

Introduction and Conclusion Paragraphs

Since the 1980s, the women's movement and the media have focused considerable attention on the highly charged issue of violence against women.¹ Canadians are aware of the annual march called 'Take Back the Night' in cities across Canada as a reminder of this event and in protest of violence against women.² Moreover, in recent years journalists' coverage of news events involving domestic violence and rape, such as the OJ Simpson or Kobe Bryant trials, has been intense. Public awareness of the issue has been heightened by campaigns such as 'No Means No', which has been promoted extensively through posters on public transit, television ads, and presentations in schools.³ Hence, Canadians have been exposed to the issue of domestic violence.

A focus on this gendered social problem is by no means a random event, but reflects the evolving consciousness among certain individuals and groups. Concern and anger about the affront which sexual assault represents has mounted. It emerged in the decades following WWII, when the world was reeling from the atrocity of the Holocaust, and within the context of a nation that had acknowledged its own violations of humanity during the war—including the internment of Japanese Canadians. Canada fervently supported the United Nation's (UN) as a neutral peace keeping body. The organization's mandate to advance human rights was enshrined in the *UN Declaration of Human Rights in 1949*. The developing world shared the UN's commitment, and Canada passed the Bill of Rights of 1961, and subsequently entrenched the Charter of Rights and Freedoms (Charter), in 1982. These rights-based documents stipulated standards for humane

¹ Kingston, Anne, *The Meaning of Wife*, Toronto: HarperCollin Publishers Ltd: 2004. 142

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³ Kingston, 143-144

treatment that included the explicit condemnation of discriminatory behavior against women based on sex.⁴

Thus, contemporary Canada has contributed to the advancement of international human rights and implemented legally binding documents that enforced these principles. Moreover, it has attempted to make restitution for its past wrongs. One would expect such a nation to abhor the alarming incidence of violence against women that afflicts all corners of the globe today, and ask questions such as: why is there still such an overwhelming amount of violence against women? Given that our judicial system has been empowered by the Charter to address this as an issue of gross injustice, why has our government failed to stop it from happening? This essay will attempt to answer these questions by examining the influence of the women's movement on the development of the Charter when they put forth the necessity for this constitutional law to include a provision that would support the desire for an end to sexual discrimination. The challenges the women encountered in their attempt to inject the document with a scope of substantive sexual equality will also be discussed to show that it parallels the problems that women have faced in their pursuit of equality in Canada since the Charter's adoption—the barriers to success have remained very much the same. In particular, the examination of the Charter at inception will focus on the similar stumbling blocks that the women faced in ensuring the Charter's capacity to deter sexual violence against women. In essence, it will be argued that the creation of the Charter may be an indication of a changing social and political culture in Canada, but while written law is necessary to induce this change, it cannot on its own accomplish this task: just as women encountered systemic resistance to their goals in the creation of substantive equality mandates in the Charter, the use of the Charter to provide substantive

⁴ MacIvor, Heather, *Women and Politics in Canada*, Petersborough: Broadview Press, 1996; 174-175.

equality has likewise been and will continue to be challenged. A detailed analysis of sexual assault adjudication in the courts since the inception of the Charter will support this argument in exposing two broad impediments to the achievement of substantive equality in the judicial system. The first involve procedural practices of the criminal legal system that render the system unresponsive and inaccessible to women as compared to men, thereby preventing them from advancing claims that would protect their equality rights. The second challenge is the underlying assumptions and beliefs that frame criminal court proceedings that inherently favor men.

Conclusion

In the past century, women have made significant gains towards the achievement of substantive equality. The women's movement celebrated 1982 Charter of Rights and Freedoms because for the first time there were constitutional guarantees against sex-based discrimination. However, these guarantees have not produced the substantive equality that was anticipated, and sexual discrimination and inequities continue to exist. They include an overwhelming incidence of sexual violence, and this translates into fear for safety among women. For some, this fear is mild, to occur only when walking alone down a dark street at night. However, for others it is a reality of daily life. As discussed in the paper, this fear is disabling, and sexual assault itself is psychologically crippling. Consequently, women's agency as citizens of Canada is compromised.

Although honorable in intent, The Canadian Charter of Rights and Freedoms has not been able to realize its mandate. This paper has identified the root cause of this inability to be patriarchal beliefs and attitudes that are deeply intertwined with institutions, systems, and social life. As these beliefs and attitudes have emerged within a historical context that is thousands of

years old, it may have been highly ambitious to expect that the Charter of Rights and Freedoms could facilitate substantive equality for women in just 20 years. Nonetheless, scholars and women's groups have been frustrated to see efforts made to advance their cause thwarted time and time again. They have recommended various paths of action that would rectify the Charter's inability to forward substantive equality for women. First, some of these scholars have argued **that** the Charter be rewritten in less vague terms, stipulating a priority for rights. They claim this would **limit** the capacity for biased interpretation among the un-elected judiciary, who harbor many engrained patriarchal beliefs. Second, advocates of Charter reform propose that the document be altered in order to provide positive rights. At present, they provide only negative rights that restrict the state from excessively intervening in the lives of its citizens. The legislation of positive rights would require government and the courts to actively pursue human rights. However, this second recommendation would demand adjustments in the stated roles and purposes of the courts and government in Canada. To enact such an activist Charter, citizens would have to agree to a more activist state. Such a state would be focused on correcting injustices in society that have occurred because privileged groups are protected from interference in their lives.

However, as noted in this paper, there have been many impediments to the development of the existing Charter, which is worded in a broad and vague fashion. Therefore, attempting to forward either of these two recommendations will undoubtedly meet resistance, along the cleavages of sex, as well as class and culture. Accordingly, some authors recommend a third path. They suggest that a focus on equality cannot provide women with greater security of person and access to the socio-economic rewards of society. This concept is extremely limited in several ways. First, equality must conform to a standard. This reference point is male, and thus

cannot account for the differences between the sexes. Second, equality is an unworkable and unwieldy concept because it is too vague to encompass women's diverse interests and needs. Third, this concept does not allow for the provision of all that is sought by women, which is not merely an equal position with men in society. Equality is an accurate term for 'equal' opportunity rights, such as the right to own property or receive equal pay for equal work. (If women raped men as often as men raped women, technically, equality would have been achieved.) However, it cannot provide women with claims to self-determination, sexual integrity, and dignity.

Accordingly, Radha Jhappan has recommended that substantive equality for women be pursued under the umbrella of 'justice.' She argues that only justice can allow for a commonly held understanding which could seek to remedy inequities and discrimination in Canadian society. This may seem very idealistic in lieu of the enormous scope and complexity of problems discussed in this paper. However, Canada's historic abhorrence for human rights infractions and persistence at upholding democratic values gives one hope that while progress may be slow, it *will* occur. After all, it took women around eighty years to earn the right to vote.

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