

CEDAW: 30 YEARS OF WORKING FOR WOMEN'S RIGHTS

1 – 3 NOVEMBER 2012, ISTANBUL

Development of CEDAW jurisprudence under the Optional Protocol

Twenty-second December this year marks twelve years since the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women entered into force, only a little more than a year after it was adopted by the General Assembly on 6 October 1999. Women's rights advocates worldwide were delighted with the speed at which the instrument had been negotiated and its rapid entry into force. It introduced two mechanisms to provide those affected by violations of the Convention with redress and realize their human rights in practice: a communications procedure and inquiry procedure. The communications procedure confers authority on the Committee to consider petitions submitted by or on behalf of individuals or groups of individuals claiming that a State party to the Optional Protocol has violated their rights under Convention, as long as certain admissibility criteria are fulfilled. The inquiry procedure empowers the Committee to conduct inquiries into reliable allegations that a State party has committed grave or systematic violations of the rights in Convention. To date, 104 States have become party to the instrument, with three of these opting, as permitted by the Protocol, not to accept the Committee's inquiry competence.

The following focuses on the Committee's achievements with regard to the Protocol.

The growing visibility of the procedures under the Optional Protocol can be considered an achievement of the Committee gained both through its outreach and the quality of its early decisions. In December 2010, I completed a chapter contained in the Oxford University Press commentary on the Convention and the Optional Protocol where I remarked that few petitions and requests for inquiries had been submitted, and that those that had been submitted concerned a limited number of States. This has changed. Currently there are 47 registered cases, 20 of these being registered since the end of 2010. The Committee has completed one inquiry, while two are ongoing and a further four registered, with requests for these six having been received since 2009. A number of reasons can be put forward for the fact that more advantage is being taken of the Protocol's procedures, including capacity building activities of OHCHR and others at the national level, but an important factor is the visibility the Committee has been able to give to these through its views and recommendations and conclusions on its first inquiry. The Committee's outreach activities, including events such as this, have encouraged lawyers and civil society to access the procedures. For example, the young lawyer who represented the petitioner in *RKB v Turkey* (CEDAW/C/51/D/28/2010) had participated in a capacity building event on the Protocol convened by Ms. Feride Acar in Turkey, while the lawyers who represented the petitioners in *VK v Bulgaria* (CEDAW/C/49/D/20/2008) and *Jallow v Bulgaria* (CEDAW/C/52/D/32/2011) attended similar activities organized by civil society actors.

The second achievement is the profound contribution of the Committee to the creation of 'a women's rights jurisprudence' through its views on petitions and recommendations to Mexico

as a result of its inquiry. These have outlined the obligations of States parties in respect of their own actions and those of their agents, such as law enforcement personnel, the judiciary and public health providers. They have also explained the obligation of States parties to act with due diligence with regard non-State actors to prevent violations of rights, investigate and punish such violations and provide compensation. It is to the Committee's credit that this jurisprudence influenced the European Court of Human Rights in the case of *Opuz v Turkey* (Application No 33401/02, 2009) and the Inter-American Court of Human Rights in the 'Cotton Field Case' (*Gonzalez (Claudia) et al v Mexico*, Series C, No 205 (16 November 2009)).

In respect of the due diligence obligation, article 2 (e) of Convention requires States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, thus rejecting impunity for non-state actors for violations of the Convention, including in the family. In 1992, the Committee addressed the due diligence obligation of States parties in respect of violence against women in general recommendation 19 on violence against women. Its views on communications have built on this with regard to violence against women itself and reproductive health rights.

In domestic violence cases, the Committee has consistently held States parties accountable for their failure to act with due diligence to protect women effectively against domestic violence in line with its ground-breaking general recommendation 19 and its approach to domestic violence in its concluding observations on the reports of States parties. In *AT v Hungary* (CEDAW/C/36/D/2/2003), the first domestic violence petition submitted under the Protocol, it held that the State party had failed to meet its obligations under the Convention to protect the petitioner against domestic violence on the basis that Hungary's legal and institutional arrangements fell short of international standards, and available domestic remedies were ineffective to protect her against her violent former partner. It also condemned the low priority afforded by national courts to domestic violence matters and the Hungary's failure to eliminate the causes of widespread violence against women in the country. In the two petitions against Austria, *Yildirim* (CEDAW/C/39/D/6/2005) and *Goecke* (CEDAW/C/39/D/5/2005), the Committee concluded that the State party had breached its due diligence obligation to protect both deceased women, victims of long-standing domestic violence, primarily by prioritizing the perpetrators' rights to liberty over the physical safety of their partners. In both cases, the Committee acknowledged the many efforts of the State party to address domestic violence, but made it clear that the political will expressed by those measures had to be matched by the actions of relevant State actors, in particular the police, for women to enjoy the practical realization of the principle of equality of women and men and their human rights and fundamental freedoms. Similarly, In *VK v Bulgaria* (op. cit.), it held the State party accountable for failing to provide the victim effective protection against domestic violence, highlighting the failure of its courts to issue a permanent protection order because of their limited understanding of the dynamics of domestic violence. This led to the courts' failure to take the full history of the domestic violence the petitioner experienced into account and reliance on gender stereotypes and the unavailability of shelters in the country for women at risk.

Where reproductive health is concerned, drawing on general recommendation 24 on women and health, the Committee has held States parties accountable for their failures to meet the distinctive health needs of women. In *Pimentel v Brazil* (CEDAW/C/49/D/17/2008) the Committee also made clear that States parties have an obligation of due diligence to ensure that private actors implement health policies and practices appropriately, an obligation they cannot evade by outsourcing medical services to the private sector.

The Committee's development of jurisprudence relating to stereotypes and ideologies which are at the root of discrimination against women has been a major achievement. *Vertido v the Philippines* (CEDAW/C/46/D/18/2008), where the prosecution of an alleged perpetrator of rape was delayed eight years until his acquittal by a judge who relied on stereotypes of rape victims and rape itself and failed to apply a Supreme Court ruling that failure of the alleged victim to escape does not negate the existence of rape, is a watershed. The Committee's conclusion that the State party had failed in its obligation to eliminate practices in the judiciary based on stereotypical notions of women and men and this had impacted negatively on Ms. Vertido's right to a fair and just trial, goes beyond existing human rights approaches by addressing the underlying the underlying assumptions and prejudices which exist in the justice sector in relation to crimes against women and, thereby, systemic discrimination in this context. Stereotypical notions of the constituents of domestic violence and the role of women in marriage were also considered to form the basis of the denial by the courts of a permanent protection order against the petitioner's former husband and compromise her right to a fair trial in *VK v Bulgaria* (op. cit).

The stereotyped notion that a husband is superior to his wife, and that his opinions should be taken seriously, disregarding the fact that domestic violence affects women considerably more than men, underpinned the actions of the Bulgarian authorities and courts in the case of *Isatou Jallow* (op. cit). Here the petitioner's husband was awarded an emergency protection order and custody of the couple's child on the basis of his statements and actions with the court not being alerted to or failing to consider incidents of domestic violence reported by Ms. Jallow, an isolated illiterate black immigrant with little command of Bulgarian, to social workers, requests for help from the police for protection and the husband's use of pornography which was available to his two year old daughter. Similarly, in *RKB v Turkey* (op cit), the Committee concluded that the reasoning of the Labour Court and the Court of Cassation was influenced by gender stereotypes of the role of women and men. Here the stereotypes involved were that men have extramarital affairs, but married women should behave in such a way that they do not raise suspicions that they are behaving with sexual impropriety. Here the petitioner's contract with a hairdresser was terminated summarily, and although the Labour Court awarded her damages because the contract was terminated without a valid reason, neither it nor the Court of Cassation considered that she had been a victim of gender-based discrimination under the Labour Act. This was despite the fact that her former employer stated in court documents that she had provoked rumours by displaying, beyond ordinary friendships, seemingly sexually oriented relationships with persons of the opposite sex at the workplace. Both courts also failed to take into account that the petitioner had been successful in libel proceedings against the manager of the hairdresser's shop and two other employees in

relation to this allegation, the individual with whom she was alleged to have had an affair was still working in the hairdresser's shop and the manager had sought to make a document attesting that she had benefited from all her rights, allegedly threatening her that if she did not do so he would spread rumours about her relationships with men other than her husband. Taking account of these facts, the Committee held that neither court had addressed the discrimination faced by the author as they were required to do under the Labour Act, thus showing gender insensitivity, concluding that by failing to address treatment of the petitioner by her former employer when her contract was wrongfully terminated the courts had rendered the State party in violation of the Convention, including its article 11 on non-discrimination in employment.

Another achievement of the Committee in its decisions under the Optional Protocol is its recognition of compounded, intersectional or multiple discrimination. In general recommendation 28, the Committee recognized that the discrimination that women experience because of their sex/gender is 'inextricably linked with other factors such as race, ethnicity, religion or belief, health status, age, class, caste and sexual orientation and gender identity' and that discrimination on the basis of sex/gender may consequently 'affect women belonging to such groups to a different degree or in different ways to men.' The general recommendation established that the Committee considers that States parties are required, through all appropriate measures, to recognize, prohibit and eliminate intersectional discrimination. Several Optional Protocol cases have identified situations of intersectional discrimination. These include *Kell v Canada* (CEDAW/C/51/D/19/2008) where the Committee identified the discrimination that Ms. Kell suffered as arising in the context of her status as an aboriginal woman and survivor of domestic violence in respect of whom the State was required to ensure the provision of culturally appropriate legal services. Similarly, in *Pimentel v Brazil* (op. cit) the Committee considered that the deceased's status as a woman of African descent and her social-economic status placed her in a vulnerable sector of society in relation to access to health services.

Some commentators have suggested that a challenge facing the Committee as more women turn to the Optional Protocol is consistency of interpretation. These commentators acknowledge that the Committee's approach to communications where the sex and gender implications are immediately apparent from the facts – such as violence against women, reproductive health rights and stereotypes – has been strong. They suggest, however, that the Committee has been less strong where the sex and gender implications of the facts are less apparent or more complicated, in regard to which they consider that the admissibility criteria in article 4 of the Protocol have been applied conservatively. Here comparisons have been drawn between the approach of the Committee to the requirement of exhaustion of domestic remedies in its first case, *B-J v Germany* (CEDAW/C/36/D/1/2003), concerning financial provision and settlement of property on divorce after a long marriage, and *AT v Hungary* (op. cit.), relating to domestic violence. Commentators have also raised questions about the inadmissibility decision in the case of *Munoz-Vargas v Spain* (CEDAW/C/39/D/7/2005), in particular the minority judgement which concludes that a claim of succession to a title of nobility, which the Committee deemed purely symbolic and honorific was not compatible

with the Convention, which is aimed at protecting women from discrimination which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women on a basis of equality of men and women of human rights and fundamental freedoms in all fields, despite the fact the petitioner had been denied her claim on the basis of discrimination through which her younger brother's claim was prioritized over hers.

It is important that the Committee be aware of these concerns. At the same time, its work under the Protocol has been an inspiration, a beacon of hope to women in States parties where implementation of the Convention is weak and the foundation of an international jurisprudence of women's human rights.
