



Domestic violence as a human rights issue

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Abstract

Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women.

Keywords: Domestic Violence, Women, Gender Neutral Law, Empowerment

Introduction

General Assembly Resolution, December 1993

Freedom not only from violence but also from the threat of violence is the first indicator of rise in women's capacity for survival and empowerment. Violence against women is a universal reality but at the same time it is invisible. The UNDP's gender development index ranks India 108 among 174 countries in terms of gender equity. It is no coincidence therefore, that countries ranking highest on this index rank India 108 among 174 countries in terms of gender equity. Gender equity and social development are inseparably interlinked. In addition to the above criteria another important criterion required to be able to create gender equity would be to do away with the fact of violence against women in particular with domestic violence which is widely prevalent in India but which unlike most other forms of violence against women is scarcely acknowledged as being widespread and is hardly ever treated as a crime. Instead, Indian society makes domestic violence invisible. Domestic violence is one of the few phenomena which cut across all the cultural, socio-economic, educational, ethnic and religious barriers. This type of violence not only seems to increase even with rise in women's education but also prevails among the elite sections of the society. Violence by intimate family members is one of South Asia's darkest legacies. In a survey on violence against women in India, 94 percent of the cases involved an offender who was a member of the family.

Sex ratio in certain states of India is very disturbing. There are 79.3 girls for every 100 males in Punjab and 87.8 girls for every male in Gujarat. In the North-Eastern states women related violence is highest among the kasi society in Meghalaya which is a matriarchal society where the status of women is higher than that of men. Women inherit all family properties and who brings her husband into her home. However, the other issue which deserves further investigation is whether hyper-masculinity or hyper-femininity inbreeds more violence against women. Next to Meghalaya comes Mizoram which is a patriarchal society. The MHIP (Mizo Hmeiche Inzawmkhawm Pawl), the most active woman organization in the state, has been trying to eradicate the commercialization of bride-price, the dowry system, sexual exploitation of women of any kind and inequality between man and woman. However, inspite of this movement launched by the MHIP, violence against woman is still higher and it has become a matter of great concern. Laws to deal with domestic violence do exist and they include Section 113(a) of the Indian Evidence Act, Section 498(a) and 304(b) of the Indian Penal Code and the Dowry Prohibition Act, 1961 as amended in the year 1986.

However, the effect of such laws is very limited. For example, a report by Amnesty International observes, "Analysis of Court decisions in one particular district of Maharashtra, Yavatmal for example, shows that only 2.2 percent of cases brought under 498A during the period 1990-96 resulted in conviction Section 113(a), Indian Evidence Act says, "Where a married woman commits suicide within 7 years of her married life and it is shown that her husband or his relatives had treated her with cruelty, it would be presumed by the Court that her husband or relatives had aided (abetted) her suicide". Section 304(b) of IPC says, "(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or by any relative of her husband, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death. For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961). (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

I. Problems with Understanding Domestic Violence as a Human Rights Issue

A. The Scope of International Human Rights Law

The concept of human rights developed largely from Western political theory of the rights of the individual to autonomy and freedom. International human rights law evolved in order to protect those individual rights from limitations that might be imposed on them by states. 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. The aim of the human rights movement is to enforce states' obligations in this regard by denouncing violations of their duties under international law. The exclusive focus on the behaviour of states confines the operation of international human rights law entirely within the public sphere.

B. Gender-Neutral Law

Gender Biased Application International human rights law is facially gender-neutral. The rights embodied in the Universal Declaration of Human Rights are defined as belonging to "all human beings," not just to men." All the major human rights instruments include sex as one of the grounds upon which states may not discriminate in enforcing the rights set forth.

Although international law is gender neutral in theory, in practice it interacts with gender biased domestic laws and social structures that relegate women and men to separate spheres of existence: private and public. Men exist as public, legal entities in all countries, and, barring an overt abuse by the state, participate in public life and enjoy the full extent of whatever civil and political rights exist. Women, however, are in every country socially and economically disadvantaged in practice and in fact and in many places by law. Therefore, their capacity to participate in public life is routinely circumscribed. This gender bias, if unchallenged, becomes so embedded in the social structure that it often assumes the form of a social or cultural norm seemingly beyond the purview of the state's responsibility, rather than a violation of women's human rights for which the state is accountable. In

some cases, even civil and political rights violations committed directly by state actors have been shrugged off as acceptable.

C. The Concept of State Responsibility

The concept of state responsibility defines the limits of a government's accountability for human rights abuses under international law. Of course, all acts are done by real people, individually or with others, and not by the fictive "person" of the state. Therefore, responsibility is generally understood to arise only when an act by a real person or persons can be imputed to the state. Traditionally, the idea of vicarious responsibility for acts is a perfectly acceptable one: such responsibility flows from the authorized acts of agents of the state, or persons acting with the apparent authority or condonation of the state. In traditional human rights practice states are held accountable only for what they do directly or through an agent, rendering acts of purely private individuals—such as domestic violence crimes—outside the scope of state responsibility. More recently, however, the concept of state responsibility has expanded to include not only actions directly committed by states, but also states' systematic failure to prosecute acts committed either by low-level or para state agents or by private actors. In these situations, although the state does not actually commit the primary abuse, its failure to prosecute the abuse amounts to complicity in it. For instance, in three significant cases, Velasquez, Godiriez and Fairen, and Solis, decided by the Inter-American Court on Human Rights in 1988-1989, the tribunal found that the government of Honduras was responsible for a series of forced disappearances carried out between 1981 and 1984 by members of the Honduran military who were acting as private individuals.

The test of the state's responsibility for an act differs depending upon whether the actor is the state or a private individual. To hold a state accountable for the actions of state actors, one of two things must be shown: (1) the state explicitly authorized the act (i.e., a senior official committed or authorized it); or (2) the state systematically failed to prosecute abuses committed by its agents, whether or not these acts were ordered by senior officials. In the latter case, one must usually show a pattern of non-prosecution of acts that violate human rights, and that the state has agreed to enforce those human rights. For example, the state is responsible if it fails systematically to prohibit or prosecute torture, because the right to be free from torture is guaranteed under international law. Governments have agreed not to torture people themselves, and have undertaken to ensure that no one else in the state tortures. If the state failed to prosecute torturers, it would violate its international obligations. The test is different when the actors are private. For example, systematic non enforcement of laws against armed robbery by private actors alone is not a human rights problem; it merely indicates a serious common crime problem. Non prosecution of the crimes of private individuals becomes a human rights issue (assuming no state action or direct complicity) only if the reason for the state's failure to prosecute can be shown to be rooted in discrimination along prohibited lines, such as those set forth in Article 26 of the Covenant on Civil and Political Rights. There are rights to bodily integrity in international human rights law which armed robbery appears to violate. However, these are rights against the state, not rights that states must enforce against all other persons. States cannot be held directly accountable for

violent acts of all private individuals because all violent crime would then constitute a human rights abuse for which states could be held directly accountable under international law. The state's international obligation with regard to the acts of private individuals is to ensure that where it does protect people's lives, liberty, and security against private depredations, it must do so without discrimination on prohibited grounds. Therefore, there would have to be systematic, discriminatory non-enforcement of the domestic criminal law against murder or assault for domestic violence to constitute a human rights issue, not merely a showing that the victims' lives ended or their bodies were harmed.

The expansion of state responsibility to include accountability for some acts of private individuals as described above is one of the factors necessary to permit analysis of domestic violence as a human rights violation. However, in many cases it is also necessary to show a pattern of discriminatory non-prosecution which amounts to a failure to guarantee equal protection of the law to women victims. The following section is an overview of new information about the vast extent of violence experienced by women and the frequency of its non- or discriminatory prosecution, which was revealed as a general characteristic, not merely a rare anomaly of domestic criminal law.

D. Widespread Violence and a Pattern of Non-Prosecution

As noted, domestic violence generally has been understood as a "private" matter in which governments should not interfere and for which they are not accountable. Traditionally the home has been idealized as a place of safety and security, a sanctuary from duty, responsibility, and work. The relationships between members of the family were also idealized as respectful and supportive. The reality is quite different, "modern studies suggest . . . and that much of this violence is directed at the female members of the family." New information on domestic violence has surfaced as a result of a long international campaign by women's rights groups to raise consciousness about women's issues.

After successfully pushing for the inclusion of a commitment to equal rights for women in the UN Charter and Universal Declaration of Human Rights, women's organizations worked for the establishment of the UN Commission on the Status of Women and other formal mechanisms for the advancement of women's status. The Commission and affiliated nongovernmental organizations (NGOs) drafted a variety of conventions to combat discrimination against women internationally and pressed for the General Assembly to declare a Decade for Women program. It was the international resurgence of women's activism in the 1960s and 1970s, and the pressure generated by women's organizations internationally, that made the UN Decade for Women (1975-1985) a reality. As the Decade unfolded, women's rights activists coordinated international efforts to study the position of women in all societies and the reasons for their subordinate status. In 1985, the participants at the Final Conference of the Decade for Women in Nairobi, Kenya, reached a consensus that violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and other objectives of the Decade and should be given special attention... National machinery should be established in order to deal with the question of violence

against women within the family and society. Women have been revealed as seriously deprived of basic human rights. Not only three times that of men, and that of all spousal violence crimes, 91 percent were victimizations of women by their husbands or ex-husbands. In Colombia during 1982 and 1983, the Forensic Institute of Bogota found that out of 1,170 cases of bodily injury, 20 percent were due to marital violence against women. The Forensic Institute also determined that 94 percent of persons hospitalized in bodily injury cases were battered women. In Thailand, a study in Bangkok revealed that more than 50 percent of married women were beaten regularly by their husbands. And the reported number of women killed in dowry disputes in India almost doubled between 1985 and 1987, rising from 999 reports to 1,786 reports per year.

E. The Underlying Right to Equal Protection of the Law

As indicated above, the inclusion within the limits of state responsibility of failure to prosecute human rights abusers, whether by state agents or private individuals, is not-in and of itself-enough to position domestic violence within the human rights framework. Evidence of a state's failure to prosecute is not sufficient unless a pattern can be shown that reveals the failure to be gender discriminatory and thereby a violation of the internationally guaranteed right to equal protection of the law. However, even though increased research into and understanding of domestic violence indicated that states were discriminating against women in the enforcement of criminal laws; gender-discrimination under international law was not a central human rights concern. Until recently, sex discrimination has been visibly absent from the agendas of most governmental and nongovernmental bodies concerned with human rights, with the exception of the Committee on the Elimination of All Forms of Discrimination Against Women, the UN body which monitors state conduct under the Convention on the Elimination of All Forms of Discrimination Against Women. The Committee and the other women's rights bodies located in Vienna have undertaken landmark work in holding governments accountable for discrimination on the basis of sex, whether by commission or omission. These organizations have made notable progress despite insufficient resources and limited enforcement mechanisms in the instruments they oversee.

However, and more importantly for the purposes of this paper, the mainstream Geneva-based human rights bodies, which oversee instruments that have stronger protective mechanisms, have used the existence of this separate women's human rights regime as an excuse to marginalize sex discrimination and most other women's human rights violations, which nonetheless fall clearly within their own mandates. Within the cumulative human rights practice of governments and governmental bodies, sex discrimination has been de-emphasized and placed outside the rubric of central human rights concerns. International nongovernmental human rights organizations, including the two largest groups, Amnesty International and Human Rights Watch, have until recently reflected and perpetuated this trend^[3].

II. Indian Scenario: Domestic Violence and Human Rights Issue

Domestic Violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994, the Beijing Declaration and the Platform for Action

(1995) have acknowledged this fact. The Protection of Women from Domestic Violence Bill, 2005 having been passed by the Lok Sabha on 24th August, 2005 and by the Rajya Sabha on 29th August, 2005 received the assent of the President of India on 13th September, 2005 and came on the statute book as the Protection of Women from Domestic Violence Act, 2005 (43 of 2005) ^[18]. Highlights of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005) ^[4]:

- Any harm, injury to health, safety, life, limb or well-being or any other act or threatening or coercion, etc., by any adult member of the family, constitutes domestic violence.
- Any woman who is, or has been in a domestic or family relationship, if subjected to any act of domestic violence can complain.
- Aggrieved or affected woman can complain to the concerned protection officer, police officer, service provider or Magistrate.
- Aggrieved woman has a right to be informed about the available services and free legal services, from the protection officer, etc.
- Shelter-home and medical facilities can be provided to aggrieved woman.
- Interim compensation can be available to aggrieved woman.
- Proceedings of the complaint can be held in camera.
- Every aggrieved woman has a right to reside in shared household.
- Protection order by Magistrate can be given in favour of an aggrieved woman.
- Monetary relief can be given to aggrieved woman to meet expenses or losses.
- Appeal can be made to Sessions Court within 30 days from the order of concerned Magistrate.
- Imprisonment up to 1 year or a fine up to Rs. 20,000 or both for breach of protection order by the opposite party.
- Protection officer can be prosecuted, up to 1 year imprisonment or with a fine up to Rs. 20,000 or both for the failure of his duties ^[5].

A. The approach to domestic violence in the act

The present act defined clearly the concepts it works with. As will be seen, the recognition of domestic violence as a crime has resulted in broadening the understanding of what domestic violence is, who may seek protection under the Act, and what type of protection may be sought.

In its understanding of domestic violence itself, the present Act clearly scores over the former Bill. Under section 3 of the 2005 Act, domestic violence is defined in terms of mental, physical, sexual, verbal, emotional and economic abuse. The extent of domestic violence hence extends from physical hurt to emotional and economic blackmail and may be interpreted by courts and lawyers to include and punish marital rape as well. The 2002 Bill, however, only included habitual assault and 'cruelty', and exempted cases in which the assaulter committed the act in self defence, or in the protection ^[5] of his property. The Act introduces the concept of a domestic relationship. This has broadened the scope of those who may ask for relief under the Act. Previously, only a woman who could prove a relationship with the respondent--either by blood or marriage--could avail of relief against domestic violence. The present Act requires only the proof of a domestic relationship as the basis for action. This provision

goes a long way in recognizing existing social realities in India, where a vast number of marriages are legally invalid due to a number of reasons. The Act now makes it possible for the victims of violence in such relationships to approach the court for redressal.

A concept similar to that of a domestic relationship also exists in the domestic violence legislation in England but which was amended in 2004. In England, co-inhabitants are protected against domestic violence under law. The law in England also moves away from the hetero-normative paradigm and includes within its ambit complaints by same-sex couples. In India, past co-inhabitants are protected as well. However, the Indian definition doesn't easily provide for domestic violence suffered by members in a family who are not female. Take for example, the domestic violence law in Malaysia known for its progressive domestic violence legislation which includes as aggrieved parties a spouse, for spouse, children, mentally incapacitated adults, and any other family member the Domestic Violence Act, 2005 does not account for violence perpetrated against with whom the accused might have shared a relationship in the past or against such person who was employed to work in the household.

The status of a child is hazy in the Act as well. While section 2(b) defines who a child is for the purpose of the Act, it is not clear whether or not a child can be the aggrieved party. The rest of the Act would lead to the same conclusion, as section 2(a) defines an aggrieved person specifically a woman, and in many cases the prescriptions in the Act are not child-friendly. In contrast to this, the status of women and children in the English legislation is unambiguous, and domestic violence law clearly applies to children. Here greater responsibility is placed on such adults who live with children. The second important advance made by the Act in understanding the nature of domestic violence has been in the combination of civil and criminal remedies. The relief system in the Act clearly shows the attempt on part of the legislature to the accused to have access to a variety of relief measures, to be adapted to different circumstances. The Domestic Violence Act provides monetary compensation Protection Orders and Residence Orders. A Protection Order is a relief measure that is used in most domestic violence legislation internationally. It is a method by which domestic violence is sought to be curbed by issuing directions to the offender. Once domestic violence has been proved, a Residence Order details the living arrangements for the offender and the aggrieved in order to make sure that further violence is not perpetrated against the aggrieved.

B. Implementation of the Act

There has been a significantly through debate during the drafting of this Act that would be easiest to implement. An example of this has been the provision of settlement of domestic violence cases in the Magistrate's courts. The reasoning behind this provision is easy access for the aggrieved. The option of Family Courts wherever they have been was also considered. However, it was noted that the Family Courts, are overcrowded due to the channeling of cases under section 125 CrPC to these courts. Argument that has been brought out against the Family Courts is that they tend to shift cases of domestic violence within the field of family 'disputes'. Thus, in the interest of preserving the family, abuse up to a certain limit is tolerated, the primary purpose of Family Courts being to 'promote conciliation'. There has been an effort in this Act to simplify and make

more effective issues of the method of filing a complaint of domestic violence for obtaining relief. It also simplifies procedural matters for an aggrieved who wishes to file a complaint. For example, the Act allows anyone, perhaps a friend or an NGO that has witnessed a case of domestic violence, to file a complaint in that regard to the Protection Officer.

A further criticism of the Act is with respect to section 14, which may prescribe counselling either of the parties, and delay proceedings up to two months. As has been discussed here, redressal of domestic violence has always tended to focus on conciliation between perpetrator and the victim, even within the criminal justice system. This is due to the perceptions regarding the importance of preserving the family unity. In recognition of this fact, a provision such as section 14 can be counterproductive in two ways. First, it might jeopardize speedy disposal of the case; secondly, it may also convince the aggrieved to continue in that situation without taking further action^[6].

III. Conclusion and suggestions practical problems

Human rights practice is a method of reporting facts to promote change. The influence of nongovernmental human rights organizations is intimately linked to the rigor of their research methodology. One typical method of reporting human rights violations in specific countries is to investigate individual cases of human rights violations through interviews with victims and witnesses, supported by information about the abuse from other credible sources. Analysis of domestic violence as a human rights abuse depends not only on proving a pattern of violence, but also on demonstrating a systematic failure by the state to afford women equal protection of the law against that violence. Without detailed statistical information concerning both the incidence of wife-murder, battery, and rape, and the criminal justice system's response to those crimes, it can be difficult to make a solid case against a government for its failure to guarantee equal protection of the law. Studies have shown that nearly one-third of Indian women who experience domestic violence have thought about running away from that family but fear of leaving their young children and having nowhere any place to go prevent them to do so. Community intervention is such a way that could be made to be useful. In some areas of West Bengal, for example, the 'shalishi' is used to deal with cases of domestic violence (and other issues). 'Shalishi' is a word of Persian origin which comprises mediation between the parties involved in a dispute by unbiased but powerful 'shalishidaars'. It has existed since pre-Mughal times and with its informal set up, many people find it more acceptable than formal legal avenues. It derives its legitimacy from traditional norms and value systems and it attempts to ensure that the family remains intact while it dispenses justice. In doing so, 'Shalishi' may compromise on meeting out a punishment to the culprit as the formal legal system would do but at the end of the day, it seems to help ameliorate the condition of women and that is a kind of their empowerment in itself. A social practice of Indian society is mentioned above, it may be possible to help find progressive ways to enable women to live in peace and dignity and without having to deal with violence and insecurity within their own homes. The media could go a long way in helping to do so provided it becomes more sensitive to women's rights since fighting for women's rights isn't about obtaining time. Official responses

too need to be made more sensitive and progressive to the cause of women's rights. For example, it seems faintly ridiculous to weaken one of the few laws which exist to combat domestic violence. This, however, is precisely what the The (all male) Malimath Committee suggested in a way by recommending that complaints made under the "heartless provisions" of section 498 (a), IPC be made bailable and compoundable. The Malimath Committee produced a 600 page report which among other things included 16 research papers but for some reasons excluded not only any discussion on the issue of violence against women but also excluded any inputs either from victims of marital cruelty or from those working in the field.

India needs to develop a comprehensive domestic violence policy so that at least, the institutional response to the issue gives battered women whether or not they choose to remain in relationship with someone who has perpetrated domestic violence, access to aid in the form of health-care, childcare and shelter if not anything else. The response to recognize that there are many forms of domestic violence--not restricted to life-threatening situations but also including emotional, physical, sexual, psychological and financial abuse--and it consequently should be flexible enough to be able to deal with the whole spectrum of violence. The distinction between civil and criminal law is fundamental in the Indian legal system and although, as has been seen earlier, some laws to deal with domestic violence exist, the country does not have any one comprehensive law on the issue although attempts to frame such a law have been made in the past. It is the fundamental right of all Indian citizens to enjoy life and liberty and it is the duty of the state to ensure that they can do so within the framework provided by the Constitution of India and the international obligations such as CEDAW which India has accepted. Law does not operate in a vacuum and must take into consideration social, economic and cultural factors. Fairness must be the central concern for women even when they are dealing with abusers. A multipronged approach to violence against women will result in far reaching changes, transforming attitudes and practices so that women and men can live a life of equality and dignity^[7].

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