International Human Rights Law and Domestic Violence

The effectiveness of international human rights law

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Routledge Research in Human Rights Law

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2011
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available
from the British Library

Library of Congress Cataloging in Publication Data
McQuigg, Ronagh J. A.
International human rights law and domestic violence : the effectiveness of international human rights law / Ronagh J.A. McQuigg.
p. cm.
ISBN 978-0-415-58226-1
1. Family violence—Law and legislation—Great Britain. 2. Human rights—Great Britain. 3. Family violence—Law and legislation. 4. Human rights. I. Title.
KD7973.M37 2011
345'.02555—dc22 2010041822

ISBN13: 978–0–415–58226–1 (hbk)
ISBN13: 978–0–203–81928–9 (ebk)

Typeset in Garamond by
RefineCatch Limited, Bungay, Suffolk

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

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European Court of Human Rights

Canadian Supreme Court

United Nations Committee on the Elimination of Discrimination against Women

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

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Introduction

In this book the effectiveness of human rights law is assessed through the medium of a case study of domestic violence. This is an issue that affects vast numbers of women throughout all nations of the world. An examination of the potential of human rights law to make a contribution in this area therefore casts new light on the effectiveness of the discourse of international human rights law. Domestic violence takes place between private individuals and thus would not have come within the ambit of the traditional interpretation of human rights law. Nevertheless, the practice of domestic violence constitutes a clear violation of several internationally recognised rights, for example, the right to be free from inhuman or degrading treatment, the right to bodily integrity and indeed the right to life. Can international human rights law only be effective in a 'traditional' case of human rights abuse? How well can it rise to the challenge of being used in relation to such an issue as domestic violence?

For many years the issue of violence against women taking place in the home was largely ignored. As Kelly and Radford comment, the concept of domestic violence 'simply did not exist before the present wave of feminist activism'.[1] Although violence was certainly taking place against women in the home, there was no social definition for this behaviour. However, domestic violence is now widely recognised as being a massive problem. Nevertheless, as Dobash and Dobash state, problems of definition still remain.[2] For example, they comment that 'As descriptive terms, domestic, spousal and family violence obscure the gendered nature of the problem and ignore the nature of the relationship involved'.[3] Although there are cases in which men are the victims of domestic violence, nevertheless 'the available research suggests that domestic violence is overwhelmingly directed by men against women'.[4] In the United Kingdom, it has been found that 77 per cent of all victims of domestic violence are women.[5] In addition, violence used by men against female partners tends to be much more severe than that used by women against men.[6] Mullender and Morley state that 'Domestic violence against women is the most common form of family violence worldwide.'[7] It can affect women from any background and of any age.[8]

The opening chapter of the book outlines a number of factors that may create problems as regards the effectiveness of international human rights law

in relation to domestic violence, that is, factors that may prevent human rights law from making a tangible difference as regards this issue. These are the way in which rights were formulated and the development of a public/private dichotomy; the fact that rights will often conflict; and problems surrounding implementation. The book will examine the issue of whether these difficulties can be transcended to such an extent as to enable international human rights law to have an effective role to play in the struggle to combat domestic violence.

The next chapter of the book examines the types of measures that academic commentators working in the field of domestic violence believe would be beneficial in this area. The remainder of the book measures the effectiveness of international human rights law in relation to domestic violence by assessing whether human rights law can contribute to the achievement of these measures.

In order to examine the question of how international human rights law can be used in relation to domestic violence, this book uses the United Kingdom as a case study. The possible use of human rights law through two strategies is assessed. The European Convention on Human Rights has been incorporated into UK law by the Human Rights Act 1998. The first possible route is therefore to take a litigation approach, based on the European Convention. In Chapter 3 the question of how the case law of the European Court of Human Rights in the area of positive obligations could be used in relation to domestic violence is therefore examined. Chapter 4 then assesses whether the UK courts could rise to the challenge of using the Human Rights Act to assist victims of domestic violence.

The book proceeds to consider whether international human rights law could be used more effectively as regards domestic violence through a strategy of using the statements made by international human rights bodies. In Chapter 5, the statements themselves are assessed, with particular emphasis on those made by the United Nations Committee on the Elimination of Discrimination Against Women and the Special Rapporteur on Violence against Women. Chapter 6 analyses the impact that the statements have had so far on the UK Government's policy in relation to domestic violence.

Contents

1 Potential problems for the effectiveness of international human rights law as regards domestic violence

International human rights law has accomplished a great deal since its inception. Nevertheless, it seems that there are certain factors that may stand in the way of human rights law reaching its optimal level of efficacy as regards the issue of domestic violence. In this chapter, these factors will be examined. The potential problems include the negative way in which rights were formulated and the public/private dichotomy; the fact that rights will often conflict; and difficulties surrounding implementation.

The achievements of international human rights law

International human rights law has undoubtedly accomplished much within a relatively short period of time. As Baxi comments, the twentieth century could be entitled an 'Age of Human Rights'.[1] The last century saw the emergence of all the main international human rights treaties, and these Conventions have certainly had a major impact throughout the world. For example, democratic government has emerged in Central and Eastern Europe.[2] Likewise,

> South Africa's transition from the racial authoritarianism of the apartheid era to the non-racial democratic institutions and entrenched constitutional rights of the post-1994 period is widely regarded as one of the great human rights triumphs of the post-Second World War era.[3]

As Robinson states,

> Starting with the Universal Declaration and carried forward in the body of international law that has been painstakingly developed over half a century, the world has expressed through human rights its shared commitment to the values of dignity, equality, and human security for all people.[4]

Cassel comments that 'international articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press'.[5]

In various states non-governmental organisations are working with governments in preparing reports to human rights treaty monitoring bodies and are also preparing their own reports. Women's groups are using the international treaties to further their causes.[6] In most, if not all states, the international human rights treaties are available in the main languages.[7] Indeed the discourse of human rights now plays a major role in the development activities of the United Nations. Human rights experts are also regularly involved in UN post-conflict operations.[8] International human rights law has been used to establish standards that transcend national barriers and has opened up to external scrutiny atrocities that would otherwise have remained solely the concern of the states wherein they were perpetrated.

Human rights adjudicatory bodies, such as the European Court of Human Rights and the Inter-American Court of Human Rights, have been established. As Cassel states,

> As a result of judgments of the European Court of Human Rights, not only have individual plaintiffs been awarded damages, but European governments have revised legislation on such sensitive matters as media criticism of judicial proceedings, national security measures against terrorists . . . and criminal justice procedures.[9]

The judgments of the Inter-American Court of Human Rights also appear to have been effective. Orders for governments to take precautionary measures to protect the lives of witnesses have frequently been issued and in the majority of these cases, such measures were taken. All Spanish and Portuguese speaking countries in Latin America, with the exception of Cuba, now accept the jurisdiction of the Court and state compliance is increasing. The African Charter of Human and People's Rights has not yet had a great impact; however, it must be remembered that this Convention only came into force in 1986. The African system may well develop into an effective means of protecting rights.[10]

Essentially it is clear that 'human rights are now firmly on the agenda of the international community'.[11] International human rights law has served to outline the principles by which governments should act, and the governments of most states now generally accept these principles. Human rights are also being taken into account in the foreign policies of many countries. It is clear that international human rights law has accomplished much during the last century, and the rhetoric of rights is now frequently heard. As Risse and Ropp state, 'transnational human rights pressures and policies . . . have made a very significant difference in bringing about improvements in human rights practices in diverse countries around the world'.[12]

Problems

International human rights law has certainly been effective in some areas in that it has played a tangible role in changing situations. However, it is

undeniably true that the rights of millions of people are still being violated across the world. For example, many national laws remain in force that discriminate against women or fail to recognise socio-economic rights.[13] In a survey of 20 representative countries throughout the UN, it was discovered that none of the states involved had fulfilled their duty of timely submission of reports to the international treaty monitoring bodies. Indeed the states were on average two years late with their reports.[14] One of the most common reasons for this trend was a lack of governmental commitment to the process. In states such as Canada, Finland, India, Iran, Jamaica and Zambia, it was said that the submission of reports was not a high priority for the governments.[15] When reports are submitted, they tend to be formalistic and insufficiently frank. Governments do not usually disseminate the concluding observations of the treaty enforcement bodies to the public.[16] Indeed, in many states there is widespread ignorance of the international human rights treaties.[17]

It is therefore clear that although the rhetoric of human rights has been firmly established with the creation of the international human rights treaties, this rhetoric is not being translated into reality in all situations. In many cases there are immense difficulties with the effectiveness of international human rights law. Nevertheless, as Cassel states, 'continued atrocities do not disprove the case for international human rights law; the fact that it has not triumphed everywhere does not mean that it serves no useful purpose anywhere'.[18] However, which factors may create difficulties for the effectiveness of international human rights law in relation to domestic violence?

The way in which rights were formulated and the public/private dichotomy

One potential problem for the effectiveness of international human rights law may be found in the way in which the rights themselves were formulated. Thomas and Beasley remark that, 'the concept of human rights developed largely from Western political theory of the rights of the individual to autonomy and freedom'.[19] The foundation of international relations is the idea of the liberal state. Romany comments that, 'liberalism constructs a social and political order which seeks to emancipate the individual from the oppression of political structures'.[20] International law thus has its basis in the liberal social contract theory, whereby states are regarded as individuals that should have equality, independence and freedom. Inherent to this theory is the idea of negative rights ensuring individual freedom. This concept is thus embedded deeply in the discourse of international law, and subsequently human rights law.[21] Essentially the concept of 'negative rights' means that the state cannot interfere with an individual in certain aspects of his or her life.[22]

Another main principle of international law is that only states can be subject to this body of law. Individuals are immune from this framework. A number of exceptions did develop. For example, pirates and international war criminals can be held individually accountable under international law. However, as Cook comments, 'These exceptions prove the general rule that

private individuals and agencies are not directly bound by the provisions of international law'.[23]

The idea of negative rights ensuring individual freedoms emerged again during the fight against totalitarianism, which was a vital catalyst in the development of human rights law. The concept of human rights evolved to protect the rights of the individual from encroachment by the state. As Thomas and Beasley remark, 'States are bound by international law to respect the individual rights of each and every person and are thus accountable for abuses of those rights'.[24] However, the rights norms that emerged were generally formulated in a very negative manner, whereby the state was required only to refrain from violating the rights in question. There were no obligations on the state to take positive steps to ensure that the rights of the individual were not breached. The 'neo-liberal commitment to minimal state intervention'[25] resulted also in the situation whereby the state was not required to protect the rights of the individual from violation by another private party.

The implications of the theoretical underpinnings of human rights law can be clearly discerned from the practical developments in the field. The 'first generation' of rights was concerned primarily with civil and political rights. These were mainly rights possessed by the individual, with which the state could not interfere. As Romany comments, the ultimate concern was the separation and protection of the individual from the state.[26] The objective of the framers of the earlier human rights instruments was to ensure that there was a space wherein the individual would be 'left alone' by the state. Their aim was not to obtain positive entitlements from the state, and neither was it to compel the state to intervene in a situation whereby the rights of one individual were being breached by another private entity.

For example, arguably the most influential regional human rights instrument is the European Convention on Human Rights. This Treaty dates from 1950 and was formulated as a defence against totalitarianism in the aftermath of the Second World War.[27] As is to be expected, the Convention deals primarily with fundamental civil and political rights, and most of its provisions are framed in a negative way. For example, article 8, which is commonly known as the right to private and family life, actually prevents only an interference with the exercise of the right to privacy.[28] Again the emphasis is placed on the state's duty of non-interference. The European Convention provides one of the clearest examples of the negative formulation of rights that is found in many human rights instruments. Historically this negative formulation of rights has caused major difficulties for the effectiveness of international human rights law, as it served to limit greatly the types of situation in which human rights law could be used.

Rights were developed in such a manner as to create a public/private dichotomy whereby human rights norms were upheld in the public sphere where the state is involved, but were not applied in the private sphere. The public/private dichotomy may be formulated in several ways. Cook points to two possibilities.[29] First, the public realm can be seen as the area that is

regulated by law and politics, and the private sector as the area where regulation is viewed as being inappropriate. Second, the public arena can be seen as the state and its agents, while the private sphere is constituted by non-state activities.

In relation to the first definition of the public/private divide, Charlesworth and Chinkin comment that 'the liberal account of international law rests on a series of distinctions between the "public" and the "private" that has long played a central part in Western legal and political philosophy'.[30] Even back in the time of the ancient Greeks, a division between the public sphere and the private realm of family and home was recognised. The general principle was that men were free to participate in the public sphere because they were supported by their wives at home in the private realm.[31] John Locke later used the distinction between the public and private spheres to deny the existence of the divine right of kings without criticising the patriarchal familial structure of the day. Locke claimed that the king's political power was accorded to him by those he governed, and fell within the public sphere. Patriarchal authority, however, fell within the private realm and thus was immune from regulation. Indeed it was regarded as being divine in origin.[32]

Charlesworth and Chinkin point out that an 'important function of the (public/private) dichotomy in liberal jurisprudence is to demarcate areas appropriate for legal regulation from those that come within the sphere of individual autonomy'.[33] The dichotomy divides a public realm of rationality where political activity occurs, from a private realm that is believed to fall outside the boundaries of regulation. For example, the 1957 Wolfenden Report on Homosexual Offences and Prostitution stated that 'there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business'.[34] Essentially the Report took the stance that the law should not involve itself with the private realm unless an adverse impact on the public sphere was produced.[35] There is certainly some degree of merit in this argument. Most citizens would be of the opinion that there are certain areas in relation to personal or consensual acts that must remain unregulated, in order to respect the right to privacy.

The public/private divide may also refer to human rights law binding only states. Hirschl comments that,

> Despite the open-ended wording of the constitutional catalogues of rights in Canada, New Zealand, and Israel, the national high courts of all three countries tend, by and large, to conceptualise the purpose of rights as protecting the private sphere (human and economic) from interference by the 'collective' (often understood as the state and its regulatory institutions).[36]

He points out that courts in the three legal jurisdictions in question appear to see state regulation as more damaging than the oppression that can result from allowing powerful private bodies to be immune from international human rights law. It seems that these courts are of the opinion that the role of

the state as regards human rights is to refrain from violating rights, as opposed to taking positive steps to ensure that the rights of individuals are not breached by any party – whether by the state or by another private individual. It is interesting to note that constitutional rights are usually given a wide interpretation by the courts of Canada, New Zealand and Israel where negative rights are at issue, but are given a far narrower interpretation in positive rights claims.[37]

Analysis of the public/private dichotomy is certainly a recurring theme in feminist literature.[38] For example, Ewing states that, 'The public/private distinction in international law . . . places many forms of violence against women beyond the protective scope of human rights instruments'.[39] Quite frequently, women's human rights will come into conflict with powers other than that of the state. These powers generally emanate from the private sphere, for example from within the family unit. These powers are, however, frequently just as strong as the state itself.[40] Indeed they may be even more effective as they are found within the sphere that is closest to the individual concerned – a sphere which is usually associated with safety and security. Women all over the globe suffer from human rights abuses in the private sphere such as domestic violence, female genital mutilation, dowry killing[41] and sati. 'Daughters, sisters, brides, wives, mothers, grandmothers, and caregivers – all are vulnerable to domestic violence, degradation, and devaluation.'[42] Under traditional principles, abuses perpetrated by these powers did not come within the ambit of international human rights law as they are not inflicted directly by the state. It has been argued that 'abuses, exclusions and constraints that are more typical of women's lives are neither recognised nor protected by mainstream human rights instruments'.[43]

For example, the right to be free from torture and inhuman or degrading treatment is regarded as fundamental. However, it was usually drafted in such terms as to apply only to situations where it is the state itself that is inflicting the prohibited treatment.[44] For example, article 1 of the United Nations Convention against Torture clearly states that to constitute torture, the pain or suffering in question must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. The right to be free from torture was designed to prevent situations such as where a political prisoner is ill-treated in prison. Such a prisoner is usually male. Torture as it is experienced more frequently by women was not envisaged. Various feminist critics have likened domestic violence to torture.[45] They have pointed out that similar methods are used both by official torturers and abusive partners. However, until very recently, domestic violence has not been viewed as torture, or on the same level as torture, by the international human rights community. Provisions such as the European Convention's prohibition on torture were formulated in response to the atrocities of the Second World War and the Holocaust. It is essential to recognise that these provisions must be interpreted in such a way as to be effective in the circumstances that prevail in modern times. Nowadays, for