The Menace of Domestic Violence and the Indian Legal Proforma- An Appraisal

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ABSTRACT
Violence against women is a centuries-old phenomenon that has been perpetrated in the name of religion, social customs and rituals. Though violence against women is an old phenomenon, legal resistance to the evil of domestic violence is a recent process. The phenomenon of domestic violence is basically rooted in the socio-cultural fabric of India. Indian society is highly patriarchal. The
state has also failed in making required arrangements like sensitization of masses; bringing the entire family in the purview of the domestic violence law; legal awareness, economic empowerment of women etc. for preventing the occurrence of domestic violence.

Key words:- Violence, legal awareness

1. INTRODUCTION

Violence against women is a centuries-old phenomenon that has been perpetrated in the name of religion, social customs and rituals. The violence may manifest itself in different forms, like child marriage, witch-hunting, honor-killing etc. Though violence against women is an old phenomenon, legal resistance to the evil of domestic violence is a recent process. Raja Ram-Mohan Roy known as the pioneer of the movement for women’s rights in India was to a great extent responsible for bringing about socio-legal changes pertaining to the child marriage, sati and widow remarriage. Though the term ‘domestic violence’ was not in vogue in those reforms, nevertheless their aim was indirectly responsible for making the woman’s life more humane and protecting her against domestic violence. Even during the colonial period there were provisions under the Indian Penal Code and the Code of Criminal Procedure that aimed at providing certain special protections to women.

The phenomenon of domestic violence is basically rooted in the socio-cultural fabric of India. Indian society is highly patriarchal. It not only discriminates between a son and a daughter but also the former is highly preferred and latter unwanted. Gender discrimination culminates into and is manifested in various types of violent practices within ‘home’. Since ‘family’ and ‘home’ denote ‘private space’, an area free from state as well as non-state interventions, therefore, domestic violence has largely remained free from legal restraints and remains even unacknowledged as a crime. Even if there were laws, victims were hardly taking recourse to law as women are socialized right from their childhood in patriarchal values. Consequently violence within ‘home’ and by their own relatives is not perceived as a crime or something wrong by women themselves. Thus the law was simultaneously used for the twin purposes of guaranteeing ‘equality’ (Articles 14-18 of India’s Constitution declare gender based equality as a Fundamental Right) on the one hand and also to legalize the ‘private space’ by not making a law exclusively on domestic violence on the other hand. The state has also failed in making required arrangements like sensitization of masses; bringing the entire family in the purview of the domestic violence law; legal awareness, economic empowerment of women etc. for preventing the occurrence of domestic violence.

2. INTERNATIONAL CONCERNS FOR COMBATING VIOLENCE AGAINST WOMEN

The entire United Nations system has dedicated itself to ensuring the Universal recognition, in law, of equality of rights between men and women and to exploring ways to give women, in fact, equal opportunities with men to realize their human rights and fundamental freedoms. After the inception, the United Nations Organization moved quickly to affirm that the advancement of women was a major thrust area of its work. Four progressive phases are discernible in the evolution of these efforts. In the first period from 1945 to 1962, the United Nations worked to secure women’s legal equality. During the second period from 1963 to 1975, more and more Governments responded to the United Nations by adopting laws and programme to protect women’s rights. Adoption of Declaration on the Elimination of Discrimination against Women in 1967 acted as a catalyst, in women protection. The fact that development was essential if women were to achieve equality was recognized and the United Nations increased its development assistance programmes to meet this challenge.

With the proclamation of 1975 as the International Women’s Year, the campaign for women’s rights gathered momentum. A major conference was held in Mexico on the status of women which developed a three-pronged theme of equality, development and-peace. This theme became the basis of the organization work for women in the coming years. The third phase from 1976 to 1985 coincided with the United Nations Decade for Women. The findings immediately had a Global impact manifested in the
Convention on Elimination of All Forms of Discrimination Against Women, 1979 which is an International Bill of Human Rights for Women. The decade also generated a series of action programmes that recognized the need to promote equality of men and women. As in Mexico in 1975 and then in Copenhagen in 1980, another watershed was reached in 1985 with a World Conference in Nairobi to mark the end of the Decade for Women and assess its achievements. Delegates at Nairobi adopted the Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000, a blueprint for achieving women's equality. In the fourth phase, from 1986, the United Nations and its institutions have been strengthened and the supports for the rights of women have been woven into the mainstream efforts of all the organization’s agencies and bodies.

The Second World Conference on Women convened in Copenhagen in 1980, added three sub-themes: “Education, Employment and Health” in Nairobi. The Third Conference was held to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace (1976-1985). The goal was set for the adoption of “Forward-looking Strategies for the Advancement of Women to the Year 2000”, in its Thirty-third Session which was held at Vienna, Year 2000 adopted in Nairobi, at the Third UN Conference on Women. The Platform for Action recommended action in 12 “critical areas of concern”. The Beijing Conference further expanded the agenda for women’s empowerment. Issues once considered taboo, ideas earlier viewed as too sensitive and actions ruled out as unacceptable were confronted head-on. The exercise led to the adoption of a Platform for Action, unanimously, by about 40 countries.

3. DRAFT PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, 2001

- Universal Declaration on Human Rights.-

The Universal Declaration on Human Rights has exercised a powerful influence both internationally and nationally on the plight of women since its inception in 1948. “The United Nations Charter states that the United Nations aspires to “achieve international cooperation... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” As per the Declaration of Human Rights, women along with men are entitled to all rights and the terms ‘no one’ and ‘everyone’ include both men and women. Article 2 of the Declaration states that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin. Property or other status” According to Bunch, "Human Rights instruments and mechanisms provide avenues for challenging the systematic abuse of women and governments can be made to take gender-based violations more seriously by being held accountable for the implementation of laws against them."

- Convention on the Political Rights of Women, 1953.-


- Declaration on Elimination of Discrimination Against Women, 1967.-

The General Assembly of the United Nations adopted the Declaration on Elimination of Discrimination Against Women on 7th November, 1967. This Declaration was a precursor to the Convention on the Elimination of All Forms of Discrimination against Women, 1979. The Preamble to the Declaration states that despite various instruments extensive discrimination against women continues to exist. It recalled that discrimination against women violates the principles of equality of right and respect for human dignity. Article 10 of the Declaration directs that all appropriate measures shall be taken to ensure to women, married or unmarried, equal rights with men in the fields of economic and social life.
To fulfill the purposes stated in Articles 1, 2 and 55 of the UN Charter, the Declaration on the Elimination of Discrimination Against Women, 1967 was adopted which finally led to the adoption of the Convention on Elimination of All Forms of Discrimination Against Women. It was noted in the Convention that State parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights. However, despite all these instruments, extensive discrimination continues to exist against women who violate the principles of equality of rights and respect for human dignity. It was also realized that a change in the traditional role of women in society and in the family is needed to achieve full equality between men and women.

The Declaration on the Elimination of Violence against Women is the first international human rights instrument to exclusively deal with the issue of violence against women. It affirms that violence against women violates, impairs and nullifies women’s human rights and their exercise of fundamental freedom. Article 1 of the Declaration on the Elimination of Violence Against Women and the Platform for Action from the Fourth World Conference on Women both define violence as: “Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Thus, the Declaration gives a broad definition to the word violence and includes psychological harm inflicted on women. Violence against women, according to Article 2 of the Declaration, would encompass but not be limited to—(a) Physical, sexual and psychological violence occurring in the family including battery, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community including rape, sexual abuse, sexual harassment and intimidation at work in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and physical violence perpetrated or condoned by the State, wherever it occurs.

Recognizing rights of women Article 3 lays down that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. Giving directions to States, it was declared under Article 4 that States should condemn violence against women and should not invoke any custom, tradition or other religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and should:

(a) Consider, where they have not yet done so, ratifying or acceding to the Convention on Elimination of All Forms of Discrimination against Women or withdrawing reservation to that Convention;
(b) Refrain from engaging in violence against women;
(c) Exercise due diligence to prevent investigate and in accordance with the national legislation punish acts of violence against women whether those Acts are perpetrated by the State or by private persons.
(d) Develop penal, civil, labor and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subject to violence; such women should be provided with access to the mechanisms of justice and as provided for by national legislation to just and effective remedies for the harm that they have suffered. Women should be informed of the rights in seeking redress through such mechanisms;
(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing,
(f) develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence and ensure that the revictimisation of women does not occur because of laws insensitive to gender considerations enforcement practices or other interventions;
(g) to ensure that the women subjected to violence and their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counseling, health and social services, facilities and programmes as well as support structures and should take all appropriate measures to promote their safety, physical and psychological rehabilitation;
(h) Include in government budgets adequate resources for the activities related to elimination of violence against women;
(i) take all measures to ensure that law enforcement officers and public official responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
(j) adopt all measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereo typed roles for men and women promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequence of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women;
(k) Adopt measures directed towards elimination of violence against women who are especially vulnerable to violence;
(l) include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against Women and measures taken to implement the present Declaration;
(m) encourage the development of appropriate guidelines to assist in the enforcement of this Declaration;
(n) recognize the important role of Women’s movement and non-governmental organizations worldwide in raising awareness and alienating the problem of violence against women;
(o) facilitate and enhance the work of the women’s movement and non-governmental organizations and cooperate with them at local, national and regional level;
(p) encourage intergovernmental regional organization of which they are members to include elimination of violence against women in their programmes.


The States reaffirmed their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms.

- Commission on The Status of Women.

The Commission on the Status of Women is a functional Commission of the Economic and Social Council (ECOSOC) established by the Council in 1946. The functions of the Commission are: 1. To prepare recommendations and report to the ECOSOC on promotion of women's rights in political, economic, civil, social and educational fields; and 2. To make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendation. It meets biennially for its session of three weeks. As in the case of the Commission on Human Rights, the Commission on the Status of Women adopts its own resolutions and recommends draft resolutions and declaration for adoption by the ECOSOC. The Commission submits a report on each session to the Council.


The following were considered to be certain fundamental values to be essential to international relations- 1. Freedom, 2. Equality, 3. Solidarity, 4. Tolerance, and 5. Shared responsibility.

On the issue of Human Rights, Democracy and good governance it was resolved to somewhat all forms of violence against women and to implement the Convention on Elimination of All Forms of Discrimination against Women.
4. PROVISIONS ON DOMESTIC VIOLENCE UNDER THE INDIAN LAWS

- The Indian Penal Code (IPC)

There were no specific legal provisions pertaining to violence within home till 1983. Husbands could be convicted under the general provisions of murder\(^{22}\), dowry death\(^{23}\) abetment to suicide\(^{24}\), forcing the wife to terminate her pregnancy,\(^{25}\) causing hurt\(^{26}\) and wrongful confinement\(^{27}\), or using force or assault on the spouse\(^{28}\). All these offences were treated as a form of domestic violence generally. It was in the year 1983 that matrimonial cruelty was introduced as an offence in the IPC under Section 498A.

- The Dowry Prohibition (Amendment) Act, 1986

Dowry death or related harassment is a unique kind of crime practiced in the Indian subcontinent. A legal ban was put on the practice of dowry way back in 1961 through The Dowry Prohibition Act, 1961. The Act was amended in 1984 and then in 1986 to make it more stringent.

- The Commission of Sati Prevention Act, 1987

'Sati' means the burning or burying alive of a widow along with the body of her deceased husband or any other relative, or with any article, object or thing associated with the husband or relative.\(^{29}\) The aforesaid Act declares the observance, support, justification or propagation of sati as criminal activity.

- The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

It is not only that women face violence during their lifetime but also even before birth. Female foeticide using the Pre-Natal Diagnostic Technique has been widely prevalent in India.\(^{30}\) A law was drafted for the purpose of curbing female foeticide unless medically required.

- Civil Law

In India the problem of domestic violence has always been looked upon from the perspective of both criminal and civil laws. Under the civil law also several provisions are available to deal with different types of domestic violence.

- Dissolution of Muslim Marriages Act, 1939 (DMMA)

The DMMA stipulates cruelty as a ground for divorce. Cruelty as envisaged in the Act means\(^{31}\)

- Habitually assaulting the wife or making her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment
- Associating with women of ill-repute or leading an infamous life
- Attempting to force the wife to lead an immoral life
- Disposing of the wife’s property or preventing her from exercising her legal rights over it
- Obstructing the wife in the observance of her religion

- The Hindu Marriage Act, 1955 (HMA)
Under the HMA, cruelty is a ground for divorce as well as judicial separation (Section 10, HMA). However, the term ‘cruelty’ is not defined in the HMA. It is through decided cases that the term has been understood to mean acts of physical as well as mental cruelty.

- Other Matrimonial Laws
The Special Marriage Act, 1954 (SMA), the Indian Divorce Act (IDA), and the Parsi Marriage and Divorce Act (PMDA)—all allow ‘cruelty’ as a ground for divorce. However, all these laws were not sufficient to explain and deal with various forms of domestic violence.

- Protection of Women from Domestic Violence Act 2005
While most of the Western countries passed laws against domestic violence in the 1970s, in India only violence in matrimonial relationship, particularly dowry related violence, remained the focus of the women’s movements as well as that of legislative institutions. It was only in year 2005 that a specific law on domestic violence was passed. It came into force in October 2006. Moreover, the Act is not relying only on law enforcement agencies for protecting women against domestic violence. It refers to “Protection officers” and allows registration of NGOs as “Service Providers for legal aid, medical examination or shelter for women in distress”.

The Domestic Violence Act is a comprehensive piece of legislation to deal with violence within home. The term “domestic violence” has been defined for the first time in such a detailed manner which includes actual abuse or threat of abuse that is physical, sexual, verbal, emotional or economic. Even harassment by way of unlawful dowry demands to women or her relatives would also be covered under this definition regardless of the religious backgrounds. The Act seeks to cover even those women who are or have been in a relationship with the abuser, where both parties have lived together in a shared household and are related by consanguinity, marriage or adaption. Also, relationships with family members living together as a joint family are included. Legal protection is thus available to women who are sisters, widows, mothers, single women or living with the abuser. Besides, the Act protects the rights of women to secure housing. The Act defines domestic violence to include actual abuse or threat of abuse—physical, sexual, verbal, emotional or economic violence.

Section 3 of the Act says that any act, omissions or commission or conduct of the respondent shall constitute domestic violence in case it:
(a) harms or injures or endangers the health, safety of life, limb or well-being, whether mental or physical, of the aggrieved or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce him or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

For the purpose of Section 3:
(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
(iii) “verbal and emotional abuse” includes...
(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and
(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.
(iv) “economic abuse” includes:
   (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
   (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonable required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
   (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

The new law has widened the meaning of the word ‘woman’ and it covers the woman facing violence outside matrimony. The term ‘woman’ here is religion neutral and provides protections to women, irrespective of their religion, and personal laws.

For obtaining relief under the Act an application to the Magistrate may be filed by an aggrieved person or Protection Officers (PO) or any other person on behalf of the aggrieved person. The Magistrate shall fix the first date of hearing within three days from the receipt of an application by the Court. The Magistrate at any stage of the proceedings may direct the respondent or the aggrieved person to undergo counseling. The Magistrate passes the protection order in favor of the aggrieved person, prohibits the respondent from committing or aiding in the commission of acts of domestic violence, attempting to communicate with the aggrieved, alienating the asset of the aggrieved person. The Magistrate is also empowered to pass an order of residence. The Act acknowledges speedy justice in the cases. Though the law is civil in nature, criminal procedure is to be applied in accessing legal recognition. It is very important to provide economic security to women in order to fight back domestic violence as there is a proven correlation between women economic status and violence faced by them.

The Magistrate may also direct the respondent to pay the ‘monetary relief’ to meet the expenses incurred and losses suffered by the aggrieved person. However, the Act does not take into account the financial condition of the respondent and gives no clear guidelines for calculating the amount and term of monetary relief. There is also provision for compensation for the damages and injuries including mental torture and emotional distress by acts of domestic violence. But the entire provision of monetary compensation, relief and other protections is largely dependent on the subjective satisfaction of the Magistrate. The Magistrate may even give custody of the child to the aggrieved (though temporary) which is contrary to the provisions of the Hindu Guardianship Act 1956 which declares the father as the natural guardian and which may further create new issues between the parents causing legal complications for the aggrieved. Ideally justice should be delivered within three months but in view of the fact that the courts are overloaded with work, the case may linger on for months.

Minute analysis of the DV brings out certain loopholes which need to be looked into and plugged appropriately. A lot of scope for the Magistrate’s discretion in matters pertaining to monetary relief, monetary compensation, child custody, contradictory reports of enquiring authorities (as the complaint may simultaneously be filed under Section 498A of the IPC as well as the PWDVA 2005).
Similarly there are maintenance provisions within the various personal laws (Hindu, Muslim and Christian) which may stand contrary to the provisions of monetary compensation and relief and even right to residence within the PWDVA 2005. The Act is not ‘gender neutral’ since it is for ‘women’ only. There are about five petitions challenging it on the grounds of constitutional right to equality. The Act is civil in nature but criminal in procedure and offence under this Act is cognizable and non-bailable. Violence faced by the ‘mother-in-law’ is completely missing. There is no mention of it. The Act completely ignores violence by the daughter-in-law against the in-laws. There is no mechanism to make it mandatory by the States to enforce the law in its totality; consequently in most of the States implementation is half-hearted. One can find extreme disparities in the appointment of POs: providing inadequate budgetary support, maintaining poor record thus making the collection of data difficult; for example, while Maharashtra has appointed approximately 3687 POs, Assam only 27 and Gujarat just 25. The Act needs a centrally sponsored scheme for effective implementation.

Too many laws on one issue create lots of confusion in the large number of already illiterate women who are without any/adequate knowledge of law. It creates confusion for the decision-making authorities also, notably the judiciary. Consequently there is wider scope for judicial discretion—something that appeal to their wisdom than becomes the legal remedy or law. At the same time it also creates scope for further exploitation of the “victim” by lawyers.

5. CONCLUSION
To conclude, it may be said that the strategy of the Indian state towards a problem, and particularly that of women, is to rely largely on law and often only on law. The responsibility of the state ends with the drafting of the required laws, whereas the problems relating to women, particularly domestic violence, are socio-economic and cultural problems which demand a multi-faceted approach. Multiplication of laws relating to women has led to the problem of overlapping, legal dilemmas and legal confusion. Moreover, to overcome the problem of socio-economic and cultural hurdles, it is desirable to adopt a human rights approach to women’s problems. It is only through the human rights perspective that one can help safeguard human dignity and create a “violence-free home” leading to a “violence-free society”. State should have given emphasis to the overall (socio-economic and political) empowerment of women to strengthen their position in society and family.

REFERENCE
1. Child marriage (Raja Ram-Mohan Roy)
2. Child Marriage Restraint Act 1929 (also known as Sarda Act).
3. ‘Sati’ was made a crime of culpable homicide punishable with fine, imprisonment or both in 1829.
5. IPC, CrPC and various civil laws like Hindu-Muslim and Christian Personal Laws were drafted during British period.
6. Articles 14-18 of India’s Constitution declare sex based equality as a Fundamental Right
8. From 29th March to 7th April, 1989.
9. Supra note
10. Article1(3)
12. Supra note 1
14. Articles 1,2 &3
15. Supra note 1.
16. Supra note 1.
18. Supra note 1
19. Supra note 1.
20. Supra note 1.
21. Supra note 1.
22. Supra note 1.
23. Section 302 of IPC
24. Section 304B of IPC
25. Section 305
26. Section 313-316
27. Section 321-323, 326-327
28. Sections 339, 340
29. Section 350, 351
30. Section 2(1)(c), The Commission of Sati Prevention Act.
32. Section 2(viii), DMMA.
33. Section 13(1)(ia), HMA
34. Section 27(1)(d), SMA.
35. Section 10, IDA (but the cruelty has to be coupled with adultery).
36. Section 32(dd), PMDA.
40. Sundersan Harini and Ramakrishnan Nirupama, “Domestic Violence Act Constitutional Perspectives”, NALSAR. www.legalserviceindia.com/articles/dmt.htm-
42. Raman Richa, op.cit.
44. Ibid.
45. IPC, CrPC and various civil laws like Hindu-Muslim and Christian Personal Laws were drafted during British period.
46. PWDVA 2005 under Section 26 provides that an application for reliefs may also be filed in any pending litigation that affects the rights of the women. Hence application may be filed in pending divorce proceedings or criminal proceedings Under Section 498A of IPC.