

Equality and Non-discrimination: The Two Essential Principles for the Promotion and Protection of the Human Rights of Women

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Ms. Carole Petersen, Associate Professor and Director of the Centre for Comparative and Public Law (CCPL), opened the conference and introduced the Keynote Speaker, Ms. Shanthi Dairiam, the Executive Director of the International Women's Rights Action Watch – Asia Pacific.¹ Ms Petersen noted that the goals of the conference included:

1. To increase awareness in Hong Kong of the importance of the Convention on the Elimination of All Forms of Discrimination Against Women² (which we will generally refer to here as “CEDAW” or the “Convention”) and international standards of equality.
2. To facilitate the development of a working relationship between the Hong Kong women's movement and the International Women's Rights Action Watch – Asia Pacific.
3. To assess the situation of women in Hong Kong, focusing on those issues where better implementation of CEDAW and the recently created Women's Commission could make a difference.

Ms. Shanthi Dairiam: Keynote Speech

The principles of equality and non-discrimination are essential principles for the promotion of women's rights. When discussing these principles, you cannot avoid

¹ See the website (<http://www.iwraw-ap.org>) of the International Women's Rights Action Watch – Asia Pacific for additional information on the organization. The website also provides substantial information on CEDAW, the activities of the CEDAW Committee, and guidance on how NGOs can participate in the CEDAW enforcement process.

²GA Res 34/180, 1249 UNTS 13, available (together with additional information on CEDAW) on-line at www.un.org/womenwatch/daw/cedaw/frame.htm. See also the resources on CEDAW on the website of the Centre for Comparative and Public Law, the University of Hong Kong at www.hku.hk/ccpl.

mentioning the Convention on the Elimination on all Forms of Discrimination Against Women. The Convention is premised on these two principles and all the work of my organization is done through interpretation of these principles, by learning through the work of the CEDAW Committee, its interpretations of CEDAW and the jurisprudence that has developed.³ For me, CEDAW is practically synonymous with the principles of equality and non-discrimination.

Although progress has been made in many societies, we find that the disparities in well-being, status, rights and power between men and women continue to persist.⁴ The reason why we decided to work on CEDAW is because we felt this was one treaty that perhaps held some promise, because it guarantees equality and non-discrimination. We decided to premise our work on these principles, to give us a better opportunity to address the persistent nature of inequality. It is particularly important that the Convention calls for the elimination of discrimination in all fields, not only in the public sphere but also in the private sphere.

CEDAW gives women's rights activists a very good theoretical framework to identify barriers to women's advancement, to identify needs and measures for action, and to assess accomplishments. Very often, there is a lack of an adequate framework in the work related to women's rights. It tends to come in bits and pieces and to be very *ad hoc*, and there is no theoretical underpinning as to why a particular approach is better. We need a theoretical framework and this treaty gives us that.

The need to deal with the system rather than the symptoms

³ A complete set of General Recommendations of the CEDAW Committee, dealing with various aspects of the Convention, is available at the Treaty Body Database on the website of the Office of the United Nations High Commissioner for Human Rights (www.unhchr.ch). [Click "Treaty body database" on the site map, then click "CEDAW Committee" and choose "General Comments."]

⁴ For detailed analyses on the impact of CEDAW in ten different jurisdictions, see Marilou McPhedran, Susan Bazilli, Moana Ericson and Andrew Byrnes (eds.), *The First CEDAW Impact Study: Final Report*, (Centre for Feminist Research and the International Women's Rights Project, York University: 2000) [Available electronically from the CCPL website (www.hku.hk/ccpl). Click "CEDAW in Hong Kong" to find the link to "CEDAW Impact Study on-line," which takes you to the website of International Women's Rights Project of York University listing a number of other resources including the CEDAW Impact Study].

There is a need to go beyond a single issue in which we may be interested. Instead, we must attempt to unravel the pernicious structural and dynamic process of discrimination that underpins the various manifestations of inequality. There is a tendency to put labels on people when we start to help them, such as “asset-less,” “landless” or “the illiterate.” However, we do not know the story behind the labels. Why is that person so, and what are the underlying reasons? There is a tendency to look at these manifestations and deal with them separately. Yet the problem has to be dealt with holistically. We must address several institutions at the same time—family, market, community and the state. These institutions interact and reinforce this web of discrimination, facilitating a denial of responsibility and a state of helplessness, because discrimination is so pernicious. An example of such a situation is when a state builds schools but the family does not send the girl child to study; the state will say “we have done everything; it is beyond our control”. But the Convention is unequivocal in its demands. The measure of state action to secure the human rights of women and the indicators of state progress in this regard lie not just in what the state does (such as building schools) but more importantly in what the state achieves (the level of progress).

How can this obligation be implemented in practice? In Bangladesh, in spite of progressive state policies in education and the availability of education, it was found that parents in rural areas were reluctant to send their girl children to school because the majority of teachers were male; being a conservative society, parents would not allow their girls to be educated by men. The government rectified the situation by introducing the policy of having sixty percent female teachers to overcome the cultural barrier. This is an example of why there has to be a constant questioning as to why, despite so many interventions, equality still eludes us. There are always various levels of impediments that have to be addressed and removed.

Substantive (not merely formal) equality

By demanding the practical realization of rights, CEDAW promotes the substantive model of equality, which includes equality of opportunity, equality of access to opportunity, and equality of result or outcome. Understanding the concept of equality of access is critical

because this is where discrimination normally occurs. Opportunity is, by and large, created but there is an impediment to availing it. The acknowledgment that discrimination has to be eliminated is based on the understanding that discrimination is socially constructed and that it is not an essential or natural principle of human interaction. This recognizes the need for and paves the way for concerted action against inequality and the institutional mechanisms, which perpetuate it. It also paves the way for proactive positive measures. So it is not just enough to prohibit discriminatory practices. Rather, we must focus on what could be the enabling issues, so as to put in place a positive responsibility on the state as well.

How does the Convention look at discrimination?

Article 1 of the Convention defines discrimination as anything—restriction, exclusion or distinction—which is based on sex and has the intention or the effect of denying women the exercise of rights.⁵ This is a very useful yardstick for measuring discrimination. Although there is no article on violence against women in the Convention, the CEDAW Committee has brought domestic violence and trafficking into the purview of the Convention, as forms of discrimination against women. The rationale: all forms of violence deny women a whole range of rights, and therefore constitute discrimination. It is important to look at everything that has the effect of denying women their rights, although there may not be an intention to deny rights. So, neutral laws and policies treating men and women at par may seem to be non-discriminatory, but could be discriminatory because women may be at a disadvantage as compared to men due to existing inequalities. This approach helps us to identify the weaknesses of formal or so-called neutral laws and policies. Opportunities presented through formal equality, which manifest themselves in gender-neutral policy or law, may actually discriminate against women. For example, an aquaculture development project in a South Asian country presented itself as an “equal opportunity” project, providing, on the same basis, access to training and other technical inputs to become fish farmers. The criteria, which was applied equally to men and women, was that aspiring participants should own their own ponds. This automatically discriminated against women,

⁵ Complete text of CEDAW is available at the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.unhchr.ch/> [Click “treaties” to get a list of human rights instruments arranged thematically].

who do not inherit property because of the weakness in the law. Thus the neutral application of the requirement actually constituted unintended discrimination against women. Similarly, in Australia, a neutral retrenchment policy of “last-in and first-out” was held to be discriminatory against women because it did not take into consideration the effect of the past discriminatory recruitment policies, which had denied women job opportunities. Equality also requires us to consider equality and sustainability of results, which involves ensuring a just flow of benefits to women.

In many countries, although it is now “uncivilized” to discriminate against women overtly, women continue to suffer from the effects of past discrimination. In Malaysia, for example, there are very few women judges. This is not because there are not qualified women in the profession but because some decades ago women did not go beyond becoming magistrates. Now they do not have the requisite number of years of experience and therefore cannot get appointed to the higher judiciary. That is true also in the civil service, although there is no policy of discrimination at present. The existence of conditions of eligibility that women cannot fulfill (for no fault of their own) and which privilege men have the effect of discriminating against women. The state is obligated to put in place some form of temporary special measures to help correct the effects of past discrimination.⁶ Courts in various jurisdictions are now more ready than before to strike down policies that are overtly discriminatory. But they are still reluctant to develop jurisprudence in favor of positive obligation. The courts need to move in this direction.

Impediments to promoting the idea of substantive equality

1. The notion of men being instinctively better: Unfortunately, people tend to believe this notion until you challenge them and ask for concrete examples as to how they are better. Another argument, found in almost all cultures, is that men are set out almost divinely to do certain things and that women must do certain other things, and that if you change this order of things you will upset the social fabric of life. This is presented as “complementarity”.

⁶ See *ibid.* for General Recommendation 23 (Politics and Public Life) of the CEDAW Committee, which elaborates on the state party’s treaty obligation to put in place temporary special measures to deal with past discrimination against women with regard to participation in public life.

The answer to such an argument is that you cannot be complementing each other if you are not equal. Two people may be doing different things but for them to be complimenting each other, their work must be seen as equal. Otherwise, you may be viewed as merely supplementing the mainstream work, leading to reinforcements of stereotypes. This has real consequences in terms of allocation of resources, entitlements, rights, privileges, powers etc. The notion of complementarity can be insidious and dangerous.

In Asia, religious and cultural factors are often indistinguishable. This creates a great deal of conflict of interest and a balance has to be maintained to ensure that women's rights are not sacrificed. To maintain such a balance, there needs to be an understanding of the processes by which a community and society create, maintain, reinforce and reproduce social relations between women and men as an element of group identity. This process of preserving group identity has invariably led to the social construction of discrimination against women.⁷

Kabeer and Subrahmanian explains that discrimination is based on social norms that come in the form of culture and tradition. These rules and norms are socially legitimized by all the institutions—family, market, state and community. These institutions combine their practices, creating links, and re-imposing discrimination against women through the allocation of responsibilities, roles, resources, privileges and rights on the basis of legitimacy of the norms. If men are seen as the main bread-earners and women as supplementary wage earners, then inheritance rights and better wages will go to men. The state does not require equal pay for equal value and at the family level sons are given better education opportunities, while women are supposed to fulfill their household responsibilities. The market reinforces this by employing men without giving them child support benefits. On the other hand, women who demand market place replacement of child caring are seen as unruly and they are not represented in the decision making process. Thus a web of discrimination is created.

2. Equality as a western conception: The other argument that comes from many governments has to do with the notion of equality being a western conception. They argue that the concept needs to be “adjusted” before it can be implemented in a particular society.

⁷ For an explanation of this phenomenon, see Naila Kabeer and Ramya Subramanian, *Institutions, Relations and Outcomes: Framework and Tools of Gender-Aware Planning*, (1996: IDS Discussion Paper 357).

My answer is that equality is a norm that is essential. It guarantees the potential for the fullest enjoyment of all rights for the individual and makes choice and autonomy possible. Equality cannot be adjusted. However, the CEDAW Committee does acknowledge the principle of progressive implementation. For example, the Committee does not expect developing countries to bring about universal literacy in one year. There is no comparison of the indicators of well-being between poor and wealthy countries. But *rights* are universal; they are not only for the West. So too is equality. However, the level of accomplishment of the fulfillment of the rights may be at different degrees of progression. Moreover, the methods applied to realize rights may have to be adjusted for particular societies.

3. Protectionist approach: There are several institutions and organizations in each government, each with their own interpretation of equality and they may tend to take a protectionist approach. They curtail freedoms of women in the name of protecting them from harm. A prohibition of night work is one example of this approach. Another example is an executive decision in Nepal prohibiting women from going abroad to work, justified as an attempt to protect them from being trafficked. Protectionist approaches are inherently limiting in that they do not challenge gender-based discrimination and the reasons why women are at risk. Rather, these approaches reproduce discrimination in the garb of protecting women. Protectionism serves to curtail women's freedom to work which men enjoy. It reproduces old myths that women are less safe at night or that violence against women only happens at night, and it thus frees the state from carrying out the obligation to secure the environment. Another example can be found in Croatia, where the government banned women with children less than 4 years old from doing overtime work. This policy simply reinforces old stereotypes and fails to make it a duty of the parents (instead of only women) to look after their children.

4. Claiming that women already enjoy full equality and that nothing more needs to be done. This is often the result of lack of norms and standards for equality. If there are welfare programmes of poverty alleviation or family planning programmes targeted towards women or in cases where the conditions of women such as in the areas of health, education or income are fairly good it is assumed by policy makers and the community at large that women enjoy equality. But in these situations, women's social positioning may still be

inferior. For example, their participation in public decision making and political participation may be poor, they are bunched up in the lower echelons of the job market, there is both horizontal and vertical labour market segregation, they are exposed to all forms of violence and have very little autonomy or decision making power at the personal level. There is therefore no equality.

5. Citing lack of resources and special circumstances: Governments often rely upon the lack of resources or prevailing social problems as a “justification” for not implementing CEDAW. For example, during the hearings before the CEDAW Committee, the Chinese national government emphasized the problem of over-population. Similarly, Iraq told the Committee that the country was under economic sanctions and therefore little could be done for the women. Nepal said that it was one of the poorest countries and had no resources. However, what this Convention requires is not to have a status of progress comparable to highly developed countries. Rather, it deals with the condition of women as against men. That is the context in which these issues must be considered. Thus, the question is: what is the government doing to ensure that the women are not suffering disproportionately where sanctions have been imposed? What is being done to protect women from violence, to make sure that they receive equal humanitarian services in situations of armed conflict? When states say that they have no resources, the states are asked to show that they have made the maximum possible effort for the realization of rights. Is there a plan, for example, to eliminate certain inequalities or deprivations? These governments normally do not have any such plan. The justification of lack of resources is, therefore, often seen by the Committee as invalid and as demonstrating a lack of good faith.

6. Weak institutional arrangements. Sometimes in spite of all efforts to create a positive environment for the promotion and fulfilment of women’s rights, the results are poor because of inappropriate institutional and procedural arrangements. The procedures for claiming rights may be cumbersome or the structures may be male dominated and hence hostile. Sweden for example has put in place excellent laws and policies to promote equality for women. Among other interventions, there is a law for equal pay for work of equal value. There is a council that evaluates jobs and decides its worth as against other jobs for purposes of equal financial remuneration. Thus there is a potential for midwifery to be evaluated to

be equal to a technical job. There is also a tribunal to which workers can bring their cases if they are not happy with the evaluation. But the council is male dominated and their evaluation of jobs do not necessarily give credit to jobs traditionally carried out by women and a case on the matter cannot be brought up to the tribunal by an individual but only through the trade union. But since the trade union is male dominated they do not on many occasions perceive a women's complaint as having merit.⁸

7. Weak constituencies of women. Effective implementation of the Convention is largely dependent on the political will of governments. This political will can only be created through a strong and highly conscious constituency, not only among women and women's groups, but within civil society and government bureaucracy as well. For this to happen, women have to organise themselves and speak with unity. They have to become a constituency that compels accountability from government and provide a counter balance to the more reactionary elements of society who may be contesting politically against women's demands for justice and equality. Women have to create the climate and culture that will be conducive for women. However, in many countries, women are divided and do not come together to show strength.

In Conclusion

The Convention does not automatically confer rights on women. Its promise can only be delivered if we learn to use it effectively in practice, thereby contributing to a jurisprudence of the Convention.

Much cynicism about the Convention exists, especially as in many countries, the principles of the Convention have not been incorporated into domestic legislation. But there are many examples of the use of the Convention in spite of this. Constitutions and national laws have been 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 it has been used where the law is silent to confer rights on women, and development policies have been formulated using the framework of the Convention.

⁸ Swedish NGO Shadow report to the CEDAW Committee. 25th session 2001

I will conclude with a few examples of the use of the Convention in Nepal and India. In Nepal, NGOs have successfully challenged the validity of discriminatory laws such as the law of inheritance, tenancy laws and immigration laws. In the absence of a law on sexual harassment, the principles of equality and non-discrimination of the Convention were used by the Supreme Court in India to develop guidelines for employers to prevent and address sexual harassment in the work place. An ambiguous phrase in the Hindu guardianship act in India was re interpreted to favour women as guardians. These are exciting developments.

All our governments are committed in principle to equality for women through the constitution and through various laws and policies. But it is the Convention that forces us to close the gap between law policy and reality.

The CEDAW Committee's review of Hong Kong's Initial Report under CEDAW (1999)

CEDAW was extended to Hong Kong in 1996 and the first report of the Hong Kong Special Administrative Region was submitted in August 1998.⁹ The CEDAW Committee reviewed Hong Kong's report in February 1999 (as part of its review of China's third and fourth periodic reports).¹⁰ The Committee expressed happiness about the enactment of Sex Discrimination Ordinance in 1995.¹¹ However, the Committee made a number of recommendations for better implementation of CEDAW, including the formation of a "high level national machinery, with appropriate powers and resources that will coordinate a focused policy for women and a long term strategy to ensure effective implementation of the Convention."¹² The primary mandate of such a body would be to

⁹See *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/CHN/3-4/Add.2 (also available on the CCPL CEDAW website and the website of the Health and Welfare Bureau, Hong Kong Government: <http://www.info.gov.hk/hwb/english/ARCHIVE/INDEX.HTM>)

¹⁰ See Moana Erickson and Andrew Byrnes, "Hong Kong and the Convention on All Forms of Discrimination Against Women", (1999) 29 *Hong Kong Law Journal* 350.

¹¹Cap. 480, Laws of Hong Kong. For discussion of the political and legal developments that led to the enactment of the Sex Discrimination Ordinance and the extension of CEDAW to Hong Kong, see Carole J. Petersen, "Equality as Human Right: the Development of Anti-discrimination Law in Hong Kong" (1996) 34 *Columbia Journal of Transnational Law* 335.

¹²See *Report of the Committee on the Elimination of Discrimination Against Women, Twentieth session* (19 January-5 February 1999), at Concluding Comments on the Initial Report on the Hong Kong Special Administrative Region, UN Doc

coordinate efforts to implement CEDAW in Hong Kong. (The Women's Commission was subsequently announced by the Hong Kong government in 2000 and established in 2001.)

Tasks for Hong Kong non-governmental organizations

One of the tasks that remains for Hong Kong NGOs (who did excellent work during the presentation of Hong Kong's initial report) is to evaluate the actions of the government post-review and to assess the level of success and achievements. The Committee talked about the structural impediments in the electoral system, low presence of women in statutory boards, the civil service, and the judiciary, and it supported affirmative action for better participation of women. The Committee also asked that marital rape be criminalized¹³ and steps be taken to ensure health and safety of sex workers. It further recommended that more be done to implement the concept of equal pay for equal work of equal value¹⁴ and that there be public consultation on the implementation of the Concluding Comments.

An important function for NGOs and civil society is that they should set the standards for achievement of many of these targets. The standards will be lowered if the government does this. Thus, NGOs should further provide information to the Committee on the manifestations of discrimination and what needs to be done to reduce them, monitor actions that are taking place and make sure that all women are benefiting from them.

A/54/38/Rev.1 (available at the Centre for Comparative and Public Law's CEDAW website, www.hku.hk/ccpl/cedaw/govt.html).

¹³ The government's original view (which may well have been correct) was that since the Hong Kong statute was based upon English law, a Hong Kong court would likely follow the decision of the English House of Lords in *R v. R* [1992] 1 AC 599, 614 and hold that non-consensual sex between married persons constitutes rape. However, the Committee's comment highlighted the lack of clarity on the topic and the need to expressly provide for this in the legislation. Thus, pursuant to the Committee's recommendation, a Bill aimed at criminalizing marital rape by amending the relevant provisions in the Crime Ordinance (Cap 200) was introduced in the Legislative Council in July 2001. See generally, Robyn Emerton, "Marital Rape and Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance" (2000) 31 *Hong Kong Law Journal* 415. As of this writing it appears that the government may now adopt a simpler approach, which will be to leave the concept of "unlawful" in the definition of rape but add language stating, for the avoidance of doubt, that rape within marriage is a criminal offence.

¹⁴ The Hong Kong Equal Opportunities Commission is currently conducting a study of this issue. For a discussion of the extent to which equal pay for work of equal value is required by law in Hong Kong, see Carole J. Petersen, "Equal Pay for Work of Equal Value: A Feminist Perspective", in *Proceedings - Equal Pay for Work of Equal Value: A Conference Organised by the Equal Opportunities Commission* (Hong Kong Equal Opportunities Commission 2000).

Women need to learn to claim their rights; in order to do this, we also need to create a democratic space for the issue to be raised.

Discussion and questions following Ms. Dairiam's speech

Responding to a question regarding the triple burden that women have to bear as participants in economic activities, Ms Dairiam agreed that economic participation adds to the burden of women. “But what we are also concerned about is economic independence, which has serious implications in terms of her own decision making, protecting herself from violence etc. There is great value in ensuring that women are economically independent.” Ms. Dairiam also noted that the Convention says that child bearing is a social function that women perform and that the society has to bear the costs. Article 5 (elimination of stereotypes) further states there has to be education regarding sharing of responsibilities between men and women. The Committee regularly questions governments on such issues. When the Croatia government said that it banned women with children under four from working over-time, the Committee said that if you want to ban, you should ban both mother and father. The issue of triple burden has to be constantly raised and monitored if new policies have been introduced, to make sure that there are no elements of discrimination, even when the policies are intended to be positive and generous.

Ms. Carole Petersen raised the issue of the Chief Executive's recent announcement that a primary focus of his second term would be the creation of more jobs. Women's organizations should make sure that jobs are created for women and not just in traditional sectors (such as construction) where primarily men work. This could be an issue that the Women's Commission could focus upon, especially as part of its current “gender mainstreaming” project.

Ms. Tessa Stewart asked if resorting to mediation to settle disputes under the Sex Discrimination Ordinance affected the exercise of rights. Mediation may not be an equal process, since women may give in earlier for the sake of harmony.

Ms. Petersen responded that there is a significant body of research showing that mediation can actually perpetuate power imbalances. One point to note about the process in Hong Kong is that the EOC does not choose whether to use mediation. The statute *requires* the EOC to attempt to conciliate any complaint under the Sex Discrimination Ordinance, except those complaints which should be discontinued. Thus, the EOC does not have the discretion under the law to take a case directly to litigation, even if it is a strong case. Indeed, the complainant cannot even apply for legal assistance from the EOC until conciliation has been attempted and failed. In theory, a complainant could bypass the EOC and file a complaint directly in the District Court (as this is an option under the law). However, in practice, most people need the EOC's assistance and thus are obligated to participate in conciliation. Our research on this topic, which is not yet complete¹⁵, suggests that certain steps could be taken to strengthen the position of the complainant in the process. One possibility is to find people to help them to articulate their complaint in the conciliation conference since the EOC officers are required to stay objective during the process and cannot advocate for one party during the conference. If the officer openly assists the complainant in the conference, s/he could be accused of bias by the other party. Another possibility would be to bring back the issue of whether we need an equal opportunity tribunal, as was proposed in Anna Wu's Human Rights and Equal Opportunities Commission Bill. If there was a low-cost tribunal available it might increase the bargaining power of the complainant in the conciliation process. Presently, the complainant does not know if she will receive legal assistance if she does not accept the settlement offer. The EOC does not have unlimited funds and cannot support all cases.

However, **Ms. Anna Wu**, chairperson of the Equal Opportunities Commission, noted that on occasions, the EOC had given time to the complainant to step out of conciliation and speak to the Commission lawyers. While the conciliator cannot tell the complainant what to do, s/he can encourage the complainant to look for legal advice.

Protectionism v Protection for Women

¹⁵ The research project is entitled "Enforcing Equal Opportunities In Hong Kong: A Study of Investigation, Conciliation, and Other Enforcement Mechanisms", supported by a grant from the Hong Kong Research Grants Council (principal investigator: Carole J. Petersen, co-investigators: Andrew Byrnes, Cecilia Chan, and Lynch, Katharine; Senior Research Assistant: Fong, Janice).

Ms. Dairiam responded to a question regarding protectionism by asking the participants to distinguish between protectionist policies and protection for women. In countries like India where there are many cases of custodial violence, there is a rule in the police force that no woman can be brought for interrogation between 6 PM and 6 AM. The question that needs to be asked is whether that policy denies them any right. If it does not, it should be supported. But we need to be careful about protectionist attitudes, which entrench disadvantages for women, such as banning women from certain kinds of work, banning them from travel, etc. Each case has to be considered by examining the effect.

Session Two: Comments by Panelists

Ms. Wai Ha Lam, the External Organiser of the Association for Advancement of Feminism, said that the lack of resources among women's organizations in Hong Kong results in the priority being put on the local level, rather than on the international mechanism. There are always pressing issues at the local level that require lobbying with the government. However, we tend to work without any theoretical framework and without a comprehensive analysis. Preparing the alternative report (for the CEDAW Committee hearing in 1999)¹⁶ gave us the opportunity to develop a more comprehensive approach. It was a good experience and an achievement (for Hong Kong women's organizations) because we all had to document our experiences and express our concerns. It also involved certain skills in terms of analysis, something that Hong Kong NGOs rarely do. Moreover, as a result of the alternative report, the Women's Commission became a reality.

Unfortunately, on the whole, the Hong Kong Government has done nothing for the implementation of CEDAW besides producing some materials. Women's organizations criticized these materials because they are not educative enough; they merely mention the

¹⁶ See *Submission to the CEDAW Committee on the Initial Report on Hong Kong Under the Convention on the Elimination of All Forms of Discrimination Against Women by Non-Governmental Organizations* (1998) (endorsed by Association for the Advancement of Feminism, Hong Kong Women Workers Association, Hong Kong Women Christian Association, Hong Kong Federation of Women's Centers, Association Concerning Sexual Violence Against Women, Hong Kong Association for the Survivors of Sexual Women Abuse, Family Ideal Community Education Project, Queer Sisters, Sitting, and Hong Kong Human Rights Monitor) (link available at the CEDAW website maintained by the Centre for Comparative and Public Law, <http://www.hku.hk/ccpl/cedaw/ngo-reports.html>).

name of the Convention. The standard position of the government has been that as long as we do not blatantly discriminate against women we are a liberal, free society. Every time an anti-discrimination bill has been introduced, the government argues that if we prohibit the employers too much investors will leave and Hong Kong will experience economic difficulty.

There is a lack of commitment on the part of the government in terms of initiative to implement CEDAW. There is very little space for advocacy in Hong Kong because democracy is very restricted, and there is a shortage of resources among NGOs. The NGOs were not widely consulted while preparing the CEDAW report. They were merely consulted on the headings, not the substance. Submissions were invited from NGOs but nobody knows how they were incorporated.

The government has formed the Women's Commission but in many ways it has gone against the recommendation of the CEDAW Committee. The Women's Commission is not a very high authority within government, as it is under the Health and Welfare Bureau. It has little resources since it is an advisory committee and the secretariat is very small. It does not have enough power and it has failed to work very closely with the NGOs. There is no collaboration with them. It has taken up most of the bad practices of the government and is very bureaucratic. There has to be a more constructive and productive relationship. Since the Commission monitors the work of the government regarding women, NGOs can be a very good source of feedback, but we do not want to be mere advisory bodies, whose advice is sought at the pleasure of the Commission. We want to be able to participate in the decision making as well. We would also like to have (unpublished) information about women's position in Hong Kong from the Women's Commission since it has direct contact with the government.

One of the difficulties with an international mechanism is that Hong Kong is considered a developed society and therefore the resources are not forthcoming in Hong Kong for international human rights work. Also, women NGOs are not well-equipped to analyze and produce comprehensive gender analysis on policies and services because we are generally pressed with our other areas of concern. We need to work a bit more with the

universities, because at the moment we do not do all that much work with the academics. We seem to be working separately.

Ms. Chan Yu, Director of the Hong Kong Federation of Women's Centres, said that Ms. Dairiam's lecture had forced her to look back at CEDAW, the perspective of which women's organizations in Hong Kong had lost in the last two years. The notion of gender mainstreaming, which became popular after the Fourth World Conference on Women (held in Beijing in 1995), means that everyone should be an expert on gender equality. But do people really know about CEDAW and gender mainstreaming? Gender mainstreaming is a process, a strategy to achieve equality. We need to learn more about CEDAW and its content as well as the Optional Protocol to CEDAW. We can then educate grassroots people as to what CEDAW entails and what it means. If we adopt CEDAW as a tool, we will need to consider women's issues from a rights perspective.

We also need to learn more about the partnership between the state and the civil society, and how the two can work for the implementation of the convention and education. Empowerment cannot be carried out without the NGOs because they have a lot of experience and are good educators for gender equality. Their experience should be taken into account.

Mandate and Work of the Women's Commission

Ms. Petersen commented that the terms of reference of the Women's Commission (which were set by the government) do not actually mention CEDAW.¹⁷ This is disappointing, given that the Commission was actually created in response to the concluding comments of the CEDAW Committee and is supposed to serve as the primary enforcement body for CEDAW in Hong Kong. The failure to mention CEDAW in the terms of reference says something about the Hong Kong government's approach to women's rights. "At hearings before international human rights bodies, the government will point to the Women's Commission as the implementing body for CEDAW; however, when it comes back to Hong Kong, it is not so keen to bring the international jurisprudence home."

¹⁷ See the Women's Commission's website (<http://www.womens.gov.hk/women>).

Certain legislators tried to add a specific mention of CEDAW in the Sex Discrimination Ordinance when the Bill was debated in the legislature. But the government did not want that in the law. It argued that the Convention was too vague to be referred to expressly in the local Ordinance. A specific mention of CEDAW would have been more helpful, although the EOC still does work related to it and relies on it in litigation. We should also start focusing on the role of the Women's Commission in educating and training women about CEDAW. The Women's Commission should think about how we can make training and education of CEDAW more effective.

Dr. Judith Mackay, a member of the Women's Commission, spoke (in her personal capacity) to explain some of the work that the Commission has been doing since its establishment. A good deal of energy during the past year has been spent in setting up the institution, making familiarization visits to NGOs, and being briefed by various parties on a wide range of different issues affecting women. The present focus of the Commission is on education, gender empowerment and gender mainstreaming. The Commission has produced a checklist for gender mainstreaming, currently approaching the end of its piloting stage. Further ideas that were suggested at the conference for gender mainstreaming were the chief executive's employment programme as well as the training fund. Based on her experience with civil servants, she believes that in many cases it is not that the government officials are actually against the idea of gender mainstreaming, but that they have never systematically considered gender perspectives before. She was optimistic that officials would adopt the idea of gender mainstreaming when encouraged to do so. For example, the Commission is asking all government departments to automatically keep data in a sex-disaggregated form when it obtains new data and government officials appear open to this idea.

The Commission is also dealing with various issues of women's empowerment, like getting more women on government boards, gender mainstreaming etc. But it has not really had the time and the opportunity to sit down and look at its framework under CEDAW.

Work of the Women's NGOs

Ms. Anna Wu, chairperson of the EOC, commended the work of the women's NGOs and added that because of their hard work a lot of things have been fought for and secured—like the Women's Commission. She noted that her suggestions to the government (to elevate the Women's Commission to the Chief Secretary's level and to change the name of the Health and Welfare Bureau, under which the Commission now belongs, to include Women's Affairs) were declined. But since the ministerial system is now being proposed, it may be that this is the right time to ask which minister is responsible for women's issues.

Hong Kong NGOs face a problem monitoring during the periods between reports to the CEDAW Committee. If NGOs could coordinate a yearly monitoring exercise, there would be more to say when the reporting date approaches and more pressure could be put on the government. NGOs can take the initiative and play a leadership role in this area. She also offered to provide certain EOC back-up resources (such as research and venue) to NGO workers working towards that end.

Ms. Wu noted that every time a rights initiative is taken, the government raises “cost to business” as a reason to oppose it. The argument should really be put the other way around: the cost occurs when they violate rights, not when they are protecting them. She also noted that although CEDAW is not mentioned in the Sex Discrimination Ordinance, as a matter of strategy, whenever the EOC litigates, the case is developed with the Convention obligations in mind. The EOC puts the Convention into the case in every way possible.

The EOC has also been lobbying the government to award certain extra points to tenders of companies with good equal opportunities systems. By marrying that with the government education funds used for training, which are in fact being given to private sector companies, it should be possible to create a better enabling environment for women.

Identifying Key Officials for Sensitization

Ms. Vandana Rajwani, a barrister and an Assistant Professor in the Faculty of Law, University of Hong Kong, suggested that a holistic and comprehensive approach should be

adopted in order to avoid projects being criticized as lacking in gender sensitivity. It was imperative that gender sensitivity training was widespread. In particular, it would be effective to design a short training course on gender issues for people in key policy-making positions. Such an approach could be more influential than having one gender sensitive member on the board who will be the lone person fighting to convince others who are unaware of the issues. She added that there was a need to train the trainers as well as to educate the educators. Even if more gender sensitive textbooks are approved, ultimately it rests on the trainers to instill concepts of equality.

Textbooks and Stereotypes

Dr. Wendy Taylor of the Department of Nursing, University of Hong Kong, made a comment on the recent research by the EOC, which demonstrated that Hong Kong boys still have very stereotypical and sexist views (more so than Hong Kong girls). She said it was necessary to consider why boys think the way they do, who is teaching those stereotypes, and what are we doing to change them? We can change the textbooks but if the teaching of stereotypes starts at home, then we cannot make much progress with that limited approach. The problem needs to be addressed from a systemic point of view by looking at the various institutions—family, government etc.

Importance of Accounting for Unpaid Work

Ms. Dairiam stressed that accounting for unpaid household work of women was more than an emotional issue of gaining recognition for their work. There is a lot of work going on in various countries, including, in particular, the statistical committee at the United Nation's Economic and Social Council for Asia and the Pacific (ESCAP) which is putting together methodologies to do the calculation.¹⁸ It should not stop at saying that women are definitely contributing to the economic activities of the countries by their domestic work since there is a value to it. This is not a substitute for an actual income in their hands.

¹⁸ ESCAP has prepared a draft Guidebook on Integrating Unpaid Work into National Policies, available (barring two chapters) at the ESCAP website at <http://unescap.org/stat/> which lists its new publications, including the draft guidebook. (visited June 12, 2002)

However, the value of accounting for unpaid work can be used for various resource allocation policies of the state and certain services. For instance, insurance policies are beginning to recognize that if there is an injury to a woman, the compensation to her should consider the loss that her handicap would cause to the family. In the past, companies said there is no loss. It should also be considered for social security, pension benefits and old age benefits for women, because they have contributed to the national economy.

The Extent of Civil Society and State Partnership

Ms. Dairiam added that there is a need for partnership in the gathering of information and understanding the issues. In the absence of such partnerships, policy decisions will be made based upon false assumptions and women may never benefit. Education at every level can be facilitated if there is a partnership and full implementation of the treaty is only possible through such partnership.

Civil society needs to maintain the accountability of the government as to whether it is working for the realization of women's rights. How far this partnership will be successful, how much demand one can make from the state, and whether it is taking the responsibility right up to the international level to the CEDAW Committee will vary from country to country.

Enforceability of CEDAW and the Role for NGOs in a Jurisdiction

Ms. Dairiam noted that very often doubts are raised about the effectiveness and enforceability of the treaty. "So what can this treaty do for us?" is the question posed. The question needs to be reversed to "What do you plan to do with this treaty?" There is a need for the state to use the treaty if it is to be of use. It is not like a manna from heaven which has suddenly fallen into one's hands. The second doubt that the people have is: how enforceable is it? So what if the CEDAW Committee gives recommendations, how can you force the government to comply? In fact, these governments have shame, no matter how recalcitrant. They want to look good.

One of the problems with the NGOs is that they do excellent work up until the time of the review. They give all the information to the CEDAW Committee and the Committee asks many excellent questions of the government. But when they come home, there is a complete lull in the activity. The NGOs don't pursue the monitoring of the work. They need to insist, right at the start, on an action plan on how the recommendations are going to be achieved. That is where the partnership also needs to come in. The governments should sit together with the NGOs and put up a detailed action plan and monitor how that is progressing. Otherwise there will be no framework for monitoring. The legislature can demand an action plan as well, which can facilitate the review of the Committee at a later reporting. It will also make things do-able and practical. When there is no focus on what it is monitoring, the Committee can go a bit off track as well.

Dr. Judith Mackay of the Women's Commission felt that NGOs have a usefulness of being outside the system and pushing the envelope forward and saying things that government officials cannot say. At the Women's Commission, a working group is considering various collaboration models—with academia, the NGOs, the EOC—and we have no answers to it as yet. By December (2002), there should be some form of a model for collaboration.

Ms. Dairiam agreed that collaboration was a difficult position but there has to be a model that ensures NGO participation with their views getting full weight in the process of policy formulation and identification of priorities. But at the same time the NGOs still have to remain outside of the system and be able to monitor and draw accountability. There cannot be a total merging of state and NGO in a way that the NGO cannot hold the government accountable.

According to **Ms. Sophia Woodman**, a visiting scholar at the CCPL, Faculty of Law, at the last session in which the CEDAW Committee reviewed a report on Hong Kong, there were just too many shadow reports from Hong Kong NGOs, without any priority list to enable the Committee to understand which are the most important issues. The lack of focus is a serious problem when the Committee gets too much material, and it is essential for the next time around that the NGOs in Hong Kong come to an understanding on what

could constitute the core of all the shadow reports in order to provide a focus to the Committee.

Closing the discussion, **Ms. Petersen** said that although it was unlikely that China would ratify the Optional Protocol of CEDAW in the near future, that did not mean that CEDAW was not enforceable here. First, we cannot underestimate the impact of the enforcement process of CEDAW as a lobbying tool. The Concluding Comments have made an impact in Hong Kong. That is why we have the Women's Commission. Also, the courts are willing to refer to CEDAW. The EOC relied on CEDAW in the case against the Director of Education and the court held that the Convention can be referred to when interpreting the Sex Discrimination Ordinance. That is very important. It is a precedent that can be applied to other cases under the Sex Discrimination Ordinance. The court also held that there is a presumption that the legislature intends to comply with international treaties that bind Hong Kong. So the presumption is that other legislation should also comply with CEDAW.

Conclusions and Recommendations

During the course of the conference, the following issues were raised and received with general acceptance among the participants:

1. In order to achieve substantive equality—as against mere formal equality—it is important to have a holistic understanding of the overall situation of rights and there is a need to focus on the equality of results, instead of focusing merely on formal equality of opportunities.
2. Based on the Concluding Comments of the CEDAW Committee, NGOs and civil societies in Hong Kong should take the initiative to set standards for achievement in various fronts of women's rights, and use those standards to hold the government accountable.
3. In view of the recent announcement of the Chief Executive that his second term would have job creation as its main priority, women's organizations should work

towards ensuring that the new jobs created do not fall only in the traditional sectors in which men work.

4. Since the conciliation model that is presently required by statute may tend to perpetuate the power imbalance between the victim and the perpetrator, the community should reconsider the desirability of having a low cost Human Rights or Equal Opportunities Tribunal. That could increase the bargaining power of complainants and also provide the respondent with a greater incentive to make reasonable offers for settlement.
5. There is a need for civil societies and NGOs to work more closely with the academic community in Hong Kong, and to maximize the impact of advocacy through collaborative work.
6. Since the Women's Commission is the national mechanism established by the government in response to the CEDAW Committee's Concluding Comments, the Commission should develop a strategy to educate and train women about CEDAW.
7. NGOs should coordinate a yearly review and monitoring of the government's initiative towards realizing the rights of the women as provided for in CEDAW. This can put pressure on the government and also facilitate a more comprehensive monitoring of the government's actions.
8. Emphasis should also be put on sensitizing key decision-makers about the issues relating to equality.