

VIOLENCE AGAINST WOMEN:

Inadequate Remedies under the CEDAW

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It was not until the mid 20th century that human rights became a global agenda. Prior to the Second World War, states were considered to be the main subjects of international law and what happened in their borders was outside of the scope of international law. The bloodshed and the massive human rights violations during the world wars were wakeup calls for the international community to deal with such atrocities. So, human rights, *i.e.*, rights that persons are entitled to for being human beings, duly received global attention.

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), also referred to as the bill of rights of women, is considered to be one of the most important developments in human rights and the area of women's rights in particular. It is said to be one of the most comprehensive documents dealing with the rights of women.

1. Definition of Violence against Women and Implications

As defined in the Declaration on the Elimination of Violence against Women¹, violence against women means "*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.*"² This

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¹ See UNGA, Res 48/104, Declaration on the Elimination of Violence against women, 1993, Article 1

² Report of the special Rapporteur on violence against women, its causes and consequences, United Nations, Economic and Social Council, Commission on Human Rights, New York, 1997(Unpublished doc. Number E/CN.4/1997/47) While describing violence against women, Radhika Coomaraswamy, UN special Rapporteur on violence against women stated that "[t]hroughout a woman's life, there exists various forms of gender –based violence that manifest themselves at different stages. Most of this violence is domestic, occurring within the home, perpetuated by those to

definition has various implications. States are very cautious to enter into treaties to protect the interests of third parties to the treaty, which are usually individuals. As Dixon noted, this would be an acknowledgement that “the state” is no longer the supreme, ungovernable entity that pure positivism suggests.³ It has been a great shift to go from states being the only subjects of international law to bringing into being international organizations, corporations and individuals, though the status of individuals and corporations is still debatable.

For the purpose of this comment, the fact that human rights are rights that are given to human beings suffices, and whether individuals are subjects or objects of international law poses little problem. The point of focus of this comment is to highlight the extent to which CEDAW avails remedies against violence against women.

2. CEDAW’s Gap in the Definition of VAWs

Needless-to-say, CEDAW stands against violence against women. However, CEDAW is a toothless instrument when it comes to the protection of women. My first argument is related to the scope of the CEDAW. Violence against women has been defined in the Declaration on the Elimination of Violence against women in 1993. Further elaboration has been given under Article 2 of the Declaration.⁴ However, there is nothing in the text of the CEDAW that actually deals with this definition.

The second point that the reader may notice is that the definition given (which is 14 years younger than the CEDAW) is incorporated in a declaration. It is a fact that declarations, which are General assembly resolutions are usually not binding. This point has been verified by the ICJ in its advisory opinion on the definition of force.⁵ And even if they were, this particular definition is not incorporated in the CEDAW itself and this would not serve the purpose of the CEDAW. It is true that rights against Violence

whom the woman is closest. Even before birth, females in cultures where son preference is prevalent are targeted by the violent discriminatory practices of sex-selective abortion and female infanticide. Violence against the girl child manifests itself as enforced malnutrition, unequal access to medical care, as well as physical and emotional abuse...”

³ See Martin Dixon, *International Law*, (Oxford University Press, 2005), p320

⁴ See *supra* note 1, Article 2

⁵ Developing countries wanted to adopt a wider definition of the term “force” while developed nations wanted the literal meaning of the term and in the General Assembly, the majority voted for the former definition and the ICJ affirmed that though the GA resolutions are not binding, they do show *opinio juris*.

Against Women (hereinafter referred to as VAWs) are human rights which have their sources in morality and ethics, and the question remains whether we can really expect positive results from states if the definition of the term itself is left to each of them.

First, it can be argued that states are capable of coming up with satisfactory definitions and laws as was intended by the CEDAW as the Convention is just a tool for governments wanting to improve their own laws by broadening the basic rights of women.⁶ It can at the same time be observed that there is cultural pluralism among states and, in effect, what may be considered as violence by one state may be a reflection of the way of life for another. Lack of specificity in the very definition of what constitutes violence is thus a major loophole for states not to recognize certain acts as VAWs.⁷

The CEDAW seems to be very carefully written and understandably so as it has taken more than 20 years to draft.⁸ Apart from the substantive content, its vagueness on the definition of VAW seems clearly in support of equality of the sexes.

3. CEDAW's Reservation Clause

The second argument that can be made is in relation to its Part VI, specifically, Article 28 of the CEDAW which deals with reservations. It has been noted that there is no provision in the text that prohibits reservations as long as it is not against the object and purpose of the CEDAW. But who is to determine whether a particular reservation is against the object and purpose of the CEDAW? The answer would be the *states*. The same states which bear obligations towards their nationals and the same ones which would be held responsible for its breach.

It has been argued that states should not be placed in a position to decide whether reservations to human right provisions are or are not in line with the object and purpose of the document and that this power should be rightly passed to the Committee on Human Rights. However, this is clearly not the case. Under Article 28 of the CEDAW, it has been clearly put that it is states

⁶ See <http://www.womenstreaty.org/CEDAW%20Book-%20WHOLE%20BOOK.pdf>

⁷ For example, Ethiopia, which is a member state to the CEDAW has not criminalized marital rape though it is considered as a VAW by the Declaration on the Elimination of Violence against Women.

⁸ It took twenty years beginning from 1945 when the Commission on the Status of Women started its work on the status of women worldwide to the four international conferences which started in New Mexico in 1975 to 1979 when it was adopted.

that will decide whether a reservation is against the object and purpose of the convention. That is why we have states that have ratified the CEDAW and still do not have laws on most VAWs.⁹

Various states (e.g. Saudi Arabia) have made reservations such as the non-applicability of the CEDAW in case of conflict with Sharia laws. According to many critics, Sharia laws treat sexes unequally in marriage, property as well as politics and education. Yet, such states are still allowed to be member states of the CEDAW.¹⁰ Algeria and many other states have made reservations to Articles 2 and 16 of the CEDAW with no consequences except for a few objections from a number of states.¹¹ These provisions are particularly important since they embody most of the objects and purposes of the Convention. Article 2 deals with measures (both legislative and otherwise) that states have to take in order to bring about equality and impliedly alleviate the problem of VAWs while Article 16 deals with marriage and family rights.

The Committee itself recognizes the importance of these provisions in the following quote:

“Articles 2 and 16 are considered by the Committee to be core provisions of the Convention. Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles.”¹²

One may argue that the above problem could have been solved if there were prohibitions to certain reservations. Since there is no prohibition to reservations, many states are not willing to step forward and set standards as to when the object and purpose of the CEDAW has been affected since most states are making strikingly similar reservations.¹³

4. State Reports and the Challenge against Peer Sanctions

CEDAW has a system of state reports under Article 18. This provision requires states to report on the progress that has been made by their legislative, executive and judicial bodies as well as other organs. The report has to be submitted to the Secretary-general of the UN every four years after the initial report. The latter is expected to be made one year after the entry

⁹ An illustrative listing (such as marital rape, sexual harassment etc.) has been provided by Article 2 of the Declaration on the Elimination on the Violence against Women.

¹⁰ See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

¹¹ See <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

¹² *Supra* note 10, paragraph 6

¹³ *Supra* note 11

into force of the CEDAW for that state. The purpose of this system is to assess progress of states concerning their duties in the elimination of discrimination and further investigate reasons (if any) for non-compliance.

This can raise two questions: First, since most states have made reservations in respect of Article 2 of the CEDAW, would the reports have a significant contribution?¹⁴ The second issue would be in relation to the very meaning of these obligations. Is this obligation not asking us indirectly to tell the Secretary General of the UN if the states have breached the obligations that they have solemnly undertaken? What state would voluntarily do that, especially where it has not fulfilled its obligations?

States that have made reservations in respect to important provisions like Article 16 have also made general exclusion of the CEDAW when in conflict with laws such as the Sharia. In these countries, reports have either been delayed or not made as such.¹⁵ This obligation would however not be totally pointless if there were a requirement of shadow reporting in which case non-governmental organizations would present reports as to whether states are complying with their obligations. This would somehow encourage states to be truthful in their reports as there are shadow reports which would not be “shadows” of their reports if they decide to include untruthful information.

Another question relates to the impact of reports. Article 21 of the CEDAW provides that the Committee has the responsibility of reviewing the reports submitted to it by states after which it will make recommendations and suggestions to the general assembly through the ECOSOC as to what should be done for future compliance. So, basically, even if shadow reports were made mandatory, they would be reported back to the states that made them, just under the different name of the general assembly (which is the composition of all state representatives).

Here, one may argue that these reports are presented to the UN General Assembly since states will have the opportunity to influence each other positively. A state where VAWs have been successfully eliminated can thus make amends and take certain influential measures against those states which are in constant breach of the same. At this point, however, it must be noted that the rationale for states to conform to international law rules may not always squarely apply to human right instruments because the latter do not

¹⁴ It is to be noted that they have not agreed to change laws etc internally as demanded by Article 2.

¹⁵ <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

represent economic or other similar interests where there is *quid pro quo* exchange of rights and obligations between states.

We know that there is no international sovereign and a vertical system of governance in international law; the driving principle is thus consent of states. Be that as it may, states are in constant fear of being alienated for the breach of international obligations towards other states and there are other “non-legal” consequences for breaches. Taking these reasons into consideration, it may not be wise to say that states would resort to such means in relation to human rights as VAW is in existence in most parts of the world although the degree and type may differ.¹⁶ In other words, most states have shortcomings in their own closet and would not dare to go and dig in other states’ closets in the fear that their own maybe discovered in the process.

Another evidence of the ineffectiveness of the reports is the fact that states, which are required to make them every four years, do not respect such deadlines. It is not uncommon to find states which have combined two or three reports together and reported all at once or states like Afghanistan or the Bahamas that have never made any reports.¹⁷

5. The Non-mandatory Nature of Individual Complaints

The next point worth consideration would be that in the CEDAW, individual complaints are not mandatory; they are rather conveniently included in the optional protocol of the same.¹⁸ As defined in Article 2 of the optional protocol, individuals or groups of individuals can submit individual complaints to the Committee only if the state to which this individual or group of individuals belongs has signed this optional protocol.¹⁹ If a state makes laws that violate basic rights of women, would this state allow individuals to challenge it in front of the Committee thereby giving ammunition to individuals with the knowledge that it would eventually backfire? If our answer is no, then, a state would be taking the obvious and easier way out.

¹⁶ In “The World’s Women 2000: Trends and Statistics,” the United Nations reports an estimated 100 to 132 million girls and women worldwide have been subjected to female genital mutilation (FGM).¹⁶ Approximately 2 million girls are genitally mutilated in some form each year. FGM is known to be practiced in 28 African countries and in parts of Asia, and is also reported among immigrant communities in North America, Europe, Australia, and New Zealand.

¹⁷ See supra note 12

¹⁸ See <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>

¹⁹ IBID, Article 2 and 3

However, after having considered the considerable number of states that have opted for the optional protocol,²⁰ this argument may not always hold water but at the same time the preceding paragraphs have shown that violence against women is still a large problem worldwide. So, why did a number of states make this decision? I would say that though states have indeed opted for the optional protocol, the fact remains that the CEDAW does not really have that obligatory force that would make states responsible. Having this in mind, it would not be as such a huge commitment for states to sign in into this optional and yet inconsequential protocol.

Concluding remarks

The conclusion that can be drawn from the above is that the rights that are “protected” under the CEDAW can be disregarded by any country at anytime, and there is no effective compliance mechanism what would stop states from doing so. In the strictest sense, CEDAW can hardly be regarded as an international law rule. Henken stated that “most states respect most international laws most of the time”. This may hold true for the classic international law rules which have definite legal consequences if breached. In the case of the CEDAW, however, the situation is different in that there really is no means of enforcement. As Vaughan Lowe noted, “...*If no consequences attach to [breach of international law], we should question whether they are rules of law or statements of policy or aspiration...*”²¹

Most human right instruments, including the CEDAW really do not have strict enforcement mechanisms. As Vaughan Lowe argued, human right instruments have no effective enforcement mechanism and this would mean that there would not be a strict state responsibility as such. This would lead us to the inevitable conclusion that without state responsibility, there would not be an effective rule of law but rather a set of aspirations which nearly reduce these human right treaties to New Years’ resolutions to achieve certain goals that almost never transpire. CEDAW is bound to remain a set of such declarations of mere aspiration until it addresses its downsides as a toothless instrument in the actual protection of VAWs. _____■

²⁰<http://www.un.org/womenwatch/daw/cedaw/protocol/CEDAW%20Ratification%20Table%20IV-8.en.pdf>

²¹ See Vaughan Lowe, *International Law*, (Oxford University Press, 2007) p 119
