

CEDAW and Optional Protocol – two important legal steps to gender democracy

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I

Personal approach

May I introduce myself.

I am from Austria and I have been working as a judge specialised in commercial law since 1976. However, since the 1980ies I have also focussed on the implementation of human rights at the international and national level. I was one of the legal „ghost-writers“ for Ms. Johanna DOHNAL and so one of the mothers of the Austrian Federal Act on Protection against Domestic Violence 1997, a legal milestone. She was the first Austrian Minister for Women’s Affairs and is a famous feminist and lesbian. Not being a lawyer herself she had signed and promoted CEDAW. In the 1980ies and 1990ies Austrian’s male leading legal experts denied the existence of that undoubtedly legal binding treaty. During the following years they kept CEDAW secret and did not publish it in their text books and legal editions.

In 1993 I was a delegate at the UN World Conference on Human Rights in Vienna. In 1995 I was a member of the Austrian government delegation at the 4th UN World Conference on Women in Beijing. Since 1998 I was appointed Substitute Justice at the Austrian Constitutional Court.

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Further, in my capacity as lecturer and communication coach, I have been dealing with the importance and impact of social rules as well as with the issue of group exclusion mechanisms. It is the fate of discriminated groups which is my greatest concern.

II

Short history

In my opinion CEDAW 1979 and its Optional Protocol 1999 certainly are the most important legal instruments in favour of women's rights as human rights, a political slogan during the Women's Decade (1975 -1985) of the UNO which transformed to a legal provision (Vienna, Beijing : Declaration Art 14). Italy and Austria have a similar development concerning both treaties: They became member states of the UNO in 1955. Both states signed CEDAW in 1980 and ratified in the next five years. The Optional Protocol came into force in 2000 when Italy signed being the tenth State Party.

Austria had a special connection to the Optional Protocol: In 1996 the Commission on the Status of Women established a working group to draft a so called „ Optional Protocol „ corresponding to CEDAW. Female individuals should have the permission of a direct application to CEDAW Committee. An individual complaint procedure should be established. Ms. Aloisia WOERGETTER, a young Austrian diplomat, was elected as chairperson and showed great personal commitment. Until March 1999 the working group was active. Finally the chairperson managed to establish this Optional Protocol as a strong and effective instrument. In October 1999 it was adopted by the UN General Assembly.

III

Optional Protocol: some remarks

It is a treaty in its own right and may be signed by those State Parties that have ratified CEDAW. A woman, a group or somebody on behalf of a woman can send communications to CEDAW Committee, if a State Party of both treaties is suspected to have violated a woman's right that is guaranteed under CEDAW Convention. The state in question must have ratified both treaties before the violation. It is not necessary that the woman concerned is a national of this state, she must only be under the sovereignty and the laws. The communications must be written and must not be anonymous. A representative on behalf of a woman must prove her consent. All national available remedies must have been exhausted. Etc.etc.

IV

The situation in Austria

CEDAW Art 1 – 4 was ratified on federal constitutional level. The treaty was non-self-executing, so feminists and NGO's demanded the implementation into the national legal framework.

Some examples:

a. Art 7 of the Austrian Federal Constitution was repeatedly amended adapting positive actions (Art 4 CEDAW).

b. Family law was „ gendered „ in several legal steps.

c. Quotas for women at the universities, at the courts and other authorities of the state, in the army and in the civil service were established in many (ordinary) laws.

Summarizing I can say that the implementation of CEDAW was a success. Before 1995, the year when Austria joined the EU, human rights for women exclusively derived from CEDAW transforming the rule of law.

It is a matter of fact that CEDAW does not refer explicitly to violence against women. So it is very important to know that several so called General Recommendations by CEDAW Committee addresses this fundamental issue:

Nr 12 /1989 on violence against women

Nr 14/ 1990 on female circumcision (FGM) and other traditional practises harmful to the health of women

Nr 19/ 1992 on violence against women.

Art 1 CEDAW includes all forms of gender-based violence which is defined as „ violence that is directed against a woman because she is a woman or that affects women disproportionately.“ The full enjoyment of human rights , especially the right to life; the right not to be subject to torture or to cruel , inhuman or degrading treatment or punishment; the right to equal protection under the laws.

In 1992 Johanna DOHNAL started the campaign „ Test the West - Gender Democracy and Violence „. In her opening address she said:

„ Speaking about violence is a difficult undertaking for various reasons: Day in , day out, we are confronted with images of violence, both through the media and in our own lives. Our range of reactions includes dismay, revulsion, anxiety; but also indifference, resignation and ignorance. We do live in a modern democratic society, but violence is at the same time an everyday fact..... Throughout the whole long history of patriarchy women have had to put up with violence. They are subject to gender-based discrimination , they are faced with disadvantages , and they have never been permitted to live a life of self-determination. Humans who are denied an identity of their own, who are denied the right to be different, who are economically dependent or who are not given access to education and refused personal development, have always been victims of violence....“

Famous experts from abroad come to Vienna and spoke to us about the context between structural violence against women and gender democracy. Catharine A. MacKinnon, Susan Schechter, Ellen Pence, Charlotte Bunch, Alberto Godenzi, Erica Fischer, Susanne Baer and others were our lecturers. Especially the information about the Domestic Abuse Intervention Project in DULUTH/ Minnesota-USA was an inspiration for us. Then we – some feminists and NGO-representatives - elaborated a draft concerning an Anti-Domestic-Violence-Act. We had to fight against the male staff of traditional lawyers from two ministries (Justice and Home Affairs). In May 1997 the Federal Act on Protection against Domestic Violence entered into force. It was a victory against the establishment of Austrian lawmakers! For women it was really a milestone because it represents a major paradigm shift: The focus is on the safety and needs of the (female) victim. She is not obliged to leave her home. She receives protection by specialized NGO's, so called intervention centres. On the other hand the perpetrator has to leave the home and is not allowed to contact the victim. There are new legal remedies like eviction orders by the police or/and „ interim injunctions „ under civil enforcement law. Undoubtedly the adoption of this federal act was an important step to incorporate the spirit of CEDAW into the Austrian legislation. But from the start we „ mothers „ of that act knew that the remedies against domestic violence are only useful in cases with moderate, not really severe attacks by a perpetrator who is not a criminal. The new remedies were created in addition to the possibilities by criminal law, especially the imposition of detention.

The turning point is to assess the aggressor's potential for further violence in a realistic way and to consider the possibility of further escalation !

V

Sahide and Fatma are dead

In September 2009 there was a conference of WAVE in Vienna. Ms. Rosa LOGAR, director of the Domestic Abuse Intervention Program Vienna and one of the founders of the Austrian Women's Shelter Movement, spoke about two Austrian cases at CEDAW Committee and the consequences for Austria.

She told us about two women in the age of 35 to 45 years with ethnic roots in Turkey. Fatma became citizen of Austria. Both lived in Vienna. Both were murdered by their husbands in 2002 and 2003, although they had demanded protection by police and judicial authorities. Before their deaths they repeatedly suffered from threats and violent acts which had been reported. Although both offenders were evicted from their homes, the police (in one case) and the public prosecutor (in both cases) failed in assessing the actual danger for the victims that emanated from the perpetrators. Even Sahide's husband had had a weapon but nobody seemed to be interested in this fact. No detention order was obtained, both males were only charged without arrest. After the murders both husbands were sentenced to life imprisonment .

Sahide and Fatma had been clients of the Austrian Domestic Abuse Intervention Centre. To its duties belong counselling for victims of domestic violence and assisting

them in order to enforce their rights. So in behalf of both women communications were sent to Cedaw Committee (5/2005 and 6/2005).It was argued that Austria had violated the rights of Sahide and Fatma under Art 1,2,3 and 5 CEDAW , because the authorities of the State Party had not taken all appropriate measures to protect their lives.

Roa LOGAR:

„At its 39 th session in August 2007 the CEDAW Committee decided that Austria , in both cases, had violated the rights of the two women to protection to their lives and physical integrity according to Art 2 a and c to f of the CEDAW Convention , together with Art 3 and General Recommendation Nr 19 of the CEDAW Committee.....“

„ The Committee therefore .. considers the failure not to have detained I.Y...as having been in breach of the State Party’s due diligence obligation to protect Fatma...

In both cases the CEDAW Committee acknowledges the fact that Austria’s domestic violence law established a comprehensive model of protection from domestic abuse. However, the Committee emphasizes that this is not enough since the political will as expressed in the law must be supported by State actors put into practice the State’s due diligence obligations .In other words : it is not enough to have good laws, they also have to be enforced by all actors.

Regarding Austria’s argument that detention would have been disproportionate, the Committee notes in both cases that although it has to be considered for each case individually whether detention would disproportionately interfere in a suspect’s fundamental and human rights,“ the perpetrator’s right can not supersede women’s human rights to life and to physical and mental integrity“

CEDAW Committee made a number of recommendations to Austria .

Meanwhile Austria has reacted improving the legal framework (Anti-stalking; Victim’s Protection etc.)It is a pity that training programs for judges, public prosecutors, lawyers and law enforcement officials are not established for lack of budget.So it could occur again that Austrian authorities suppose – by error - death threats of male perpetrators against their wives , sisters , daughters , mothers and other female relatives are only „ couple disputes „ or „disturbances „ or „ conflicts with a certain cultural background „.

V

Gender democracy now ?

Ms. Rashida MANJOO, the UN Special Rapporteur on Violence against Women, sent a message to the recent WAVE-Conference:

„...Violence against women is both universal and particular. It is universal in that there is no region of the world, no country and no culture in which women's freedom from violence has been secured. The pervasiveness of violence against women across the boundaries of nation, culture, race, class and religion points to its roots in patriarchy – the systemic domination of women by men. The many forms and manifestations of violence and women's differing experiences of violence point to the intersection between gender-based subordination and other forms of subordination experienced by women in specific context (Secretary-General's report „ Ending violence against women – from words to action „ 2006 page 28).

Despite the existence of provisions on non-discrimination on the basis of sex in formal international legal instruments since 1945.....the promotion and protection of women's human rights remains a challenge.....“

30 years CEDAW – 10 years Optional Protocol : It was even not enough time to transform European democracies ! To use CEDAW for many cases of gender-based discrimination would support and accelerate the enforcement of women's rights as human rights.
