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AND MILES TO GO... CHALLENGES FACING WOMEN'S HUMAN RIGHTS

*Madhu Mehra**

Since the Vienna Conference on Human Rights in 1993, the slogan 'women's rights are human rights' has come to be formally acknowledged and adopted at the intergovernmental level. The increasing ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (referred to as CEDAW) following Vienna and Beijing¹ has created the illusion that the state parties have indeed recognised that gender based violations constitute human rights violations and need serious intervention on their part to address it.

This paper examines the barriers faced in claiming human rights for women, both in terms of the general and special human rights framework, and in conclusion outlines some contentious issues that continue to confront women's human rights. Although India is a ratifying party to both general and special human rights standards set out in the ICCPR, ICESCR, and CEDAW, women's rights continue to be marginalised from the normative framework of the human rights regime by the state. While the position set out here is by no means specific to India, and indeed reflects the problem areas within international human rights order, the examples drawn upon here are from the Indian context.

What is Gender Based Discrimination and Abuse

Gender based human rights abuse would refer to denial or violation of rights on the ground of being female. Sex has been the basis for differentially attributing to men and women certain roles, relations and identities. The socialised roles thus attributed are based on assumptions about men and women, which are variously drawn from culture, tradition and religion. These underlying assumptions have been the justification for delineating different rights, responsibilities and resources to men and women in the family, the society, the market and the state. Although these roles are not static but vary over time and cultures, they have historically disadvantaged women in terms of fixing greater degree of responsibilities on them while allowing them lesser choices, lesser rights and subordinate status.

The gendered reality for women determines the nature and circumstances of the human rights violations specific to women, as well as the availability and accessibility of remedies for them.² It therefore is important to draw into the human rights framework,

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1. This refers to consensus declarations from the World Conference on Human Rights at Vienna in 1993 and the Fourth World Conference on Women at Beijing in 1995.

2. With the appointment of the Special Rapporteur on Violence Against Women in March 1994 by the UN Commission on Human Rights, the linkages between the causes, nature and consequences of gender based violence have been included as being integral to the analysis and reporting of women's human rights mandate.

the impact of a gendered social reality on the women's rights.³ For example, in a cultural context such as India, where women are perceived as custodians of culture, the violations of their right to life and bodily integrity is different from men in a situation of communal or caste violence. Although the sexual abuse of women of the victim group nearly always accompanies such violence, most documentation of such incidents, reflect, the numbers of those killed and injured, comprising largely of male victims. The capacity of human rights documentation frameworks to take into account such gender specific violations is severely limited.

An even more contentious area of discrimination has been the private sphere, given the power vested in the institutions of family and the community to arbitrate women's rights and freedoms. Significant numbers of women "are routinely subject to torture, starvation, terrorism, humiliation, mutilation, and even murder" within the family simply because they are female. "Crimes such as these against any group other than women would be recognised as a civil and political emergency as well as a gross violation of the victims' humanity."⁴ However, the human rights discourse for most part of its existence, failed to recognise such violations as falling within its purview, despite its claims of universality.

Barriers Within the General Human Rights Framework

There exist serious limitations in 'extending' human rights guarantees to women despite being framed as available without discrimination on the basis of sex. The general human rights framework adopted a normative male model of rights violations and as a result excluded in its application differently situated persons. Its primary focus has been the state sanctioned or condoned oppression in the public sphere, far removed from the private spaces where women's lives are circumscribed. The application of these norms to persons in unequal situations has inflicted rather than alleviated discrimination against women, because its neutral framework fails to take into account the historical discrimination against women.⁵

The historical context of the cold war separated the civil political rights from the socio economic and cultural, fragmenting for times to come, the indivisible bundle of rights. The debate on human rights thereafter has been ridden with dilemmas on prioritisation of one set of rights over the other – the civil political over the socio economic and cultural. That most persons exercising civil political rights in the public

3. The 52nd Session on the Commission of Human Rights called for all its special mechanisms and rapporteurs to integrate gender perspective into their mandate. This mandate has been implemented with varying degrees of success. See for instance, Unifem, *Promoting Accountability for Women's Human Rights: Working with the Thematic Special Mechanisms of the Commission on Human Rights* (1993), and Unifem, *Integrations of Women's Human Rights in the Work of the Special Rapporteurs* (1993).

4. Charlotte Bunch "Women's Rights as Human Rights; Toward a Re-Vision of Human Rights". 12 *Human Rights Quarterly* 491 (1991). Also refer to the violations documented by women's groups in India ranging from female foeticide, infanticide, domestic violence, dowry deaths, unequal distribution of food, nutrition, healthcare, education and other resources within the family.

5. Jane Connors, "General Human Rights Instruments and their Relevance to Women" Andrew Byrnes, Jane Connors, Lim Bik (eds.), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* 29 (1997).

sphere are male, given their unhindered access to the public/political sphere in contrast to the socio cultural barriers that hinder women's participation in the public sphere was not considered. This prioritisation of the civil and political has impaired the recognition of women's rights given that often the attainment of right to life for women is conditional upon and mediated through the realm of socio cultural and economic rights. For example, the lack of full reproductive rights has been known to be life threatening to women in many parts of the world, as reflected in the high maternal mortality and deaths from unsafe abortion services.⁶ Although reproductive rights may be of significance to men, they by no means have a direct impact on their life and survival.

Further, the violator in terms of the general human rights framework has always been the state acting through its agents. It has failed to and resisted taking note of private actors contributing to systemic forms of discrimination against women in the private sphere. Domestic violence is a case in point.⁷ This constitutes one of the most universal and systemic forms of gender based discrimination. While there may be instances of violence against individual men this does not constitute a pattern of violence experienced by men in any given society.

In response to critiques of the general human rights framework, it has often been argued that the increasing numbers of women are entering the political and public sphere are equally vulnerable to state abuse as reflected in cases of custodial rape and torture of women. Hence, it is asserted that the traditional model of human rights is valid and inclusive of gender specific abuse. This position continues to invisibilise the immutable power and control exercised by the family and the community over women, which is parallel only to that of the state in case of men. When socio cultural norms deny women both spaces and capacity of existing independently of marriage or family, their situation in domestic violence is similar to that of a victim of custodial violence. The reality that legal redress, however flawed,⁸ does exist is obscured by the social conditioning that once married a woman belongs to her marital home and must exit it only upon death. It is therefore not surprising that a high number of cases of domestic violence come to fatal conclusions.⁹ The state through the law has clearly enabled the social norms and the family to regulate women's rights.¹⁰ Despite such evidence, the general human rights

6. Rebecca J. Cook "International Human Rights and Women's Reproductive Health" Julie Peters and Andrea Wolper (eds.), *Women's Rights Human Rights: International Feminist Perspectives* 238 at 256 (1995).

7. See for instance, Rhonda Copelon, "Intimate Terror: Understanding Domestic Violence as Torture" and Kenneth Roth, "Domestic Violence as an International Human Rights Issue" Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, 1995.

8. Even when legal recourse is available, as in the case of s.498A of the Indian Penal Code 1860 the response of the law enforcement machinery to preliminary reporting of such cases often trivialises the problem as a private one, that is capable of compromise on the initiative of the complainant.

9. The Crimes Against Women Statistics compiled by the office of the DIG of Police, Maharashtra record 105 dowry murders in the state in 1997, which rose in 1998 (uptil November) to 116 in the state, as cited in *The Lawyers Collective* 8 (Jan. 1999). In the district of Bandha, Uttar Pradesh, there were 7 cases of suicides by young married women and 21 cases of dowry deaths in 1998 as recorded by Vanangana, a women's group working with in the district.

10. Madhu Mehra, "Exploring the Boundaries of Law, Gender and Social Reform" VI (1) *Feminist Legal Studies* (1998). See for a detailed discussion on case law on dowry and domestic violence that endorses unequal gendered roles for women, thereby curtailing women access to justice though the available legal redress.

discourse for long viewed domestic violence as an autonomous phenomenon, free from state influence or support and as a result resisted placing accountability on the state for actions of non-state actors.

The difficulty in extending human rights to women has arisen in attempting to insert gender specific violations into a predetermined format based on a particular type of violation – one in which victims were largely male actors in a public arena and violators, state agents. The problem has arisen in fixing of the human rights framework to correspond to this specific form or type of violation – and using that as a standard to comprehend and assess other forms of violations. When different forms of violations fail to fit this framework as in the case of women's rights violations, they tend to get dismissed as 'social' or 'developmental' problems.

CEDAW : Transforming Human Rights for Women

Since the 'extension' of general human rights guarantees to women, has been fraught with difficulties, there was need for special formulations that would assert, protect and promote women's human rights. This was the basis for CEDAW, the Declaration on Violence Against Women,¹¹ and the Beijing Platform for Action – all of which mutually reinforce the different dimensions of human rights violations of women. Hence while the long-term task of integration of gender specific forms of violations into the general human rights framework remains imperative, the need for a specific assertion on women's human rights was important. The convention fulfills this agenda. In this context, it is worth examining the conceptual and normative difference that CEDAW brings into the fold of human rights law.

The Convention expressly states that discrimination against women is socially and culturally constructed, and encompasses both the public and the private spheres. Thereby bringing within its fold the family, the community, the workplace, the state laws and policies, and the interconnectedness of discrimination in all these areas.¹² In fact the discrimination in private sphere is often reinforced in the public sphere and therefore needs to be addressed by the state to eliminate the problem. The false dichotomies of public and private, much like the civil political and the socio economic have obscured the issue of connectedness of discrimination against women in the public and private spheres. For example the notion of women as skilled in housekeeping and feminine jobs finds reflection in the stereotyping of jobs available for women in the workplace, and the unequal wages attached to such jobs, as compared to 'masculine' jobs of equal worth.¹³ Similarly the discrimination against women within the family in relation to

11. Adopted by the UN General Assembly on 20.12.93 vide GA Resolution 48/04.

12. Elucidated in Victoria Falls Declaration of Principles for Promoting the Human Rights of Women, Zimbabwe, 1994.

13. Raissa H. Jajurie, "The Problem of Occupational Segregation: The Philippines Worst Case Scenario in relation to CEDAW" A paper submitted to Asia Pacific Forum for Women, Law and Development – *Saligan*, 1996. This study describes how women's increasing participation in the labour force is restricted to 'traditionally female' occupations that are lower paid with few options to higher wage employment. It establishes how this violates women's free choice in employment and results in wage discrimination in the absence of norms and systems to enforce equal pay for work of equal value.

their access and control over family resources often finds resonance in the family laws relating to inheritance and succession.¹⁴

In clubbing together the public and the private, CEDAW has broken through the categories of civil/political and socio economic/cultural, which have been embedded, so strongly into the international human rights order through the two international covenants on the subject. That right to life for a large number of women, encompasses education, sexual rights, reproductive health, freedom from forced marriages and gender based violence, is reflective of how unfounded the segregation of different types of rights are and the implication of such segregation for achieving women's human rights.

Another feature of CEDAW has been to fix responsibility upon the state for actions of private actors, particularly when such actions constitute a systemic pattern of violations within the community. In the context of women, this refers to actions ranging from domestic violence, sexual assault to more subtle forms of discrimination, such as unequal career advancement opportunities in the workplace, or unequal representation in political structures, all of which are symbolic of and contribute to the subordination of women. The state's disinclination to effectively intervene in such patterns of violence and discrimination amount to a condonation of the violations. Hence the absence, the inadequacy or ineffectual enforcement of a law to counter such discrimination, would amount to state condonation of such gender-based discrimination and abuse by private actors. In fact these violations continue to be perpetrated with impunity by private actors because of the disinclination of the state to view the problem as a human rights violation and seriously address it. Gender discrimination, like caste based discrimination, untouchability and bonded labour, has socio-cultural underpinnings and is practiced by private actors. However, while the Indian State has brought the caste-based discrimination within the fundamental rights arena, women's human rights continue to be treated as a private problem.

State obligation under CEDAW covers a range of interventions such as law, policy, programmes and affirmative action in the form of temporary special measures, that together aim at bringing about behavioural change and a culture of respect for gender equality.¹⁵ It is therefore not enough for the state to restrict its intervention to criminalisation. Legislations prohibiting dowry and female foeticide reflect a trend where gender discrimination is treated solely as an individual wrong that is punishable by law. Criminalisation of systemic violations, when unaccompanied by other interventions distances the state from assuming deeper responsibility in addressing the structures that sustain the problem. In fact, criminal sanctions empower the state machinery and individualise the problem, without addressing the larger structures or the underlying causes of the problem. Instead, interventions at multiple levels that address both the empowerment of women and engage constructively with the community are required. For instance in the case of female foeticide, it might be more effective to engage with

14. Women are entitled to substantially lesser shares upon succession under Muslim and particularly under Hindu personal laws in India. See for instance, Ratna Kapur and Madhu Mehra, "Submissions pertaining to Discrimination Against Women in response to the Government of India's Third Periodic Report under the ICCPR" Centre for Feminist Legal Research, February 1997, and Vasudha Dhagamwar, "Marriage and Family Laws", Indian NGOs Report on CEDAW (1995).

15. Articles 2,3,4 of CEDAW.

the community through public education and health care programmes, along with programmes and laws that strengthen the status of the girl child and women generally. The effect of the present law with its emphasis on policing individualises the problem without implicating the larger structures, traditions and the discriminatory state laws that together contribute to the subordination of women.

CEDAW has contributed significantly in setting new normative standards for human rights law and practice, and specifically in the formulation of a framework for women's human rights. The ratification of the Convention makes the state party internationally accountable for initiating efforts to eliminate discrimination, at the *de jure* and the *de facto* levels. However, CEDAW also has the distinction of being the most reserved human rights convention today. A reservation allows a state party to modify or waive obligations in relation to certain parts of the treaty it has ratified. This in addition to the weak systems of accountability and implementation continue to make women's human rights an arena of ongoing struggle.

Dilemmas and Challenges Ahead

India, like many other state parties, has ratified CEDAW with a declaration that limits its obligations relating to changing the discriminatory cultural practices within the community and the family. Hence in relation to Articles 5 (a) and 16 (1),¹⁶ the Indian state declares that "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent".¹⁷ Thus in India discriminatory provisions for women within marriage and family continue to be asserted and defended as a cultural and religious right.¹⁸ In a similar vein, many other state parties to CEDAW have either in general terms or in relation to specific provisions limited their obligation on the ground of inconformity with the Sha'ria laws which govern rights in relation to the family and/or the criminal justice system.¹⁹

Women's human rights remains a contentious area, given the high number of reservations, apathy in translating treaty obligations into express legislative enactment at home, the inadequate accountability and enforcement and the alienation of individual from accessing the treaty body for enforcement of these rights. At the level of setting normative standards, wide ratification of CEDAW is an achievement for women's human rights agenda. However until the issues of accountability, enforceability and individual redress remain unresolved human rights will remain far-fetched for women. This section takes an overview of the contentious issues in the context of women's human rights and the challenges emerging in relation to them.

16. *Id* Articles 5 (a) and 16 pertain to state obligation to intervene in discriminatory social and cultural patterns of gender stereotyping, and in matters relating to marriage and the family respectively.

17. That the state is reluctant to intervene to address discrimination against women in the family, even when the initiative comes from the community is evident from the apathy to repeated calls for reforming the Christian family law. *Ammini E.J v. Union of India* AIR 1995 Ker 252.

18. In response to several petitions challenging discrimination in the different family laws, the Supreme Court held that these matters were of state policy in which the court would not ordinarily have any concern, and therefore dismissed the petitions, *AWAG and Ors. v. Union of India* JT 1997 (3) SC 171.

19. See for instance reservations made by Maldives, Bangladesh, Malaysia and Egypt.

Reservations

International law is premised on the principle of state sovereignty, that allows ratifying states to limit or modify their obligations under a treaty. Admittedly, state ratification, and the resulting obligation to eliminate discrimination against women, is an achievement both in terms of transforming human rights generally and in validating a conceptual framework for women's human rights. To that extent, reservations can be viewed instrumentally as an enabling device that facilitates state endorsement of normative standards on women's human rights whilst postponing complete accountability until it is better equipped to meet the entire range of obligations. However, once a broad consensus is built, the issues of implementation and accountability are bound to arise and cannot be subordinated to the political expediency of 'ratification' and consensus building.

India's declaration which limits its obligations under CEDAW, and other reservations of similar intent give rise to both technical and conceptual issues relating to tenability of such reservations. The Vienna law of treaties governing reservations permits only those reservations that are consistent with the object and purpose of the treaty in question.²⁰ Further, the reservation is required to be specific and not vague, and be made in good faith by the state party. Reservations to CEDAW, such as that of India, amount to an unqualified exemption for the state from intervening in discriminatory cultural practices in the private sphere even though by ratification the state implicitly acknowledges the need for such intervention. Since India's reservation fails to specify a time frame or limit the nature of interventions it is equipped to undertake, it can only be construed as being inconsistent with the objectives and purpose of the Convention. Given the range of state interventions envisaged by CEDAW, it is inconceivable for a state to completely disclaim its obligation to pro-actively transform discriminatory customary practices through at least one of the many forms of interventions at the programmatic, policy and legislative levels.

Underlying the issue of reservations is the sovereign right of a state to limit its obligations in relation to other states. Generally, international treaties constitute an exchange of obligations between states and allow for 'reservations' to enable states to limit or modify their obligations in certain areas. However, human rights treaties are differently placed, in that they relate to the rights guaranteed to persons which upon ratification the state undertakes to protect. Many of these rights are non-derogable, and accountability of the state flows regardless of ratification of the treaty containing the same.²¹ This therefore puts human rights treaties on a different footing from other treaties under international law, justifying a more stringent scrutiny of its 'reservations'. Hence, it can be argued that the treaty bodies constituted for monitoring human rights treaties need to have the power to scrutinise reservations to examine their compatibility with the object and purpose of the treaty, and its effect on the integrity of the concerned treaty. In the event a reservation is found unacceptable, the treaty

20. The Vienna Convention on the Law of Treaties 1969.

21. This refers to human rights guarantees which are part of international customary law and therefore do not require express ratification for state accountability, as for example the right to fair trial.

body ought to 'sever' the same, while continuing the operation of the treaty against the state party without the benefit of the reservation.²²

Cultural relativism in the context of women's human rights

The issue of validity of cultural relativist arguments to justify state derogation from its human rights obligations in relation to women's rights is critical given the large number of reservations made on this basis. The retreat from such responsibility condones and re-affirms the patriarchal control of communities over their women. India's reservation to CEDAW, casts aside discrimination against women as an issue for the community to resolve autonomously. This position continues to sustain and re-construct the false dichotomies of public/private, civil political/socio economic and individual/collective that women's rights movement and more recently, the international human rights law has tried hard to erode.

In notable contrast, women's movements have explored issues of cultural specificities to assert the multiplicity of identities and diversity of the struggles that constitute it. Cultural contexts have not been used by women to waive their rights to equality and dignity, as is reflected in the history of the making of CEDAW. In the debates leading to the adoption of the Convention, Afghanistan had said that overcoming discrimination would require "combating of traditions, customs and usages which thwart the advancement of women... (and) intense educational efforts... designed to enlighten public opinion".²³ The drafting committee for the Convention itself constituted representatives from Iran, Egypt, Philippines, Ghana and other countries known for their strong traditional and cultural moorings. When the draft Convention was finally put to vote at the Commission on the Status of Women, the representatives from different cultural contexts collaborated across geo-political boundaries to retain the Convention's mandate on state obligation to eliminate discriminatory cultural and traditional practices.²⁴ In contrast, the reservations by the state parties have used cultural relativism to uphold discriminatory cultural practices even when these violate women's human rights. This view tends to project culture as being fixed and homogenous, with no democratic space for plurality of interpretations or practice, which in fact is incorrect since diversity in norms and practice has always existed. Given that women as a social group have suffered the maximum human rights violation in the name of culture, it is important to begin investigating and exposing the primary beneficiaries of such claims and their politics.²⁵ In such instances it is important for women's and human rights groups to begin questioning the status of the speaker, and the participation of the affected social group in formulating a reservation that curtails their human rights.

22. Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)1.

23. Arvonne S. Frazer, "The making of the Convention on the Elimination of All Forms of Discrimination Against Women". Unpublished paper on *International Women's Rights Action Watch - University of Minnesota*.

24. *Ibid.*

25. Arti Rao, "The Politics of Gender and Culture in International Human Rights Discourse" in *supra* note 6 at 167.

Implementation

optional protocol

CEDAW is premised on discrimination operating against women as a class. Its effectiveness internationally would depend upon the treaty body's capacity to respond to cases of individual and mass violations. Most other human rights treaties can be invoked for individual redress and for instituting inquiry against systemic violations through their respective optional protocols.²⁶ CEDAW however, is yet without one. Although women's rights groups have been able to lobby for considerable support for an optional protocol, but it has yet to be adopted by the General Assembly and transformed into a treaty.²⁷ It remains to be seen whether state parties consider women's rights issues serious enough to strengthen international mechanisms for their enforcement, at least to a stage equivalent to the other human rights treaties. The optional protocol if passed, would allow the CEDAW Committee to entertain individual petitions and enquire into issues of systematic and mass discrimination, only upon a separate ratification of the protocol by the state in addition to its ratification of CEDAW.

domestic enforceability

Although international human rights order has transformed itself conceptually in response to repeated challenges from women's rights movement, the conclusive test of its effectiveness lies in its enforceability in the municipal arena. The jurisprudence on municipal enforcement of international human rights law has evolved. Rather than making enforcement conditional strictly upon legislative enactment, there is a growing tendency to read international human rights law into the constitutional law in areas where the domestic laws are vague or even silent.²⁸

Since human rights treaties once ratified by a state, secures to individuals a universal standard of human dignity (rather than mere inter state obligations), the ratification creates a legitimate expectation in individuals for securing the rights guaranteed under the treaty.²⁹ This argument has facilitated enforcement of international human rights law in municipal courts even in the absence of express legislative enactment on the

26. By virtue of the optional protocol, treaty bodies such as the Human Rights Committee, the Committee on Elimination of Racial Discrimination, the Committee Against Torture, are competent to entertain individual petitions and institute enquiries on mass violations that fall within the substantive scope of their respective Conventions.

27. The women's rights groups have lobbied for the last five years for a draft optional protocol, which after many modifications has recently been adopted by the commission on the status of women at its 43rd session in March 1999. However, it still remains to be adopted by the UN General Assembly and be ratified by a stipulated minimum number of states before it becomes a treaty.

28. *Vishaka v. State of Rajasthan* (1997) 6 SCC 241. See also the *Bangalore Principles* (1998), from the Judicial colloquium on the Domestic Application of International Human Right Norms; and the Conclusions of the Asia/south Pacific Regional Judicial Colloquium on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights (Hong Kong, 1996).

29. This argument has been used with success in several jurisdictions. See for instance, *Unity Dow v. The Attorney General, Botswana* (Court of Appeal, 1992); *Teoh v. Minister for Immigration and Ethnic Affairs* (1994) 128 ALR 253 (High Court of Australia); and *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 (Supreme Court of India).

subject. The role of the judiciary in upholding and enforcing claims based on 'legitimate expectation' has been critical in face of parliamentary apathy towards enacting its international obligations under CEDAW into domestic law.

Conclusion

While women's human rights will remain a contentious and difficult area for times to come, there have been some noteworthy development and a building of alliances between international law bodies, municipal judiciaries, lawyers, human rights and women's rights movements. The emerging debates in relation to the issues outlined above reflect the strength of such cross-sectoral alliances in transforming women's rights. These alliances need only to be strengthened and supported in their struggle to towards securing human rights for women. However, it is painfully evident that even after 50 years of the Universal Declaration of Human Rights, women's rights have only recently been acknowledged conceptually while its practice and reality still remain tangled in complex issues of culture, inadequate and/or lack of enforcement, accountability systems and political will. All these combine to ensure a long struggle ahead for making human rights a reality for all women.