Human Rights and Domestic Violence [*]

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Introduction

Over the past three decades, the issue of violence against women, in its myriad of forms, has achieved increasing recognition both in Australia and within the legal and welfare systems of other Western countries such as Canada, the United States and various European jurisdictions. As a corollary to the growth in strength and organisation of women's movements around the world and the development of both regional and international non-government organisations concerned with women's rights, violence against women has emerged as a global issue (Heise 1996). Despite gradual changes in domestic spheres, and increasing evidence that domestic and other forms of violence affect women from a range of cultural and geographic backgrounds, violence against women remained low on international human rights agendas until the early 80s. Conceptualising gender violence as a human rights issue has thus been a relatively recent development and translating the rhetoric and formality of international legal mechanisms into programs and policies at a grass roots level remains a major challenge for health, welfare and legal professionals in Australia.

International Human Rights Law: A Background

In 1945, following the tragedies of the Second World War, representatives from 188 nations around the world agreed, through signing the Charter of the United Nations, to form an international alliance which would promote peace, cooperation and

human rights across the globe. In the years that followed, various bodies within the United Nations, in consultation with non-government, intergovernmental and related agencies, developed a series of Conventions, Covenants and Declarations articulating certain inherent, inalienable and universal standards regarding the quality and dignity of life to which all persons were entitled (Halliday 2001). These documents formed the basis of international human rights law, which continues to evolve and adapt to the changing needs of disadvantaged and minority groups from a diversity of cultural, social and economic backgrounds.

Declarations, like the Universal Declaration of Human Rights 1948, set out the general inalienable rights of all individuals, while Conventions and Covenants tend to focus on more specific areas or interest groups. Unlike many other countries, none of these instruments are technically binding under Australian law, so once ratified they can only place a degree of political and/or moral pressure on the State to ensure that citizens within the boundaries of their jurisdiction can both access and enforce the rights set out in their provisions. This can be done in a number of ways, such as incorporating provisions of a particular treaty into domestic legislation, developing policies or programs which promote and/or protect human rights or through establishing national institutions to monitor, prevent or redress human rights violations. Several treaties also carry Optional Protocols, which, if adopted by a member State, allow for individual complaints of human rights abuses to be brought directly before UN Committees (Barker 1997). While Optional Protocols exist for the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and for the Convention on the Elimination of Discrimination Against Women, only the former three have been ratified and signed by the Australian Government, the Howard Coalition having announced in 2000 that it did not intend to adopt the Optional Protocol to the CEDAW as yet (Halliday 2000).

The discourse of human rights and the mechanisms in place to protect and enforce rights embodied in international documents suggest a way in which a legal standard of minimal protection might be recognised as mandatory for the maintenance of human dignity and thus, the entitlement of all human beings (Miller 1998). Like other

models for achieving justice and equality in society however, the human rights framework has its critics, the most prominent of which, in recent years, has been the women's movement.

Women's Rights as Human Rights

The first major recognition of women's rights as human rights occurred in the 1970s when the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) was drafted and adopted by a majority of member states of the UN (Halliday 2001). The CEDAW identifies measures to be taken to eliminate discrimination against women in a range of fields and requires States who have signed and ratified the Convention to report periodically to the UN Committee on the Elimination of Discrimination against Women. (Roberts Chapman 1990) The primary focus of the CEDAW however, was originally on political and economic discrimination and issues that emerged in the public spheres of women's lives. Feminist critiques of the human rights discourse have argued that by neglecting to acknowledge human rights abuses occurring in the private sphere, such as domestic violence, rape and sexual abuse, the Convention only reinforced existing patriarchal structures and perpetuated a public/private dichotomy that further oppressed women, on an international level (Coomaraswamy 1994).

From 1975 to 1985 the Division for the Advancement of Women, a branch of the United Nations Secretariat specialising in issues concerning the status of women, was responsible for arranging three World Conferences on Women in Mexico, Copenhagen and Nairobi. At none of these conferences was the issue of violence against women, in its many forms, addressed in any detail (Coomaraswamy 1994). It seems, as Charlesworth argues, that "…issues traditionally of concern to men are seen as general human concerns; 'women's concerns' by contrast, are regarded as a distinct and limited category" (Charlesworth 1995, p 104). It is only since the 1990s that any major advancement has been made towards having gender based violence mainstreamed into the global human rights agenda (Charlesworth 1995).

In 1992, the UN Committee on the Elimination of Discrimination Against Women took what was arguably the most critical step towards having violence against women recognised as a human rights issue. In their 11th session, under General

Recommendation 19, the Committee submitted that gender based violence, that is, violence directed against a woman because she is a woman, or which affects women disproportionately, constituted a form of gender discrimination and could therefore amount to a breach of specific provisions of the CEDAW, regardless of whether those provisions expressly mentioned violence. This decision was followed by a series of meetings, conferences and recommendations resulting, in 1993, in another major development - the proclamation by the UN General Assembly of the Declaration on the Elimination of Violence Against Women. In 1994 a Special Rapporteur was appointed by the Commission on Human Rights to seek and receive information on violence against women, its causes and consequences, to carry out field missions to various geographical regions in both an investigative and consultative capacity and to make recommendations for national, regional and international reform in relation to the elimination of violence against women (Coomaraswamy 1994).

The 1995 World Conference for Women held in Beijing represented yet another milestone for the women's human rights movement. The Beijing Platform for Action (BPFA), developed in the course of this conference, is now considered "…one of the most progressive 'blue prints' for achieving women's equality" and sets out twelve critical areas of concern – one of these areas is identified as Violence Against Women and corresponding principles and strategic actions are set out to assist governments in addressing the issue (Halliday 2001, p.17). The progress of member States in implementing the BPFA was reviewed in 2000 during the Beijing+5 Conference in New York and an evaluation of its objectives conducted. The 2000 review resulted in the BPFA outcomes document, which contains additional measures for addressing violence against women.

The recognition of gender-based violence as a form of gender discrimination thus provided a source of international legally-binding material dealing expressly with violence against women and the Declaration on the Elimination of Violence Against Women, together with the BPFA, provided both a benchmark from which international standards and norms might develop and a comprehensive set of strategies for achieving those objectives.

Domestic Violence as a Human Rights Issue: Approaches and Challenges

While recognition of violence against women as a human rights issue and the development of international legal mechanisms for addressing such human rights abuses represent a significant step forward, a number of challenges remain. Specifically, how can international human rights instruments and the treaty bodies established under them be made relevant to individual women when so many acts of violence were being perpetrated by private individuals independent of the State? In the past, a State could only be held responsible for acts committed on its behalf or through one or more of its agents (Halliday 2001). Feminist and human rights scholars have approached this dilemma in a number of ways. Some have argued domestic and other forms of violence amounted to torture under international standards; others have suggested that systems of gender discrimination in society create an environment where violence against women is condoned (Lambert & Pickering 2001). For either of these arguments to hold any weight however, one must accept that the State has a duty to exercise due diligence in ensuring that the provisions of various international documents are upheld. Although still contentious, support for the concept can be found not only in the Conventions and Declarations themselves, but in regional human rights instruments, in recent judicial decisions, in recommendations made by UN Committees and Special Rapporteurs and in reports submitted by non-government organisations such as Amnesty International (Coomaraswamy 1994).

The Declaration on the Elimination of Violence against Women provides a concise summary of the meaning and standard applied to the concept of due diligence. The Preamble asserts that violence against women is a manifestation of historically unequal power relations in society and that its eradication therefore requires an analysis of not only violent acts but of the social conditions, institutions and norms which perpetuate them. Accordingly, a State party to the Declaration has a responsibility to not only refrain from engaging in or encouraging acts of violence against women but to actively intervene in and exercise due diligence in the prevention of such acts (Coomaraswamy 1994; Amnesty International 2001). The concept of due diligence thus provides advocates for victims of domestic violence

with a platform from which to argue that human rights abuses are being condoned and perpetuated by the State, through their complicity. What this means is that social justice and/or welfare issues can be reconceptualised as human rights issues, arguably providing a much stronger political and legal framework from which to work (Miller 1998).

To illustrate, evidence that crimes of violence against women are not being prosecuted proportionately may amount to unequal treatment before the law and thus breach specific provisions of international agreements. Alternatively, it may amount to discrimination and a State's failure to remedy the situation could be viewed as a failure to actively intervene in preventing, or as condoning, discriminatory practices amounting to human rights violations under various treaties. Similarly, failing to train legal/judicial officers in matters of domestic violence or to conduct adequate research and provide accessible services may all amount to a failure to exercise due diligence and thus a breach of international legal, moral or political obligations under a Convention, Declaration or Covenant (Coomaraswamy 1994).

Conclusion

It is an unfortunate legacy of the patriarchal structures upon which human rights law has been built, that issues pertaining primarily to women, such as domestic violence, continue to struggle for recognition within global human rights bodies and agendas. However, developments over the last few decades have provided women with the basic mechanisms through which their rights under various international instruments might be enforced. Much, however, remains to be done. Women who are multiply disadvantaged, such as indigenous women, migrant women, disabled women and older women have often been overlooked in the quest for 'universal women's' human rights. Where their concerns have been addressed, the approach has often been to simply 'add and stir' (Stubbs & Tolmie 1995). Further, in order for human rights instruments to have any value, they must be utilised by those entitled to enforce them. Violence against women occurs in virtually every corner of the globe and its prevalence does not appear to be decreasing dramatically. As we move into the 21st century it is thus more crucial than ever that dominant human rights discourses are

challenged and a discourse acknowledging the diversity, equality and basic human rights of women and men from a diversity of backgrounds be achieved.

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> *Although written specifically for indigenous people and/or organisations, the text clearly sets out the bodies and systems of the United Nations, various treaties Australia has ratified and which of those have Optional Protocols and/or reservations, who is responsible for monitoring our compliance with those treaties domestically and internationally, how to submit alternative reports or complaints to UN Committees, and other practical information on how to use the mechanisms of international human rights law to lobby for social change.*

Brennan, S. 1999, 'Having our say: Australian women's organizations and the treaty reporting process', *Australian Journal of Human Rights,* vol. 5, no. 2, pp. 94-100. Available: www.austlii.edu.au/au/journals/AJHR/1999/25.html [2003, August 22].

> *Provides illustrations of how the use of international legal mechanisms and reporting processes can have a significant impact on domestic policy and encourages organisations to become involved in defending and promoting the human rights of disadvantaged groups within Australia and overseas.*

Chapman, J. 1990, 'Violence against women as a violation of human rights', *Social Justice*, vol. 17, no.2, pp.54-70.

> *Examines three aspects of efforts to eradicate violence against women used nationally and locally in the US and discusses their potential for being integrated into an international human rights agenda.*

Cook, R. 1997, 'Women' in *The United Nations and International Law*, ed C. Joyner, Cambridge University Press, Cambridge.

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Useful guide to general literature on women's human rights, including various International Labour Organization instruments.

Coomaraswamy, R. 1999, 'Reinventing international law: women's rights as human rights in the international community' in *Debating Human Rights*, ed P. Van Ness, Routledge, London.

Describes some of the achievements of the most recent World Conferences on women and argues that women's rights should have status comparable with civil, political, social, economic and cultural rights. Suggests this conceptualisation is needed as old human rights provisions are not suited to discussion of newly emerging issues like violence against women.

Halliday, S. 2001, *International Women's Day 2001: CEDAW Information Package,* Human Rights and Equal Opportunity Commission & Sex Discrimination Commissioner Publication, Sydney.

Package does not specifically address gender based violence or its legal meaning under the CEDAW but provides basic information on what the UN is, what it does, what the CEDAW is and how it relates to sex discrimination laws and women's human rights generally.

Pritchard, S. 1995, 'The jurisprudence of human rights: some critical thought and developments in practice', *Australian Journal of Human Rights* vol. 2, no. 1, pp. (3)-38. Available: www.austlii.edu.au/au/journals/AJHR/1995/2.html [2003, August 22].

Good overview of the major critiques of human rights discourses, outlining the pros and cons of utilising an international legal framework to address social justice and welfare issues.