

The Emergence/Extention of Due Diligence Standard to Assess the State Response towards Violence against Women/Domestic Violence

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ABSTRACT

This article begins by providing a brief summary of emergence of due diligence principle in the International human rights law. The article then explores the role of International/regional human rights mechanisms/instruments in clarifying and specifying the content of due diligence obligations and its application in the context of violence against women. It illuminates, in particular, the contribution of the reports prepared by the mandate holders of United Nations Special Rapporteurs on violence against women its causes and consequences. The article argues that the criterion has been useful in dealing with gender based violence within a human rights framework since it provides a yardstick to determine what constitutes effective fulfilment of the obligation (Manjoo, 2001). It concludes by taking note of Pakistan's level of compliance with due diligence obligation particularly in the area of 'prevention' of violence against women.

KEY WORDS: Due Diligence obligation, violence against women, human rights mechanism, CEDAW, Special Rapporteur on violence against women

Introduction

For many years the developments regarding state's due diligence obligation remained relevant only to the protection of individuals from injury caused by the agents of the state (Erturk, 2006: 2). Acts that were imputable to the individual perpetrator against other private actors would not engage state responsibility, even if it were obvious that the damage had occurred due to state's failure to avert such harm (Crawford & Ollsen, 2003: 445, 459). State responsibility would arise only for those acts or omission where involvement of public authorities could be proved. The gradual shift in due diligence obligation from restrictive state-centric approach, mostly involving active state conduct, to a more expansive interpretation of the obligation including broader categories of non-state actors, such as private individuals, is a recent advance in human rights law (Erturk, 2006: 6). This development of due diligence standard, beyond the traditional requirement

of state agency, offers a useful framework for dealing with violations of women's human rights, such as violence against women, at the hands of private individuals (Hasselbacher, 2010:).

The due diligence standard for violence against women was articulated in the General Recommendation (GR) 19 of the Committee on Elimination of Discrimination against Women (the Committee hereinafter) for the first time in 1992. It called on States to act with due diligence to prevent and respond to violence against women. The due diligence criterion was then laid out in Article 4(c) of DEVAW 1993, reaffirming the provisions contained in the Committee's GR 19. The principle was also reiterated in paragraph 125(b) of Beijing Platform for Action. Coomaraswamy, the former Special Rapporteur on Violence Against Women (SRVAW) developed a list of considerations to measure State compliance with due diligence obligation in her 1999 Report. The traditional approach to VAW-due diligence analysis was to focus on the State's response to acts of violence that have already occurred, using tools such as legislation reform, access to justice, and the provision of care services. However, the due diligence standard was more clearly specified in 2006 report published by Ertürk, the former Special Rapporteur on Violence against Women. The entire report is devoted to this subject, which employed the due diligence standard as a mechanism for promoting greater state accountability with a view to eliminate violence against women. The report set up a framework of analysis, under four key principles namely, prevention, protection, punishment and reparations, against which the conduct of States can be evaluated. To effectively address the issue, the report urged the States to act in good faith, abstain from invoking custom/tradition as a pretext, and to record accurate statistics on violence against women. The report considers non-discrimination as a fundamental principle in applying the due diligence standard. The report, therefore, suggests a multi-pronged approach to fight gender discrimination. It requires States to use the same level of commitment in relation to preventing, investigating, punishing and providing remedies for acts of violence against women (VAW) as they do with other forms of violence. The report prepared by the SRVAW immensely contributed in concretizing due diligence obligations. It has also broadened the scope of such obligations by including private individuals as duty-bearers in the framework. By so doing the report attempts to push the boundaries of due diligence standard in order to utilise the maximum potential of the conceptual tool within the context of women's right to be free from violence. The obligations defined and developed within the context of VAW are also useful in other areas of human right law.

A brief overview of the four criteria of due diligence would be helpful to understand the nature of these obligations. The obligation to prevent includes not only law making in the relevant area but also changes in cultural and social patterns and transformation of social institutions that reinforce or appear to justify individuals' acts of violence. A second obligation of state under the due diligence standard is to investigate properly and effectively the violations of human rights.

Thirdly, in case any violation of women's human rights occurs state is obliged to prosecute and punish those who are responsible for such violations. The compliance with obligation to prosecute can be judged by the number of cases prosecuted (involving violence against women) and the types of judgments handed down in these cases. The Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence further elaborates on the requirement of investigation and prosecution. It calls on the state parties to ensure effective investigation and prosecution without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

And finally the obligation to compensate requires state to provide compensation to the injured party for the violation of human rights even when state is not involved in such violation. Concisely, a State is obliged to take positive measures to prevent human rights violations before they occur, such as adopting relevant laws and policies, and to effectively prosecute and punish them once they have occurred. Through the development of jurisprudence in the regional human rights courts, the due diligence test has been increasingly adopted as a benchmark by international and regional human rights monitoring bodies. Arguably, this approach has gained much currency in the contemporary human rights discourses.

The Role of Treaty Based Mechanism and Regional Human Rights Systems In This Regard

Two cases decided by the Committee on Elimination of Discrimination Against Women (the Committee hereinafter) concerning the liability of the state for failure to protect the women against violence by the husbands (partners), eventually resulting in women's death will be discussed briefly. *Goekce v. Austria* and *Yildirim v. Austria* involves series of violent episodes in which two women Sahide Goecke and Fatima Yildirim had been murdered by their husbands following years of brutal abuse. The event of their death occurred despite reporting the violence to the police and obtaining protection orders, however, the Austrian authorities repeatedly failed to ensure the women's safety. The complaints were brought to the Committee after victims' death by a non-government organisation on behalf of the deceaseds' descendants. In *Goekce* case the Committee concluded that even though the husband had been prosecuted 'to full extent of law', Austria violated its due diligence obligations 'under articles 2(a) and (c) through (f), and Article 3 of the Convention read in conjunction with article 1 of the Convention and General Recommendation 19 of the Committee...' Also in *Yildirim* case the Committee held that notwithstanding the comprehensive set of legislative and policy measures adopted to address violence in the family, the Convention required that state officials in practice observe the due diligence obligation. The Committee concluded that authorities knew or should have known of 'extremely dangerous situation' faced by Fatima Yildirim, hence found Austria in breach of its due

diligence obligation. These decisions are particularly relevant for those states that have established a comprehensive model to address the issue of domestic violence. However, due to the lack of due diligence of the state's authorities, the perpetrators continue to commit such crimes and manage to slip through the cracks of the system.

In 2002, prior to UN Special Rapporteur on Violence Against Women 2006 Report, the Committee of Ministers of the Council of Europe adopted a recommendation regarding protection of women against violence. The Recommendation recognized the evolving due diligence standard to combat domestic violence against women as a means of providing express guidance to member states. The text of the 2002 recommendation is largely influenced by the concept of due diligence emerging worldwide and it made express reference to the principles contained in Declaration on Elimination of Violence Against Women (DEVAW), General Recommendation 19 of the Committee, The Convention on the Rights of Child etc. The 2002 Recommendation of the Committee of Ministers suggested several specific measures that the Council of Europe member states were required to take to exercise due diligence. The provisions outlined in the 2002 Recommendation serves as a benchmark for Council of Europe member states to be used in guiding their national policy related to protection, investigation, prosecution and compensation in the context of domestic violence. It clearly established a framework for judging compliance with due diligence criterion in cases arising out of the Council of Europe member states.

In the backdrop of these international and regional developments two landmark cases were considered by the European Court of Human Rights (ECtHR). The subject matter of both the cases *Bevaqua* and *S. v. Bulgaria* and *Opuz v. Turkey* was domestic violence and the judgements for these cases were announced in 2008 and 2009 respectively. The European Court of Human Rights' (ECtHR) decisions in these cases had profound effects in delineating specific state's obligation of due diligence standard by providing concrete substance to the conceptual requirement. Particularly the court's decision in *Opuz* clearly made prevention of violence against women in the domestic sphere as positive obligation of the state and the systematic failure to act in conformity with it, a violation of the Convention's prohibition of discrimination. The decision recognizes that domestic violence against women is a systematic problem reflecting a fundamental imbalance of power. The court's judgement place a strong burden on states to protect women from domestic violence.

That said, at the regional level, Inter-American human rights system once again took a lead in the norm creation process of human rights law and framing binding legal obligations. It successfully adopted Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994 or the Convention of Belem Do Para` as it is commonly called. The Convention Belem do Para` is the only specific binding international legal instrument on gender-based violence as of yet. It aims to prevent all possible situations in which

violence against women is likely to take place and broadens the responsibility of state parties in meaningful ways. Belem Do Para has become an important framework in which the state parties undertake to implement policies, laws and national and regional action programs to eradicate VAW. The treaty directly address the issue of VAW and explicitly recognize the due diligence obligation, by calling on the states to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence..to apply due diligence to prevent, investigate and impose penalties for violence against women.

A parallel initiative has been taken in Europe as well in the form of Convention on Combating and Preventing Violence Against Women and Domestic Violence, called CAHVIO Convention. However, it will take a while for the instrument to create binding obligations in violence against women /domestic violence matters by setting a comprehensive legal framework in the European region. The Council of Europe opened the CAHVIO Convention for signature in May 2011, it will enter into force 3 months after the ratification by ten signatories, including at least eight member States of the Council of Europe

The most notable recent case regarding due diligence in the domestic violence context was decided by the Inter-American Commission of Human Rights (IACHR) in *Jessica Gonzales et al v. United States*. Ms Gonzales is a domestic violence survivor from Colorado, her three children were killed when local police failed to enforce a restraining order against her husband. The case is especially significant because for the first time domestic violence issue is brought against USA before any international body. In the Gonzales case the Inter American Convention on Human Rights (IACHR) was asked to consider the nature and extent of the United States' affirmative obligation to protect individuals from the private acts of violence under the American Declaration on the Rights and Duties of Man. On August 17, 2011, the Commission issued its landmark decision, finding the United States responsible for human rights violations suffered by Ms. Gonzales. The Inter-American Commission on Human Rights (IACHR) found that the United States failed to meet its obligation to protect Ms. Gonzales and her children, and thereby breached their rights to life and to freedom from discrimination. The Commission recommended changes to U.S. domestic violence law and policy. The Inter-American Commission on Human Rights' unfavourable ruling against one of the world's most advanced legal system and its disapproval of the USA's current due diligence standard, arguably, can have far reaching implications both in state's internal as well as international legal system. The Inter-American Commission on Human Right's decision has contributed to the expansion and development of the doctrine of due diligence in relation to State's responsibility to address domestic violence. It has also sparked transnational dialogue on domestic violence as a human rights issue.

Finally, decisions in local jurisdictions, such as in UK, have also elaborated on the extent and scope of state obligation when the right to life is engaged. For instance it was held by the House of lords in *Hertfordshire Police v Van Colle* that the right to life imposes a positive obligation on the state to protect life against the

criminal acts of another individual, by taking preventive operational measures. This means that the standard required for states obligated to respect the right to life help to inform what is demanded for fulfilment of the 'duty of care' in a claim of negligence against the state. It is important to note that the idea of 'duty of care' in Common law is not a fixed/absolute standard, it operates rather on a sliding scale. It means that the duty of care increases/decreases accordingly with the increase/decrease of risk in any given situation. Arguably, the overview of the developments on international and regional level indicates that a similar standard has #been evolving for due diligence obligations in human rights law as well.

Assessment of Pakistan's Compliance with due Diligence Obligation in the Area of Violence against Women

This section evaluates the measures taken by the Pakistan government to fulfil its first due diligence obligation, i.e, prevention, to combat gender based violence. The focus of present discussion is the prevention aspect of due diligence obligation because significant strides have been made in Pakistan in this area.

As stated in the above discussion a State must meet four criteria in order to fulfil its obligation under due diligence standard as laid down in International human rights law. Application of due diligence standard to eliminate violence against women is well established in international human rights law. The Declaration on Elimination of Violence Against Women article 4(c) urge States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

Also the Committee in its general recommendation 19 explains that:

Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Due diligence standard had been conceptualized and developed in the framework of the mandate of the UN Special Rapporteur on violence against women, its causes and consequences. Moreover, it has been recognized by the former UN Special Rapporteur on Violence Against Women that due diligence principle exists in customary international law that binds states in addressing violence against women. The UN Special Rapporteur on violence against women asserts that the concept of due diligence is at the heart of her mandate and it serves as a tool for rights-holders to hold duty-bearers accountable by providing an assessment framework for ascertaining what constitutes effective fulfilment of the obligation, and for analyzing the actions or omissions of the duty-bearer.

Accordingly the due diligence standard provides a kind of measuring stick with which to evaluate if the state is meeting the obligation that it has assumed in a concrete and meaningful way. The obligation to act with due diligence to eradicate violence against women is a well developed framework in the United Nations human rights regime. From this established framework, Pakistan's adherence to due diligence criteria in the area of violence against women can be judged. The Constitution of Pakistan ensures equality before law and guarantees equal protection of law to all its citizens. Also Pakistan is a party to the key international human rights instruments that specifically address violence against women or gender based violence such as Convention on Elimination of all forms of Discrimination against Women (CEDAW) and the Declaration on the Elimination of Violence against Women (DEVAW). In CEDAW article 1 women's right to freedom from violence is recognised as an aspect of the right of women to be free from discrimination. Besides being exclusively addressed by women specific human rights instruments, women's right to freedom from violence is also protected in the general human rights instruments. The most fundamental human rights such as right to life, equality before law and freedom from torture, inhuman or degrading treatment are enshrined in International Covenant on Civil and political Rights (ICCPR) 1966 and in the Convention against Torture (CAT) 1984 respectively. Pakistan has ratified both of these Conventions too. By ratifying all the aforementioned instruments Pakistan has committed itself to respect, protect and fulfil the human rights in the treaties to which it has consented. As already argued, the most basic rights are now understood to include the requirement that States must protect individuals against the actions of private actors. When women's most basic human rights are threatened by the harmful acts of other individuals, State has to take action to fulfil its due diligence obligation. All the four requirements for a State to meet the criteria of due diligence obligation regarding VAW are equally important. The criteria require States to implement all possible, reasonable measures in these four key areas.

In an attempt to address violence against women and to achieve first prong of due diligence criterion, i.e, prevention, the most common primary measure is the enactment of legislation. In the recent years significant efforts have been made in the area of law making in Pakistan to fight various forms of violence against women. Particular pieces of legislation were amended or passed to address the problem of violence against women in the past few years. These initiatives include amendments of the Criminal Code to address the crimes in the name of honour, and to eradicate anti-women practices etc. New legislations are also drafted to address the issue of domestic violence and sexual harassment. Although implementing legislation is deemed as a vital step to prevent violence, however, it has been realised that enacting legislation is not all that is required by prevention criterion of due diligence principle. The Committee goes a step further when it demands that state parties should 'take appropriate measures...to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women'. This view has been reinforced in several

key reports of the United Nations, in his recent address the United Nation Secretary General said:

Violence stems from social attitudes that belittle women and girls. It is tolerated through indifference, ignorance and fear of speaking out. And it thrives where families and communities pressure women to suffer in silence.

As already noted, the standard of due diligence is high. Having a system in place to address the problem of domestic violence is not sufficient; the system must be put into effect by the States who understand and adhere to the obligation of due diligence. Therefore, to check whether there has been adequate fulfilment of due diligence obligation, the focus of assessment is 'analysis of results and effectiveness'. Pakistan's efforts are seriously lacking in this respect. The consistent rise in incidence of violence against women indicates that mere enactment of legislation unaccompanied by supporting governmental action has failed to achieve the desired aims. In Pakistan similar forms of violence occurs as in other parts of the world. However some forms of violence against women may be more rampant in the country due to the cultural specificities. For instance domestic violence is rife and continues to be the most common form of violence against women in the society. Though the tool to get justice is available to the victims of domestic violence in the form of newly enacted law, however, it would not be able to produce significant effects if due diligence has not been adequately exercised to prevent, protect, punish or provide reparations. There is a critical need to dismantle those deeply entrenched societal attitudes that are injurious to the cause of eliminating violence against women from the society. For instance stereotypical response to domestic violence as a 'private matter' of the concerned family has to be challenged. The manifestation of this social conditioning is most common among the law enforcers who, despite being legally authorized, would hesitate to intervene into the situation, perceiving it a 'family matter'. Similar tendency often exist among the family/relatives and friends, who assume that reporting domestic violence can bring a bad name to family. They therefore, often choose to remain silent to save family reputation. Arguably, it is highly unlikely that domestic violence law, if used as a stand-alone strategy, may be able to bring about any positive change in the existing situation. Sexual harassment is another common form of violence against women in Pakistan that requires substantial changes in the unhealthy attitudes of the society. Quite frequently officials, media and community leaders blame sexual harassment on women and their personal choices than perpetrators. An effective prevention strategy, therefore, needs to address such beliefs that tolerate (and promote) violence against women in the society. Prevention should be focused on transforming discriminatory attitudes that position women as sub humans. Under this approach prevention extends to education and awareness-raising, gender mainstreaming in all the government policies and plans, eradication of gender stereotyping, nationwide media

campaigns targeting change in attitudes and gender trainings for law enforcers, judiciary, policy makers and other key personnel. These initiatives must have as an ultimate goal the positive transformation of perspectives, social values and approaches which have been perpetuating violence against women.

Notes

1. It urges the state to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons
2. Due diligence standard has been applied in various human rights issues. See Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking, (E/2002/68/Add.1); Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” (E/CN.4/Sub.2/2003/38/Rev.2).
3. Chirwa, Danwood, Mzikenge, 2004, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights,’ *Melb.J. Int’l L.* 5(1)
4. Author of Communications in both cases was The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice.
5. The case was brought under the Declaration because the US has not ratified any Inter-American human rights treaties.
6. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* 1979, art 2(e) (requiring States Parties to ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc See, eg, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted on 11 May 2011, CETS No.: 210 (not yet in force), art 5; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém Do Pará) 1994 art 7(b); IACHR, Case 12.051, Report No. 54/01, Maria Da Penha Maia Fernandes v Brazil, Annual Report, 2000, OEA/Ser.L/V.II.111 Doc.20 rev. (2000). See also The Due Diligence Standard as a Tool for the Elimination of Violence against Women, 2006 Report of the UN Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2006/61
7. The mandate of the Special Rapporteur on violence against women, its causes and consequences was established by Commission on Human Rights 1994/45 and was most recently renewed by its successor the Human Rights Council in 2011 pursuant to resolution 16/7.
8. Erturk argues that the general criteria of human rights treaties also include due diligence obligations. Human Rights Committee, general comment No. 31, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, general comment No. 5, CRC/GC/2003/5,, para. 1; Committee on Economic, Social and Cultural Rights, general comment No. 14, E/C.12/2000/4 para. 33
9. The need to address the issue was felt by the legislature, legal intervention was made in the area in the form of Protection against Harassment of Women at Work Place Act 2010. However, this itself will be insufficient/ineffective in the absence of comprehensive measures to tackle the issue at grass root level.

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