



# CEDAW CASEBOOK

AN ANALYSIS OF CASE LAW  
IN SOUTHEAST ASIA



UN Women is the UN organization dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women was established to accelerate progress on meeting their needs worldwide. UN Women supports Member States in setting global standards for achieving gender equality, and works with governments and civil society to design the laws, policies, programmes and services required to implement these standards. UN Women stands behind women's equal participation in all aspects of life, focusing on the following five priority areas: increasing women's leadership and participation; ending violence against women; engaging women in all aspects of peace and security processes; enhancing women's economic empowerment; and making gender equality central to national development planning and budgeting. UN Women also coordinates and promotes the UN system's work in advancing gender equality.



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### **CEDAW Casebook: An Analysis of Case Law in Southeast Asia**

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(UN Women)

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The views expressed in this publication are those of the meeting participants, and do not necessarily represent the views of UN Women, the United Nations or any of its affiliated organizations.

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Government  
of Canada

Gouvernement  
du Canada

**CEDAW Casebook:  
An Analysis of Case Law in  
Southeast Asia**

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# [ Acronyms and abbreviations ]

APWLD	Asia Pacific Forum on Women Law and Development
ASEAN	Association of Southeast Asian Nations
BSP	Bangko Sentral ng Pilipinas (Central Bank of the Philippines)
CBA	Collective Bargaining Agreement
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRPD	Convention on the Rights of Persons with Disabilities
COMELEC	Commission on Elections
CRC	Convention on the Rights of the Child
FASAP	Flight Attendants and Stewards Association of the Philippines
GFI	Governmental Financial Institution
GSTT	Guru Sandaran Tidak Terlatih
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JSMP	Judicial System Monitoring Programme
Lao PDR	Lao People's Democratic Republic
LGBT	Lesbian, Gay, Bisexual, Transgender
LRA	Law Reform (Marriage and Divorce) Act of 1976
MCW	Magna Carta of Women
PP DHL	Hulu Langat District
SEAP	Southeast Asia Programme
SSL	Salary Standardization Law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

## [ Foreword ]

In seeking to improve women's access to justice across plural legal systems, UN Women through the Canada-funded Regional Programme on Improving Women's Human Rights (CEDAW SEAP Phase II) promotes the translation of CEDAW awareness into laws, policies and their effective implementation. This is done through capacity development facilitated through regional institutions and networks; the generation of regional resource materials based on good practices; and south-south exchanges. Moving from a general understanding of "what is CEDAW" to "how to implement and apply CEDAW, UN Women has focused on knowledge generation and exchange, stock taking and priority setting.

Despite the progress made, the evidence reveals that women across Southeast Asia face impediments to accessing justice and the rule of law. These limitations are observable both in formal as well as in informal and/or plural justice systems. Customary community-based dispute resolution mechanisms and norms, while more accessible and familiar to many than the formal administration of justice, can perpetuate harmful gender norms and stereotypes which result in discriminatory treatment and the denial of equal rights to the protection of the law. As such, apart from gender equality legislation, actions must be taken to ensure non-discriminatory administration of justice, whether formal or customary and religious-based.

This publication - CEDAW Casebook: An Analysis of Case Law in Southeast Asia - on the application of CEDAW in national courts is an analytical compilation of jurisprudence from selected countries in Southeast Asia. It was prepared to be used to enhance the capacity of those in the administration of justice to utilize international human rights standards for the realization of women's human rights. Drawing on jurisprudence in Southeast Asia, the casebook presents a cross-section of women's rights claims adjudged by courts and takes stock of the progress with which national legal systems in these countries have incorporated the Convention. The Casebook is intended as reference for judges as well as other legal practitioners and advocates of women's human rights.

UN Women would like to thank Mary Jane Real, who prepared the casebook. We welcome the continued collaboration with the International Commission of Jurists and thank the Government of Canada for this support to advancing women's human rights.

A handwritten signature in black ink, appearing to read 'Roberta Clarke', with a stylized, flowing script.

Roberta Clarke

Regional Director and Representative  
UN Women Regional Office for Asia and the Pacific  
Bangkok, Thailand



## [ Introduction ]

This casebook on the application of CEDAW in national courts is an analytical compilation of jurisprudence from selected countries in Southeast Asia. It presents a cross-section of women's rights claims adjudged by courts in Indonesia, Malaysia, the Philippines and Timor-Leste, and takes stock of the progress with which national legal systems in these countries have incorporated the Convention. Although limited in number, the cases exemplify myriad possibilities for the judiciary to actively and creatively adopt the Convention as a normative legal framework in deciding cases, and contribute significantly to the advancement of women's human rights in the region.

### SCOPE AND LIMITATIONS

The purpose of this casebook is to improve understanding and promote the use of the CEDAW in courts. It is intended as a reference for judges as well as other legal practitioners and advocates of women's human rights on the application of the Convention in judicial decision-making. It serves as a resource to enhance their capacity to utilize international human rights standards for the realization of women's human rights embodied in the Convention. While cases from Indonesia, Malaysia, the Philippines and Timor-Leste were identified based on a systemic search of superior courts' cases that cited the Convention, the casebook does not attempt to provide an exhaustive review of the state of jurisprudence on the CEDAW in the region.

This compilation covers the period of 2001 - 2015 to complement A Digest of Case Law on the Human Rights of Women Asia Pacific published by the Asia Pacific Forum on Women Law and Development (APWLD), which has cases up to 2000. Included in this compilation are women's rights claims that refer to the CEDAW through the reasoning by the courts, or arguments by any of the parties. Only cases adjudicated with finality were considered for inclusion. Complaints rendered admissible by the CEDAW Committee under the Optional Protocol are also summarized in this compilation as additional reference.

Initially, the research was intended to include all eight countries of UN Women's CEDAW Southeast Asia Programme (SEAP). These countries are: Cambodia, Indonesia, Lao People's Democratic Republic (Lao PDR), Myanmar, the Philippines, Thailand, Timor-Leste and Viet Nam. Several attempts have been made, but due to various difficulties, only cases from Indonesia, the Philippines and Timor-Leste were included. Although not among the SEAP countries, cases from Malaysia were included since its courts have issued landmark decisions based on the CEDAW. These countries have on-line databases of superior courts' decisions, which tremendously facilitated the search for cases since no provision was made for field research.

The difficulty in searching for cases is symptomatic of the state of accountability of the judiciary in the region. In some jurisdictions, written judgments are not readily, if at all, available. Public access to court cases has been problematic due to restrictive regulations, or the sheer difficulty of such undertaking. For example, in Cambodia, court files are not computerized, and there is no centralized filing system. Standards regarding the issuance of court decisions also vary. In Viet Nam, a brief statement of the judgment, without need of a *ratio decidendi*, is sufficient, which makes it difficult to gauge if any of the courts considered the CEDAW. Improving access to information in state agencies imbued with public interest, such as recent initiatives in government offices to set up on-line public information portals, is crucial to further the accountability of the judiciary.

Cases recommended or shared by participants at the *Regional Workshop of Judicial Training Institutions on Good Practices in Promoting Women's Human Rights*, held on 15-16 October, 2014 in Bangkok, Thailand, were considered, including cases suggested from Thailand, although they were not included since none referred to the CEDAW. With the exception of summaries of admissible complaints from the Philippines, all communications brought before the CEDAW Committee under the Optional Protocol were reviewed and included as secondary sources to further elaborate on the application of the Convention. Cases in this compilation were cross-checked with published case digests on the CEDAW covering Asia Pacific and the Philippines.

## METHODOLOGY

Textual analysis of the full judgment issued by each court, or its English translation, was employed as a methodology. This entailed an interpretative reading of each ruling based on the written judgment. It was no easy feat considering that these cases emanate from different legal systems, judicial structures and diverse socio economic, political and cultural contexts. Working with different languages added another layer of difficulty. Differences in terminologies and the complicated, sometimes verbose, legal texts made it challenging to develop a concise yet accurate summary of each judgment appropriate for wider usage by a broad audience in the region and beyond.

## KEY FINDINGS

A thorough search of cases in Southeast Asian countries that maintain on-line databases of superior courts' decisions yielded only a total of 13 cases that cited the CEDAW. For the period of 2001 – 2015, there are two cases from Indonesia, five cases from Malaysia, five cases from the Philippines, and one case from Timor-Leste. This is a marked increase in number since the APWLD digest of cases covering 1990 to 2000 only had one case each from Indonesia and the Philippines and none from the other Southeast Asian countries. Nevertheless, there is much room to improve the courts' utilization of the CEDAW considering that, except for Timor-Leste, more than 20 years have passed since countries in Southeast Asia ratified or acceded to the Convention.

Based on cases analysed in this research, there is no consistent use of the Convention as a normative framework on women's human rights across courts in Southeast Asia. Half of the cases still relied on: constitutional guarantees regarding prohibition against sex or gender discrimination; provisions on equality before the law and equal protection of the law found in constitutions; or direct application of national statutes that prohibit discrimination. The CEDAW principles or its articles are cited primarily as persuasive authority, rather than a direct source of rights and duties. A key obstacle in the courts' application of the Convention lies in legal complexities surrounding the status of international treaties in domestic legal orders.

The courts that did engage with the Convention, endorsing the essence of its principles on substantive equality, non-discrimination and State obligation, have made significant strides in advancing claims for women's human rights. Some of the best examples are: upholding the constitutionality of an anti-violence against women and children legislation; restoring temporary special measures on women's political representation; affirming in jurisprudence the positive evolution of customs to encompass women's equal rights to inheritance; and recognizing that women have an equal role in the religious upbringing of her child. These cases illustrate innovative approaches in the courts' enforcement of the CEDAW, incorporating in the adjudication of cases international standards on women's human rights embodied in the Convention.

This casebook begins with an introduction that details the scope and limitations of the research and presents its key findings. A brief overview of the application of the CEDAW and its Optional Protocol in Southeast Asia follows the introduction. Subsequent chapters are divided into key themes based on substantive articles of the CEDAW referred to or related to the cases. Where cases fall under different themes, cross-references are made accordingly. There is a brief summary of the facts and decision of each case, with a commentary that analyses the application in each judgment of different dimensions of the substantive equality framework of the CEDAW. The last chapter on conclusions reflect on possible ways forward to achieve the purpose of this casebook and, in general, improve women's access to justice.

**Substantive  
Equality**

**CEDAW**

**State  
Obligation**

**Non-  
Discrimination**

# [ Application of CEDAW and its Optional Protocol ]

Southeast Asian countries covered in this research are all States parties to the CEDAW, four of which also ratified or acceded to the Optional Protocol. Several countries have taken important steps, including through litigation of precedent-setting cases, to enforce the CEDAW and evolve new standards on women's human rights in the region. But much remains to be done to accelerate the domestic enforceability of the Convention. Having reviewed all of these countries at least once, the CEDAW Committee concluded that international standards of equality in the Convention have not been applied consistently in the jurisdictions of countries in Southeast Asia.

## STATUS OF RATIFICATION OF THE CEDAW

**Table 1. Date of Signature, Ratification or Accession to the CEDAW in Selected Countries in Southeast Asia**

COUNTRY	DATE OF SIGNATURE <sup>1</sup>	DATE OF RATIFICATION/ACCESSION <sup>2</sup>
Cambodia	17/10/1980	15/10/1992
Indonesia	29/07/1980	13/09/1984
Lao PDR	17/07/1980	14/08/1981
Malaysia		05/07/1995
Myanmar		22/07/1997
Philippines	17/07/1980	05/08/1981
Thailand		09/08/1985
Timor-Leste		16/04/2003
Viet Nam	29/07/1980	17/02/1982

Source: *UN Treaty Collection*<sup>3</sup>

1 Signature is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound, but qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. See [http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml#signaturesubjectas](http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#signaturesubjectas)

2 Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.

3 [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)

With the exception of Timor-Leste, more than two decades have elapsed since each country ratified or acceded to the Convention. However, “the legal framework to mandate and demand such a coherent, holistic and consistent application of the Convention is not available in these countries with any level of certainty”.<sup>4</sup> Most countries in the region have yet to pass legislation that incorporates a framework of substantive equality. Similarly, most countries must ensure that constitutional guarantees on equality are reflective of the comprehensive definition of discrimination in Article 1 of the Convention to avoid its narrow or inconsistent interpretation in judicial decision-making.

Lao PDR passed the Law on the Development and Protection of Women of 2004, which details the elimination of all forms of discrimination against women, particularly domestic violence and trafficking in women. While not stated in the law itself, the definition of discrimination in Article 1 of the Convention is reiterated in the decree to implement it. The Philippines also enacted the Magna Carta of Women Act of 2009, which codifies into a comprehensive legislation women’s fundamental rights guaranteed under the CEDAW. The enactment of these laws laid out the basis for the enforceability of the Convention and the comprehensive application of its framework of substantive equality in these countries; other countries in the region have yet to enact similar legislation.

## RESERVATIONS INCOMPATIBLE WITH THE CONVENTION

Cambodia, Lao PDR, the Philippines and Timor-Leste ratified CEDAW without any reservations. Malaysia and Thailand entered reservations on substantive provisions, several of which they have modified or withdrawn subsequently. However, Malaysia has yet to remove its reservations in relation to Article 16, which are incompatible with the Convention. Indonesia, Myanmar, Thailand and Viet Nam also registered reservations to Article 29 pertaining to prescribed procedures for the settlement of disputes between States parties in relation to the interpretation or application of the Convention.<sup>5</sup>

Specifically, Indonesia, Myanmar, Thailand and Viet Nam stated that their respective governments are not bound by Article 29, which stipulates that disputes between States parties relating to the Convention that are not settled by negotiation may be submitted for arbitration or may be referred to the International Court of Justice at the request of any one of the parties to the dispute. The Government of Indonesia takes the position that this may only be done with “the agreement of all parties to the dispute”.<sup>6</sup> Since these reservations are allowed in Article 29(2), they do not generally affect enforcement of substantive provisions of the Convention.

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<sup>4</sup> Dairam (2014: 31).

<sup>5</sup> See <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

<sup>6</sup> Ibid.

Article 28(2) of the Convention, however, adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties, which does not permit any reservations that, according to General Recommendation No. 29 of the CEDAW Committee, “are incompatible with the object and purpose of the Convention”. Articles 2 and 16 are considered by the CEDAW Committee to be core to the Convention. According to the Committee, Article 2 (a) to (g) contain the very essence of the States parties’ obligations to achieve the purpose of eliminating all forms of discrimination against women.<sup>7</sup> The Committee also stressed that reservations to Article 16 – whether lodged on the grounds of tradition, religion, or culture – are incompatible with the Convention.<sup>8</sup>

Contrary to the intent of the CEDAW Committee to preclude any reservations under Article 16, Malaysia has not withdrawn its reservations to Article 16 (a), (c), and (g) in relation to equal marital rights between men and women. It also retained its reservations to Article 16 (f) on guardianship, wardship, trusteeship and adoption of children, and Article 9 (2) regarding equal rights between men and women with respect to the nationality of their children. It declared that enforcement of Article 5 (a) on the elimination of customary and all other practices based on stereotyped roles of men and women is subject to the *Sharia* law on the division of inherited property.<sup>9</sup> *Sharia* law, which remains enforced in Malaysia, take precedence over the Convention.

## CONSTITUTIONAL GUARANTEES ON GENDER EQUALITY

In varying degrees, principles of gender equality are guaranteed in constitutions of countries in Southeast Asia. These principles can be found in: article 31 of the Cambodian Constitution of 2010; article 28(2) of the Indonesian Constitution of 1945; articles 35 and 37 of the 2003 Constitution of Lao PDR; article 8 of the Malaysian Federal Constitution of 1957, as amended; articles 348 and 349 of the Myanmar Constitution enacted in 2008; article 2(11) and (14) of the 1987 Constitution of the Philippines; sections 16 and 17 of the 2002 Constitution of Timor-Leste; articles 16 and 26 of the Viet Nam Constitution of 2013; and section 30 of the 2007 Constitution of Thailand, which was in effect before it was replaced with an interim constitution by the military government that took over on 22 May 2014.

In spite of such constitutional guarantees, enforceability of the CEDAW in most countries in Southeast Asia remains tenuous. Constitutions of most countries do not provide clear guidance to resolve any conflict regarding the status of international law in domestic legal orders. Except for the Constitution of Timor-Leste, which declares in section 9 (3) that laws contrary to international treaties adopted in

7 CEDAW Committee General Recommendation No. 28 (2010) [CEDAW/C/GC/28] 16 December 2010

8 CEDAW General Recommendation No. 29 (2013) on Article 16, Economic consequences of marriage, family relations and their dissolution [CEDAW/C/GC/29] 30 October 2013.

9 See <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

its national legal system are invalid, incorporation of the CEDAW principles in constitutions does not automatically repeal national laws that contravene these principles. Countries like Malaysia that guarantees equal rights in its Federal Constitution of 1957, as amended, opted to uphold differential treatment between men and women under *Sharia* law as expressed in its reservations to Article 16 of the Convention.

Many of these constitutional guarantees are part of the declaration of principles and policies, which are not self-executing. To give full effect to these constitutional guarantees in accordance with the spirit of the Convention, enabling acts are still necessary such as passage by the legislature of an enabling law incorporating a framework of substantive equality in the national legal system, or adoption of a law that applies the Convention's comprehensive definition of discrimination under Article 1. Existing laws that conflict with the Convention should also be amended or repealed, and all remaining reservations to the Convention must be withdrawn by the State party.

## RATIFICATION AND UTILIZATION OF THE OPTIONAL PROTOCOL

The Optional Protocol to the CEDAW is a separate treaty that provides two mechanisms for redress under the Convention: a complaints procedure, which gives individuals the right to submit a communication before the CEDAW Committee regarding any violation of their rights under the Convention; and an inquiry procedure that enables the CEDAW Committee to conduct inquiries into serious and systematic abuses of women's human rights. Being a separate treaty, it requires an independent ratification or accession by States parties to the Convention. In Southeast Asia, only Cambodia, the Philippines, Thailand and Timor-Leste are signatories to the Optional Protocol. Indonesia signed, but has yet to ratify it.

**Table 2. Date of Signature, Ratification or Accession to the CEDAW Optional Protocol in selected countries in Southeast Asia**

COUNTRY	DATE OF SIGNATURE	DATE OF RATIFICATION/ACCESSION
Cambodia	11/11/2001	13/10/2010
Indonesia	28/02/2000	
Lao PDR		
Malaysia		
Myanmar		
Philippines	21/03/2000	12/11/2001
Thailand	14/06/2000	14/06/2000
Timor-Leste		16/04/2003
Viet Nam	29/07/1980	17/02/1982

Source: UN Treaty Collection<sup>10</sup>

10 See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)



A complaint under the Optional Protocol is lodged through a formal communication filed before the CEDAW Committee. Article 4 of the Optional Protocol enumerates requirements for the admissibility of a complaint, specifically the exhaustion of all domestic remedies. In addition, complaints are rendered inadmissible under any of the following circumstances: the subject matter has already been examined by the CEDAW Committee or any other procedure of international investigation or settlement; the complaint is incompatible with the provisions of the CEDAW or it is manifestly ill-founded or not sufficiently substantiated; the complaint is an abuse of the right to submit a communication; or facts that are the subject of the complaint occurred prior to the entry into force of the Optional Protocol for the concerned State party, unless such facts continued after that date.

So far, the Philippines is the only country in Southeast Asia with individual complaints filed under the Optional Protocol. These are: **Karen Tayag Vertido v. the Philippines** (2008); **M.S. v. the Philippines** (2011) and **R.P.B. v. the Philippines** (2014). Only **Karen Tayag Vertido v. the Philippines** and **R.P.B. v. the Philippines** are summarized in this compilation. **M.S. v. the Philippines** is not included because the CEDAW Committee decided, “[T]he communication is insufficiently substantiated for purposes of admissibility”. In her dissenting opinion, Committee Member Patricia Schulz concurred that the communication is inadmissible, but on the ground that it is an abuse of the right to submit a communication.

The Optional Protocol and the rules of procedure of the CEDAW Committee do not contain periods of prescription for the submission of complaints. In this regard, Schulz explained that striking a balance between the right of victims of discrimination prohibited by the Convention to defend themselves by submitting a communication, and the right of States parties not to be held accountable for violations past a “reasonable time” is a delicate exercise. She acknowledged that victims of sexual violence often need time to recover from trauma resulting from the violence, but in **M.S. v. the Philippines**, the author did not provide any justification as to why it took her almost five years after the decision of the Supreme Court to file her complaint.

In **Karen Tayag Vertido v. the Philippines** and **R.P.B. v. the Philippines**, the CEDAW Committee established that gender stereotypes on rape and rape victims evident in the reasoning of the courts in both complaints amount to discrimination, and in the case of **R.P.B. v. the Philippines**, multiple discrimination prohibited in Article 1 of the Convention and other treaties. The Philippines, as State party, was called upon by the Committee to fulfil its obligations under Article 2(c), (d) and (f) and Article 5(a) to give effect not only to the Convention, but equally important, to uphold women’s fundamental rights, particularly: the right to personal security; the right to due process, including a fair and impartial trial; and reproductive rights and rights related to their sexuality.

## [PHILIPPINES]

**KAREN TAYAG VERTIDO V. THE PHILIPPINES**

Communication No. 18/2008  
CEDAW Committee  
16 July 2010

**Laws and International Instruments Considered**

*Revised Penal Code of the Philippines of 1930*  
*Republic Act No. 8353, Anti-Rape Law of 1997*  
*Revised Rules of Court of the Philippines*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*CEDAW General Recommendation No. 19 (1992)*

**SUMMARY**

The CEDAW Committee in this complaint deliberated on the core obligations of the State party under Article 2 of the CEDAW. The Committee recommended the State party to review its law on rape as well as reform its legal procedures to correct gender stereotypes about rape and rape victims in order to uphold women's right to exercise autonomy over their bodies.

In 1996, Karen Vertido filed rape charges against J.B.C., then President of the Davao City Chamber of Commerce and Industry where Karen was serving as the organization's executive director. After close to ten years at the trial court level, the accused was acquitted in 2005. The Regional Trial Court found the complainant's allegations regarding the sexual act to be implausible. It concluded that evidence presented by the prosecution, in particular the testimony of the complainant herself, was unconvincing to the court. Since there was insufficient evidence to erase all reasonable doubts that the accused committed the crime, the court acquitted him.

The complainant argued that the judgment of acquittal of the accused barred her from filing any appeal because of the constitutional right of the accused against double jeopardy. Article 3 (21) of the 1987 Constitution of the Philippines forbids an accused from being tried twice for the same crime. According to her, an extraordinary remedy of certiorari under Rule 65 of the Revised Rules of Court, which can be used in cases of acquittal under certain circumstances, is not available in this case. Although disputed by the State party, she claimed to have exhausted all domestic remedies. Not having received an adequate remedy before the court for acts prohibited under the Convention, she filed a complaint before the CEDAW Committee on 29 November 2007.

The author exposed several myths based on gender stereotypes underpinning the reasoning of the court, which led to the acquittal of the accused. She asked the CEDAW Committee to declare that the decision of the court was discriminatory according to Article 1 of the Convention, in relation to General Recommendation No. 19. She requested the Committee to recommend that “the State party provide her with financial compensation in an amount proportionate to the physical, mental, and social harm caused to her and to the seriousness of the violation of her rights, and to enable her to continue her therapy and other treatment”.

The author argued that the acquittal of the accused was a violation of the positive obligations of the State party, under CEDAW Article 2(c), to establish competent national tribunals for the effective protection of women against any act of discrimination; Article 2(d), to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; Article 2(f), to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women and Article 5(a), to take all appropriate measures to modify or abolish customs and practices as well as gender stereotypes, which constitute discrimination against women. She called for far-reaching reform of the justice system to ensure that women’s rights are respected in accordance with the CEDAW.

The author pointed out that her case was not an isolated one, but that it was one among many trial court decisions in rape cases that discriminate against women and perpetuate discriminatory beliefs about rape victims. Myths, misconceptions and discriminatory assumptions reflected in jurisprudence continue to place rape victims at a legal disadvantage and significantly reduce their chances of obtaining redress for violations stipulated against in the Convention. More than 25 years since the Philippines ratified the Convention in 1981, the author stressed that interpretation of the Philippine law on rape by the Supreme Court has been full of contradictions.

## DECISION

According to the CEDAW Committee, the State party failed to fulfil its obligations and violated the rights of the author under Article 2(c) and (f) and Article 5(a) read in conjunction with Article 1 of the Convention and General Recommendation No. 19. It directed the State party to provide appropriate compensation commensurate with the gravity of the violations of her rights. The CEDAW Committee further requested the State party to undertake a wide range of measures to reform its legal system in order to improve the judicial handling of rape cases and to provide training and education for judges, lawyers and law enforcement personnel to change discriminatory attitudes towards women.

The CEDAW Committee found merit in the author's allegations that the accused was acquitted due to gender-based myths and misconceptions about rape and rape victims relied upon by the court. According to the Committee, it was clear from the judgment that the assessment of the credibility of the author's version of events was influenced by a number of gender stereotypes: the author in this situation not having followed what was expected of a rational and ideal victim, or what the judge considered to be the rational and ideal response of a woman in a rape situation.

The CEDAW Committee pointed out the legal precedent established by the Supreme Court that it is not necessary to show that the accused had overcome the victim's physical resistance to prove lack of consent. However, since the court implied that it expected that the author should have resisted in the situation, the myth that women must physically resist sexual assault to allege rape was reinforced. In this regard, the Committee stressed that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence."

The Committee has continually clarified that rape constitutes a violation of women's right to personal security and bodily integrity. "Lack of consent" is an essential element of the crime. The Committee directed the State party to review the definition of rape in the Revised Penal Code of the Philippines so as to place the lack of consent at its centre. It further recommended the State party to remove any requirement that sexual assault be committed by force or violence, to exclude any requirement of proof of penetration and to minimize secondary victimization of the complainant.

## CONCURRING OPINION, COMMITTEE MEMBER YOKO HAYASHI

Committee Member Yoko Hayashi joined the view of majority of the CEDAW Committee because she agreed with part of the author's allegations that the court proceedings were materially delayed, and the court's reasoning may have been influenced by so-called rape myths. However, she opined that the Committee is not equipped to examine the testimony of parties concerned, nor is it competent to evaluate the credibility of the accused or the author. In her opinion, it is not the role of the Committee to judge that without gender myths and stereotypes, the accused would have been convicted of the crime.

She concurred that the author was entitled to receive compensation because of the undue delays in the proceedings and the reasoning used by the court in its decision, which could potentially victimize the author. However, she stressed that the recommended compensation does not include damages arising from the author's economic loss, nor from the court sentence that acquitted the accused. In her opinion, the State party cannot be made accountable for this portion of damages since it is not within the purview of the CEDAW Committee to determine if the court's judgment was erroneous or not.

## COMMENTARY

The CEDAW Committee in reviewing this complaint brought forth the centrality of women's autonomy to exercise control over their bodies in understanding the nature of gender-based violence, particularly the non-consensual nature of sexual offences such as rape. Women as autonomous beings are free to make choices on matters of sexuality, which includes setting their own boundaries regarding their sexual activity by giving or withholding their consent. The Committee clarified that, contrary to its characterization in the Revised Code of the Philippines, "lack of consent" is an essential element of rape. The offence is a violation of women's human right to personal security and bodily integrity.

The CEDAW Committee recommended the Philippines to place "lack of consent" as a central element of its definition of rape in the Revised Penal Code and to "remove any requirement in the legislation that sexual assault be committed by force or violence". Underlying this recommendation are two prevailing conceptualizations of rape: (i) the *consent model*, which characterizes the offence of rape as non-consensual sex, where force or intimidation is not considered an element of the offence; and (ii) the *coercion model*, which treats the act of force or violence as the essence of the offence. The consent model asks the key question: what did the complainant do to suggest consent to the sexual relations with the perpetrator? In contrast, the coercion model focuses on identifying factors that characterize a perpetrator's abusive conduct.<sup>11</sup>

Each of these approaches has shortcomings. On one hand, the notion of consent, specifically when and how it is expressed, remains highly contested that there is no consensus regarding the legal standard to determine consent to sex. Some jurisdictions have adopted the "affirmative permission standard", under which obtaining a person's consent to sex prior to the sexual contact, is a prerequisite for the legitimacy of the contact. Anything less than overt words or actions indicating permission – particularly the silence of the complainant – are considered lack of consent. On the other hand, the notion of force or violence has been construed narrowly leaving certain types of rape unpunished. It needs to be broadened to include other forms of abuse of power such as psychological threat or economic coercion.<sup>12</sup> Both approaches have merits, which account for the mixed application of these models in practice.

Explicitly, the Philippine rape law subscribes to a *coercion model* since article 266-A(1)(a) of the Revised Penal Code of the Philippines, as amended by Republic Act No. 8353 of 1997, stipulates that the use of "force, threat, or intimidation" is one of the means of committing the crime. However, a closer reading of the law reveals that it also follows the *consent model*, particularly under paragraph 1(b), "when the offended party is deprived of reason or otherwise

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<sup>11</sup> See Buchhandler-Raphael (2011).

<sup>12</sup> Ibid.

unconscious” and paragraph 1(d), which considers the inability of the offended party under 12 years of age to give consent in the case of statutory rape.

The CEDAW Committee apparently urged the Philippines to adopt the *consent model* consistently since it is strongly grounded in freedom of choice and autonomy of the individual, yet demurred that should it prefer to subscribe to the *coercion model*, it must include “a range of coercive circumstances”, not only physical force or violence. Since the law in the country has not been amended to reflect preference for any particular approach, jurisprudence has vacillated between the two models as illustrated in this complaint. On the one hand, the court considered circumstances surrounding the complainant’s consent and deemed that it was consensual because she did not resist the advances of the accused and did not escape. On the other hand, the court focused on the lack of a gun and asserted that for a rape to occur by means of threat, there must be clear evidence of direct threat or violence.

The CEDAW Committee called attention to the obligations of the State party under Article 2 of the Convention. Gender stereotyping, evident in the reasoning of the court, infringes upon women’s fundamental right to a fair and just trial, and negates the State party’s obligation under Article 2(c) to establish competent national tribunals and Article 2(f) in relation to Article 5(a) to modify or abolish customs and practices that constitute discrimination against women. Committee Member The Committee is unanimous in its recommendation for the State party to undertake a wide range of measures to ensure that legal processes in cases involving crimes of rape and other sexual offences are impartial and fair, and do not rest upon prejudices based on gender stereotypes.

The CEDAW Committee advised the State party to give due consideration to its views and recommendations, and submit a written response to the Committee within six months, including any information on action taken. To date, the Philippine Government has yet to comply, and the Optional Protocol does not provide any mechanism to compel its compliance. At most, the Committee may call its attention during the periodic reporting required of States parties, but the latest state report submitted by the Philippines was in 2006. No state report was submitted in 2014, four years after the period for regular reporting specified in the Convention.

## [PHILIPPINES]

**R.P.B. V. THE PHILIPPINES**

Communication No. 34/2011  
CEDAW Committee  
23 May 2011

**Laws and International Instruments Considered**

*Constitution of the Philippines of 1987*  
*Revised Penal Code of the Philippines of 1930*  
*Republic Act No. 8353, Anti-Rape Law of 1997*  
*Revised Rules of Court of the Philippines*  
*Republic Act No. 8505, Rape Victim Assistance and Protection Act of 1998*  
*Republic Act No. 9710, the Magna Carta of Women Act of 2010*  
*Supreme Court Memorandum Order No. 59-2004 of 10 September 2004*  
*Supreme Court, Office of the Court Administrator Circular No. 104-2007 of 18 October 2007*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*CEDAW General Recommendation No. 18 (1991)*  
*CEDAW General Recommendation No. 19 (1992)*  
*Convention on the Rights of Persons with Disabilities*  
*International Covenant on Civil and Political Rights*  
*Convention on the Rights of the Child*  
*Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

**SUMMARY**

In this complaint, the CEDAW Committee laid the legal basis to hold the State Party accountable under the CEDAW to address intersecting forms of discrimination experienced by the minor, deaf-mute complainant of rape. It dealt with the complexities of intersectional or multiple discrimination, and directed the State party to comply with its obligations under Article 2(c), (d) and (f) in relation to Article 1 of the Convention.

In 2006, a case of qualified rape “aggravated by the circumstances of treachery, abuse of superior strength, night-time, and dwelling” was filed against the accused by R.P.B. The complainant was a minor whose physical handicap, “being deaf and dumb”, was known to the accused at the time of the commission of the crime. The Regional Trial Court acquitted the accused in 2011. The court challenged the credibility of the author’s testimony and found that she failed to prove that the sexual intercourse was not consensual.



According to the court, “it is unnatural for an intended rape victim [...] not to make even a feeble attempt to free herself despite a myriad of opportunities to do so.” In particular, she could have tried to escape or shout for help, given that “her being a deaf mute does not render her incapable of creating noise”. The court noted that the author’s “overall deportment during her ordeal defies comprehension and the reasonable standard of human conduct when faced with a similar situation”. The court considered her demeanour “inconsistent with that of an ordinary Filipina whose instinct dictates that she summons every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity”.

The complainant maintained that the judgment acquitting the accused barred her from filing any appeal because, under Philippine law, the accused is entitled to his constitutional right prohibiting double jeopardy. The State party asserted that a petition for certiorari under Rule 65 of the Revised Rules of Court, which can be used in cases of acquittal under certain circumstances, is available in this case. The author asserted otherwise and claimed that she already exhausted all domestic remedies. She filed a complaint before the CEDAW Committee on 23 May 2011.

The author contended that the decision of the court is discriminatory, within the meaning of Article 1 of the Convention in relation to General Recommendations Nos. 18 and 19 of the CEDAW Committee. She stressed that the court should have considered her condition as a deaf-mute minor and should have given credence to her testimony that she did not consent to the advances of the accused. The author claimed that the State party violated its positive obligations under Article 2(c), (d) and (f) of the Convention; specifically, it did not afford her access to a competent national tribunal that should have effectively protected her from discrimination.

Although the court’s decision in this case was promulgated several months after the adoption of the Committee’s views in **Karen Tayag Vertido v. the Philippines**, the author submitted that the court still relied on gender stereotypes and myths similar to those employed in Vertido: “The credibility of the complainant in a rape case is mostly based on stereotypes regarding a standard of behavior that courts believe a rape victim should exhibit.” Authors who satisfy the stereotypes are considered credible, while those who do not are deemed dubious. In this complaint, the court viewed the author as an “incredible witness” and acquitted the accused according to stereotypical notions about the conduct of a rape victim, regardless of her special circumstances being a deaf-mute minor.

The author also alleged that serious inadequacies and irregularities in the police investigation constitute discrimination. Sign language interpreting was not provided to her during the police investigation and during a number of court hearings, including during the pronouncement of the judgment. This is in violation



of article 3(1) of the 1987 Constitution of the Philippines and Article 21(b) of the Convention on the Rights of Persons with Disabilities. In violation of Article 16 of the Convention on the Rights of Persons with Disabilities and national laws, the State party's authorities further failed to provide critical psychosocial services for her healing and recovery.

According to the author, her case is not isolated, but is illustrative of systemic discrimination against deaf persons in the country. At present, there is no comprehensive policy in the Philippines promoting equal accessibility of the justice system to deaf people, particularly women and girls. To date, there are only two policies for cases involving deaf parties or witnesses: Supreme Court Memorandum Order No. 59-2004 of 10 September 2004; and Supreme Court, Office of the Court Administrator Circular No. 104-2007 of 18 October 2007. Both policies, which deal mainly with the appointment of sign language interpreters, in effect are still discriminatory given that they require interpreting only when the deaf person "needs to be fully understood", in violation of the complainant's right to information, including both her right to understand and to be understood.

The court did not take notice of the Convention on the Rights of Persons with Disabilities (CRPD), which explains that "women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation" and that they are "subject to multiple discrimination". To ensure that relevant agencies of the State party comply with international obligations and are responsive to the special needs of people like her, the author asked the CEDAW Committee to direct the State party to undertake measures in its judicial, legislative and executive branches in line with the recommendations in **Karen Tayag Vertido v. the Philippines**, with particular focus on the intersectionality of gender, disability and age.

## DECISION

The CEDAW Committee concluded that the State party failed to fulfil its obligations and violated the rights of the author under Article 2(c), (d) and (f) in relation to Article 1 of the Convention and General Recommendations Nos. 18 and 19. The Committee directed the State party to provide reparation, including monetary compensation, considering that the author had suffered material and moral damage and prejudice. Discrimination against the author was apparent in the court proceedings where her specific situation as a minor, mute and deaf victim of rape was not taken into consideration.

In relation to Article 2(c) and (d) of the Convention, the CEDAW Committee concluded that the State party failed in its obligation to provide effective protection, which read in conjunction with General Recommendation No. 19 paragraph 24(b) and (i),

includes the right to an effective remedy to overcome all forms of gender-based violence. In this context, the Committee emphasized that, in cases where the parties concerned such as the accused or witnesses cannot understand or speak the language used in court, the free assistance of an interpreter is integral to the fundamental right to due process enshrined in human rights treaties, and further developed in the jurisprudence of treaty bodies.

The CEDAW Committee further observed that the court's findings betrayed strong gender stereotyping and disregard for the individual circumstances of the case, such as the author's disability and age, in violation of the State party's obligation under Article 2(f). It reiterated its views in **Karen Tayag Vertido v. the Philippines** that lack of consent is an essential element of the crime of rape. It repeated its recommendation to the State party to integrate the element of "lack of consent" in the definition of rape in the Philippine Revised Penal Code.

The CEDAW Committee urged the State party to take the appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. The Committee stressed that stereotyping affects women's right to a fair and just trial, and in general, women's access to justice. The State party should provide adequate and regular training on the Convention, the Optional Protocol and the General Recommendations of the CEDAW Committee to the judiciary and legal professionals to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.

## COMMENTARY

This complaint was filed on 23 May 2011, almost a year since the CEDAW Committee adopted its decision in **Karen Tayag Vertido v. the Philippines** on 16 July 2010. Yet, similar gender-based myths and stereotypes are attendant in the reasoning of the court, which the Committee already declared as discriminatory under Article 1 of the Convention. From the Committee's perspective, the court's assertion that the sexual act was consensual because the victim did not exert physical resistance is indicative of gender stereotypes regarding a standard of behaviour that courts expect of a rape victim. Rather than relying on these stereotypes, the Committee concurred with the author's view that the court should have considered other evidence of lack of consent. The author's condition as a deaf-mute minor is akin to situations in which the victim is incapable of giving valid consent.

The CEDAW Committee drew attention to intersectional forms of discrimination experienced by the author because of her gender, age, and disability. Although the CEDAW itself is silent on other grounds of discrimination aside from gender, citing General Recommendation No. 18 in relation to General Recommendation No. 19, the CEDAW Committee established the basis under international law to compel the State party to take all necessary measures to ensure that women with

disabilities have access to effective remedies. The Philippines also ratified the CRPD on 18 April 2008, which further strengthens the legal justification for demanding direct accountability of the State to address the impact of intersecting forms of discrimination on the author and other victims like her.

In this complaint, the court failed to take into consideration multiple or intersectional discrimination, which led to the court's erroneous appreciation of the situation of the author infirmed by her disability and disadvantaged by her age and gender. As a guide to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the CERD Committee suggested the following four-fold inquiry as a methodological approach to understanding intersectional or multiple discrimination that might also be of use to courts:

- ▶ First, the form or nature of the violation should be identified.
- ▶ Second, consider the circumstances or context of the violation to determine the practical or legal situations in which different forms of discrimination occur.
- ▶ Third, examine the consequences of violations resulting from all forms of discrimination.
- ▶ Finally, determine how multiple forms of discrimination affect the availability and accessibility of remedies to the victim.<sup>13</sup>

The Philippines has yet to report to the CEDAW Committee on its compliance to the recommendations issued in this complaint, including steps taken to implement its recommendation in **Karen Tayag Vertido v. the Philippines** to incorporate the element of "lack of consent" in the definition of rape in the Philippine Revised Penal Code. Moreover, beyond the recommendations of the CEDAW Committee, which were confined to specifically addressing discrimination on the grounds of gender and disability, it is also critical for the State party to put in place more comprehensive measures to build the capacity of the justice system to apply the substantive equality framework of the CEDAW in decision-making in order to comprehensively address the complex manifestations of systemic and intersectional discrimination.

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13 See Banda and Chinkin (2004: 15).





Photo: Mr. Eko Bambang Subiantoro



## [ Article 1 Non-Discrimination ]

Non-discrimination is a core principle of the CEDAW derived from [Article 1, which 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.*

Read together with Article 15(a) on equality between men and women before the law, it is a “stand-alone” right.<sup>14</sup> In General Comment No. 18 (1989), the Human Rights Committee explained that discrimination is prohibited in law or in fact in any field regulated by public authorities with regard to legislation and the application thereof, regardless of any specific reference to a right recognized in the treaty.<sup>15</sup>

A similar stand-alone right to non-discrimination is provided for in the CERD and in the CRPD. In its General Comment No. 18 (1989), the Human Rights Committee crafted a similar definition in relation to the International Covenant on Civil and Political Rights (ICCPR) with the same intent to establish an “autonomous right”, pursuant to Article 26 that all persons are equal before the law and are entitled to equal protection of the law without discrimination.<sup>16</sup> The Committee on Economic, Social, and Cultural Rights (ESCR) in its General Comment No. 20 (2009) adopted a related definition of non-discrimination as an “immediate and cross-cutting” obligation in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>17</sup>

14 See CEDAW Committee, Communication No. 7/2005, Dissenting Opinion of Mary Shanti Dairiam in Cristina Munoz-Vargas v. Spain [CEDAW/C/39/D/7/2005] 9 August 2007.

15 See <http://goo.gl/N5qlfN>

16 Ibid.

17 [E/C.12/GC/20] 2 July 2009.

The CEDAW prohibits discrimination specifically on the basis of sex or gender, used interchangeably in this context. Sex refers to the biological difference between men and women. General Recommendation No. 33 (2015) of the CEDAW Committee and General Comment No. 20 (2009) of the Committee on ESCR both clarify that sex as a prohibited ground not only covers physiological characteristics, but also the social construction of identities, attributes and roles for women and men, and the cultural meaning imposed by society on biological differences constantly reproduced in societal structures, including the justice system and its institutions.<sup>18</sup>

General Comment No. 20 (2009) of the Committee on ESCR categorically states that “other status” in relation to prohibited grounds include “sexual orientation” and “gender identity”, which are intricately linked to prejudices related to gender stereotyping in the construction of identities and roles of men and women.<sup>19</sup> In *Ang Ladlad LGBT Party v. Commission on Elections (Philippines)*, the court relied on views articulated by international treaty bodies, and took a broader perspective to affirm that the provision in the 1987 Constitution of the Philippines that prohibits discrimination on the basis of sex, or more precisely gender-based discrimination, also refers to sexual orientation.

The Universal Declaration of Human Rights (UDHR), the ICESCR and the ICCPR enumerate prohibited grounds of discrimination other than sex, which is mirrored in constitutions of countries in Southeast Asia. In *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)*, the court pointed out that the amendment of the Federal Constitution of Malaysia of 1957 specifically adds “gender” as a ground of discrimination. Generally, enumeration in constitutions also tend to include “other status”, which makes it permissible to consider other grounds germane to the enumeration, such as characteristics that a person cannot change, and/or should not be forced to change because it is so central to their being or identity.

The CEDAW Committee General Recommendation No. 28 (2010) explains that, under Article 2, States parties have an “immediate and continuous obligation to condemn discrimination against women – in all its forms”. This includes emerging forms and those not explicitly mentioned in the Convention.<sup>20</sup> Forms of discrimination against women may either be direct or indirect. **Direct discrimination** constitutes different treatment explicitly based on grounds of sex or gender. The Committee on ESCR General Comment No. 20 clarifies that direct discrimination includes “detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation”, a classic example of which is discrimination due to pregnancy.<sup>21</sup>

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18 [CEDAW/C/GC/33] 23 July 2015.

19 Ibid.

20 [CEDAW/C/GC/28] 16 December 2010.

21 [E/C.12/GC/20] 2 July 2009.

**Indirect discrimination** as contemplated under the CEDAW occurs when a law, policy, programme or practice appears to be neutral insofar as it relates to men and women, but has a discriminatory **effect** in practice on women because pre-existing inequalities or differences are not addressed by such seemingly neutral measure. The CEDAW Committee General Recommendation No. 28 stresses that indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination, and unequal power relationships between women and men that negatively impact women's actual enjoyment and exercise of their rights.<sup>22</sup>

**Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas and the Executive Secretary (Philippines)**, while not concerning a women's rights issue, provides an example of indirect discrimination. The challenged section of Republic Act No. 7653 does not appear to discriminate in its purpose. However, relying on the definition of non-discrimination in the CEDAW and the CERD, the court ruled that it results in **indirect discrimination** when enforced together with subsequent laws that would considerably lower salaries of rank-and-file employees of the bank compared to employees of other government financial institutions.

The CEDAW Committee General Recommendation No. 28 also urges States parties to recognize intersecting forms of discrimination as part of their obligation under Article 2.<sup>23</sup> Discrimination against women based on sex or gender inextricably intersects with other categories such as race, ethnicity, religion or belief, health, age, class, caste, sexual orientation and gender identity. These categories of privilege or discrimination do not operate independently, but reinforce each other and could give rise to multiple forms of discrimination. **Multiple or intersectional discrimination** "seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination".<sup>24</sup>

The CEDAW and Article 3 of both the ICCPR and the ICESCR require States parties to ensure the equal right of women and men to the enjoyment of all human rights set out in the Covenants. Human rights treaty bodies tend to approach equality and non-discrimination as positive and negative expressions of the same principle. The concept of equality is not defined in the CEDAW; however, a close reading of the Convention and as articulated by the CEDAW Committee, convey two fundamental understanding of equality: **formal equality**, which also subsumes a related protectionist approach, and **substantive equality**. Feminist advocates have evolved these concepts of equality into an analytical framework or tool to examine the extent to which a legislation or policy measures up to the Convention's standards of equality.

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22 Op. cit.

23 [CEDAW/C/GC/28]16 December 2010.

24 See Crenshaw (1991).

The **formal or *de jure* equality** approach asserts that, as equals, men and women should be treated the same according to the law. It is inscribed in several provisions of the CEDAW, for example, Article 7(a) requires States parties to guarantee both men and women equal rights to vote. As an approach, formal equality focuses on an “even-handed application” of the law or an anti-discrimination treatment of equals.<sup>25</sup> While it seeks to apply the law in neutral terms, this approach remains insufficient because underlying causes of gender discrimination and inequality, which pre-existed before the application of the law, are left intact and unaddressed. Implicit in this approach, which concentrates on **sameness**, is a **male reference**: to treat men and women the same means to ignore differences between sexes, which translates in an expectation for women simply to cope with and meet a masculinist or male standard.

The **substantive or *de facto* equality** approach consists of ensuring “equality of opportunity” and “equality of results”. **Equality of opportunity** means that everyone should, at the outset, have the same opportunities so that they can realize their capabilities and participate in all areas of economic, social, political and cultural life as equals. **Equality of results** takes a step further and considers that progress towards equality must bring about outcomes or long-term changes in gender relations, which entails changing societal norms and practices that prejudice women in relation to men. It also requires transforming institutions, systems and structures of gender inequality.

As an approach, substantive equality recognizes that treating men and women who are differently situated in the same way can cause or exacerbate disadvantage. General Recommendation No. 28 of the CEDAW Committee stated that **not every differential treatment constitutes discrimination or inequality**. The standard of substantive equality requires non-identical treatment to address biological, socially and culturally constructed differences between men and women.<sup>26</sup> General Comment No. 20 of the Committee on ICESCR underscores that differential treatment based on prohibited grounds, such as sex or gender, will be viewed as discriminatory, but there are exceptions.<sup>27</sup> General Comment No. 18 of the Human Rights Committee sets the criteria for differential treatment: the differentiation must be reasonable and objective, and the aim is to achieve a purpose that is legitimate under the Covenant.<sup>28</sup>

The CEDAW makes a direct reference to equality between men and women before the law in Article 15(1). The Human Rights Committee General Comment No. 18 establishes a link between the principle of non-discrimination with the provisions on the right to equality before the law and equal protection of the law without

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25 See Dairam (2014).

26 Ibid.

27 [E/C.12/GC/20] 2 July 2009.

28 See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en)



any discrimination found in Article 2(1) in relation to Article 26 of ICCPR.<sup>29</sup> Similar provisions are found in constitutions of Southeast Asian countries, and courts, as shown in the cases in this compilation, which have relied more on these constitutional guarantees than the CEDAW in assessing claims of discrimination on the basis of sex and gender.

As illustrated in **Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas and the Executive Secretary (Philippines)** and **Ang Ladlad LGBT Party v. Commission on Elections (Philippines)**, questions on discrimination turn on the legality of a “reasonable or valid classification” as an exception to the right to equal protection guaranteed in the Philippine Constitution of 1987. This is related to the permissibility of differential treatment as an exception to non-discrimination, inferred in General Comment No. 18 of the Human Rights Committee. The criteria for both exceptions are similar, as elaborated upon in General Comment No. 18 and in the courts’ exposition in both cases on the requirements of a valid classification.

Reliance on constitutional guarantees of equality before the law and equal protection of the law results from the legal complexity of incorporating the CEDAW in domestic legal systems of countries in Southeast Asia where there is no framework of substantive equality in law. The Philippines is one of the countries in the region that laid such a foundation with the enactment of Republic Act No. 9710 or the Magna Carta of Women Act of 2009. The court in **Ang Ladlad LGBT Party v. Commission on Elections (Philippines)** did not cite this law, which mirrors the definition of discrimination found in Article 1 of the CEDAW. It opted to refer to the definition of discrimination developed by the Human Rights Committee that is not specific to women.

In **Ang Ladlad LGBT Party v. Commission on Elections (Philippines)**, the court escaped any infirmity in its decision by declaring discrimination on the ground of sexual orientation against the petitioner through its use of ratified international covenants, and its creative application of principles therein. The court could have further argued against sex discrimination within the framework of advancing substantive equality. The concurring opinion gives the court reason to advance the argument that deferential treatment of lesbian, gay, bisexual and transgender (LGBT) people does not amount to discrimination; rather, within a substantive equality approach, it is necessary to accord them “equality of opportunity” to participate in the electoral party-list system.

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29 Ibid.

## [PHILIPPINES]

**CENTRAL BANK (NOW BANGKO SENTRAL NG PILIPINAS) EMPLOYEES ASSOCIATION, INC. V. BANGKO SENTRAL NG PILIPINAS AND THE EXECUTIVE SECRETARY**

G.R. No. 148208  
Supreme Court  
15 December 2004

**Laws and International Instruments Considered**

*Republic Act No. 7653, New Central Bank Act of 1993*  
*Constitution of the Philippines of 1987*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*International Convention on the Elimination of All Forms of Racial Discrimination*  
*International Convention on Civil and Political Rights*  
*International Convention on Economic, Social and Cultural Rights*  
*Universal Declaration of Human Rights of 1948*

## SUMMARY

While this case does not concern any issue on women's human rights, the court adopted the definition of discrimination derived from the CEDAW to explain the meaning of "indirect discrimination" resulting from the enforcement of the challenged section of Republic Act No. 7653 or the New Central Bank Act of 1993 together with subsequent laws.

The petitioner, Central Bank (now Bangko Sentral ng Pilipinas) Employees Association, Inc., filed a petition before the Supreme Court against Bangko Sentral ng Pilipinas (BSP) and the Executive Secretary of the Office of the President to challenge the constitutionality of section 15 (c), article II of Republic Act No. 7653 or the New Central Bank Act of 1993. The petitioner alleged that the law makes an unconstitutional distinction between two classes of employees in the BSP: (i) the BSP officers exempted from the coverage of the Salary Standardization Law (SSL); and (ii) the rank-and-file not exempted from the coverage of the SSL. The petitioner asserted that the stratified salary structure between these two classes violates the right to equal protection of the law guaranteed in the 1897 Constitution of the Philippines.

## DECISION

Initially, the court ruled that the challenged provision of Republic Act No. 7653 does not violate the constitutional right to equal protection. However, subsequent laws amended the charter of seven other governmental financial institutions (GFIs), exempting all their employees from the coverage of the SSL. In this light, the continued enforcement of the specific section of Republic Act No. 7653 in effect constitutes indirect discrimination against rank-and-file employees of the BSP who, unlike their counterparts in other GFIs, would not be exempted from the SSL. The court revised its initial ruling and declared the provision unconstitutional.

The court explained that the constitutional right of equal protection simply requires that all persons in similar situations should be treated the same, both in terms of rights conferred and responsibilities imposed. It is not a requirement that a statute must treat all affected persons alike in order to avoid the constitutional prohibition against inequality. The right to equality before the law and equal protection of the law “guarantees equality, not identity of rights”. Differential treatment based on a valid classification is allowed as an exception to this constitutional guarantee.

The court relied on the landmark case of **Victoriano v. Elizalde Rope Workers’ Union**,<sup>30</sup> which set the following criteria for a valid classification. The classification must: (i) be based on substantial distinctions; (ii) be germane to the purpose of the law; (iii) not be limited to existing conditions; and (iv) must apply equally to each member of the class. In this case, the court held that the standard is satisfied if the classification or distinction is based on a reasonable foundation or rational basis, and is not palpably arbitrary.

In upholding the constitutionality of the challenged section of Republic Act No. 7653, the court confined its initial evaluation to the classification between rank-and-file employees and officers of BSP. The exemption of officers, but not rank-and-file employees, from the SSL was intended to address BSP’s lack of competitiveness in terms of attracting competent officers and executives. Differences in the terms of employment between the officers and the rank-and-file employees accounted for the disparity in their salaries and benefits. The court determined that such classification is reasonable based on the criteria established in **Victoriano v. Elizalde Rope Workers’ Union**.

However, the enactment of subsequent laws exempting all rank-and-file employees of the GFIs from the SSL, with the exception of the employees of the bank, “constituted significant changes in circumstance” that altered the reasonableness of enforcing the disputed provision of Republic Act No. 7653. Rank-and-file employees of the BSP, unlike similar employees of the GFIs, would be governed by a different salary structure under the SSL. The court declared that the initially valid classification

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30 59 SCRA 54.

between officers and employees of the BSP no longer holds since in this context, differentiation is made between employees of the GFIs who belong to the same class.

The court traced the evolution of standards set for equal protection challenges under international human rights law. It noted the long-standing recognition of the principle of equality in Article 1 of the UDHR. Subsequent regional instruments and international conventions, including the CEDAW, established the principle of non-discrimination together with fundamental guarantees of equality. The court stressed that the CEDAW and other conventions impose positive obligations on States parties to take steps to eradicate discrimination in all its forms in order to achieve equality.

The court relied on the definition of discrimination developed by the Human Rights Committee based on the CEDAW and other international conventions as:

*any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*

Invoking this definition, the court acknowledged that there is **indirect discrimination** in this case because the challenged section of Republic Act No. 7653 by subsequent operation has the effect of discriminating against rank-and-file employees of the BSP in relation to employees of other GFIs. The court stressed that the right to equal protection includes the prohibition against enacting laws that allow discrimination – directly or indirectly. If a law has the effect of resulting in discrimination and denying equal protection, or permits such denial, it is unconstitutional.

The court asserted that the challenged provision of Republic Act No. 7653 makes a distinction based on class. It stipulates higher compensation competitive with the industry for officers of the bank, while salaries for employees, the majority of whom are poor, are lower, based on the strictly regimented rates of the SSL. The court observed that the Philippine Constitution of 1987 extends special protection to marginalized sectors such as labour. Where the classification stipulated in a law violates a fundamental right of persons accorded such special protection, the classification deserves strict scrutiny by the court.

## COMMENTARY

This case does not involve any issue concerning women's human rights, yet it is relevant because the court specifically cited the CEDAW to better understand the meaning of "discrimination" in relation to the right of equal protection of the law in the 1987 Philippine Constitution. In this case, the court linked the application of the concept of discrimination stipulated in international treaties such as the CEDAW with its reasoning to uphold a constitutional right. The court was clear in its intent that "there should be no hesitation in using the right to equal protection as cutting edge to eliminate every conceivable irrational discrimination in our society."

Indirect discrimination, from the CEDAW perspective, refers to an action or omission that has the effect of nullifying or impairing a right, even if there was no intention of doing so. In this case, Republic Act No. 7653 does not appear to discriminate in its purpose, but it results in **indirect discrimination** when enforced together with subsequent laws that exempt all employees of the GFIs from the coverage of the SSL, but not the rank-and-file employees of the BSP. Not a valid or reasonable classification, according to the court, it is also a form of differential treatment prohibited under the constitutional right to equal protection.

Under most circumstances, the court declared that it would exercise judicial restraint in deciding questions of constitutionality, recognizing the broad discretion given to the legislature in exercising its power. According to the court, legislative discretion would be given deferential treatment, and judicial scrutiny relating to equal protection challenges would be based on the "rational basis" test: i.e. that the classification in the statute reasonably relates to the legislative purpose. However, in this case, the court carved out an exception to this general rule, such that **prejudice to persons accorded special protection by the Constitution requires stricter judicial scrutiny** than mere rationality.

In addition, taking cognizance of Article 2 of the CEDAW, which directs the State party to take all steps necessary to eradicate discrimination, the court proactively applied a stricter standard in reviewing the challenge against equal protection in this case. The court examined not only the means, but also the ends achieved in legislating a classification that would allow an exception to equal protection. For example, the court cited the inquiry into sex discrimination, where "classifications by gender must serve important governmental objectives, and must be substantially related to achievement of those objectives". In this regard, the court ruled that based on stricter judicial scrutiny, the classification made in this case is no longer valid.

## [PHILIPPINES]

**ANG LADLAD LGBT PARTY V. COMMISSION ON ELECTIONS**

G.R. No. 190582  
 Supreme Court  
 8 April 2010

**Laws and International Instruments Considered**

*Republic Act No. 7941, Party-List System Act of 1995*  
*Constitution of the Philippines of 1987*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*International Convention on Civil and Political Rights*  
*Universal Declaration of Human Rights of 1948*  
*Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006)*

**SUMMARY**

Relying on pronouncements of the CEDAW Committee and other international treaty bodies, the court in this case acknowledged that discrimination on the basis of sex includes sexual orientation. It ruled that *Ang Ladlad*, an organization composed of LGBT individuals, is qualified to participate in the electoral party-list system on the same basis as other marginalized and under-represented sectors.

Section 2 of Republic Act No. 7941 or the Party-List System Act of 1995 states that the purpose of a party-list system is “to enable Filipino citizens belonging to marginalized and under-represented sectors, organizations and parties, and who lack well-defined political constituencies but who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation [...] to become members of the House of Representatives”. Of the total membership of the House of Representatives, 20 percent are reserved for party-list representatives.

In 2006, *Ang Ladlad* first filed with the Commission on Elections (COMELEC) its application for registration as a party-list organization under Republic Act No. 7941. This was denied by the COMELEC on the ground that it had no substantial membership base. On 17 August 2009, *Ang Ladlad* again filed a petition with the COMELEC to be accredited as a party-list organization in order to field its own candidates for the congressional elections in May 2010.

The COMELEC Second Division denied the petition on “moral grounds” and ruling on petitioner’s motion for reconsideration, the COMELEC Chair broke the tie and affirmed the denial of the petition. In its resolutions, the COMELEC stated that it was unable to accredit *Ang Ladlad* until such time that the organization was “able to

justify that having mixed sexual orientations and transgender identities is beneficial to the nation". As far as the COMELEC is concerned, "*Ang Ladlad* constituencies are still male and female, and they will remain either male or female protected by the same Bill of Rights that applies to all citizens alike."

Reiterating the denial of the petition on the ground that it is contrary to "public morals", the COMELEC further cited that the organization violates article 201 of the Revised Penal Code of the Philippines, which penalizes "those who shall publicly expound or proclaim doctrines openly contrary to public morals". The COMELEC asserted that the organization is a "nuisance" under article 694 of the Civil Code of the Philippines considering that it "shocks, defies, or disregards decency or morality".

Claiming that the resolutions issued by the COMELEC violated their constitutional rights and contravened international obligations of the Philippines to eliminate discrimination based on sexual orientation, *Ang Ladlad* filed a petition before the Supreme Court to annul the COMELEC resolutions and direct the COMELEC to grant its application for accreditation in the party-list system. *Ang Ladlad* also sought the issuance ex parte of a preliminary mandatory injunction against the COMELEC, which had announced that it would begin printing final ballots for voting in the May 2010 elections by 25 January 2010.

## DECISION

The court granted the petition and directed the COMELEC to accredit *Ang Ladlad* in the party-list system. Adopting the definition of non-discrimination articulated by international treaty bodies including the CEDAW Committee, the court affirmed that discrimination on the basis of "sex" includes sexual orientation. The court, however, declined to single out homosexuals as a separate class meriting differential treatment under the guarantee of equal protection in the Philippine Constitution of 1987. To avoid the imprimatur of discrimination, the court ruled that *Ang Ladlad* deserves to participate in the party-list system on the same basis as other marginalized and under-represented sectors.

Although sexual orientation is not specifically enumerated as a status or ground of discrimination in Article 26 of the ICCPR, the court noted that the Human Rights Committee opined that reference to "sex" in Article 26 should be construed to include "sexual orientation." The court also took notice that United Nations (UN) bodies declared discrimination on the basis of sexual orientation to be prohibited under various international agreements. Specifically, the court cited that the CEDAW Committee, on a number of occasions, criticized States parties for acts of discrimination on the basis of sexual orientation.

However, contrary to the claim of the petitioner, the court did not consider the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, which outline international principles relating to sexual orientation and gender identity as “generally accepted principles of international law”. According to the court, obligations outlined in these Principles are not reflective of the current state of international law and do not find basis in any of the sources of international law enumerated under Article 38(1) of the Statute of the International Court of Justice.

The court also examined the violation of the petitioner’s right to equal protection of the law guaranteed in the 1987 Philippine Constitution. The court applied the “rational basis” test as the standard, in which case the government need only show that the challenged **classification is rationally related to serving a legitimate state interest**. The court explained the COMELEC’s unsubstantiated claim that *Ang Ladlad* cannot contribute to the formulation of legislation that would benefit the nation and its assertion of moral disapproval of an unpopular minority such as that LGBT people are a legitimate state interest sufficient to satisfy the test of rationality required to merit an exception to the right to equal protection.

The COMELEC posited that the majority of the Philippine population considers homosexual conduct as immoral and unacceptable, and accordingly, there is sufficient reason to disqualify the petitioner. However, the court pointed out that there is no law criminalizing homosexual behaviour or expressions, or parties who exhibit homosexual behaviour. These “generally accepted public morals claimed by the COMELEC have not been convincingly transplanted into the realm of law”. The court stressed that the COMELEC had not identified any specific overt immoral act performed by *Ang Ladlad* to merit disqualification.

The court was not prepared to single out homosexuals as a separate class meriting special or differential treatment under the constitutional right to equal protection. It did not receive sufficient evidence to this effect, and according to the court, the petitioner merely demanded to be recognized as all other groups similarly situated. Hence, Republic Act No. 7941 should apply with equal force to LGBT people. The court pronounced that *Ang Ladlad* deserves to participate in the party-list system on the same basis as other marginalized and under-represented sectors.

## CONCURRING OPINION, JUSTICE RENATO PUNO

Justice Puno opined that a classification based on **gender or sexual orientation is a “quasi-suspect” classification that calls for a heightened level of judicial review** to ensure that it is not the product of historical prejudice and stereotyping. He relied on **Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas and the Executive Secretary**, which carved out an exception such that prejudice to persons accorded special protection by the 1987 Philippine Constitution, such as labour and other marginalized sectors, requires stricter judicial review than mere rationality.



Relying on American case law, he pointed out that a State action questioned on equal protection grounds is subject to three levels of judicial scrutiny, which on a “sliding scale basis”, varies with the type of classification utilized and the nature of the right affected. He explained the following three levels of judicial scrutiny.

American jurisprudence has determined that “suspect classes” in relation to the right to equal protection include classifications based on race, religion, alienage, national origin, and ancestry. The underlying rationale is that where legislation “affects discrete and insular minorities”, the presumption of constitutionality fades, and the State bears a heavy burden of justification. It must demonstrate that the classification made by legislation has been tailored precisely to serve a compelling governmental interest to be valid.

If the classification, while not invidious per se, nonetheless it gives rise to recurring constitutional difficulties. Moreover, if a classification disadvantages a “quasi-suspect class”, it will be treated under intermediate or heightened review. “Quasi-suspect class” includes classification based on gender or illegitimacy. To pass intermediate scrutiny, the law must not only further an important governmental interest and the classification substantially related to that interest, but the justification for the classification must also be genuine and should not depend on broad generalizations.

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. This is a relatively relaxed standard. As in the majority opinion in this case, the court assumes a deferential attitude in relation to classifications made by legislature under a law, and it is reluctant to invalidate such law unless there is a clear and unequivocal breach of the constitution. The presumption is in favour of the validity of the classification; that is, the grounds for distinction are legitimate, and the State action is fair and reasonable.

Justice Puno summarized that instead of adopting a rigid formula to determine whether certain legislative classifications warrant more demanding constitutional analysis, the United States Supreme Court has employed the following factors as a guide: (i) the history of invidious discrimination against the class burdened by the legislation; (ii) the characteristics that distinguish the class in relation to its ability to contribute to society; (iii) the “immutability” of the distinguishing characteristic of the class; and (iv) the political power of the subject class.

In this case, he noted that in relation to the first factor, it is indisputable that historically, gay and lesbian people have been discriminated upon solely due to their sexual orientation. *Ang Ladlad's* petition cited details of the discrimination and violence perpetuated against them. Justice Puno explained this history of discrimination suggests that any legislative burden placed on lesbian and gay people as a class is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective”.

Citing American jurisprudence, Justice Puno subscribed to the view that an individual's homosexual orientation "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities". Homosexuality bears no relation at all to an individual's ability to contribute fully to society. Hence, considering the second factor, he opined that classification made in this case merited heightened scrutiny. The characteristic that distinguish the class – i.e. sexual orientation – bears no relationship to its ability to contribute to society. The classification is likely based on irrelevant stereotypes and prejudice.

The third factor considers whether the attribute or characteristic that distinguishes a class is immutable. According to Justice Puno, this requirement of immutability is satisfied when the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it". In this case, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment, or escape the prejudice of a classification in the law. Sexual orientation is not the type of human trait that allows courts to relax their standard of review because the barrier is temporary or susceptible to self-help.

The factor of political powerlessness does not require a showing of absolute political powerlessness. The analysis turns on "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means". Justice Puno pointed out that discrimination against LGBT people has been so pervasive and severe that it would not be difficult to conclude that they are entitled to heightened constitutional protection despite recent political progress.

## COMMENTARY

There is no debate that the disqualification of *Ang Ladlad* from accreditation in the party-list system is an act of discrimination on the basis of sex, which the court viewed pursuant to interpretations of the CEDAW and other international human rights treaties as inclusive of sexual orientation. The court relied on the prohibited grounds of discrimination enumerated in the same Article 2 of the UDHR, the ICCPR and the ICESCR, and by reference, the CEDAW Committee's comments that acknowledged sexual orientation as a ground of discrimination. The phrase "other status" in the enumeration of prohibited grounds in these Covenants also allows for the inclusion of other grounds germane to the purpose of the prohibition.

Justice Puno, in his concurring opinion, considered the exception created in **Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas and the Executive Secretary**, and citing American case law, explained that LGBT people may be constituted as a class on their own or a "quasi-suspect class" upon application of a stricter judicial review in relation to determining valid classification under the

right to equal protection in the 1987 Philippine Constitution. In essence, his opinion leads to another basis for invalidating the COMELEC Resolutions: *Ang Ladlad's* disqualification is not only an act of discrimination based on sexual orientation, but also a form of discrimination committed in relation to a special or "quasi-suspect class" that meets the criteria for differential treatment under the constitutional right to equal protection.

The court declared and Justice Puno is in agreement that *Ang Ladlad* is entitled to participate in the party-list system together with other marginalized and under-represented sectors. The court invalidated any rationale for their disqualification by categorically declaring that the party cannot be discriminated against because of sexual orientation. The court did not deliberate on the full implications of the constitutional right to equal protection within the framework of substantive equality of the CEDAW. It stopped short of declaring that *Ang Ladlad* represents LGBT people, a special or "quasi-suspect class" entitled to differential treatment necessary to afford them "equality of opportunity" to participate in the electoral party-list system. Rather, the court concluded that *Ang Ladlad* deserves to be accredited solely on the ground that it qualifies among the "marginalized or under-represented sectors" referred to in the Party-List System Act.



Photo: Hamid Mukhlis

## [ Article 5(a) Customary Practices ]

Article 5 (a) of the CEDAW obliges States parties to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women”. This is closely related to the obligation of States parties under Article 2(f) to take all appropriate measures, including legislation, to modify or abolish existing customs and practices that discriminate against women. Article 5(a) and Article 2(f) emphasize the centrality of addressing harmful customary and other practices as well as gender stereotypes to achieving substantive equality.

Compliance with the CEDAW entails States parties to identify and eradicate negative cultural patterns and stereotyping in all areas covered by the Convention, or in **Karen Tayag Vertido v. the Philippines**, the CEDAW Committee opined that this even extends to rights guaranteed by other treaties such as the right to a fair and just trial. Article 5 (a) of the Convention connects specific socio-cultural patterns and gender stereotypes to structural discrimination, which lies at the root of intractable inequality between men and women even in countries where considerable achievements have been made to attain *de jure* equality.<sup>31</sup>

Joint General Recommendation No. 31 of the CEDAW Committee/ General Comment No. 18 of the Committee on Convention on the Rights of the Child (CRC) underscores that the requirement to effectively address harmful practices is among the core obligations of States parties under the CEDAW and the CRC. Harmful practices are rooted in discrimination based on sex, gender, age and other status. They are often associated with serious forms of violence, or are themselves forms of gender-based violence against women and children. The Committees called upon States parties “to explicitly prohibit by law and adequately sanction or criminalize

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31 Sepper (2014).

harmful practices, in accordance with the gravity of the offence and the harm caused, and provide for means of prevention, protection, recovery, reintegration, and redress for victims to combat impunity for harmful practices”.<sup>32</sup>

The CEDAW Committee explained in its General Recommendation No. 28 (2010) that any reservations under Article 2 and its paragraphs, which under Article 2(f) would include the obligation to modify harmful customs and practices, are impermissible since these are incompatible with the Convention. The Committee instructed that in cases of any inconsistency between national law, including religious and customary laws, and the State party’s obligations under the CEDAW, national laws may never be used as justification for a States party’s failure to carry out its international obligations.<sup>33</sup>

Multiple legal orders are implicated in relation to the obligation of States parties to modify customs and practices that discriminate against women. Modification of tradition, religion, or culture takes place in a highly complex terrain of “legal pluralism”, or more precisely, “State legal pluralism”, which means that different bodies of State law apply to different groups of the population within the State depending on ethnicity, religion, nationality, or locality. Legal pluralism also describes the social reality that what some groups or communities recognize as law may not be State law, and institutions or mechanisms that enforce the law may not be the State or part of the official legal system.<sup>34</sup>

Amidst this complexity, the CEDAW Committee emphasized the intent of the Convention to prevail over national laws – including religious and customary laws – that discriminate against women. Many countries do not subscribe to this view. They registered reservations under Article 16, the provision to which States parties have made the most reservations. Malaysia, one of the Southeast Asian countries that expressed reservation to this article, specifically declared that its accession to the Convention is subject to the understanding that “provisions of the Convention do not conflict with the provisions of the Islamic *Sharia* law”.

In a national context of legal pluralism, upholding the Convention over discriminatory national laws becomes complex, particularly where the conflict is not only between the CEDAW and what the CEDAW Committee referred to as “national law”, but also between various components of State law (e.g. Penal and Civil Codes v. religion-based personal status law like *Sharia* law), or between State law and “non-State legal orders” (e.g. criminal laws v. indigenous norms and practices enforced in communities without State sanction).<sup>35</sup> The CEDAW Committee did not detail specific strategies for courts to resolve these contradictions.

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32 [CEDAW/C/GC/31-CRC/C/GC/18]14 November 2014.

33 [CEDAW/C/GC/28] 16 December 2010.

34 Ursua (2014).

35 Ibid.

In General Recommendation No. 28 (2010), the CEDAW Committee proffered a general approach for courts to apply the principle of equality embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties.<sup>36</sup> According to General Recommendation No. 29 (2013), “identity-based personal status laws and customs perpetuate discrimination against women and the preservation of multiple legal systems is in itself discriminatory against women.”<sup>37</sup> The CEDAW Committee stressed that tradition, religion, or culture cannot be invoked to justify non-compliance with the Convention.

The CEDAW Committee, in its General Recommendation No. 33 (2015), enjoined States parties and non-State actors to examine ways in which plural justice systems can work together to reinforce protection for women’s rights. It mentioned models to harmonize plural justice systems with the Convention: the adoption of legislation that delineates the relationship between existing plural justice systems; law reforms to develop unified family laws or codify religious, customary and other systems; or accommodation of personal choices regarding application of preferred laws. Not only are these recommendations daunting, but they may be legally cumbersome to implement, if not impracticable.

In **Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors (Malaysia)**, the court took an easier route to settle such conflict of laws. It subsumed *Sharia* law and related identity-based laws and customs under the superior status of the constitution and statutory laws of the State legal order and did not engage with the complexity of resolving any contradictions between the applicability of multiple laws in plural justice systems. In **Jance Faransina Mooy-Ndun v. Junus Ndoy, et al. (Indonesia)** the court suggested an interesting, novel approach to resolve these contradictions where the court played the role more of a facilitator than an arbiter in contestations between customary laws and women’s human rights.

In the latter case, the court still relied on the constitution and national law, which accord recognition and respect for traditional customary rights, subject to regulation under the law to ensure equality for all. Instead of simply affirming and imposing the superiority of the constitution and statutes over customary laws, the court took judicial notice of actual changes in cultural practices of indigenous communities to accommodate women’s equal right to inheritance. The court affirmed that such changes in customary practices have been reflected in jurisprudence over the years and these are also in consonance with national law and the CEDAW.

Recognition of multiple discrimination as a dimension of non-discrimination under Article 1 of the CEDAW and the latent multiple identities embedded therein provides a broader perspective within which to resolve conflicting laws in plural justice systems. Multiple legal systems represent the accommodation of multiple identities in a national legal order. Rather than summarily dismiss multiple legal

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36 [CEDAW/C/GC/28] 16 December 2010.

37 [CEDAW/C/GC/29] 30 October 2013.



systems as inherently discriminatory, courts can look into manifestations of multiple discrimination and undertake harmonization of simultaneously applicable laws (e.g. the CEDAW, the constitution, statute and customary laws) to the extent that best address the causes and consequences of multiple discrimination against women.

Where harmonization is not possible and contestations become inevitable, the ruling in **Jance Faransina Mooy-Ndun v. Junus Ndoy, et al. (Indonesia)** points a positive way forward for courts to play a critical role in interpreting the CEDAW through the lens of changes in the local culture so as to make it both meaningful and relevant in the local setting. In the process, external law (e.g. international or national law) also influences local culture to change and reflect human rights principles.<sup>38</sup> This interplay of influence between law and culture allows for more dynamic processes of cultural change to happen instead of impositions regarding the dominance of one system of laws over the other, or of one identity over the validity of multiple identities.

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38 The Politics of Culture in International Law. See [https://clg.portalxm.com/library/keytext.cfm?keytext\\_id=55](https://clg.portalxm.com/library/keytext.cfm?keytext_id=55)



## [INDONESIA]

**JANCE FARANSINA MOOY-NDUN V. JUNUS NDOY, ET AL.**

No. 1048 K/Pdt/2012  
 Supreme Court  
 28 September 2012

**Laws and International Instruments Considered**

*Federal Constitution of Indonesia of 1945*  
*Law No. 39 of 1999, Human Rights*

*Convention on the Elimination of All Forms of Discrimination against Women ratified through Law No. 7 of 1984*

**SUMMARY**

Pursuant to Article 5 (a) of the CEDAW, the court in this case upheld the primacy of women's equal right to inheritance over customary practices that discriminate against women. The court affirmed that the customary law enforced in several communities in Indonesia that subscribe to patrilineal inheritance systems has changed to reflect the right of equality between men and women.

The appellant claimed that she was the legal heir of four parcels of land from her father who died in 1951. Claiming ownership, just like her predecessors, she continued planting coconut trees on the land and had been benefitting from the harvest. Around the 1990s, counter-claimants, without her knowledge and permission, started building houses and planting coconut trees on the same land claiming it as theirs. The counter-claimants submitted an application for the National Land Agency of the Rote Ndao District to register the disputed parcels of land in their names. The appellant filed a complaint before the District Court of Rote Ndao, which ruled in her favour.

On appeal, the High Court of Kupang reversed the decision of the District Court of Rote Ndao. The court ruled that although the appellant is the heir of her deceased father, customary law enforced in Rote Ndao district, East Nusa Tenggara, follows a patrilineal inheritance system, according to which the lawful heir is the son, and should the family have no son, the family should adopt a son of their relative, known as "dendi anak kelambi". Considering that the appellant is a woman, the court ruled that she is not a legal heir of her father. The court also pointed out that she does not have the capacity to file a lawsuit to claim the land. The appellant filed an application for cessation with the Supreme Court arguing that the High Court of Kupang "falsely applied or violated the applicable law".

## DECISION

The court ruled in favour of the right of the appellant, as a sole daughter, to inherit from her father. Specifically, the court cited article 5 (a) of Law No. 7 of 1984 pertaining to the legislation applying the CEDAW, which clearly prohibits cultural practices that discriminate against women. Upholding patrilineal inheritance systems in communities such as the appellant's, according to the court, would be contrary to existing jurisprudence that recognize equal inheritance rights between women and men even among indigenous communities. The court cited numerous cases since 1968 that establish the right of daughters and wives to inherit in these communities, including the right of an only daughter to be the sole heir of her father.

The court explained that patrilineal inheritance systems adopted by communities in Rote Ndao, Timor, Tapanuli, Lombok, Bali, Ambon and other regions in the country that do not provide inheritance rights to women are no longer in accordance with the principle of gender equality articulated in the CEDAW and the Federal Constitution of Indonesia. Article 27(1) of the Federal Constitution of Indonesia states that "all citizens shall be equal before the law" and in particular, article 18(b)(2) states that "the State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence", **but subject to regulation under the law.**

The court further relied on article 17 of Law No. 39 of 1999 on Human Rights, which guarantees the right of "everyone, without discrimination" to equal protection of the law, including the right to due process and fair trial. The court affirmed that the appellant has the right to file a lawsuit in order to claim her ownership over the disputed land. Pointing out that the High Court of Kupang erroneously applied the law applicable in this case, the court reversed its ruling and restored the appellant's right as a legitimate heir of her father's land and affirmed her right to file the lawsuit to claim her inheritance.

## COMMENTARY

From a CEDAW perspective, the customary law of patrilineal inheritance systems adjudged in this case manifests direct discrimination since it deprived the appellant of her right to inherit as the sole heir of her father. The court decided to rectify this. It relied on guarantees to equality in the 1945 Federal Constitution of Indonesia, article 17 of Law No. 39 of 1999, and the CEDAW to endorse the principle of substantive equality embodied in the Convention. The principle of equality, in relation to Article 5(a) of the CEDAW, calls for modification of customary practices in order to eliminate discrimination against women.

The State obligation to modify cultural practices that discriminate against women is carried out with the active role of courts to advance jurisprudence that outlaw discriminatory customary laws and practices. In this case, the court affirmed that patrilineal inheritance systems have ceased to be enforceable because a long line of cases since 1968 already confirmed changing customary practices even among indigenous communities to accommodate women's equal right to inheritance. Modification of patrilineal inheritance systems that disadvantage women is in accordance with the principle of equality between men and women embodied in the Federal Constitution and the CEDAW.

Similar to *Khofifah Indar Parawansa, et al.*, the court also leaned on Law No. 7 of 1984 on the ratification of the CEDAW to support its ruling. Upon ratification, the Convention has become a direct source of rights and duties in the national legal system, establishing the legal foundation for the court's application of the framework of substantive equality. The court cited Article 5(a) of the CEDAW to invoke the State party's obligation specifically to modify discriminatory customs and other practices, and not only regulate such practices, as called for in the Constitution. The application of the CEDAW in effect has provided the court with a broader legal basis to assert that patrilineal inheritance systems that discriminate against women's equal right to inheritance are no longer enforceable.

## [ Article 7 Political and Public Life ]

Articles 7 and 8 of the CEDAW recognize women's right to political participation on equal terms with men, and direct that "States parties shall take all appropriate measures to eliminate discrimination against women in political and public life". Article 25 in relation to Articles 2 and 25 of the ICCPR similarly recognizes the right of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives, without any distinction, including on the basis of sex. Constitutions of countries in Southeast Asia generally acknowledge women's political rights on an equal basis with men.

General Recommendation No. 23 (1997) of the CEDAW Committee refers to political and public life as encompassing the exercise of legislative, judicial, executive and administrative powers, covering all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels. Public and political life extends to civil society involvement, such as public boards and local councils, and activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political affairs.<sup>39</sup>

Recent breakthroughs made in advancing women's political rights are directly linked with State policies and programmes pertaining to temporary special measures recommended under Article 4 of the CEDAW. The Report of the UN Working Group on Discrimination against Women in Law and Practice noted that the most significant increase in the numbers of women in national parliaments over the past three decades has occurred in countries where special measures, such as gender quotas, have been effectively adapted to specific electoral and political systems. Research has shown that, in general, women's chances of winning seats in parliamentary elections increase in proportional representation systems.<sup>40</sup>

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39 See [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23)

40 Report of the Working Group on the issue of discrimination against women in law and in practice [A/HRC/23/50] 19 April 2013

As early as its General Recommendation No. 5 (1988), the CEDAW Committee acknowledged that the removal of *de jure* barriers to equality is not sufficient, and temporary special measures are necessary to achieve *de facto* equality for women.

<sup>41</sup>The Committee further noted women's lack of participation in public and political life, and in General Recommendation No. 23, urged States parties to use temporary special measures specifically provided for in Article 4 "to give full effect to Articles 7 and 8 of the Convention".<sup>42</sup> In the CEDAW General Recommendation No. 25 (2004), the Committee detailed guidelines for States parties to implement these measures.<sup>43</sup>

The purpose of **temporary special measures** is two-fold, both as a forward-looking and restorative strategy: they are necessary to accelerate women's progress towards equality as well as to correct the effects of past and current discrimination that has disadvantaged women as a group compared to others. Measures under Article 4 (1) of the CEDAW are of a temporary nature, unlike those mentioned in Article 4 (2), which are permanent measures for non-identical treatment of women and men due to their biological differences. The CEDAW Committee clarified that "the duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time."

The CEDAW, under Article 4, is clear: **temporary special measures shall "not be considered discrimination"**. Aimed at accelerating *de facto* equality between men and women, these measures are essential part of – not exception to – the well-established principles of equality and non-discrimination embodied in the Convention. In no way are such measures considered discriminatory against men provided that they do not lead to maintenance of unequal or separate standards between sexes, and are discontinued when their desired results have been achieved and sustained for a period of time.

A formal approach to equality, usually inscribed in constitutional rights, promotes the individual to claim rights based on merit, but obscures unequal treatment or discrimination against her on the basis of "group categorical distinction" such as sex, or based on any prejudicial view attached to the group she belongs to. Such an approach fails to address deeply rooted or systemic discrimination inscribed in her membership in a disadvantaged group (e.g. women). Temporary special measures are precisely intended to fill this gap by aiming to address the impact of systemic discrimination against any disadvantaged group, which are not dealt with in a formal approach to equality that focuses on individual claim of rights.<sup>44</sup>

In **Khofifah Indar Parawansa, et al. (Indonesia)**, the court led in taking a bold step of upholding temporary special measures pursuant to Article 4 in relation to Articles 7 and 8 of the CEDAW specifically to advance substantive or *de facto* equality for

<sup>41</sup> See [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom5](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom5)

<sup>42</sup> See [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23)

<sup>43</sup> See [www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

<sup>44</sup> Siegle, cited in Dairam (2014).

women as a disadvantaged sector in political and public life. Considering that women are still underrepresented in the sphere of politics in Indonesia, the court nullified several sections of Law No. 17 of 2014 for eliminating special provisions on women's political representation. Instituting temporary special measures by way of judicial fiat is a step in the right direction of incorporating the standard of substantive equality established in the CEDAW into judicial interpretations of the constitution and national laws.

In this case, the court declared that affirmative measures for women as a marginalized sector are integral to achieving equality before the law guaranteed in the constitution, but it did not rely on international conventions ratified by Indonesia. The court could have further strengthened its legal justification for affirmative action in **Khofifah Indar Parawansa, et al. (Indonesia)** had it not hesitated to assume the petitioners' view that Indonesia's ratification of international conventions, particularly the CEDAW by virtue of Law No. 7 of 1984 and the Convention on the Political Rights of Women through Law No. 68 of 1958, transformed these international treaties into direct sources of rights and duties enforceable within the national legal system.

## [INDONESIA]

**KHOFIFAH INDAR PARAWANSA, ET AL.**

No. 82/PUU-XII/2014  
 Constitutional Court  
 29 September 2014

**Laws and International Instruments Considered**

*Federal Constitution of Indonesia of 1945*

*Law No. 17 of 2014, The People's Consultative Assembly, People's Representative Council, Regional Representative Council, and Regional People's Representatives Council*

*Law No. 27 of 2009, The People's Consultative Assembly, People's Representative Council, Regional Representative Council, and Regional People's Representatives Council*

*Law No. 8 of 2012, General Elections for Members of People's Representative Council, Regional Representative Council, and Regional People's Representatives Council.*

*Law No. 15 of 2011, Organizing General Elections*

*Law No. 2 of 2011, Political Parties*

*Convention on the Political Rights of Women, ratified through Law No. 68 of 1958*

*Convention on the Elimination of All Forms of Discrimination against Women ratified through Law No. 7 of 1984*

*Beijing Declaration and Platform for Action, 1995*

**SUMMARY**

By declaring Law No. 17 of 2014 unconstitutional for eliminating temporary special measures on women's representation in legislative bodies that were previously accorded by law, the Court in this case restored the validity of affirmative action for women. It acknowledged temporary special measures as integral to women's right to equality before the law provided for in the Indonesian Constitution of 1945, interpreting this constitutional right in accordance with the standard of substantive equality prescribed in the CEDAW.

The petitioners, who included women political leaders, activists and women's organizations, filed a petition before the Constitutional Court to declare various sections of Law No. 17 of 2014 unconstitutional. They maintained that the absence of clauses on representation of women in Law No. 17 of 2014 regarding the organization of the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representatives Council impair their constitutional rights. Specifically, this law deprives them of special treatment necessary to obtain the same opportunities and benefits, and achieve equal treatment before the law guaranteed in articles 28(d)(2) and 28(h)(2) of the Indonesian Constitution.

The petitioners maintained that enactment of a quota for women's representation is an affirmative action, which gives women who have been disadvantaged in social, economic, political and other aspects the same opportunity as men to be able to occupy positions of leadership. Affirmative action for women to be elected as leaders of legislative bodies may reduce or limit political rights of male legislative candidates, but the petitioners asserted that it is not necessarily inconsistent with the Constitution. article 28 (j) (2) of the Indonesian Constitution explicitly provides that in the exercise of fundamental rights "every person shall have the duty to accept restrictions established by law for the sole purpose of guaranteeing the recognition and respect of the rights and freedoms of others".

The petitioners cited Indonesia's ratification of the Convention on the Political Rights of Women through Law No. 68 of 1958 and the CEDAW through Law No. 7 of 1984. They stressed that recognition of women's human rights, particularly women's right to political participation, has been strengthened by the international consensus around the Beijing Declaration and Platform for Action. Therefore, Law No. 17 of 2014, which did not include prioritization of women's participation in the constitution of legislative bodies, runs contrary to various sources of international law that have been the basis of the government's efforts to advance gender equality in the country.

## DECISION

The court ruled that Law No. 17 of 2014, which eliminated temporary special measures pertaining to women's representation in the constitution of various bodies of the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council and the Regional People's Representatives Council, impairs women's political rights guaranteed in the Indonesian Constitution of 1945. The court declared that article 97(2), article 104(2), article 109(2), article 115(2), article 121(2), article 152(2) and article 158(2) of this law are unconstitutional.

The court took the view of the petitioners that the absence of clauses on women's representation in Law No. 17 of 2014 is contrary to the Indonesian Constitution, particularly article 28 (h) (2), which states that "every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness". Ensuring women's representation in positions of leadership at the House of Representatives and other political bodies is a form of special treatment guaranteed constitutionally. The court stressed that it is a national policy enforced through various laws in the country.

The court also cited numerous decisions that affirm the political rights of women. For example, in its judicial review of Law No. 10 of 2008 on General Elections for Members of the People's Representative Council, the Regional Representative Council and the Regional People's Representatives Council, the court ruled to uphold the constitutionality of setting quotas for women's political participation. In this case,



the court explained: “[T]he policy prescribing an ideal of 30 percent of women’s representation and a requirement of one woman out of each three candidates for legislative members are features of an affirmative action policy that is temporary to encourage women’s participation in national policy-making.”

According to the court, Law No. 17 of 2014 also created a “legal uncertainty for women” who have a right to expect equal treatment under the law guaranteed in article 28 (d) (1) of the Indonesian Constitution of 1945. The court pointed out that elimination of women’s representation clauses in Law No. 17 of 2014 is not based on any assessment indicating that equality between women and men has been achieved to merit the removal of temporary special measures. In fact, representation of women in Indonesia still falls below the quota of 30 percent. From 2009 to 2014, the total number of women in the parliament remained below 21 percent. The percentage of votes for women in the general elections held in 2014 did not reach 30.

## COMMENTARY

This case marks a clear affirmation of women’s fundamental right to political participation guaranteed in Articles 7 and 8 in relation to Article 4 of the CEDAW. Realization of this right includes the obligation of a State party to put in place temporary special measures to ensure that women as a disadvantaged group are able to enjoy similar opportunities for political participation accorded to men in the realm of public life. By nullifying sections of Law No. 17 of 2014 for violating women’s entitlement to affirmative action secured under the Indonesian Constitution of 1945, the court in effect restored the prioritization of women’s representation in legislative bodies decreed under Law No. 27 of 2009.

In clear terms, the court subscribed to the standard of substantive equality prescribed in the CEDAW in its interpretation of the constitutional guarantee of equality before the law. Substantive equality encompasses the obligation of States parties to bring about equality in all aspects, both *de jure* and *de facto*. Temporary special measures, such as the ruling in this case to add specific provisions on women’s political representation in the law on the constitution of legislative bodies, are not discriminatory. Rather, these measures are necessary to accelerate *de facto* equality between men and women considering that women have been disadvantaged by a history of discrimination against their gender and continue to be underrepresented in politics.

This case sets an example for other courts to emulate regarding strengthening the critical role of the judiciary in the realization of women’s human rights. Amidst the politics surrounding the passage of Law No. 17 of 2014, the court took on the challenge to interpret the constitutional right to equality before the law broadly. It declared provisions of the legislation unconstitutional specifically because the law removed the affirmative measure put in place for women. While the court

categorically stated that the 1945 Constitution of Indonesia takes precedence over “the policy demands based on the CEDAW”, its ruling ensured that the constitutional right to equality before the law is interpreted to encompass Indonesia’s commitment to foster the standard of substantive equality in accordance with the Convention.

As mentioned by the petitioners, Indonesia ratified the two relevant treaties on women’s political participation: the Convention on the Political Rights of Women, ratified through Law No. 68 of 1958; and the CEDAW, ratified through Law No. 7 of 1984. While the court was reluctant to rely on international conventions such as the CEDAW to uphold affirmative action for women, ratification of these international treaties presents the court with legal justification to demand government’s compliance with positive obligations of the State party to fulfil women’s fundamental right to political participation guaranteed in Articles 7 and 8 in relation to Article 4 of the Convention.

## [ Article 11 Employment ]

The CEDAW recognizes women's equal right to work as an inalienable human right. Article 11(1) enumerates components of this right to include: the right to the same opportunities for employment; the right to choose a profession or employment; the right to equal remuneration, including benefits, and equal treatment in respect of work of equal value; and the right to just and favourable conditions of work, in particular the right to safe working conditions. Similar provisions, including the collective right to form and join trade unions, are found in Article 23 of the UDHR and Articles 6, 7 and 8 of the ICESCR.

Not provided for in other international conventions, Article 11 (2) of the CEDAW contains provisions to prevent any impairment or nullification of women's right to work in relation to their marital status or maternity. States parties are obliged to provide special protection to women during pregnancy or in relation to child rearing by undertaking specific measures such as: prohibition of dismissal on the ground of pregnancy; provision of benefits such as maternity leave; and establishment of services such as child care facilities that enable parents to combine pursuit of work and family obligations. These measures are subject to review periodically and may be revised or extended as necessary.

Protective measures specific to women who are pregnant or burdened with child rearing contemplated in the CEDAW are framed within the standard of substantive equality, more comprehensive than a formal equality or protectionist approach. This entails that States parties must take appropriate measures to secure for women "equality in opportunity" and "equality in results". Biological, socially and culturally constructed differences between women and men must be taken into account, which may require non-identical treatment to address them as well as the underlying causes and structures of gender inequality.

Yet, contrary to the protective measures explicitly provided for in the Convention, a **protectionist approach to equality**, a variant of formal equality, permeates the area of labour rights. The protectionist approach acknowledges differences between

men and women (e.g. women's maternal capacity) and based on such differences, treats them differently. But rather than achieve substantive equality, the aim is to reach the standard of sameness, which approximates the same male or masculinist standard implicit in formal equality. Underlying such differential treatment is a preconception, from the vantage point of a male reference, that women are weaker. Rather than extending protection, women are penalized for their inability to meet the male standard.

For example, in Viet Nam, Circular No.26/2013-TT on Equality of Opportunity and Treatment of 2013 prohibits all women from engaging in 38 types of jobs, such as installing oil rigs at sea or drilling wells. In addition, pregnant women or women with children under 12 months of age are prohibited from working in another 39 types of jobs. Similar regulations regarding the types of jobs for women are also found in Malaysia's Employment Act No. 265 of 1955 and Thailand's Labor Protection Act of 1998. The intent of these laws to protect women by precluding their employment in certain types of work in effect reinforces gender stereotypes, particularly a sexual division of labour, which discriminate against them.

In **Dung Thi Thuy Nguyen v. The Netherlands**, the CEDAW Committee further considered discrimination resulting from such persistent sexual division of labour. Committee members, in their dissenting opinion,<sup>45</sup> argued that an anti-accumulation clause that capped maternity benefits for women in multiple part-time employment may in effect constitute a form of **indirect discrimination** based on sex. The State party admitted that "part-time work is particularly common among women". Burdened with reproductive responsibilities at home, they make up the majority of those who combine part-time work as salaried employees and self-employed work as family helpers in their husbands' businesses. Committee members expressed concern about the resulting disproportionate impact of the policy on the majority of women engaged in part-time work.

Prohibition against night work for female workers is another example of protectionist legislation. In Malaysia and Thailand, female employees are prohibited from working in any industrial or agricultural undertaking at night; more specifically, pregnant women are prohibited from working at night, including working on holidays and overtime. These laws have not been revised even if their enforcement has resulted in violation of women's equal right to work. A similar prohibition was provided for in the Philippine Labor Code of 1974, but was subsequently repealed by Republic Act No. 10151 – An Act Allowing the Employment of Night Workers of 2011. The Act ensures that an alternative to night work is available to women but that pregnant women and nursing mothers are allowed to work at night subject to regulation, including certification of a competent physician.

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45 Individual opinions of Committee members, Ms Naela Mohamed Gabr, Ms Hanna Beate Schöpp-Schilling and Ms Heisoo Shin (dissenting) in [CEDAW/C/36/D/3/2004] 29 August 2006.

The protectionist approach to equality is further illustrated in the cases from Malaysia and the Philippines. The legal controversies in these cases revolve around stipulations in employment contracts or collective bargaining agreements that treat women differently because they are assumed to be in need of protection. Such stipulations include a lower retirement age for women in **Patricia Halaguena, et al. v. Philippine Airlines Incorporated (Philippines)** or termination or withdrawal of employment due to pregnancy in **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)**, **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor (Malaysia)** and **Airasia Bhd v. Rafizah Shima Mohamed Aris (Malaysia)**.

In **Patricia Halaguena, et al. v. Philippine Airlines Incorporated (Philippines)**, the main issue is the compulsory requirement for women to retire early, as stipulated in the collective bargaining agreement. The ruling of the court, which failed to nullify this discriminatory clause, in essence reifies the sexual division of labour and reinforces the dichotomy between the public and private spheres that has kept women in subordination. It conveys that women, in this case flight attendants, are compelled to retire earlier than men on the premise that the public sphere remains the primary domain of men. This implies that women are best confined to the private sphere, and are unable to fully engage in productive employment as men.

Article 7 (2) (a) of the CEDAW contains an explicit prohibition against “dismissal on the ground of pregnancy” as integral to the standard of substantive equality set by the Convention. Women’s capacity to become pregnant is an immutable condition inherent to their sex. Termination of employment solely due to pregnancy is undoubtedly a form of discrimination against women on the basis of sex. Pregnancy-based discrimination is a classic example of **direct discrimination**, which General Comment No. 20 of the Committee on ESCR defines as “detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation”.<sup>46</sup>

In **Dung Thi Thuy Nguyen v. The Netherlands**,<sup>47</sup> where the author alleged discrimination because of reduced maternity benefits, the State party argued that the maternity benefit is “specifically designed to give women an advantage in relation to men. It is therefore impossible to see how it can lead to more unfavourable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause.” This argument leads to a false conclusion that because there is “no comparable situation” (i.e. men cannot become pregnant), the author’s complaint of discrimination in maternity benefits has no merit.

General Comment No. 20 of the Committee on ESCR establishes the presumption that “differential treatment based on prohibited grounds will be viewed as discriminatory”; claims for permissible differential treatment must be proved and justified as compatible with the nature of the rights enshrined in the Covenant.<sup>48</sup>

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46 [E/C.12/GC/20] 2 July 2009.

47 [CEDAW/C/36/D/3/2004] 29 August 2006

48 [E/C.12/GC/20] 2 July 2009.

**Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor (Malaysia)** and **Airasia Bhd v. Rafizah Shima Mohamed Aris (Malaysia)**, which argue for pregnancy as a valid ground for termination of employment, do not appear to meet such criteria. In **RKB v. Turkey**, the CEDAW Committee further stressed that the principle of equal treatment in the field of employment should be interpreted “to the maximum extent possible” in line with obligations of States parties under the Convention.<sup>49</sup>

In assessing discriminatory terms of employment, most of the cases mainly relied on guarantees of equality before the law and equal protection of the law found in constitutions. **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor (Malaysia)** demonstrates the limits of understanding gender discrimination within the confines of formal equality inscribed in these constitutional guarantees. In this case, the court’s ruling became confusing as the court tried to argue that the discriminatory clause in the collective agreement is a reasonable classification, an exception to the constitutional right to equal protection. The CEDAW as a normative legal framework brings clarity. In **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)**, the court applied the standard of substantive equality in ruling that the policy and the act of the public official in disqualifying the job applicant because she was pregnant amount to gender discrimination.

The formal or *de jure* approach to equality, including the associated protectionist approach, is often linked with an “**anti-discrimination framework**”. The focus is on eliminating discrimination by espousing a “symmetrical application of the law” – that is, comparing individuals to others similarly situated and with the same attributes, then discerning disparities in treatment based on the standard of “treating likes alike”. Under this sameness standard, individual women are measured according to their correspondence with men. The approach to eliminate discrimination consists of providing measures for women to meet the male or masculinist standard, rather than correct systems and structures that have kept them disadvantaged in relation to men.<sup>50</sup>

In an anti-discrimination framework, in order to achieve formal equality, any differences between men and women are regarded as inconsequential. The imposition of a male standard is implicit, and ultimately, this framework favours men and discriminates against women. **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)** provides a good illustration. The case revolves around a gender-neutral policy regarding the recruitment of temporary teachers initially open to all, but on application, has prejudiced the plaintiff who was subsequently disqualified because she was pregnant. In effect, the pronouncements of the education officials betray an underlying premise of the policy, which is to hire primarily male teachers (who cannot get pregnant) in order to resolve the shortage of teachers in schools.

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49 [CEDAW/C/51/D/28/2010] 13 April 2012.

50 See Dairam, Shanthi (2014).

In contrast, an “**anti-subordination framework**” not only focuses on manifestations of discrimination against individual women, but takes the extra step towards transforming systems and structures that characterize women collectively as a disadvantaged group and perpetuate discrimination against them. Based on **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)**, courts can take the initiative to employ an “anti-subordination framework” in deciding labour disputes. They can play a more proactive role towards the development of labour policies and laws that do not gloss over discrimination against women by presuming they are equally placed or should aim to be like men, rather address structural discrimination and its impact on women, not as individuals but as a group.<sup>51</sup>

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51 Ibid.



## [PHILIPPINES]

**PATRICIA HALAGUENA, ET AL. V. PHILIPPINE AIRLINES INCORPORATED**

G.R. No. 172013  
 Supreme Court  
 2 October 2009

**Laws and International Instruments Considered**

*Presidential Decree No. 442, Labor Code of 1974*  
*Republic Act No. 6725, Act Strengthening Prohibition on Discrimination against Women of 1989*  
*Constitution of the Philippines of 1987*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*Beijing Declaration and Platform for Action, 1995*

**SUMMARY**

The court in this case raised the issue of discrimination against women in the area of employment. Although it deferred ruling on the issue of gender discrimination, the court acknowledged that the CEDAW is one of the sources of obligation that gives rise to a cause of action questioning the constitutionality of a provision in a collective bargaining agreement that prescribes a lower compulsory retirement age for female flight attendants.

The petitioners were employed as female flight attendants of the respondent, Philippine Airlines (PAL). They are members of the Flight Attendants and Stewards Association of the Philippines (FASAP), a labour organization that entered into a Collective Bargaining Agreement (CBA) with Philippine Airlines (PAL-FASAP CBA), valid for five years. The agreement stipulates the compulsory retirement age to be 55 for females and 60 for males. The petitioners complained that this is discriminatory and demanded the removal of this provision in the re-negotiations of the PAL-FASAP CBA.

Subsequent to the petitioners sending their complaint to PAL, the President of FASAP showed willingness to begin collective bargaining negotiations between the management and the association at the soonest possible time. The petitioners filed a special civil action for declaratory relief with prayer for the issuance of a temporary restraining order and writ of preliminary injunction with the Regional Trial Court.

The Regional Trial Court ruled in favour of the petitioners. Contrary to the argument of the respondent, the court asserted its jurisdiction over the case. According to

the court, the case seeks a declaration to nullify the questioned provision of the PAL-FASAP CBA, which is contrary to the 1987 Philippine Constitution, the Labor Code of 1974 and the CEDAW. It is not a case involving a labour dispute arising from an employer-employee relationship that would fall under the jurisdiction of the National Labor Relations Commission.

Aggrieved, the respondent appealed before the Court of Appeals and argued that the order of the Regional Trial Court, which denied its objection to the court's jurisdiction, should be annulled and set aside for having been issued without jurisdiction or with grave abuse of discretion amounting to lack of jurisdiction. The Court of Appeals reversed the decision of the Regional Trial Court, ruling that the court did not have jurisdiction over the case. Consequently, the orders of the Regional Trial Court were set aside, and the Court of Appeals ordered the dismissal of the case.

The petitioners brought the case before the Supreme Court and argued they have the constitutional right to fundamental equality with men under article 2, section 14 of the Philippine Constitution of 1987. Article 3 of Presidential Decree No. 442 or the Labor Code of 1974 also recognizes their statutory right to equal work and employment opportunities with men. Under article 135 of the Labor Code as amended by Republic Act No. 6725 or the Act Strengthening Prohibition on Discrimination against Women of 1989, it is unlawful, even criminal, for an employer to discriminate against women employees with respect to the terms and conditions of employment solely on the basis of their sex.

The petitioners claimed the discrimination against them is contrary to the CEDAW, which the Philippines ratified in 1981. The government, including the courts, must not only condemn all forms of discrimination against women, but also implement measures towards its elimination. They expressed that this case is a matter of public interest not only because of PAL's violation of the constitution and existing laws, but also because it highlights the fact that 23 years after the Philippines ratified the Convention, discrimination against women still persists in the country.

## DECISION

The court ruled partly in favour of the petitioners, reversing the decision of the Court of Appeals. But as to whether the stipulation in the PAL-FASAP CBA is discriminatory or not, according to the court, this is a question of fact. A full-blown trial is necessary for the court to ascertain whether this provision violates the constitution, statutes, and treaties. The case was remanded to the Regional Trial Court, which has jurisdiction to hear the case and determine the merit of the petition for declaratory relief.

The court clarified that the matter of employer-employee relationship is merely incidental in this case. The cause of action arose from different sources of obligation – “i.e. the Constitution and the CEDAW”. The power to interpret the constitution, labour statutes, law on contracts, and the Convention is well within the jurisdiction of the Regional Trial Court, a court of general jurisdiction. The jurisdiction of the National Labor Relations Commission under article 217 of the Labor Code is limited to disputes arising from an employer-employee relationship.

## COMMENTARY

Article 2, section 14 of the 1987 Philippine Constitution recognizes the principle of non-discrimination on the basis of sex. Republic Act No. 6725 amends article 135 of the Labor Code, imposing criminal liability on any employer that discriminates against women “with respect to terms and conditions of employment solely on account of her sex”. This law follows the intent of Article 11 (d) of the CEDAW, which obliges States parties to ensure the same rights for women and men, in particular “the right to equal remuneration, **including benefits**, and to equal treatment in respect to work of equal value”.

A precondition in employment that requires a lower compulsory retirement age for female flight attendants is indicative of a **protectionist approach to equality**. This is a form of **direct discrimination**, specifically because the purpose of the provision clearly discriminates against women. While it appears that the provision has been put in place to protect women by allowing them to retire earlier, this measure ultimately results in lesser pay and lesser benefits for female flight attendants compared with their male colleagues.

The iteration of Article 11 (d) in relation to Article 1 of the CEDAW in Republic Act No. 6725 proffers sufficient legal ground for the court to apply the CEDAW principle of non-discrimination domestically and declare as discriminatory the stipulation regarding a lower retirement age for female flight attendants in the PAL-FASAP CBA. In fact, the Regional Trial Court where the petition was initiated already ruled that “it discriminates against female flight attendants in violation of the Constitution, the Labor Code, and the CEDAW” and enjoined PAL and its representatives from implementing this provision pending resolution of the case.

On appeal, the Supreme Court did not rule on the question of gender discrimination. The court stressed that the central issue, which pertained to the “intrinsic validity of the CBA”, is a question of fact and remanded the case to the Regional Court to conduct the trial and decide on the pending petition to annul it. While the court is precluded from deciding on what it has perceived as a question of fact, applying the CEDAW as a normative legal framework reveals that the provision of the PAL-FASAP CBA, on its face, is patently a form of **direct discrimination**.

The attempt in the collective bargaining agreement to extend preferential treatment to female flight attendants, presumably to bring about equality by acknowledging differences between men and women, falls short of the CEDAW standard of substantive equality. Underlying such preferential treatment is a male or masculinist standard: female flight attendants should be like their male colleagues otherwise, they should be treated differently. This approach fails to rectify socially constructed differences or gender stereotypes that disadvantage women and reinforce systemic discrimination against them.

## [MALAYSIA]

**BEATRICE AT FERNANDEZ V. SISTEM PENERBANGAN MALAYSIA & ANOR**

[2005] 2 CLJ 713  
Federal Court, Putrajaya  
11 May 2005

**Laws and International Instruments Considered**

*Federal Constitution of Malaysia of 1957*  
*Employment Act of 1955*

*Convention on the Elimination of All Forms of Discrimination against Women*

**SUMMARY**

In this case, the court deliberated on the applicability of the CEDAW in determining whether or not the stipulation in a collective agreement that pregnancy is a ground for termination of employment constitutes gender discrimination and contravenes the principle of non-discrimination stated in article 8(2) of the 1957 Federal Constitution of Malaysia, as amended.

The appellant, Beatriz Fernandez, was employed with *Sistem Penerbangan Malaysia*, an airline company, as a flight attendant. Her employment contract was bound by a collective agreement, which states that any flight attendant upon becoming pregnant should resign from the company, or if she fails to do so, the company shall have the right to terminate her services. The appellant became pregnant in the course of her employment. Upon her refusal to resign, the airline terminated her employment.

Aggrieved, the appellant brought an action before the High Court seeking to declare the collective agreement void because it contravened article 8 (2) of the Federal Constitution of Malaysia. She also raised the issue regarding the enforceability of the CEDAW in a collective agreement between the employer and a trade union, where the terms and conditions are discriminatory in nature.

The Court of Appeal affirmed the decision of the lower court that the collective agreement was not discriminatory even on the basis of gender and therefore, it did not violate the non-discrimination principle under article 8 (2) of the Federal Constitution. The appellate court further ruled that the collective agreement is not legislation to be taken cognizance of by the Constitutional Court, but a contract strictly within the realm of private law and enforceable through adjudication by the Industrial Court. Dissatisfied with this ruling, the appellant filed an appeal with the Federal Court.

## DECISION

Article 8 (2) of the 1957 Federal Constitution of Malaysia, as amended, states: “[T]here 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...”. The court stressed that a collective agreement is a lawful contract enforceable between the contracting parties. “It is certainly not a law” within the contemplation of this provision. To invoke her rights under this article, the court explained that the appellant must show that a law or an executive action discriminated against her. Constitutional law, as a branch of public law, does not extend its reach to cover the infringement of any rights between private individuals or entities.

In dismissing the appeal, the court observed that article 8(1) of the Federal Constitution, which guarantees the right to equality before the law and equal protection of the law, extends to persons in the same class. The condition to terminate employment because of pregnancy applies to all female flight attendants, in compliance with this article. It is a valid form of classification as an exception to this constitutional right. The court took judicial notice of the nature of the job of flight attendants, which requires long hours of work, extensive walking on board, and often flying across different time zones. The court concluded, “It is certainly not a conducive place for pregnant women.” It is a “specialized occupation” that justifies different conditions of employment.

## COMMENTARY

In this case, the court had difficulty in addressing the issue of discrimination within the narrow confines of the constitutional right to equal protection. The difficulty arose because the court was forcing its justifications not to declare the differential treatment of women discriminatory, blinded by its unquestioning adherence to formal equality inscribed in the constitution. While the appellant proposed it, the court did not consider the CEDAW a normative legal framework in deciding this case. It ended entangled in determining whether or not there is any infringement of an enforceable right under the constitution, and if the appellant has a cause of action to file a suit.

According to the court, the collective agreement is not discriminatory in terms of gender. The amendment of the 1957 Federal Constitution of Malaysia to add “gender” as a ground for discrimination under article 8(2) took effect on 28 September 2001. The collective agreement became enforceable on 1 September 1987 for a period of three years. It was already in force long before the amendment of the Constitution. The court also ruled that the airline is not a government agency or public authority. The appellant cannot invoke article 8(2) of the Federal Constitution, which only applies to the impairment or nullification of any constitutional rights of an individual by the legislative or the executive departments, or their agencies.

Considered under the guarantees to equal protection provided for in article 8 (1) of the Federal Constitution, the court stressed that there was no discrimination because differences between men and women account for differential treatment. Women have to be treated differently to bring about a formal, or more precisely, a protectionist approach to equality. The differential condition of termination of employment due to pregnancy stipulated in the collective agreement applies to all female flight attendants in the same class hence, it is a reasonable classification permissible as an exception to these constitutional guarantees.

Applying the **standard of substantive equality** prescribed in CEDAW, no confusion is apparent. Termination of employment based on pregnancy is patently a form of **direct discrimination**. It is directed exclusively against women: only women can become pregnant, so unlike their male colleagues, the stipulation in the collective agreement singles out female flight attendants. Instead of applying the substantive equality standard, the court – subscribing to formal equality – employed a protectionist approach. It took judicial notice of the peculiar conditions of employment, and sought to protect female flight attendants by affirming that pregnancy is a valid ground for termination. Article 11(2)(a) of the CEDAW explicitly “prohibits, subject to the imposition of sanctions, dismissal on the grounds of pregnancy”.

The Convention takes a more comprehensive view – beyond “individualized rights” where rights are deemed to accrue solely to the individual and where the legal issue is narrowed to whether the individual has been unfairly treated therefore discriminated against in a particular context. From the CEDAW perspective, the issue is broadened to consider the individual within the context of her collective identity (e.g. as a woman). It frames the issue not simply in relation to any violation of her individual rights, but rather in consideration of any present, historical, or cumulative forms of discrimination against her group that impact on the realization of her individual rights.<sup>52</sup> The issue, then, is not whether the appellant was treated unfairly by the respondent, but whether the appellant had been discriminated upon because of her membership in one of the disadvantaged sectors (i.e. women). As a woman who had been subjected to discrimination, the appellant has a cause of action in this case.

The appellant is entitled to seek redress, arguably even within the ambit of the 1957 Federal Constitution of Malaysia, as amended to challenge the constitutionality of the stipulation in the collective agreement. The court’s argument that the condition of pregnancy as a ground for termination of employment among female flight attendants meets the criteria for a valid classification does not appear convincing. Clearly, a form of direct discrimination under the CEDAW, the condition cannot be justified as differential treatment that constitutes a valid classification permissible under the right to equal protection of the law guaranteed in article 8 (1) of the Federal Constitution of Malaysia.

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52 Ibid.





Photo: Mr. Eko Bambang Subiantoro

## [MALAYSIA]

**NOORFADILLA AHMAD SAIKIN V. CHAYED BASIRUN & ORS**

[2012] 1 CLJ 769  
 High Court Malaya  
 12 July 2011

**Laws and International Instruments Considered**

*Federal Constitution of Malaysia of 1957*  
*Specific Relief Act of 1950*

*Bangalore Principles on the Domestic Application of International Human Rights Norms*  
 (1988)

*Convention on the Elimination of All Forms of Discrimination against Women*  
*Vienna Convention on the Law of Treaties of 1969*

**SUMMARY**

In this case, the court demonstrated the relevance of Article 1 of the CEDAW in clarifying the meaning of discrimination on the basis of added to article 8 (2) of the Federal Constitution of Malaysia of 1957, as amended. The court sought to determine whether or not the act of withdrawing the plaintiff's appointment to a teaching post because of her pregnancy constitutes gender discrimination.

The plaintiff applied for a teaching post as *Guru Sandaran Tidak Terlatih* (GSTT) with the Education Office of the Hulu Langat District (PP DHL). The PP DHL was in charge of employing those interested in the GSTT position for the Hulu Langat District. The Ministry of Education proposed hiring untrained teachers, also known as GSTT, as a solution to the shortage of teachers in Malaysia. After completing the interview and other requirements, the plaintiff was offered the post. But the PP DHL officer, upon learning that she was pregnant, withdrew her appointment.

The plaintiff, through her husband, wrote to the Ministry of Education requesting an explanation. The Ministry replied that a pregnant woman cannot be appointed to a GSTT post because to do so would not fulfill the purpose (of employing a GSTT) to tackle the problem of lack of teachers in the country. The plaintiff filed a complaint that the post offered to her was withdrawn on the sole ground that she was pregnant. She maintained that she is entitled to be employed as a GSTT even if pregnant, and demanded that her employment be restored immediately.

## DECISION

The court, ruling in favour of the plaintiff, acknowledged that in interpreting article 8 (2) of the Federal Constitution of Malaysia, it is the court's duty to take into account the government's obligations under an international convention like the CEDAW to which Malaysia is a signatory. The court noted that precisely in compliance with the Convention, article 8 (2) of the Federal Constitution of 1957 was amended to add "gender" as a prohibited ground of discrimination, an amendment that came into force on 28 September 2001. Hence, there is no prevailing impediment for the court to refer to Articles 1 and 11 of the CEDAW, and on this basis, declare that withdrawal of employment due to pregnancy is a form of gender discrimination.

The court explained that Article 11(1)(b) of the Convention provides that States parties must take all appropriate measures to eliminate discrimination against women in the field of employment. This is to ensure, on equal basis between men and women, the fundamental right to work, i.e. the right to the same employment opportunity, including the application of the same criteria for selection and hiring in matters of employment. Article 11(2) (a) of the CEDAW explicitly directs States parties to prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy.

Applying CEDAW's Article 1 on non-discrimination and Article 11 on equal right to work, the court declared that withholding the plaintiff's appointment to the post because of her pregnancy is a form of gender discrimination due to the biological fact that only women have the capacity to become pregnant. The court referred to the decision of the Supreme Court of Canada in *Brooks v. Canada Safeway Ltd.*<sup>53</sup>

*It cannot be disputed that everyone in society benefits from procreation. The Safeway Plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus, in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. A refusal to find that Safeway Plan is discriminatory would undermine one of the purposes of anti-discrimination legislation.*

In discerning the meaning of "gender" in the amendment to article 8 (2) the Federal Constitution of Malaysia, the court relied on the Bangalore Principles adopted at the judicial colloquium on the Domestic Application of International Human Rights Norms held in Bangalore, India in 1988, which provide:

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53 [1989] 59 DLR (4th) 321.

*It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes -- whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.*

The court echoed the ruling in **Australian Chu Kheng Lim v. Minister for Immigration**<sup>54</sup> on the *doctrine of legitimate expectation*: “where a statute or subordinate legislation is ambiguous, courts should favour the construction that accords with a country’s obligations under a treaty or international convention to which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument” because the Parliament intends to give effect to the country’s obligation under international law.

The court further cited that in **Vishaka v. State of Rajasthan**,<sup>55</sup> the Supreme Court of India in interpreting the Constitution emphasized the obligation of the government in two other international declarations, one of which was the Beijing Declaration and Platform for Action. The court noted that Malaysia is also a party to this declaration. It pointed out that international commitments made by the government, although not directly part of the domestic law, can be used in this case to elaborate and give further meaning to constitutional guarantees.

Following the decision in **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor**, the court reiterated that to invoke article 8(2) of the Federal Constitution of Malaysia, the complainant must show that some law or action of the executive body discriminated against her so as to controvert her rights under this article. Constitutional law, as a branch of public law, deals with any infringement of the rights of an individual by the legislative or the executive departments, or their agencies. In this case, the defendants are public authorities, clearly agents of the executive body.

But contrary to the ruling in **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor**, the court explained that discrimination against pregnant women cannot be justified by applying the principle of reasonable classification as an exception to the constitutional guarantees to equal protection. According to the court, reasonable classification is applicable only to article 8(1). It does not apply to article 8(2) of the 1957 Federal Constitution of Malaysia, as amended. Discrimination on grounds enumerated in article 8(2) is not subject to any exception. Therefore, any form of discrimination based on grounds enumerated in this article cannot be validated by having recourse to the principle of reasonable classification.

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54 [1992] 176 CLR 1.

55 AIR [1997] SC 3011.



The court ruled that there is no merit in the argument that employing a pregnant woman to fill in the post will defeat the purpose of GSTT to address the shortage of teachers in Malaysia. The contract for GSTT is a month-to-month contract, which can be terminated at any time. Even after one month of working, there is no guarantee that the person appointed to the post will stay even if she is not pregnant. Further, the provision in the circular on the terms of employment of GSTT supports the argument that a pregnant woman can be engaged as GSTT. The circular does not specifically prohibit a pregnant woman from applying to the post; it merely states that a GSTT is not entitled to maternity leave.

## COMMENTARY

Invoking the CEDAW, in very clear terms, the court established any ambiguity or uncertainty in the meaning of discrimination on the basis of gender added to article 8(2) of the 1957 Federal Constitution of Malaysia as amended. The court pointed out that this provision must be interpreted in accordance with the principle of non-discrimination in Article 1 of the CEDAW. The court confirmed that, without doubt, the curtailment of women's right to work on the sole basis of pregnancy is an obvious act of discrimination that is prohibited under the Federal Constitution as well as Article 11 of the CEDAW.

Subscribing to the principle of non-discrimination in the CEDAW, the court unerringly complied with the **standard of substantive equality** set in the Convention. The gender-neutral policy on GSTT amounts to **indirect discrimination** because, while the purpose is to open applications to all, the effect has been discriminatory against the plaintiff. The act of the respondent to read into the policy a disqualification on the ground of maternity and on this basis withdraw the plaintiff's employment because she was pregnant is a form of **direct discrimination**, "[a] detrimental act... on the basis of prohibited grounds where there is no comparable situation", as explained under General Comment No. 20 of the Committee on ESCR.

The court conceded that provisions of an international treaty ratified by the government do not automatically form part of the national system of laws, unless those provisions have been validly incorporated by statute. However, pursuant to the Bangalore Principles and the *doctrine of legitimate expectation*, the court took the initiative to apply the CEDAW in settling the meaning and removing any ambiguity around the definition of gender discrimination under article 8 (2) of the Federal Constitution. The court's act of incorporating the principle of non-discrimination under Article 1 of the CEDAW to elaborate on the meaning of a constitutional right integrated the Convention in the domestic legal order.

## [MALAYSIA]

**AIRASIA BHD V. RAFIZAH SHIMA MOHAMED ARIS**

[2015] 2 CLJ 510  
 Court of Appeal, Putrajaya  
 3 July 2014

**Laws and International Instruments Considered**

*Federal Constitution of Malaysia of 1957*  
*Convention on the Elimination of All Forms of Discrimination against Women*

**SUMMARY**

The court in this case examined the enforceability of international treaties like the CEDAW in Malaysia, which has adopted a dualist regime in the domestic application of international legal systems. The court reviewed whether or not the training agreement, which stipulates that pregnancy is a ground for termination of employment, discriminates against women.

The respondent was an employee of the appellant Air Asia Berhad, a private limited liability company that runs a low-cost carrier. On 19 October 2006, she was chosen by the company to undergo the Trainee Aircraft Maintenance Engineering Program. A Training Agreement and Bond was executed, clause 5.1(4) of which stipulates that the trainee must not get pregnant during the training period, which runs approximately for four years. However, in June 2010, the respondent furnished the company with a medical report confirming her pregnancy. By letter dated 1 July 2010, the company terminated the agreement as well as the employment of the respondent.

The appellant company filed a civil suit at the Sessions Court for breach of the agreement, and a summary judgment was entered against the respondent. The respondent appealed the decision with the High Court. The respondent also filed an *originating summons* in the High Court seeking the court to declare clause 5.1(4) of the agreement null and void because it has the effect of discriminating against her rights as a married woman. She further argued that the agreement contravenes article 8 of the 1957 Federal Constitution of Malaysia and the CEDAW. The High Court granted the respondent's *originating summons* and dismissed the appellant's application to strike it out.

The appellant initially appealed both decisions of the High Court before the Court of Appeal. Since both appeals involved the same parties and pertained to common questions of fact and law, the Court of Appeal heard them together. At the beginning of the hearings, the appellant withdrew the second appeal regarding the dismissal of the application to strike out the respondent's *originating summons*. In contesting the respondent's petition, the appellant argued that the High Court erred in failing to apply the principle in **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor** in deciding the case. The appellant contended that the parties are private parties and as such, provisions of the Federal Constitution do not apply. The appellant also submitted that the High Court erred in relying on the case of **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors**.

## DECISION

The Court of Appeal ruled in favour of the appellant and concluded that clause 5.1(4) does not restrain marriage nor does it prohibit pregnancy if the respondent had completed the Trainee Aircraft Maintenance Engineer Program in accordance with the agreement. It subscribed to the appellant's contention that pursuant to the ruling in **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor**, constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority and does not apply in relation to the infringement of rights between private individuals or entities. In this case, the agreement entered into between the appellant and the respondent is a lawful contract between private parties. Pursuant to the agreement, the respondent is required to resign upon being pregnant, or termination would take place in the event of refusal to resign.

The Court acknowledged that Malaysia is a signatory to the CEDAW, which it ratified in 1995. However, it took cognizance of the two general modes of the application of international legal systems in domestic legal orders: the doctrine of incorporation (monism) and the doctrine of transformation (dualism). Like the United Kingdom, Malaysia has adopted a dualist system. Unlike in a monist system, ratification alone does not make the treaty applicable domestically. The treaty can only become part of the domestic legal order when it is transformed into municipal law by the legislature's passage of a legislation or statute.

## COMMENTARY

The court in this case conformed with the ruling in **Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor**. Relying on article 8(2) of the 1957 Federal Constitution of Malaysia, as amended, the court simply viewed the training agreement as an enforceable contract between private parties. The court stated that the respondent was not precluded from exercising any of her rights if only she complied with the requirements of the Trainee Aircraft Maintenance Program as specified in the



agreement. The respondent also cannot invoke infringement of any rights under the Federal Constitution because article 8(2) only applies to impairment or nullification of individual rights committed by public authorities.

According to the court, “the agreement does not discriminate against women”. Unlike in **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)**, the court did not even consider the enumeration of prohibited grounds of discrimination specified in article 8(2) of the 1957 Federal Constitution of Malaysia, which was amended precisely to add “gender”. The court did not examine if the stipulation in the training agreement regarding termination of employment due to pregnancy is a valid classification as an exception to the guarantees to equal protection provided for in article 8(1). It did not engage with the issue of gender discrimination in relation to the CEDAW. The court insisted that the CEDAW does not have any binding effect in the domestic legal order because it has not been transformed into a national law or statute.

Devoid of the CEDAW framework of substantive equality, the court failed to consider that termination of employment based on maternity is a blatant manifestation of **direct discrimination**. Further, the court limited its view to upholding the enforceability of the training agreement between contracting parties, regardless of its problematic stipulation, which in effect violates the prohibition against discrimination on the basis of gender guaranteed in article 8(2) of the Federal Constitution in relation to Article 1 of the CEDAW. If the court applied the Convention, as explained by the CEDAW Committee in General Recommendation No. 28, Article 2(e) of the Convention further imposes an obligation of due diligence on States parties to prevent discrimination by private actors. The court can then initiate a closer scrutiny of the training agreement to ensure that private actors, such as the appellant airline company, do not engage in discriminatory acts against women as defined in the Convention.

In **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors (Malaysia)** and **Indira Gandhi Mutho**, the court stressed that the 1957 Federal Constitution of Malaysia was amended to include “gender” among the prohibited grounds of discrimination enumerated in article 8 (2), precisely to comply with the CEDAW. This is in consonance with the doctrine of *pacta sunt servanda* codified in the Vienna Convention on the Law of Treaties of 1969. Article 26 of the Convention states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”. The good faith element of this principle suggests that States parties may not invoke restrictions imposed by domestic law as justification for not complying with their treaty obligations provided that the treaty was duly ratified by competent authorities, and in accordance with constitutional and statutory requirements.

The court was unequivocal in its pronouncement that following a dualist tradition in the application of international legal systems domestically, ratification of the Convention alone does not make it enforceable within the national legal system. Yet, pursuant to the doctrine of *pacta sunt servanda*, courts can affirm the intent of constitutional amendment to include gender as a basis of discrimination and take appropriate steps to enforce the CEDAW domestically and give effect to the country's obligations under international law. In spite of the ruling in this case, courts would do well to continue to rely on the Bangalore Principles as well as the *doctrine of legitimate expectation* as demonstrated in *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* (Malaysia) and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* to invoke the CEDAW specifically to settle ambiguity or uncertainty in any provision in the national constitution, legislation, or common law.

## [ Article 16 Marriage and Family Life ]

The CEDAW recognizes women's right to equality within the family in the following articles: Article 9 grants women equal rights to acquire, change, or retain their nationality, particularly in the context of marriage; Article 15(1), (2) and (3) accords them same legal capacity as men to enter into contracts, administer property, and seek redress before courts and tribunals; Article 15 (4) grants women equal rights as men to freedom of movement and freedom to choose their residence and domicile; and Article 16 recognizes women's equal rights to enter into marriage and assume the same rights as men during marriage and upon dissolution. Such rights include the right to exercise a profession or occupation and to own and exercise control over property.

With respect to children in the context of family, the Convention in Article 16 clearly extends women and men the same rights to decide freely and responsibly on the number and spacing of their children. It accords every couple the same rights and responsibilities as parents, irrespective of their marital status. Parents also have equal rights to guardianship, wardship, trusteeship, adoption of children and related custodial arrangements. In all cases "the best interests of the child shall be the paramount consideration", a core principle embodied in the CRC.

Other treaties also confer women equal rights in the context of marriage and the family. These conventions include: Article 16 of the UDHR and Article 23 of ICCPR recognize equal rights between men and women in marriage, during marriage, and at its dissolution. The ICESCR under Article 10 guarantees the same rights, and in addition, provides that "special protection should be accorded to mothers during a reasonable period before and after childbirth", which should include maternity leave and other adequate social security benefits. The Convention on the Nationality of Married Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages are specific treaties upholding women's right to equality within the family.

In its General Recommendation No. 21 (1994), the CEDAW Committee acknowledged that families take many forms and assume diverse functions. Hence, the concept of “family” and congruent rights must be understood in the “widest sense”, save for an explicit prohibition against polygamous marriages. The duty of the State to eliminate discrimination against women in marital affairs further covers *de facto* unions and registered partnerships, particularly in ensuring equal economic rights between partners.<sup>56</sup> The Human Rights Committee in its General Comment No. 28 (2000) specifically extends the same rights to women as single parents. Regardless of the form it takes and the governing legal systems, the Committee underscored the State obligation to uphold equality within the family, “both at law and in private”.<sup>57</sup>

The prevailing gender stereotype regarding the patriarchal structure of a family often results in limitations to women’s right to equality within the family. This is evident in the presumption on domicile upheld by the court in **KKP v. PCSP (Malaysia)**. The court, guarding against the applicability of the CEDAW, failed to correct the underlying gender bias of ascribing to men the status of head of the family and primary decision maker. In its General Comment No. 20 (2009), the Committee on ESCR explained the notion of discrimination on the ground “sex” has evolved considerably to cover such social construction of gender stereotypes, prejudices, and expected roles that have created obstacles to the realization of women’s human rights.<sup>58</sup>

The CEDAW Committee General Recommendation No. 21 (1994) defines domicile as “a concept in common law countries referring to the country in which a person intends to reside and to whose jurisdiction she will submit”.<sup>59</sup> Under Article 15 (4) of the CEDAW, domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. The court in **KKP v. PCSP (Malaysia)**, however, insisted that a woman is not permitted by law to choose her own domicile. Withholding the choice of domicile, warned the CEDAW Committee, could limit a woman’s access to courts in the country in which she lives – a possible consequence in this case, other considerations such as the rule on *forum non conveniens* notwithstanding.

**Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors** is noteworthy in setting another example to firmly establish the domestic applicability of the CEDAW. In a bold gesture, the court invoked the CEDAW to settle the ambiguity in the meaning of “parent” in the Federal Constitution and statutes. The court leaned on the Bangalore Principles as well as the *doctrine of legitimate expectation* to pave the way for the domestic application of the Convention without need of legislation in countries like Malaysia that adhere to a dualist tradition. Applying the substantive equality framework of the CEDAW, the court resolved the ambiguity of “parent” to mean “both parents” in order to ensure compatibility between constitutional guarantees in domestic law with Malaysia’s international obligations under the CEDAW to uphold women’s human rights.

56 See [www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

57 [CCPR/C/21/Rev.1/Add.10] 2000.

58 [E/C.12/GC/20] 2 July 2009.

59 See [www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

## [MALAYSIA]

**KKP v. PCSP**

[2014] 8 CLJ 626  
 High Court Malaya, Kuala Lumpur  
 11 December 2013

**Laws and International Instruments Considered**

*Law Reform (Marriage and Divorce) Act of 1976*  
*Convention on the Elimination of All Forms of Discrimination against Women*

**SUMMARY**

In this case, the court examined compliance with Articles 2 and 15 (4) of the CEDAW in relation to determining the domicile of the wife for the purpose of assuming jurisdiction over the divorce case filed by her husband. The court took notice of Malaysia's ratification of the Convention, but pointed out that no amendments were made to change the rule on domicile; therefore, existing regulations and jurisprudence on domicile remain applicable.

Both husband and wife, the plaintiff and the defendant respectively, were born in Malaysia. Their marriage was solemnized in Malaysia. They have five children, all of whom are over 18 years of age. While the children accompanied by the wife moved first to Australia, then to Canada, they resided at the matrimonial home whenever they returned to Malaysia. The husband maintained his residence in Malaysia, which is also where he established the centre of his business. He has no permanent residence or citizenship in any other country. He has remained a Malaysian citizen.

The wife holds a dual Australian and Canadian citizenship. She had also lived in the matrimonial home with her husband in Malaysia until 10 June 2012, the date when she chose to remain in the United Kingdom (UK) and stay in one of the properties acquired through her husband's business. Although she had been staying in the UK, she is not a citizen of the country, and only holds a tourist visa. She does not have a permanent residence or work permit to remain in the country for an extended period of time.

The couple were experiencing marital difficulties and sought counselling on different occasions for the last 15 to 20 years of their marriage. Unable to reconcile, on 14 February 2013, the wife filed a petition for divorce in the UK. Around two weeks later, the husband also filed for divorce in Malaysia. On 3 May 2013, the wife filed an application with the court to stay all proceedings in Malaysia pending hearing and disposal of her petition for divorce before the High Court of Justice of England.

Under contention is the jurisdiction of the court in Malaysia to issue a divorce decree in this case. Pursuant to section 48 (1) of the Law Reform (Marriage and Divorce) Act of 1976 (LRA), the court acquires jurisdiction if the following conditions are met: (i) the marriage was registered in Malaysia under the LRA; and (ii) the domicile of the parties to the marriage at the time of the petition is in Malaysia. While the husband insisted that they were both domiciled in Malaysia, the wife claimed the contrary.

The plaintiff relied on the statutory presumption that a Malaysian citizen is deemed domiciled in Malaysia under section 3 (2) of the LRA: “For purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia”. He asserted that he and his wife were both Malaysian citizens, and evidence proved they had retained their domicile in the country. Since their marriage was solemnized in Malaysia and they both met the requirement of domicile, the court in Malaysia should have jurisdiction over the divorce case.

The defendant invoked the CEDAW, which Malaysia ratified in 1995. She maintained that her husband’s claim that a wife acquires the domicile of her husband and cannot abandon such domicile or acquire her own is outdated. She argued this presumption has been superseded by Article 15(4) of the CEDAW, which provides: “States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence or domicile”. Relying on this article, she claimed that the court in Malaysia does not have jurisdiction to hear the divorce case filed by her husband because she established her residence and domicile in the UK.

## DECISION

The court affirmed the ruling of the Court of Appeal and decided that it has jurisdiction to hear the matrimonial proceedings in Malaysia in accordance with the LRA. The court took cognizance of Malaysia’s ratification of the CEDAW and specifically cited Articles 2(b) and (f), which directs all States parties to adopt appropriate legislative or other measures or to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. However, according to the court, no provision in the LRA was amended to comply with the Convention.

The court also declared the ruling in the case of **Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam**<sup>60</sup> “is still the law of the land”. In this case, the issue of domicile was resolved with the wife presumed to follow her husband’s domicile: “a Malaysian woman upon marriage will acquire her husband’s domicile and until that marriage was lawfully dissolved, she will retain the domicile of her husband”. The court took notice that this case was decided in 1997, one year after Malaysia ratified the CEDAW, which indicated a lack of intent by the court to accommodate the contrary stipulation on domicile in the Convention.

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60 [1997] 3 MLJ 768.

The wife acquired Australian and Canadian citizenship, but according to the court, her Malaysian citizenship acquired by birth had not been revoked by the government. Under articles 23 and 24 of the Federal Constitution, an actual act of revocation, such as the issuance of an order by the government, is required to terminate citizenship. Therefore, pursuant to section 3 (2) of LRA, as a Malaysian citizen, she is deemed domiciled in Malaysia. Evidence also showed that until 6 October 2012, the date she chose to remain in the UK and file for divorce, she was living in the matrimonial home in Malaysia. She had not given up her domicile in the country.

## COMMENTARY

The court did not carefully examine the domestic applicability of the CEDAW. It did not explain, but rather inferred that following the country's ratification of the Convention in 1995, a special legislation or amendment of a law is required to make the Convention part of domestic law. The court maintained that there were no amendments to the provisions in the LRA on domicile subsequent to the ratification of the CEDAW. Similarly, **Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam**, decided one year after the ratification, sets a different rule on the domicile of spouses, contrary to that provided for in Article 15 (4) of the CEDAW.

Varying presumptions on domicile were for consideration before the court: **Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam** ruled that the wife follows the domicile of her husband until dissolution of marriage; the LRA deems citizenship and domicile to be the same, unless proven otherwise; and the CEDAW gives the wife the freedom to choose her own domicile. In both the court judgment and the LRA, domicile is ascribed – the former by reason of marriage and the latter by reason of citizenship. It is only under the CEDAW that a wife is given the right to choose her domicile, which may be different from that of her husband.

Applying the **standard of substantive equality** prescribed in the Convention, the only option is to uphold women's right to choose their domicile. This entails removing the automatic transfer of a husband's domicile to his wife, which betrays a gender bias that, by assumption, designates men as head of the family. This presumption constitutes a form of discrimination against women, particularly married women, who are deprived of their right to choose their domicile upon marriage. The stipulation in the LRA on domicile, although it does not discriminate against women on its face, in effect is **indirect discrimination**. It takes away women's right to make her choice as recognized under Article 15(4) of the CEDAW.

Given the contradicting presumptions on domicile, an issue of uncertainty arises. While the LRA is clear that citizenship and domicile are presumed to be the same, the decision in the **Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam** prescribes that the wife has to follow the domicile of her husband. This gives room for the court to turn to the Bangalore Principles and consider possibilities of



incorporating the intent of the CEDAW in settling the uncertainty. It could invoke the CEDAW and argue to interpret the LRA to allow proof that the wife has decided to choose a domicile different from her husband in exercise of her right under the Convention.

## [MALAYSIA]

**INDIRA GANDHI MUTHO V. PENGARAH JABATAN AGAMA ISLAM PERAK & ORS**

[2013] 7 CLJ 82  
 High Court, Malaya, Ipoh  
 25 July 2013

**Laws and International Instruments Considered**

*Federal Constitution of Malaysia of 1957*

*The Administration Of The Religion Of Islam (Perak) Enactment of 2004*

*Guardianship of Infants Act 1961*

*Bangalore Principles on the Domestic Application of International Human Rights Norms (1988)*

*Convention on the Elimination of All Forms of Discrimination against Women*

*CEDAW General Recommendation No. 21 (1994)*

*Universal Declaration of Human Rights (1948)*

**SUMMARY**

The court in this case demonstrated the value of enforcing the CEDAW within the national legal system and interpreting provisions of law in compliance with its standard of substantive equality. In its ruling, the High court discussed the relevance of Articles 5 (b) and 16 (1) of the CEDAW on marriage and family life in giving a broader meaning to the laws on parenting in order to uphold women's equal rights.

The applicant, Indira Gandhi, married Pathmanathan in a civil marriage on 10 April 1993. They were the parents of three children aged 12 years, 11 years and 11 months at the time of the lawsuit. The applicant recounted that, at the beginning of 2009, she and her husband had many altercations that culminated in the husband forcibly taking the youngest child from her on 31 March 2009.

The applicant lodged a police complaint. The police told her that her husband had converted to Islam, and she was fearful he might have converted their three children to Islam forcibly. She filed applications before the High Court for an interim custody order of the three children, an injunction order to restrain the husband from forcibly taking their three children, and for an order that her husband or whoever has custody of her youngest child to return the baby to her.

Before the court could hear and decide on her applications on 30 April 2009, she read with anguish from the documents served on her by her husband that her three children had been converted to Islam and that her husband already registered their conversion. She also learned that the *Sharia* High Court already decided to give care, control and custody of the three children to the husband.

The applicant brought this application for judicial review before the High Court, challenging the constitutionality of the actions of her husband and officials in converting the children to Islam. She asserted her rights under the 1957 Federal Constitution of Malaysia, which guarantees fundamental liberties, and under the Guardianship of Infants Act of 1961. The High Court assumed jurisdiction of the case as a constitutional challenge. It stressed that only superior civil courts established under the Federal Constitution can decide on issues of constitutionality, but not the Sharia Court, a “creature of State law”.

## DECISION

Article 12 (4) of the 1957 Federal Constitution of Malaysia states that the religion of a person under the age of 18 years shall be decided by his parent or guardian. Where there were two possible interpretations of the word “parent” in this article, the court preferred an interpretation consistent with the constitution, particularly the guarantees on fundamental liberties, and with the CEDAW. The court ruled that the applicant was deprived of her constitutional rights thus, the conversion of her children to Islam decided solely by the father is null and void.

The court held that interpreting article 12 (4) as requiring a single parent’s consent to convert a minor child to Islam in disregard of the rights of the non-converting parent violates the principle of gender equality under article 8 of the Federal Constitution. The court subscribed to an interpretation of the Guardianship of Infants Act 1961 and ss. 96 and 106 of the *Perak Enactment* that is consistent with international human rights principles to ensure that rights guaranteed under these statutes and the Constitution are not rendered illusory or infirmed.

Article 12 (4) in relation to article 8 (1) and (2) of the Federal Constitution should be read in a manner that vests equal rights to **both parents** to decide on a minor child’s religious upbringing. According to the court, this is in consonance with Article 26 of the UDHR, which states that “parents have a prior right to choose the kind of education that shall be given to their children”. The court cited the persuasive view that the UDHR has attained the status of international customary law and has been accorded a statutory status within the national legal system, but only to the extent that is not inconsistent with the Federal Constitution of Malaysia.

The court explained that Articles 16 (1) (d) and 5 (b) of the CEDAW stress that both parents – the father and mother – must have the same rights and common responsibilities in all matters relating to their children, including their upbringing and development. In all cases, the interests of the children shall be paramount. Since there is no indication of any reservations made specifically in relation to these articles, as a signatory to the CEDAW, Malaysia must ensure women their equal rights, particularly in marriage and family life.

The court noted that the CEDAW Committee, in its Concluding Observations to Malaysia's state report in 2006, raised concerns about the effects on women of the dual legal system operating in the country:

*The Committee is concerned about the existence of the dual legal system of Civil law and multiple versions of Sharia law, which results in continuing discrimination against women, particularly in the field of marriage and family relations. The Committee is further concerned about the lack of clarity in the legal system, particularly as to whether civil or Sharia law applies to the marriages of non-Muslim women whose husbands convert to Islam?*

The CEDAW Committee recommended that Malaysia undertake a process of law reform to remove inconsistencies between Civil law and *Sharia* law. As a State party to the CEDAW, the Committee urged it must take appropriate measures to ensure that any conflict of law with regard to women's rights is resolved in full compliance with the Convention. It drew the State's attention to its General Recommendation No. 21 (1994) on equality in marriage and family relations, which explains in detail the meaning of these rights.

Citing the case of **Ministry for Immigration and Ethnic Affairs v. Teoh**,<sup>61</sup> the court reiterated the *doctrine of legitimate expectation*, as follows:

*Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation of a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention.*

According to the court, the approach taken by the High Court in **Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors** is correct in relying on the Bangalore Principles that laid out guidelines for the domestic enforceability of international legal systems. The court adhered to these guidelines as expounded upon by Justice Michael Kirby:

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61 (1995) 183 CLR 273.

- ▶ International law (whether human rights norms or otherwise) is not, as such, part of the domestic law in most common law countries;
- ▶ It does not become part of such law until Parliament so enacts or the judges (as another source of law-making) declare that (it) is part of domestic law;
- ▶ The judge will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty – even one ratified by their own country;
- ▶ But if the issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and
- ▶ From this source of material, the judge may ascertain what the relevant rule is. It is the action of the judge, incorporating the rule into domestic law, which make is part of domestic law.<sup>62</sup>

## COMMENTARY

The court in this case confirmed an important precedent on the domestic application of international treaties such as the CEDAW in countries subscribing to the dualist tradition. Citing the Bangalore Principles as well as the *doctrine of legitimate expectation* established in previous jurisprudence, the court took the initiative to incorporate principles of international law into domestic law without need of legislation. Instead of setting aside the CEDAW, the court relied on it as a basis to settle the two possible meanings of “parent” in the Federal Constitution and statutes in a manner that upholds women’s human rights.

Squarely applying the CEDAW, the court defined parental rights to best meet the **standard of substantive equality**. Where provisions in the Federal Constitution and statutes state that either parent shall decide the religion of their minor children, the court took this to mean **both parents**. To uphold the children’s conversion to Islam on the sole decision of the father would result in denying the mother her equal right to the education and upbringing of their children. It would constitute **indirect discrimination** since the option or choice provided in the statutes becomes limited to exclude women’s equal right to parenting under Articles 5 (1) and 16 of the CEDAW.

The court did not deal with the recommendation of the CEDAW Committee to look into the “existence of the dual legal system of Civil law and multiple versions of *Sharia* law, which results in continuing discrimination against women”. Malaysia has a standing reservation that the Convention should not conflict with “provisions of the Islamic *Sharia* law and the Federal Constitution of Malaysia”. In this constitutional

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<sup>62</sup> Kirby (1993).

challenge, the court simply asserted that the Federal Constitution is the supreme law. Rather than deliberate on any possible conflict between the *Sharia* law and the statutory laws on guardianship, it ruled to nullify the children's conversion to Islam and sidestepped the decision of the *Sharia* Court to award care, custody and control of the minor children to the father.

## [ General Recommendation No. 19 Violence against Women ]

Violence against women is not mentioned in the CEDAW, but the CEDAW Committee General Recommendation No. 19 (1992) states categorically that the definition of discrimination under Article 1 of the Convention includes “gender-based violence”; it is violence directed at women because of their gender or affects women disproportionately.<sup>63</sup> In all its manifestations, gender-based violence is a cause and consequence of discrimination. Indeed, States parties to the CEDAW have a duty to take all necessary measures to end gender-based violence as part of their general obligation under the Convention to eliminate all forms of discrimination against women.

The UN Declaration on the Elimination of Violence against Women in Article 1 defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. The **effect on women** is the defining factor in qualifying any act as gender-based violence, not the purpose or motive behind the act. Article 2 of the Declaration details various forms of violence against women, and enumerates a list of examples. It specifies the sites of occurrence, which are the family, the community and the State.

Comprehensive in scope, the UN Declaration’s definition provides ample guidance and reduces the scope of discretion for the courts. In **V.K. v. Bulgaria**,<sup>64</sup> the national courts of Bulgaria focused exclusively on the issue of direct and immediate threat to the life or physical integrity of the author, neglecting her emotional and psychological suffering, which also qualify as acts of violence. The courts also failed to take cognizance of the author’s past history of domestic violence by demanding strict compliance with the procedure to file an application for a protection order within one month from the occurrence of violence. The CEDAW Committee admonished the courts for such an overly restrictive understanding of gender-based violence.

63 See [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19)

64 CEDAW/C/49/D/20/2008, 27 September 2011.



A testament to the principles of indivisibility and interdependence of human rights, the UN Declaration and in Southeast Asia, the Declaration on the Elimination of Violence against Women in the Association of Southeast Asian Nations (ASEAN) Region<sup>65</sup> emphasize that violence against women constitutes a violation of women's human rights. In this context, General Recommendation No. 19 enumerates specific rights of women that may be impaired or nullified in relation to gender-based violence, such as: the right to life, the right to liberty and security of person; freedom from torture; the right to equal protection under the law; the right to equality in the family; the right to just and favourable conditions of work; and the right to the highest standard attainable of physical and mental health.<sup>66</sup>

**Secretary of National Defense v. Manalo (Philippines)**<sup>67</sup> makes this explicit connection between violence against women and the denial or impairment of women's human rights. In this case, the court deliberated on the constitutional right to liberty and security of person and made reference to the UN Declaration on the Elimination of Violence against Women as well as the CEDAW Committee General Recommendation No. 19. The court acknowledged: "[T]he protection of the bodily integrity of women may also be related to the **right to security and liberty**". The deprivation of one right, in this sense, may adversely affect the exercise of another.

In **A.T. v. Hungary**,<sup>68</sup> the CEDAW Committee similarly acknowledged the interrelatedness of gender-based violence and violation of women's fundamental rights, upholding the primacy of women's right to life over other rights. In consonance with the ruling in **Secretary of National Defense v. Manalo (Philippines)**, the Committee affirmed that violence against women constituted a violation of the author's "**right to security of person**". The Committee further stressed that "**women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy**".

Accountability for any acts of discrimination under the Convention is not restricted to those committed by the State or its agents. General Recommendation No. 19 provides that States parties may also be responsible for **private acts** if they fail to act with due diligence "to prevent, investigate and, in accordance with national legislation, punish acts of violence against women". This is particularly important in the context of violence against women committed in the family or the community, where perpetrators are private individuals or non-State actors. In these cases, as consistently held by the CEDAW Committee, States parties are still accountable.

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65 See [www.asean.org/communities/asean-political-security-community/item/declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4](http://www.asean.org/communities/asean-political-security-community/item/declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4)

66 Ibid.

67 G.R. No. 180906, 7 October 2008.

68 Communication No. 2/2003, 26 January 2005.

State responsibility for the protection of women from gender-based violence committed by private actors is wide-ranging. The CEDAW Committee conceded with the view of the State party in **Sahide Goekce v. Austria**<sup>69</sup> and **Fatma Yildirim v. Austria**<sup>70</sup> that it is necessary in each case to determine whether arrest or detention would amount to a disproportionate interference in the exercise of the rights of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial. But the Committee maintained that, in cases of violence against women, particularly where the threshold of danger is high, the State must act: **“Perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity.”**

In **Sahide Goekce v. Austria** and **Fatma Yildirim v. Austria**, the Government of Austria was still held accountable even if the perpetrators were prosecuted to the full extent of the law for killing the victims. Conviction, although it may thwart further violations, will not in itself be sufficient to cure violations that occurred already. The CEDAW Committee established the accountability of the State party on the inability of State actors to carry out the government’s comprehensive system to address domestic violence in order to prevent the fatal acts committed by the perpetrators in the first place. The Committee reiterated that Article 2(d) of the CEDAW directs States parties to put in place measures for prevention.

Article 2 (c) of the CEDAW obliges States parties to establish a legal protection system for victims of gender-based violence that meets standards set by the Convention. In **Isatou Jallow v. Bulgaria**,<sup>71</sup> the CEDAW Committee noted lapses in adhering to these standards in court proceedings for cases of domestic violence, such as: delays in the issuance of the permanent protection order; issuance of an emergency order without hearing both parties or providing any avenue for appeal; lengthy proceedings for child custody; and lack of regard accorded to the author’s vulnerable position as an illiterate migrant woman who is dependent on her husband and without command of the Bulgarian language. All these point to the failure of the State party to ensure that its judicial system fully protects victims of gender-based violence in compliance with the Convention.

In the Philippines, innovations to improve legal protection for victims of gender-based violence include judicial decisions on possible defences for violence in intimate relationships. For the first time, the Supreme Court deliberated on the *Battered Woman Syndrome* as a defence in **People of the Philippines v. Marivic Genosa (Philippines)**. Battered by her husband, the victim shot and killed him. She raised this defence, which the court treated as a mitigating circumstance that diminished the victim’s will power. Two months thereafter, the Anti-Violence against Women and Children Act was enacted, classifying this as akin to a justifying circumstance that exculpates a victim who experienced a cycle of violence twice of any criminal or civil liability.

69 CEDAW/C/39/D/5/2005, 6 August 2007.

70 CEDAW/C/39/D/6/2005\*, 1 October 2007.

71 CEDAW/C/52/D/32/2011, 28 August 2012.

**People of the Philippines v. Jumawan (Philippines)**<sup>72</sup> bridges the gap between enforceability of the law in both the public sphere and the private sphere, applying the law in matters previously constituted as private. The court in this case unveiled the shroud of secrecy or silence that previously segregated gender-based violence in intimate relationships beyond State scrutiny and urged the State to intervene. However, the central role of State action is not simply to regulate private acts or violations by non-State actors in the interest of complying with its duty of due diligence. Reiterating the interdependence of human rights – i.e. that freedom from gender-based violence is inextricably linked with the exercise of women’s sexual rights – the court inferred that State action in the realm of the private sphere should centre around upholding women’s autonomy “to have control over their bodies and decide freely and responsibly on matters related to their sexuality”.

**Jesus C. Garcia v. Ray Alan T. Drilon, et al. (Philippines) and People of the Philippines v. Jumawan (Philippines)** demonstrate the enforceability of the CEDAW in national jurisdictions. The court cast a wide perspective, incorporating international norms and standards found in the CEDAW to perform its judicial function of interpreting the law to address gender-based violence as a harmful manifestation of discrimination against women. The court clearly applied the principle of non-discrimination under Article 1 of the CEDAW in its deliberation on the constitutionality of the Anti-Violence against Women and Children Act of 2004 and in convicting the appellant of marital rape. The court articulated its readiness to play a critical role in changing social or cultural patterns necessary to shift the character of domestic violence from a private affair to a public offence.

Upholding the constitutionality of Republic Act No. 9262, **Jesus C. Garcia v. Ray Alan T. Drilon, et al. (Philippines)** signifies a positive trend towards the active involvement of the judiciary in State efforts to eliminate violence against women. The court drew attention to the serious consequences of gender bias in the judiciary and the dire need for gender-sensitivity among its officials to comply with Article 5 (a) of the CEDAW. It demonstrated ways for the court to ensure that its ruling pertaining to violence within the family neither impairs nor nullifies women’s equal rights, particularly in relation to marriage and family relations guaranteed under Article 16 of the CEDAW. Considering that all countries in Southeast Asia except for Brunei Darussalam and Myanmar have enacted domestic violence laws, this case sets an example for courts in the region to imitate and affirm through judicial decisions the validity of these laws.

The applicability of the CEDAW in the adjudication of criminal cases is further illustrated in **People of Timor-Leste v. Helio Gonçalves Soares (Timor-Leste)**. The court, on its own accord, amended the charge against the accused to cite the Domestic Violence Act of 7/2010 as an additional basis for criminal liability in order to comply with State obligations under the Convention. Having benefitted

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72 G.R. No.13598, 15 January 2004.

from capacity-building on the CEDAW, the panel of judges applied their knowledge of the Convention to inscribe in jurisprudence the constitutional intent to treat international conventions such as the CEDAW like any legislation enforceable in the country. The Constitution of Timor-Leste, unlike other countries in Southeast Asia, clarifies that in instances of conflict, international law as ratified or acceded to takes precedence over domestic law, thereby facilitating the ease with which the Convention has been incorporated in its domestic legal order.

## [PHILIPPINES]

**JESUS C. GARCIA V. RAY ALAN T. DRILON, ET AL.**

G.R. No. 179267  
 Supreme Court  
 25 June 2013

**Laws and International Instruments Considered**

*Republic Act No. 9262, Anti-Violence against Women and Children Act of 2004*  
*Constitution of the Philippines of 1987*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*Convention on the Rights of the Child*  
*Universal Declaration of Human Rights (1948)*  
*Declaration on the Elimination of Violence against Women (1993)*

**SUMMARY**

The court in this case demonstrated the critical role of courts in changing social or cultural patterns necessary to shift the character of domestic violence from a private affair to a public offence. In accordance with the principle of non-discrimination and the standard of substantive equality in the CEDAW, the court affirmed the constitutionality of Republic Act No. 9262 or the Anti-Violence against Women and Children Act of 2004.

The petitioner's wife filed a complaint before the Regional Trial Court for the issuance of a temporary protection order against her husband pursuant to Republic Act No. 9262. She claimed to be a victim of physical violence and emotional, psychological and economic abuse as a result of her husband's marital infidelity. Her husband also inflicted physical violence on their daughter and threatened to deprive her of the custody of their minor children. He also threatened to withhold financial support if she ever sued him.

Finding reasonable grounds to believe that the wife and children were in imminent danger of violence, the Regional Trial Court issued a temporary protection order. Subsequent temporary protection orders were granted and modified due to the petitioner's failure to comply fully with the court's orders.

During the pendency of the civil case filed by his wife pertaining to the continued issuance of a temporary protection order to be enforced against the husband, the petitioner applied for a petition for prohibition with prayer for injunction

and temporary restraining order before the Court of Appeals. He challenged the constitutionality of Republic Act No. 9262 as violative of his right to due process and equal protection guaranteed in the Philippine Constitution of 1987. He also questioned the validity of the modified temporary protection order issued in the civil case for being “an unwanted product of an invalid law”.

The Court of Appeals dismissed the petition for failure of the petitioner to raise the constitutional issue in his pleadings before the trial court in the civil case, which has jurisdiction to resolve this issue. The Court of Appeals also ruled that challenging the validity of Republic Act No. 9262 through a petition for prohibition seeking to annul the temporary protection orders issued by the Regional Trial Court constituted a collateral attack on the said law. The petitioner appealed before the Supreme Court questioning the constitutionality of Republic Act No. 9262.

## DECISION

The court ruled that to nullify a statute, there must be an unequivocal breach or a clear conflict with the constitution, not merely a doubtful or argumentative supposition regarding its unconstitutionality. In this case, the petitioner did not present any concrete evidence or convincing arguments to warrant a declaration that Republic Act No. 9262 is unconstitutional. The court reiterated: “The history of the women’s movement against domestic violence shows that one of its most difficult struggles was the fight against the violence of law itself. If we keep that in mind, law will not again be a hindrance to the struggle of women for equality but will be its fulfilment.” Accordingly, the court sustained the constitutionality of Republic Act No. 9262.

The court did not hesitate to cite the progress made to advance women’s human rights at the international front to support its ruling. It acknowledged the UDHR, which affirms equality of all human beings. The court drew attention to the adoption by the UN General Assembly of the CEDAW in 1979, the Declaration on the Elimination of Violence against Women in 1993, and several outcome documents from world conferences on the rights of women held in Mexico City, Copenhagen, Nairobi and Beijing. The court noted that the establishment of the Commission on the Status of Women also marks an important milestone in the full recognition accorded to women’s human rights in the international arena.

According to the court, “the Philippines has been in cadence with the half – and full – steps of all these gains towards the realization of women’s human rights”. No less than article 2, section 14 of the Philippine Constitution of 1987 mandates the State to recognize the role of women in nation building and to ensure fundamental equality before the law of both women and men. The Senate ratified the CEDAW as well as the CRC and their respective protocols. Furthering the country’s international commitments to women’s human rights, Congress enacted Republic Act No. 9262 on 8 March 2004.

As a State party to the CEDAW, the Philippines bound itself to take all appropriate measures specified under article 5 (a) “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” The court quoted Justice Puno: “(T)he paradigm shift changing the character of domestic violence from a private affair to a public offence will require the development of a distinct mindset on the part of the police, the prosecution, and the judges.”

The court ruled that Republic Act No. 9262 does not violate the constitutional guarantee of equal protection of the law. It relied on **Victoriano v. Elizalde Rope Workers’ Union**,<sup>73</sup> which laid down standards to ensure compliance with this constitutional guarantee. The court settled in this case and in a long line of cases that a valid classification is permissible as an exception, based on the following criteria: The classification (i) must be based on substantial distinctions; (ii) must be germane to the purpose of the law; (iii) must not be limited to existing conditions only; and (iv) must apply equally to each member of the class.

The court cited the UN Declaration on Elimination of Violence against Women, which states that “violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men.” The unequal power relationship between women and men, the fact that women are more likely than men to be victims of violence, and the widespread gender bias and prejudice against women all make for substantial distinctions justifying the classification under the law, according to the court.

The court maintained that treating women as a distinct class is germane to the purpose of Republic Act No. 9262, which is to address violence committed against women and children as spelled out in its Declaration of Policy. The court pointed out that, as emphasized by the CEDAW Committee, addressing or correcting discrimination through specific measures focused on women does **not** discriminate against men. The petitioner’s contention that Republic Act No. 9262 is discriminatory, and it is an “anti-male,” “husband-bashing” and “hate-men” law deserves scant consideration.

Moreover, the court explained that the application of Republic Act No. 9262 is not limited to existing conditions when it was promulgated, but also to future conditions, for as long as the safety and security of women and their children are threatened by violence. Republic Act No. 9262 applies equally to all women and children who suffer abuse. The acts described under the law are also found in the UN Declaration on the Elimination of Violence against Women. Hence, the argument advanced by the petitioner “that the definition of what constitutes abuse removes the difference between violent action and simple marital tiffs” is tenuous.

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73 158 Phil. 60, 86-87 (1974).



The petitioner argued that the law subverted the policy of the State “to protect and strengthen the family as a basic autonomous social institution” by criminalizing violence against women instead of encouraging mediation and counselling. The court firmly stated: “[V]iolence, however, is not a subject for compromise.” Citing the rationale of Republic Act No. 9262, the court explained that mediation of issues in a proceeding for an order of protection is problematic because the petitioner is frequently unable to participate equally with the person against whom the protection order has been sought.

## COMMENTARY

The court took a proactive approach in its domestic application of international human rights standards, such as the principle of non-discrimination and the standard of substantive equality in the CEDAW. It pointed out that the enactment of Republic Act No. 9262 is in consonance with the guarantees on equality in the Philippine Constitution of 1987, and even more so, it is a culmination of the State’s evolving commitments to women’s human rights reflected in its ratification of international conventions such as the CEDAW and the CRC. Ratification of these treaties with the concurrence of Senate incorporates these principles into the national legal system and reinforces the legal justification to uphold the constitutionality of the Anti-Violence against Women and Children Act.

The court applied the **framework of substantive equality** of the CEDAW in ruling that Republic Act No. 9262 does not violate the constitutional right to equal protection because its differential regard for women and children is a valid classification allowed as an exception to this constitutional guarantee. The court endorsed the progressive perspective in international declarations such as the UN Declaration on the Elimination of Violence against Women that qualifies gender-based violence as a form of discrimination against women within the meaning of Article 1 of the CEDAW. The court took cognizance of violence against women as a manifestation of historically unequal power relations between men and women, which largely accounts for the alarming reality that more women than men are victims.

The court was adamant that litigation involving violence against women must not be subject to compromise. This stance reveals the court’s intimate understanding of the gendered power relations at play in any case of violence against women, which would negate any possibility that parties involved would reach a consensual agreement voluntarily. The court implied that the constitutional right that recognizes “the sanctity of family life” cannot be enforced at the expense of women’s right to be free from violence. In fact, the court reiterated the State obligation of the Philippines under Article 16 of the CEDAW “to eliminate discrimination against women in all matters relating to marriage and family relations”.

The court was forthright to admit: “Sadly, our own courts have exhibited prejudices and biases against our women”, citing a case where a Regional Trial Court judge was fined for Conduct Unbecoming of a Judge because of his derogatory language and lack of gender-sensitivity in dealing with a female complainant. Through this case, the court has demonstrated its willingness to rectify a culture of discrimination against women that permeates even in courts, and to assume a more active role in upholding the State obligation to respect, protect, promote and fulfil women’s human rights.

## [PHILIPPINES]

**PEOPLE OF THE PHILIPPINES V. EDGAR JUMAWAN**

G.R. No. 187495  
 Supreme Court  
 21 April 2014

**Laws and International Instruments Considered**

*Republic Act No. 8353, Anti-Rape Law of 1997*  
*Republic Act 9262, Anti-Violence against Women and Children Act of 2004*  
*Constitution of the Philippines of 1987*  
*Family Code of the Philippines (1987)*  
*Revised Penal Code of the Philippines (1930)*  
*Republic Act No. 9710, Magna Carta of Women Act of 2009*

*Convention on the Elimination of All Forms of Discrimination against Women*  
*UN Declaration on the Elimination of Violence against Women (1993)*  
*Beijing Declaration and Platform for Action (1995)*

**SUMMARY**

In this case, the court affirmed an important shift in the consideration of marital rape from a private affair to a public offence punishable under Republic Act No. 8353. In convicting the appellant of marital rape, the court signalled its willingness to address the culture of impunity surrounding gender-based violence, particularly in the context of intimate relationships. The court adopted the core principle of non-discrimination and the standard of substantive equality set by the CEDAW.

The appellant and his wife had been married since 1975. They lived together since then with four children, and over the years, established several businesses. In 1998, the wife filed a complaint alleging that her husband raped her on 16 October and on 17 October at their residence. In the joint trial of the two cases, the Regional Trial Court set aside the appellant's alibi regarding his whereabouts and found him guilty of two separate charges of rape in violation Republic Act No. 8353 or the Anti-Rape Law of 1997. On appeal, the Court of Appeals affirmed the ruling of the lower court.

The appellant filed an appeal before the Supreme Court to reverse the decision of the Court of Appeals. He argued, "[T]he two incidents of sexual intercourse, which gave rise to the criminal charges for rape, were theoretically consensual, obligatory even, because he and the victim were legally married and cohabiting couple." According

to the appellant, “[T]he consent to copulation is presumed between cohabiting husband and wife unless the contrary is proved”. Standards for determining the presence of consent or lack thereof must be adjusted on the ground that sexual community is a mutual right and obligation between husband and wife.

## DECISION

The court affirmed the decision of the Court of Appeals, and in addition, awarded exemplary damages against the appellant “to serve as an example for public good and in order to deter a similar form of domestic violence”. The court explained that pursuant to its commitment to adopt a policy of eliminating all forms of discrimination against women as a signatory to the CEDAW, the Philippines enshrined the principle of gender equality in article 2, sections 11 and 14 of the Philippine Constitution of 1987.

Subsequently, the legislature enacted laws to promote gender equality. In 1997, section 2 (2) of Republic Act No. 8353 reclassified rape as a crime against persons and removed it from the ambit of crimes against chastity under article 335 of the Revised Penal Code of the Philippines. This paradigm shift to criminalize marital rape in Philippine jurisdiction is further affirmed under Republic Act No. 9262 or the Anti-Violence against Women and Children Act of 2004. This law regards rape within marriage as a form of sexual violence committed by a man against his wife within or outside the family abode.

The court refuted the appellant’s argument that the consent to engage in sexual intercourse is presumed between husband and wife on the assumption that sexual community is a mutual right and obligation between any married couple. The court pointed out that this “irrevocable implied consent theory” has been superseded by modern principles of gender equality and respect for human dignity established in various international conventions, such as the CEDAW. New norms regarding women’s human rights, particularly recognition of women’s full autonomy and control over their bodies, have been established in these legally binding international instruments.

In accordance with Article 5 (a) of the CEDAW, the Philippines vows “to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. One of such measures is the enactment of Republic Act No. 8353 insofar as it eradicates the archaic notion that marital rape cannot exist because a husband has absolute proprietary rights over his wife’s body, thus her consent to every act of sexual intimacy with him is always obligatory or at least presumed.

The court further cited the UN Declaration on the Elimination of Violence against Women as another important international instrument on gender equality. The Declaration, in enumerating the forms of gender-based violence that constitute acts of discrimination against women, identified marital rape as a form of sexual violence under Article 2(a). Therefore, as far as the court is concerned, a man who penetrates his wife without her consent or against her will commits sexual violence upon her. The Philippines, in compliance with the CEDAW and the accompanying Declaration, defines and penalizes the act as rape under Republic Act No. 8353.

The court cited paragraph 96 of the Beijing Declaration and Platform for Action upholds human rights of women, which include their right to have control over their bodies and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such right by contracting marriage for the simple reason that human rights are inalienable, as recognized in various international law conventions, under section 3 of Republic Act No. 9710, otherwise known as the Magna Carta of Women Act of 2010.

Moreover, the court ruled that to treat marital rape cases differently from non-marital rape cases in terms of the elements that constitute the crime and in the rules for their proof, infringes on the right to equal protection of the law guaranteed under article 3, section 2 of the Philippine Constitution. Republic Act No. 8353 adopts a single definition for all three forms of rape, including sexual assault or marital rape. Hence, the law affords protection to any women raped by their husbands and those raped by any other men alike. It does not distinguish between rape outside of and within marriage.

The belated filing of charges was sufficiently explained by the wife. The incidents occurred only one year after the Republic Act No. 8353 was effective. She was not familiar with the crime of marital rape until the prosecutor informed her about it. The court took notice that social humiliation, which is a common factor that deters rape victims from reporting the crime to authorities, is more pronounced in marital rape cases. The court lamented, "[T]his is in view of the popular yet outdated belief that it is the wife's absolute obligation to submit to her husband's carnal desires. A husband raping his own wife is often dismissed as a peculiar occurrence, or trivialized as simple domestic trouble."

On a final note, the court strongly reminded husbands that marriage is not a licence to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, the woman does not divest herself of the right to exclusive autonomy over her own body. She can lawfully opt to give or withhold her consent to marital coitus. A husband aggrieved by his wife's refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield. He can seek intervention before Family Courts that can determine whether her refusal constitutes psychological incapacity justifying an annulment of the marriage as provided for in the Family Code of the Philippines.

## COMMENTARY

What is significant about this case is its consistent assertion in accordance with international declarations that marital rape is a form of violence against women, emphasizing a notable shift in the nature of the act from a private affair to a public offence punishable under Republic Act No. 8353. It signals the willingness of the court to address the culture of impunity surrounding gender-based violence, particularly domestic violence, which in many instances has been regarded beyond the protective reach of the State. Affirming the reclassification of rape, including marital rape as a crime against persons under Republic Act No. 8353, the court validated the responsibility of the State to prosecute the crime.

In this case, the court also gave due recognition to the inalienability of women's human rights, which includes the right to have control over their bodies and decide freely and responsibly on matters related to their sexuality. By insisting that a woman does not divest herself of this human by virtue of marriage, the court reinforced the legitimacy of women's reproductive and sexual rights, which have often been disputed or rendered controversial. Upholding the criminalization of marital rape is also in line with the State obligation under Article 16 of the CEDAW "to eliminate discrimination against women in all matters relating to marriage and family relations".

The court debunked persistent legal presumptions and practices based on gender stereotypes that disadvantage women. It clearly established that recognition of women's human rights related to sexuality imply that contrary to popular belief, consent to sexual intercourse cannot be presumed at any time even between married or cohabiting couple. The court took notice of the added difficulty of reporting cases of marital rape in a context of obstinate social prejudice. It pointed out that gender bias even among law enforcers also accounts for the trivialization or condonation of its occurrence. In this regard, the court reaffirmed that delay in reporting does not necessarily impair the credibility of the victim.

The court clearly laid out the domestic applicability of the CEDAW in this case. There are different options to apply international law domestically. In this case, the confusion around the valid incorporation of international law as a source of actionable rights and duties within national legal order is avoided by the actual translation into national laws of international norms and standards, such as the core principles of equality and non-discrimination of the CEDAW. It is the assimilation of these principles into national laws – the enactment of Republic Act No. 8353, Republic Act No. 9262 and Republic Act No. 9710 – that establishes their applicability in the national legal system.

## [TIMOR-LESTE]

**PEOPLE OF TIMOR-LESTE V. HELIO GONÇALVES SOARES**

Nuc. 0180/2013.PDDIL  
 No. 302/C.Ord/2014/TDD  
 Dili District Court  
 9 February 2015

**Laws and International Instruments Considered**

*Domestic Violence Act of 7/2010*  
*Penal Code of Timor-Leste, Decree Law 19/2009*  
*Criminal Procedure Code of Timor-Leste, Law 15/2005*  
*Timor-Leste Constitution of 2002*

*Convention on the Elimination of All Forms of Discrimination against Women ratified through National Parliament Resolution No. 11/2003*  
*Beijing Declaration and Platform for Action (1995)*

**SUMMARY**

In this case, the court demonstrated the active role taken by the court to enforce the CEDAW in the adjudication of criminal cases. The court, on its own volition, amended the charge against the accused to cite the Domestic Violence Act of 7/2010 as an additional basis for criminal liability, pursuant to the country's adoption of the Convention.

Helio Gonçalves Soares and Apolinária Ines Texeira Soares have lived together in cohabitation since August 2011. They have one daughter, and are expecting their second child. Several times in February and April 2012, and also in April 2013, the accused confessed that he assaulted his partner. He used his hand, elbow, foot, and a stick to hit her on different parts of her body – the nape of her neck, back and forehead. In addition to physically assaulting her, he treated her cruelly. He pressured her psychologically, forbidding her from contacting her family and colleagues, and prevented her from going to university.

Upon complaint of the aggrieved party, the public prosecutor charged the accused with the crime of spousal abuse pursuant to article 154 of the Criminal Code, which set the penalty to two to six years' imprisonment. The court, acknowledging that Timor-Leste is State party to the CEDAW, modified the charge against the accused to combine article 154 of the Criminal Code with articles 2, 3(b) and 35(a) of the



Domestic Violence Act of 7/2010. The accused confessed to the crime and did not present any defence. Since the charge, as amended, lodged against the accused was not refuted, the court meted the appropriate penalty.

## DECISION

The Dili District Court convicted Helio Gonçalves Soares of the crime of domestic violence and imposed the penalty of three years' imprisonment. However, the court suspended the execution of the sentence for a period equal to three years in consideration of article 68 (1) of the Criminal Code. During this period, the accused is under obligation not to intimidate the aggrieved party as stipulated in article 69 of the Criminal Code of Timor-Leste. In accordance with article 38 of the Criminal Code Procedure, the court also ordered him to pay the costs of litigation.

The court took judicial notice that Timor-Leste ratified the CEDAW by virtue of National Parliament Resolution No. 11/2003. Under article 9(1) (2) of the Constitution of 2002, the Convention is incorporated in the legal framework of Timor-Leste as a law. Therefore, articles 1, 2 and 5(a) of the CEDAW apply directly in determining criminal liability for the crime of domestic violence. Pursuant to the State party's obligations under the Convention, the court took the initiative to amend the charge against the accused to include articles 2, 3 (b) and 35 (a) of the Domestic Violence Act of 7/2010 in addition to article 154 of the Criminal Code as legal bases for the crime.

In determining the penalty for the accused, the court considered several aggravating and mitigating circumstances. One of the aggravating circumstances is the discrimination manifested in the behaviour of the accused that led to acts of domestic violence. According to the court, the stereotype adhered to by the accused that only women have the duty to serve their husbands is against the principles of gender equality and non-discrimination of the CEDAW. Timor-Leste is bound to uphold these principles by virtue of its ratification of the Convention, and the incorporation of the Convention into national law as stated in article 9(1)(2) of the Constitution.

Further, the court regarded as an aggravating circumstance the fact that the accused acted with direct and intense intent, and was aware of repeatedly abusing his partner. The manner in which he cruelly and inhumanly assaulted the aggrieved party, and the sensitive location of the physical injuries (e.g. the nape of the neck) also aggravated the commission of the crime. Additionally, the court considered as aggravating factors the level of education of the accused and the position he holds in the military, which should have propelled him to control his violent impulses to protect his family.

Among the mitigating circumstances, the court noted that the accused was a first-time offender and has no previous criminal record. The accused admitted the crime, implying that he had reflected upon his misbehaviour. Since the last incident in April 2013, no other allegations of spousal abuse were made by the aggrieved party against him. Hence, the court imposed a penalty of imprisonment for three years, suspended for a period of three years. The court pointed out that sentencing the accused to a term of imprisonment and the threat of its execution are sufficient to prevent him from committing similar acts against his partner in the future.

## COMMENTARY

Timor-Leste is one country in Southeast Asia where its Constitution enacted in 2002 acknowledges that the regime of international law takes precedence in the national legal system. Article 9(3) states, “[L]aws contrary to international conventions, treaties, and agreements adopted in the national legal system shall be invalid”. The CEDAW, which it ratified in 2003, has the force of a national legislation according to this constitutional directive. Thus, without any legal impediment in its domestic applicability, the court deemed it proper to refer to the Convention and amended the charge against the accused to invoke the Domestic Violence Act of 7/2010.

The Domestic Violence Act of 7/2010 under article 35(a) acknowledges that domestic violence includes the crimes defined in article 154, as well as articles 153, 155, and 156 of the Criminal Code. Its inclusion in the charge against the accused does not amount to two types of offences, considering that the Act itself does not specify principal penalties for domestic violence. Article 38 of the Act only expounds on grounds for modification of the penalty from imprisonment to a fine or imposition of an accessory penalty of prohibition if warranted for the safety of the victim. The court solely relied on and imposed the penalty provided for under article 154 of the Criminal Code. In observance of the right of the accused to due process, the court informed him of the amended charge, to which the accused did not register any opposition nor presented any defence.

According to the Judicial System Monitoring Programme (JSMP), a civil society organization monitoring the justice system in Timor-Leste, “This decision demonstrates progress since a round table consultation was held by JSMP and UN Women on 4 December 2014 with female legal professionals including judges, prosecutors, public defenders and private lawyers on the application of CEDAW in judicial decision-making.”<sup>74</sup> Continuous efforts to enhance the capacity of court officials to implement the Convention do result in positive outcomes such as better protection for victims of gender-based violence as proven in this case.

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74 Judicial System Monitoring Programme (JSMP) Press Release. 15 February 2015. “JSMP congratulates court for applying CEDAW in its decision in a case of domestic violence”. E-mail circulated on 6 July 2015.



Photo: Hamsiah Abu Bakar

## [ Conclusions ]

Only a limited number of cases are included in this compilation owing to difficulties of identifying cases in several countries. In countries that maintain on-line databases of superior courts' decisions, a thorough search for cases yielded only a total of 13 cases that cited the CEDAW covering the 2001-2015 period from Indonesia, Malaysia, the Philippines and Timor-Leste. Many of the decisions of courts in these countries demonstrated a deeper understanding among judges of the meaning of discrimination, including indirect discrimination. However, a closer review of these decisions revealed that less than half of the courts adopted the CEDAW standard of substantive equality as a legal normative framework in its decision-making.

Half of the cases were argued within the confines of formal equality inscribed in the right to equality before the law and equal protection of the law in constitutions. In some instances, this resulted in problematic verdicts, sometimes missing on manifestations of indirect, even direct discrimination (e.g. differential treatment based on pregnancy or maternal status). The male or masculinist standard implicit in applications of formal equality, couched in gender-neutral language or protective measures especially for women, has not been questioned. Underlying causes of gender discrimination remain unaddressed as most judgments concentrated on adjudicating the curtailment of individual claims of rights.

A key obstacle in the courts' application of the CEDAW lies in the legal complexity of incorporating the Convention in domestic legal orders. There are two prevailing approaches regarding the application of international legal systems. In a monist approach, international law and municipal law are considered one unified system of laws. The act of ratifying an international treaty incorporates it into domestic law. Thereafter, it can be directly applied by a judge or directly invoked by citizens like any national law. The dualist approach emphasizes that the two systems of law, international law and municipal law, are completely separate. A treaty can only become part of the domestic legal order when it is transformed into municipal law by the legislature's passage of a legislation or statute.



The question of direct applicability of the CEDAW within national legal systems is a question of constitutional law. Each State party to a treaty adopts an approach according to its legal traditions. In Southeast Asia, non-common law countries such as the Philippines and Indonesia that have adopted a monist approach treat international conventions like the CEDAW as part of the national legal system upon ratification or accession, in accordance with specifications regarding the legal process of ratification such as the concurrence of the Senate in the Philippines. Common law countries colonized by the British have generally subscribed to a dualist approach. Ratification alone does not make the treaty applicable domestically. The passage of a national law or statute is a must.

Decisions included in this compilation point to a progressive trend towards a more liberal application of the rules of incorporation of international legal systems. Guided by the Bangalore Principles on the Domestic Application of International Human Rights Norms, courts in two cases proactively applied the CEDAW to settle uncertainties or ambiguities in constitutional or statutory provisions pertaining to equality and non-discrimination. The *doctrine of legitimate expectation* cited in the same cases further proffers persuasive interpretation regarding the domestic application of international instruments without need of legislation even in common law countries that adhere to a dualist tradition like Malaysia.

Thus, the legal impediment regarding enforceability of the CEDAW in domestic legal systems does not appear insurmountable. Strict adherence to the dualist legal tradition has been challenged by judicial innovations where courts have taken bold initiatives to incorporate the Convention in jurisprudence: it is the act of the judge in relying on the treaty to interpret any ambiguity, uncertainty, or incompleteness in a legal provision that incorporates it in domestic law. Further, enactment of the Law on the Development and Protection of Women of 2004 in Lao PDR and the Magna Carta of Women Act of 2009 in the Philippines present an overarching legislation that courts in these countries could invoke for a comprehensive application of the CEDAW at the national level. Other countries, particularly Malaysia where a recent ruling reiterates the need for a legislation to give domestic effect to the Convention, are urged to follow suit.

There are prevailing and persistent obstacles that impede women's access to justice on the basis of equality. As illustrated in the cases in this compilation, the CEDAW Committee observed that these obstacles occur in a structural context of gender discrimination due to various factors, such as: intersecting or compounded discrimination; discriminatory laws and practices; gender stereotyping; gender bias in procedural and evidentiary requirements and practices; lack of capacity of judicial institutions to address women's human rights violations; and overall, a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.

To overcome these obstacles, the CEDAW Committee issued its General Recommendation No. 33 (2015). It enumerated the following six interrelated and essential components that States parties are recommended to put in place to fully address women's access to justice:

- ▶ Justiciability necessitates enhancing women's ability and empowerment to claim their rights under the Convention.
- ▶ Availability calls for the establishment of courts and other quasi-judicial bodies in urban and rural, including remote, areas as well as ensuring their maintenance and funding.
- ▶ Accessibility prescribes justice systems, both formal and quasi-judicial systems, to be secure, affordable, and physically accessible to women.
- ▶ Good quality of justice systems requires all components of justice systems to adhere to international standards of competence, efficiency, independence and impartiality.
- ▶ Provision of remedies pertains to the ability of women to receive from justice systems viable protection and meaningful redress for any harm.
- ▶ Accountability of justice systems is ensured through transparency in their functioning and monitoring of their operations.

Gender inequality, which impedes women's access to justice, is not only apparent in the discriminatory content and impact of laws, procedures, customs and practices. It is also evident in the justice systems' lack of capacity to address violations of women's human rights. Reiterated in its General Recommendation No. 33, there is a specific need to continuously build the capacity of these systems to apply the Convention, particularly for the judiciary to gain confidence in adopting the standard of substantive equality of the CEDAW in jurisprudence. More than just relying on the Convention to guide the interpretation of national constitutions and laws, as demonstrated in the good practices in this compilation, judges can take on the challenge to invoke the Convention as a direct source of rights and duties in national legal systems.

## [ Annex: List of cases ]

### INDONESIA

Jance Faransina Mooy-Ndun v. Junus Ndoy, et al., No. 1048 K/Pdt/2012, 28 September 2012

Khofifah Indar Parawansa, et al., No. 82/PUU-XII/2014, 29 September 2014

### MALAYSIA

Airasia Bhd v. Rafizah Shima Mohamed Aris, [2015] 2 CLJ 510

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor, [2005] 2 CLJ 713

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors [2013] 7 CLJ 82

KKP v. PCSP [2014] 8 CLJ 626

Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors [2012] 1 CLJ 769

### PHILIPPINES

Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, 8 April 2010

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Jesus C. Garcia v. Ray Alan T. Drilon, et al, G.R. No. 179267, 25 June 2013

Patricia Halaguena, et al. v. Philippine Airlines Incorporated, G.R. No. 172013, 2 October 2009

People of the Philippines v. Edgar Jumawan, G.R. No. 187495, 21 April 2014

### TIMOR-LESTE

People of Timor-Leste v. Helio Gonçalves Soares, Nuc. 0180/2013.PDDIL, No. 302/C. Ord/2014/TDD, 9 April 2015



## [ Annex: CEDAW Optional Protocol Cases ]

### AUSTRIA

Fatma Yildirim v. Austria [CEDAW/C/39/D/6/2005\*], 1 October 2007

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R.P.B. v. the Philippines [CEDAW/C/57/D/34/2011] 12 March 2014

### TURKEY

RKB v. Turkey [CEDAW/C/51/D/28/2010] 13 April 2012

### SPAIN

Cristina Munoz-Vargas v. Spain [CEDAW/C/39/D/7/2005] 9 August 2007

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