.
- Could the legislation have viewed the factual basis differently, i.e. without gender-based discrimination? Which facts? How?
- Could the legislation have arrived at a different conclusion in the context of applicable law? What conclusions, under what conditions?
- Can a different legislation – without gender-based discrimination – only be reached if the legal situation changes? What changes would be required?

The German Government obligated all ministries to mainstream gender into the rules and internal procedures of their political activities. The guided questions and concepts that were developed to assist in the assessment of this, and other like processes include the following:

Gender impact assessment of Draft Legislation

- I. Targets and effects of regulations:
 - a. Who is the target group?
 - b. Does it target men/women exclusively?
 - c. Does it affect more women/more men?
- II. What is the subject matter?
 - a. What areas of life does it engage [family/work]?
 - b. Does it address a social issue?
 - c. Is it linked to a certain behaviours?
- III. What is the objective?
 - a. Does the legislation enforce traditional roles?
 - b. Is the regulation directed to social change?
 - c. Is it answerable to special needs?
- IV. What is the basis for the decision-making?
 - a. Provide facts
 - b. Speculations/assumptions/stereotypes
- V. What are the consequences?
 - a. Special protection?
 - b. Affirmative action?
 - c. (Comparative) Disadvantages?
 - d. (Direct or indirect) Discrimination?

Diversity Management: examples

- Maternal leave; military service restricted to men
- Part-time work; dependent spouses; experience
- Child-care; business
- Domestic violence
- Violent behaviour (predominantly male)
- Tax reduction for “dependant” spouses
- Affirmative action
- Financial assistance to single mothers
- Statistics, estimates, studies, and assessments
- Common knowledge; personal experience
- Legal protection against violence
- Quota (for one sex/ethnic group/disabled persons)
- Quota (for the other sex); job experience; “personality”
- Exclusion; insensitivity

Step 1: Gender Proofing

Gender proofing can be accomplished by checking the gender relevance through studying sex-disaggregated data. Asking the right questions is an important process in this step: Does the proposal concern one or more target groups? Will it affect the daily life of part(s) of the population? Are there differences between women and men in this policy field (with regard to rights, resources, participation, values and norms)?

Step 2: Gender Impact Assessment

In this step the differences between women and men are assessed through evaluating: participation (sex-composition of the target, representation in decision-making); resources (distribution of time, space, information, money, and power); norms and values which influence gender roles, division of labour by gender, the attitudes and behaviour of women and men respectively, and inequalities in the value attached to men and women or to masculine and feminine characteristics; rights, anti-sex-discrimination, human rights, and access to justice.

How can policies and activities contribute to the elimination of inequalities and promote equality? This could be through participation, resources, benefits, tasks and responsibilities, value and attention.

Step 3: Implementation and Monitoring

Step three aims to provide key provisions for ensuring the sustainability of gender equality. The following key components should be taken into consideration: providing resources; informing and mobilizing stakeholders; anchoring responsibility; training and awareness raising for key personnel; creating and maintaining gender-responsive structures; monitoring and benchmarking data and statistics by sex.

Annexe V

Provincial Consultation Outcomes from the International Conference on National Commissions on Women – Islamabad, Pakistan 2001

The following table provides a synopsis of recommendations gathered from consultations in: the North West Frontier Province (NWFP), Punjab, Sindh, and Balochistan Provinces of Pakistan. This data reflects the perceptions gathered in 2001 of the Pakistan National Commission on the Status of Women. Participants included: government representatives, councillors of the respective provinces, NGO and CBO members, and civil society representatives.

	NWFP Consultation	Punjab Consultation	Sindh Consultation	Balochistan Consultation
Separate Roles for NCSW and MoWD	<p>Clearly demarcate roles and responsibilities of NCSW and MoWD.</p> <p>NCSW: Separate secretariat proper budgetary allocation.</p>	<p>Emphasised need to differentiate between roles of NCSW and MoWD.</p> <p>NCSW: a consultative, recommendatory and monitoring body of all the government's (including MoWD) policies and their implementation.</p> <p>MoWD: Responsible for undertaking initiatives in consonance with NCSW recommendations and the presence of a watchdog body, not only for the MoWD, but the government as a whole - housed separately to ensure their implementation through all line departments</p>	<p>Clearly differentiate between the roles of the MoWD and NCSW.</p> <p>MoWD: Plan, implement and monitor development programmes and policies.</p>	<p>NCSW and MoWD should be separate entities performing independently of each other in accordance with their prescribed roles.</p> <p>NCSW: Independent watchdog body, with statutory powers to get recommendations implemented Supported by Women's Development Departments in: a) Information b) Coordinating linkages c) Networking between NCSW and its offices in the country.</p> <p>Provincial NCSW Chapters be established and given autonomy.</p> <p>A steering committee can assume the coordinating role between MoWD Women's Development Departments (WWD) and NCSW.</p>
Membership Criteria and Selection Process of NCSW	<p>Nominees should: come from civil society, ex-government officials, and media. They must have a track record on women's rights issues and be specialists in their relevant areas.</p> <p>At least one member should be from the minorities of Balochistan or NWFP. Members should be full-time, paid salaries, and receive other benefits.</p>	<p>Commission members should be full-time with no other portfolio. They must have knowledge of women's issues.</p> <p>Grassroots representation stressed. No age and/or educational qualification criteria; no mandatory presence of religious representation; no ex-officio member necessary. If included, should not have the right of vote membership applications be notified in the media.</p> <p>A "board" comprising Parliamentarians and civil society representatives should select commission members, the majority should be women.</p>	<p>Strong criteria for membership open to all applicants. Special committee including civil society representatives for selecting members. Members should be full-time, get paid salaries and given other benefits.</p> <p>No member should hold any other public office this avoids confusion and ensures full attention to the NCSW work. No ex-officio members should be included other than the member-secretary; if ex-officio members are included, they should not be voting members.</p>	<p>Chairperson must be full-time and not hold any other public office. Must possess knowledge of law. Member-secretary should be regular full-time employee with a minimum of 15 years experience in legal matters.</p> <p>Membership should be reduced (ref. to Indian example). Selection on merit not quota for mere representation (ref. to South African example). Absentee members should be dropped. Rural background is an essential criterion. Relevant experience and practical involvement also be considered. No need of representation by Council of Islamic Ideology or any such type.</p>

	NWFP Consultation	Punjab Consultation	Sindh Consultation	Balochistan Consultation
Functions	<p>Accountable to Parliament; Members to elect chairperson; Chairperson not to have sole discretion over financial matters; NCSW audit be made public and part of annual report, and annual report be made public; Networking be extended to Tehsil and at District level; Women councillors be integrated into the gender focal points</p> <p>Undertake advocacy campaigns via seminars, workshops, symposia etc. on crucial women's rights issues.</p> <p>Produce monthly newsletter and conduct annual reviews of performance.</p>	<p>Chairperson should be nominated/elected by the commission members.</p> <p>It is important to collaborate with district level institutions and develop linkages with civil society.</p>	<p>Report to Parliament</p>	<p>Training of members for unity of perspective and understanding of Commission objectives; strengthen NCSW and government partnership; have budgetary allocation. Establish similar commissions/bodies at provincial and district level in line with the devolution plan.</p> <p>Maintain close interaction with all institutions of civil society, develop and conduct information/education programmes and foster public understanding on crucial women's issues.</p> <p>Rules of Business suggested: Indicators to evaluate the performance of commission members and Commission itself; conflict resolution mechanism; task force/sub-committees for each function.</p> <p>The Commission be completely free in formulating its rules of business and the government's approval should not be compulsory in this regard.</p>
Ensuring Government Responsiveness	<p>Government departments to submit reports to the NCSW on implementation of recommendations. Cite reasons/justifications in case of non-compliance. A joint parliamentary committee/ cabinet committee mooted to ensure monitoring of government action on NCSW recommendations. Present annual reports of activities and achievements. Suggestions should be implemented within a specific time period.</p>	<p>Formation of federal, provincial and district level committees comprising public and civil society organisation representatives to function as the link and facilitator between the NCSW and government departments and to act as a pressure group.</p> <p>Establish a Parliamentary standing committee to promote and pursue NCSW recommendations.</p> <p>NCSW should be represented in the Parliament and Senate. Submit biannual reports accessible to public.</p>	<p>Parliamentary committee for the NCSW to promote its recommendations.</p>	<p>All state functionaries are made bound to assist the Commission in discharge of its responsibilities through some mechanisms. The government must explain in writing, any delays or non-implementation of Commission's recommendations.</p>

	NWFP Consultation	Punjab Consultation	Sindh Consultation	Balochistan Consultation
Mandate and Rules of Business	<p>Is consulted with and gives consent on all laws, policies, programmes and matters related to women before finalisation.</p> <p>Must entail women's full participation in socio-economic and cultural development at regional, national and international levels.</p> <p>Include monitoring and ensuring implementation of international treaties and conventions to which Pakistan is signatory. Empowered to monitor departmental work related to women's development.</p>		<p>Strengthened NCSW with a presence down to the grassroots level. Able to intervene in matters of individual complaints and injustices as well as in cases of women's collective problems; should have judicial or quasi-judicial powers; special focus on women in state custody.</p>	<p>Should work for institutional integration of women and in providing equal opportunities to them in every sector.</p> <p>Add "cultural practices and customary law" in Section 7, sub-section B, and addition of word "implementation" at the end of its sub-section A.</p>
Authorities and Powers	<p>Suo-motto powers to call any person for the purpose of investigation, information and prosecution.</p> <p>Powers to penalise a person failing to cooperate with the NCSW in providing information during investigations, defaming the NCSW or hindering/obstructing its activities. Have summoning and investigative powers.</p>	<p>Suo motto powers to address incidents of women's rights violations and authority to summon and investigate individual and collective cases.</p>	<p>Strengthened powers to effectively monitor all government policies and programmes; and consultative status in policy setting and law making.</p>	<p>Empowered to approach the president or Parliament regarding any urgent matter relating to its functioning or powers. Powers to penalise any person not complying with the commission's orders or violating its rules. Powers (under CPC) to summon any person or attach any document. Suo motto powers, to take action and ensure recommendations are implemented</p>
Rules of Business	<p>Quarterly meetings</p> <p>Chairperson may call a meeting upon the request of any member, wherever a critical urgent situation arises.</p>			

Contributors

Aurat Publication and Information Service Foundation

Aurat Publication and Information Service Foundation (AF) is a civil society organization working for women's empowerment and citizens' rights. Aurat Foundation works with local partners in each of the 104 districts of Pakistan and has the largest district level network in the country. Through collaboration with citizen's groups and organizations, they provide information, build capacity, and undertake advocacy for women's issues. AF is catalyzing critical groups in society to influence policy, legislation, and programs for women's greater economic and political power in society.

Website: <http://af.org.pk/mainpage.htm>

Zarizana Abdul Aziz

Zarizana Abdul Aziz is a practicing lawyer in Penang, Malaysia. She is actively involved in numerous human rights and women's rights activities nationally and internationally. Her primary areas of interest and expertise include issues around law reform and incorporation or international human rights standards into domestic laws. Zarizana is a director of Women Living Under Muslim Laws (WLUML), former President of the Women's Centre for Change, Malaysia, and is deputy chairperson of the Human Rights Committee of the Malaysian Bar Council.

Sara Charlesworth

Sara Charlesworth is a Senior Research Fellow at the Centre for Applied Social Research at RMIT University. She has a background in social work, industrial relations and legal studies. Sara's research interests centre on gender (in)equality in employment.

She is currently working on projects around the workplace impact of industrial relations and anti-discrimination regulation, the intersection of work and family with job quality.

Kristen DeRemer

Kristen DeRemer has been working on issues related to gender and human security for the past several years. Her international experiences have taken her to Uzbekistan, Thailand, Laos, Rwanda and Northern Uganda where she has worked with a variety of local women's organizations in grassroots development, rights development and education, UNIFEM, UNICEF, and research institutes. Ms. DeRemer holds a masters degree from the Fletcher School of Law and Diplomacy.

Chulani Kodikara

Chulani Kodikara is an activist and researcher working on women's rights issues in Sri Lanka. She is the author of "Muslim Family Law in Sri Lanka: Theory, Practice and Issues of Concern to Women and Women and Governance in Sri Lanka".

Rashida Manjoo

Rashida Manjoo recently completed a two-year Fellowship at the Human Rights Program at Harvard Law School. She is an Advocate of the High Court of South Africa and a former commissioner of the Commission on Gender Equality (CGE), a constitutional body mandated to oversee the promotion and protection of gender equality. Prior to being appointed to the CGE she was involved in social context training for judges and lawyers, where she has designed both content and

methodology during her time at the Law, Race, and Gender Research Unit—University of Cape Town and at the University of Natal, Durban. Ms. Manjoo remains an Associate in the Law Faculty of the University of Cape Town. She was also an active member of the Women's Caucus for Gender Justice in the International Criminal Court and remains an Advisory Board member. She is a member of the Women Living Under Muslim Laws Network.

Ayesha Mir

Ayesha Mir is the Programme Coordinator for Shirkat Gah's Women Law and Status (WLS) Programme, Karachi. As the Programme Coordinator her responsibilities include the overall management, coordination, planning and implementation of the WLS Programme in Sindh and Balochistan besides guiding and supervising the WLS team in Karachi and supervision of any WLS publications, reports and researches. Ms. Mir also liaises with donor agencies, government departments, NGOs, Community Based Organizations, and coordinates with the three Shirkat Gah offices and WLS teams. Actively involved in the Beijing + 5 Review Process in Pakistan initiated and led by Shirkat Gah, she was a Focal Person responsible for coordinating provincial and national consultations, as well as Pakistan NGO delegations' participation in South Asia, Asia Pacific, and to the UN Special Session. Recently Ms. Mir was involved in the CEDAW process and part of the SG delegation presenting the Shadow Report at the CEDAW session in New York in May 2007.

Dagmar Oberlies

Dagmar Oberlies is a Professor at the Frankfurt University of Applied Sciences in the Department of Social Work with a specialization in criminal law, criminology, international human rights, and legal mechanisms against discrimination. She has been working actively in the fields of law, counselling, mediation, research, writing, policy advising, and university education since 1984, and is the author of both academic and non-academic publications on various issues within law. Ms. Oberlies has been engaged in volunteer work in developing countries since 1975. This has included working extensively with women's organizations, involvement with women's movements, and serving as a member of the board for women's lawyers associations on women's rights and protection issues. Her international career spans India, Cambodia, Afghanistan, the United Kingdom, and Malaysia. Ms. Oberlies is a legal expert to the German Bundestag and the Hessischer Landtag; she is experienced in law drafting and the author of five major laws. In 2005/2006 she was a visiting professor at the International Islamic University, Faculty of Laws in Kuala Lumpur, Malaysia.

Anuradha Rao / IRAW

At the time this paper was presented, Anuradha Rao, was the Executive Director of the International Women's Rights Action Watch (IRAW) Asia Pacific. IRAW Asia Pacific was formed in 1993 as a human rights organization that contributes to the progressive interpretation, universalization, implementation and realization of women's human rights through the lens of CEDAW and other international human rights treaties. Working with a human rights approach, the work focuses on experiences of women

Contributors *(continued)*

from the South. IWRAP Asia Pacific works regularly in twelve countries in South and Southeast Asia.

Website: <http://www.iwraw-ap.org/>

Jessie Rossman

Jessie Rossman is currently clerking for Judge Raymond Fisher, Circuit Court Judge for the Ninth Circuit. Ms. Rossman is a 2007 magna cum laude graduate of Harvard Law School. Previously she worked with the American Civil Liberties Union of Michigan, and has various civil rights experiences, including; the Center for Constitutional Rights in New York, the Association for Civil Rights in Israel, and the Gay and Lesbian Advocates and Defenders of Boston.

Pethu Serote

Pethu Serote is a Development Consultant working in the field of gender equality and women's empowerment. Her career includes university lecturing, secondary school teaching, adult education and journalism. She has worked extensively in the NGO sector in South Africa and the SADC Region, and was the founding Director of Gender Education and Training Network (GETNET) in 1995. Her contribution to the field of gender equality has been the development of the "Social Construction of Gender Framework" (for GETNET) and the development of the "Triangle for the Intersection of HIV/AIDS, GBV and Poverty with gender" (also for GETNET). Ms Serote was appointed the South Africa country consultant to do a capacity needs assessment of the National Gender Machinery (NGM) and propose how to strengthen its capacity and effectiveness (2003-4). She was contracted as a content

advisor for the gender mainstreaming manual for the South African government, by the Office of the Status of Women in the Presidency (2004/5) and has served as a Commissioner on the Presidential National Commission on Information Society and Development (2003-4).

Farida Shaheed

Farida Shaheed is a sociologist and the Coordinator of Shirkat Gah - Women's Resource Centre in Pakistan. She developed and runs Shirkat Gah's legal consciousness programme that seeks to change laws and policies while simultaneously building grassroots capacity through legal awareness, paralegal trainings, legal counselling/assistance and networking. A founder member of the Pakistan's national lobby, Women's Action Forum that led women's resistance under a decade of martial law (1977-88), she is one of the coordinators of the international network for information, solidarity and support: Women Living Under Muslim Laws. Her extensive publications focus on intersecting issues of women's rights, customs and religion, state, governance and development. In 1989 her co-authored book "Two Steps Forward One Step Back? Women of Pakistan" won the Prime Minister's award. In 1997 she received the Second Annual Women's Human Rights Award of the Women Law & Development International.

The Shirkat Gah – Women's Resource Center

The Shirkat Gah – Women's Resource Center was formed in 1975 as a collective to integrate consciousness raising, with a development perspective, and to initiate projects that turn

advocacy into action. Empowering women by increasing their access to information, resources, skills and decision-making is a process they have used to influence and bring positive change to policies, laws, and practices - gender is a crosscutting theme across all their programs. Working with a rights based perspective the programmatic areas include: Women Law and Status; Women and Sustainable Development; Green Economics and Globalization; and Reproductive Health and Reproductive Rights.

Website: <http://www.shirkatgah.org/index.htm>

Tan Sri Dato' Seri Siti Norma Yaakob

Tan Sri Dato' Seri Siti Norma Yaakob was appointed a Judge of the DIFC Courts in January 2008. She retired as Chief Judge of Malaya in January 2007 having held office since February 2005. After qualifying as a Barrister in London in 1962, she was appointed as a Senior Assistant Registrar in the Kuala Lumpur High Court the following year. Before becoming Chief Judge, she held a series of senior judicial and legal positions in Malaysia including that of President of the Sessions Court, Kuala Lumpur; Chief Registrar of the Federal Court, Malaysia; High Court Judge, Malaya; Judge of the Court of Appeal, Malaysia; and Judge of the Federal Court, Malaysia.

She was President of the Association of Women Lawyers in 1976-77, and President of the Judicial and Legal Service Officers Association between 1979 and 1981. She has served as a Council Member, a Regional Vice-President and President of the Commonwealth Magistrates Association, and as Secretary, Governing Council Member,

and Executive Council Member of the Asian Law Association, as well as being a Member of the Judicial and Legal Service Commission.

Tan Sri Dato' Seri Siti Norma Yaakob has represented Malaysia at many international conferences and seminars including Commonwealth Magistrates Conferences, Commonwealth Law Ministers Meeting, the International Conference of Appellate Magistrates, and the United Nations' 29th Commission on the Status of Women.

She is also an Eisenhower Fellow and presently holds the position of Vice-President of the Eisenhower Fellows Association of Malaysia. She also serves as a Pro-Chancellor, University of Malaya, sits on the Board of four companies and is very active in the running of two charitable foundations. In late November 2007, the Master Benchers of her alma mater, Gray's Inn, London elected her as an Honorary Benchers of that Inn.

Anna Wilkowska-Landowska

Anna Wilkowska-Landowska is a human rights lawyer from Poland. She specializes in women's human rights and co-operates with various human rights NGOs (i.e. NEWW, INTERIGHTS), as well as with intergovernmental organizations. In 2005 she worked as a legal consultant for the United Nations Development Fund for Women (UNIFEM) on developing a programme focused on the implementation of gender equality laws in the countries of Central and Eastern Europe and the Commonwealth of Independent States. Ms. Wilkowska-Landowska represented a Polish applicant at the European Court of Human Rights in Strasbourg, in a case concerning abortion

Contributors *(continued)*

procedures in Poland (Tysiac v Poland, in which the Court decided there had been a violation of Article 8 of the Convention). Currently she is cooperating with UNIFEM as International Consultant on Women's Economic Rights in the project entitled "Accountability for Protection of Women's Human Rights".

Women's Center for Change

Established in 1985, the Women's Center for Change helps women and children facing crisis by providing immediate service for those needing crisis intervention. Developing programmes to promote gender equality, WCC provides confidential counselling services, temporary shelter, legal advice in matters concerning the rights of women and children, and offers assistance with reaching medical, police and welfare assistance. Activities undertaken by the WCC include: conferences, seminars and exhibitions; awareness building in the community; dissemination of information and educational materials; and fundraising campaigns.

Website: http://www.wccpenang.org/wcc/index.php?option=com_frontpage&Itemid=1

Anna Wu

Anna Wu is the advisor to the Law School of Shantou University, which is supported by the Li Ka Shing Foundation. Ms Wu's role is to develop a strategy to position the Law School to meet the emerging needs in Southern China. She has established the Cheung Kong Centre for Negotiation and Dispute Resolution in Beijing and Shantou, and promoted systematic training in alternative dispute resolution in China. Recently, on behalf of the Centre and the Law School, she

has entered into a long-term program with the National Judges College in Beijing for the training of judges. Amongst other things, Ms. Wu is also a lawyer and an independent non-executive director of the Tom Group, a member of the Law Reform Commission of the Hong Kong Special Administrative Region, and a member of the Women's Leadership Board at the John F. Kennedy School of Government at Harvard University. Previously Ms. Wu served as a Legislator and the chair of the Equal Opportunities Commission of Hong Kong.

About WLUML

WLUML is an international network that provides information, solidarity and support for all women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.

The network aims to increase the autonomy of women by supporting the local struggles of women from within Muslim countries and communities and linking them with feminist and progressive groups at large; facilitating interaction, exchanges and contacts and providing information as well as a channel of communication.

حوائیہ زیرِ اِشْراسِ مُسْلِمِ قَوَانِیْنِ
 Women living under muslim laws
 النساءُ فی ظلِّ قوانینِ المسلمینِ
 Femmes sous lois musulmanes

WLUMI