

Without Prejudice

CEDAW and the determination of women's rights
in a legal and cultural context


Edited by Meena Shivdas and Sarah Coleman

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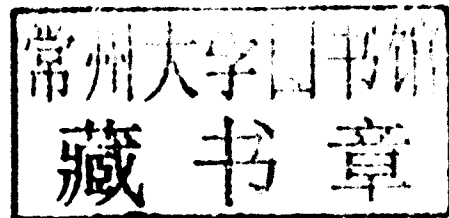
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Abbreviations and acronyms

ADR	Alternative Dispute Resolution
AfCHPR	African Charter on Human and Peoples' Rights
CARICOM	Caribbean Community
CAT	UN Convention Against Torture
CC	Constitutional Court
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women; also Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CJ	Chief Justice
CLB	<i>Commonwealth Law Bulletin</i>
CLR	<i>Commonwealth Law Reports</i>
CMJA	Commonwealth Magistrates' and Judges' Association
CSW	Commission on the Status of Women
DCJ	Deputy Chief Justice
DVA	Domestic Violence Act (South Africa)
ECHR	European Convention on Human Rights
FGM	female genital mutilation
FMJ	Federal Ministry of Justice (Lagos)
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
J	Justice
JA	Judge Advocate or Judge of Appeal
JCA	Justice Court of Appeal
JHRLP	<i>Journal of Human Rights Law and Practice</i>
JJA	Juvenile Justice Authority

JP	Justice of the Peace
JSC	Justice Supreme Court
KLR	<i>Kenya Law Reports</i>
KWJA	Kenya Women Judges Association
MMR	maternal mortality rate
NGO	non-governmental organisation
NWLR	<i>Nigeria Weekly Law Reports</i>
OIC	Organisation of the Islamic Conference
OP	Optional Protocol (to CEDAW)
PNG	Papua New Guinea
PoA	The Commonwealth Plan of Action (PoA) for Gender Equality 2005–2015
QC	Queen's Counsel
SADC	Southern African Development Community
SC	Supreme Court
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UNESCO	UN Educational, Scientific and Cultural Organization
VAW	violence against women
WHO	World Health Organization
WILDAF	Women in Law and Development in Africa

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Part I: Background

1. Introduction

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Justice Section, Commonwealth Secretariat*

The Commonwealth, with its broadly shared legal heritage – reflected in a political, geographical and culturally diverse landscape – presents both opportunities and challenges for the advancement of women's rights in judicial and quasi-judicial realms.

CEDAW – the UN Convention on the Elimination of All Forms of Discrimination against Women – is a powerful international human rights instrument that reflects a global determination to achieve gender equality through advancing women's rights. To date, all Commonwealth member states in Africa, Europe and the Caribbean, along with 82 per cent of member states in the Pacific, have ratified CEDAW.¹

In almost all Commonwealth constitutions that make provision for the protection and promotion of fundamental human rights and freedoms, the following elements are generally to be found:

- The right to life, liberty, security of the person, equality before the law and the protection of the law,
- Freedom of conscience, expression, assembly and association,
- The right to privacy in personal and family life, and
- In nearly all cases, the right to property.

All these rights and freedoms are guaranteed regardless of race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest. However, turning aspiration into reality presents many challenges, particularly in relation to the process of adjudicating on women's rights in both legal and cultural contexts. The need for addressing cultural and gender stereotyping in the course of judicial and quasi-judicial processes to enable a fair determination of women's rights is widely recognised.

The Commonwealth Secretariat, through the mandate received under the Plan of Action for Gender Equality 2005–2015, has embarked on a programme to address the fair determination of women's rights in the context of gender, culture and the law. In order to reconcile customary norms and religious perspectives with more formal judicial processes, national laws and CEDAW, the Secretariat engages in dialogues and

1. Dr Purna Sen (ed.) (2008) *Human Rights in the Commonwealth: A Status Report*. London: Commonwealth Secretariat.

projects with ministries of gender affairs/women's affairs and justice/law, judges, magistrates, traditional chiefs, religious leaders and women's legal networks.

This publication forms part of the effort to promote dialogue and share information within the Commonwealth and beyond. It identifies the approaches adopted in various Commonwealth jurisdictions to meet the range of cultural and legal challenges relating to the implementation of CEDAW. Also included are Commonwealth declarations in support of CEDAW and information on key initiatives under the gender, culture and the law project.

This practical guide will inform and assist judges, adjudicators, lawyers and activists to advance the implementation of the principles of CEDAW within jurisdictions connected historically by the application of the common law.

2 Thoughts on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Christine Chinkin, London School of Economics

The story of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) comes out of many decades of women's activism and organising around issues such as the abolition of slavery, suffrage, trafficking, the peace movement and, in many countries of the Commonwealth, nationalism and struggles for independence. However, the move for the adoption of an international treaty dedicated to the elimination of all forms of discrimination against women – to achieve formal (legal) and de facto (real) substantive equality for women with men in all areas of life in recognition of their human rights and fundamental freedoms – was to build upon and strengthen the prohibition of discrimination (including on the basis of sex) contained in the UN Charters – the United Nations Declaration of Human Rights¹ and the 1966 International Covenants.²

Why does CEDAW matter?

I think CEDAW is a revolutionary document for women for reasons both at the time of drafting and in the way it has evolved.

At the time of its adoption, the Covenants did not define discrimination. CEDAW provides a definition of discrimination,³ which closely follows that of the Race Convention.⁴ The definition has been adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights and is now widely accepted as the authoritative international law definition. It covers direct and indirect discrimination (intent and effect), equality of opportunity as well as formal equality, and disadvantageous discrimination that nullifies or impairs enjoyment by women of their human rights.

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1. See United Nations Doc. A/RES/217 (III).
 2. See International Covenant on Civil and Political Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm> [last accessed 10 May 2010] and International Covenant on Economic, Social and Cultural Rights (ICESCR) <http://www2.ohchr.org/english/law/cescr.htm> [last accessed 10 May 2010].
 3. See Article 1, United Nations Doc. A/RES/34/180.
 4. See United Nations Doc. A/RES/2106 (XX).

CEDAW requires positive action from states and provides a legal basis for temporary special measures, targeted steps to promote equality and to redress historic discrimination. It tackles the idea of cultural stereotyping and prejudice and requires states to take measures to modify social behaviours and the dominant ideology of patriarchy. This is a unique provision in human rights law, with an educative and social engineering function.

CEDAW also encompasses the totality of rights as it takes a comprehensive approach to non-discrimination. It identifies where women suffer from discrimination most and requires appropriate measures for its elimination in the public and the private (family) spheres, regarding civil and political rights and economic, social and cultural rights such as in the fields of education, health and employment. It has a free-standing 'equality before the law' clause. It also identifies the particular position of rural women – a clear link to issues of development.

CEDAW is now close to having universal membership. It was supplemented by the adoption of the Optional Protocol (OP) in 2000, which enhances the monitoring mechanisms by allowing for individual communication and a form of inquiry against structural discrimination. The Protocol also aligned CEDAW with the International Covenant on Civil and Political Rights (ICCPR), the Committee on the Elimination of Racial Discrimination (CERD) and the Convention Against Torture (CAT).

The adoption of the Protocol perhaps indicates the way in which CEDAW has grown in authority since its adoption. In the 1980s, it was called the 'Cinderella treaty', the poor relation in the body of UN human rights treaties, because of the vagueness of its language, its weak monitoring system (which was restricted to state reporting) and its association with the Commission on the Status of Women (CSW) rather than the Commission on Human Rights (CHR). However, some committed members of the CEDAW Committee worked to give effect to it as a living instrument, subject to dynamic and progressive interpretation through General Recommendations, Concluding Comments and jurisprudence under the Optional Protocol. This work, along with a commitment towards gender mainstreaming in the UN, has resulted in the Convention now having a greater authority and weight.

Let us turn to the way the Committee has developed both the Convention and its implementation. First, while the Convention itself does not refer to gender-based violence against women, the Committee clarified in 1992 that such violence is discriminatory of itself, and undermines women's enjoyment of all other rights. Accordingly, it is contrary to women's human rights and states' obligations apply to it. This analysis also assisted in the development of international criminal law where rape and sexual violence have become recognised as war crimes and crimes against humanity.

Second, the Committee has clarified states' obligations as both negative and positive. In particular the Committee has adopted the typology of layered obligation, requiring states to respect, protect and fulfil the obligations of the Convention.

Part I: Background

Third, the Convention is used as a tool for advocacy and lobbying – as demonstrated by women activists across the world. It provides the language of entitlement and a framework for empowerment. There are many examples where states have responded to constructive dialogue with the CEDAW Committee and have changed legislation or administrative practices – for example, with the adoption of domestic violence laws. It is not argued that the Committee's work is the only basis for change, but it offers 'an articulate voice in the form of concluding comments [that has] helped to promote political will and the campaign of gender advocates and women's groups who lobbied the state to initiate reform.'⁵ There are also examples where judges have applied and reinforced the principles of CEDAW (see chapter 12, summaries of case law).

Given the above, in my opinion, the Commonwealth's Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994 (see chapter 11) should be reaffirmed – perhaps reworked – to remind judges of states' obligations under international law and to create what might be called a 'travelling jurisprudence on women's rights that can fertilise domestic law in other jurisdictions'.⁶

Note

Nonetheless, CEDAW is only an effective tool for advocacy where the state has demonstrated the political will to comply with the Convention – a will that is discounted by reservations. This is why it is important that reservations be scrutinised and withdrawn, or at least narrowed and made more specific.

What CEDAW does is to provide a framework and a language which gives a basis for work between states and the Committee through dialogue, advice and examples of good practice to address obstacles and work towards full implementation. This is especially important today, when other challenges threaten to undermine its importance – for example, those of the adverse consequences of globalisation and extremist ideologies. The need to reassert and reaffirm the principles of CEDAW is ever more important for the lives of women throughout the world.

5. Savitri Goonesekere in Hanna Beate Schopp-Schilling and Cees Flinterman (eds.) *The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination against Women*. New York: The Feminist Press at CUNY.

6. Ibid.

