3. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and realisation of rights: reflections on standard settings and culture

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This article is drawn from a presentation made to the Commonwealth by Indira Jaising, Additional Solicitor General of India.

Introduction

The articulation of rights and the setting of standards remains the first step towards the realisation of those rights. Whether or not an individual can actualise the right is dependent on the capability of the individual. It must be remembered that law is only a tool of empowerment. For the actualisation of rights, the capabilities approach (developed by Amartya Sen and contextualised in the legal framework by Martha Nussbaum) is extremely appealing as it gives meaning to human rights and provides judicially manageable standards for testing the validity of law and policies.

The capabilities approach is premised on the concept of human dignity. In this approach, the first step is to identify components that indicate the functional capabilities for living a life with dignity – such as life expectancy, bodily health, bodily integrity, reasoning and imagination, emotional well-being etc. Nussbaum **suggests** that a substantive list has to be drawn up of positive freedoms that will improve a person's quality of life. Finally efforts have to be made to ensure an enabling environment, by securing institutional and material conditions that put a person in a position to secure the capability.

States guaranteeing fundamental entitlements to their citizens cannot stop at providing guarantees against state interference in the exercise of the freedoms of their citizens alone,[1] they also have to provide substantial entitlements. Adherence to a formal notion of equality does not take into account historical disadvantages. As Nussbaum asserts, the substantive equality paradigm in turn provides the rationale for affirmative action to promote the capabilities of those who suffer from traditional subordination and deprivation.

1. Such as the rights in the US that are worded as 'State shall not…'.

Common minimum standards

To ensure the protection of women's rights obligations of states, international human rights treaties and fundamental rights should be considered a common minimum standard. The debate on whether or not these standards are universal resurfaces when it comes to diverse cultural practices, minority rights and the rights of indigenous communities. While culture itself is not a closed category, the right to conserve one's culture is recognised by most constitutions and international instruments. Most notably, it includes the right to preserve language, religion and practices. Cultural rights reside in collectivities and are intimately linked with questions of self-identity.

Identity itself, both of individuals and of collectivities, is not fixed but evolving: being impacted upon by historical, social and political events. The right to conserve culture, being an inter-generational right, necessarily contains within itself a strong evolutionary element. This necessarily posits an exit option. It is therefore equally necessary to have in place legal regimes that enable women to opt out of cultural frameworks and enter the mainstream of constitutionalism.

Yet there is a seemingly unresolved conflict between the right to equality and non-discrimination based on sex, on the one hand, and the right to preserve culture, on the other. Several cultural practices negatively and disproportionately impact women. They are founded on patriarchal and hierarchal attitudes, and there is a need to transform and abolish them. Examples of this can be seen in *sati* (widow immolation sought to be justified in the name of religion) in India, female genital mutilation (FGM) in several African countries and polygamy in Islamic countries. These practices are not only discriminatory, but are anti-life sustaining. They deny women the right to live with dignity.

CEDAW: reservations and domestication

It is imperative to recognise a set of universal standards that are relevant to all communities, even if the implementation of such standards is done in a culturally sensitive manner. CEDAW is a good starting point in this direction. Article 2 of the CEDAW enjoins states to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.' Article 5 follows this with a commitment to eradicate social and cultural practices that are discriminatory towards women.[2]

Further, article 16 is an application of the objects and purposes of CEDAW in articles 2 and 5 and stresses the woman's right to equality within marriages and the removal

2. Article 5: 'to take all appropriate measures 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.'

of discriminatory practices. **The CEDAW Committee has held that articles 2 and 16 are core provisions of CEDAW**. Hence any reservations made to these articles will be in violation of the core commitments of the Convention.

There is a trend in the legal thinking which holds that such reservations which are contrary to the core commitment of CEDAW must be disregarded and the state held bound in international law to the treaty.

The law reform processes in areas where the right to equality and non-discrimination based on sex conflicts with the right to preserve culture, need to be more inclusive and consultative; yet the goals to be attained must also be clear. In India, an attempt to exclude Muslim women from post-divorce maintenance was fortunately frustrated by the Supreme Court in the *Daniel Latifi*[3] judgment, when it held that under the Muslim Women's (Protection of Rights on Divorce) Act, 1986, 'reasonable and fair' provision must be made, failing which, the law would be unconstitutional. This is an example of judicial interpretation of cultural texts in the light of constitutional values, where the constitution itself is seen as a cultural input into the discourse of rights.

Staying alive

Violence respects no culture. It recognises no caste, class, race, age or geographical boundaries. It is a truly cross-cutting issue. Necessarily, therefore, any law addressing domestic violence must also be cross-cutting, culturally neutral and universally applicable. Attempts to frame domestic violence laws point in this direction.

The stranglehold of patriarchy holds many women in violent circumstances in their own homes. These situations are akin to custodial conditions, where the autonomy and bodily integrity of individuals are under threat. Unfortunately, most human rights documents are applicable only against state action, thereby ignoring the plight of almost half the world's population. CEDAW is a progressive document in this regard, as it recognises violations by private actors. The laws pertaining to domestic violence are mostly in the area of criminal law.

Keeping the widespread incidence of domestic violence in mind, there have been moves in certain Commonwealth countries, notably the United Kingdom, to bring a criminal law onto the statute books to address the situation of violence in the home. Such a law is a step towards recognising the need for laws that are gender responsive.

Efforts at gender-responsive legislation have been undertaken in a number of countries in the Commonwealth.[4] In the Caribbean, the Commonwealth Secretariat and the Caribbean Community have collaborated on the development of a model legislation on

3. (2001) 7 SCC 740.

4. Christina Johnson (2004) Background paper on 'Gender-based violence' for the Commonwealth Human Rights Expert Group Consultation.

women's human rights that covers various aspects of discrimination against women, including domestic violence, sexual offences, sexual harassment, equal pay, inheritance, citizenship, equality for women in employment and maintenance. Johnson points out that a number of countries have enacted or revised their laws on domestic violence using this model.

Interestingly, in some of these countries, the definition of domestic violence has been broadened to include 'psychological', 'emotional', and 'financial' abuse. Further it also recognises relationships, such as 'visiting' or 'cohabiting', that go beyond the realm of marriage. A judgment of the High Court of South Africa has held that a surviving partner of a life partnership must have the same rights to maintenance as a surviving spouse in the estate of the deceased. Not to have those rights would be to violate the right to equality. This is an example of creative judicial thinking, which recognises that there are no universal norms in living arrangements that can be privileged over others.

In South Africa and a number of other states in Africa, specific legislation has been passed to deal with the issue of domestic violence. Of particular relevance is the Mauritius law, which not only recognises domestic violence as an offence, but also adopts a framework whereby an enabling environment is created for women to take action. This includes the appointment of enforcement officers, who provide holistic support to the victim, right from arranging for transportation to the drafting of affidavits to be presented before the magistrate. The magistrate is also empowered to give protection orders to victims during the pendency of a case.[5] The importance of protection orders cannot be overemphasised, as is evident from the experiences of women across the world.

In India, as in most Commonwealth countries, provisions relating to domestic violence lie in the realm of criminal laws and civil laws on divorce. Section 498A of the Indian Penal Code, makes cruelty meted out by husbands and their families to women a punishable offence. 'Cruelty' under this clause has been defined to include injuries sustained to the physical and mental health of women. The recognition of 'mental cruelty' makes this provision one of its kind in the world. The Supreme Court in some cases has held that 'cruelty' for the purposes of the constituting offence under the aforementioned section (Section 498A) need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case.[6]

Concluding thoughts

However, merely recognising and providing for the offence does not ensure that women will take recourse in law as they do not, in most circumstances, have support from

5. Ibid.

6. *Gananath Pathak v. State of Orissa* 2002 (2) SCC 619; See also *Pawan Kumar v. State of Haryana* (1998) 3 SCC 309.

family, friends and relatives. No social security exists for such women: because they have no rights over natal or matrimonial property, taking steps to address a situation of violence often leaves them and their children homeless.

In this context, there is an urgent need for the enactment of a civil law on domestic violence that *inter alia* provides for a right of residence to women in domestic violence situations. The purpose of the civil law would be to restore the woman to a position of equality within the marriage, so as to give her time and the space to decide on what she wants to do with the rest of her life. The absolute precondition for that is to stop the violence promptly.

In this context, the definition of 'violence' has to be provided for exhaustively. Emphasis must be placed on the definition of 'violence against women' as elaborated in CEDAW, the UN Declaration on the Elimination of Violence against Women and the Beijing Platform for Action.

It must be understood that the implementation of human rights norms for women can only be effective if it is in furtherance of preserving and according to women a life of dignity. The role of laws in such matters has to rise above the level of a tool of adjudication to a tool to ensure the provision of justice.