

**RIGHTS OF WOMEN AGAINST DOMESTIC VIOLENCE-  
THE LAW AND EMERGING CHALLENGES**

*Thesis submitted to the  
Cochin University of Science and Technology  
for the award of the degree of  
Doctor of Philosophy  
in the Faculty of Law*

*By*  
**S. Anuja**

*Under the Supervision of*  
**Prof. (Dr.) D. Rajeev**

**SCHOOL OF LEGAL STUDIES  
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY  
KOCHI-682 022, ERNAKULAM, KERALA**

*August 2013*

***Dedicated to -***

*Late Capt. M.V.R. Varier (my grandfather),*

*Professor T. Devidas (my mentor),*

*Professor T.V.Subba Rao (my friend, philosopher and guide),*

*P. Vijayalakshmi (my mother),*

*P.V. Sreedharan (my father) and*

*Bharath (my son)*



**School of Legal Studies**  
**Cochin University of Science and Technology**  
**Kochi – 682 022, Kerala, India**

---

**Prof. (Dr.) D. Rajeev**  
Professor (Retd.)

Ph : 04842575465 (Office)  
: 04842576070(Home)  
Mob : 9446496070  
Email : paduvathil@yahoo.com

---

**Certificate**

*This is to certify that thesis titled “Rights of Women against Domestic Violence - The Law and Emerging Challenges” submitted by Smt. S. Anuja for the degree of Doctor of Philosophy under the Faculty of Law is the record of bona fide research carried out under my guidance and supervision in the School of Legal Studies, Cochin University of Science and Technology, Kochi-22. This thesis or any part thereof has not been submitted elsewhere for any other degree*

*Kochi -22*  
*12<sup>th</sup> August 2013*

**Prof. (Dr.) D. Rajeev**  
*(Supervising Guide)*

## Declaration

*I declare that the thesis titled- "Rights of Women against Domestic Violence -The Law and Emerging Challenges" is the record of bona fide research carried out by me in the School of Legal Studies, Cochin University of Science and Technology, Kochi-22. I further declare that this has not previously formed the basis of the award of any degree, diploma or associateship or other similar title of recognition.*

*Kochi-22  
12<sup>th</sup> August 2013*

*S. Anuja*

# Acknowledgement

---

*I take this opportunity to acknowledge the guidance of my supervising teacher, Professor D. Rajeev, Former Director, School of Legal Studies, Cochin University of Science and Technology. I record my deep felt gratitude towards him for the pains he has taken to read and correct the draft of my thesis.*

*I express my sincere gratitude to Professor A.M. Varkey for giving me insights as to the different stages of the research. Dr. N.S. Soman, the present Director, School of Legal Studies in spite of his busy schedule helped me a lot in completing the work in time. I am greatly indebted to him in giving me valuable insights in the field of human rights. I express my gratitude to Professor N.S. Gopalakrishnan and Dr. V. S. Sebastian, Former Directors, of this School and other Members of the Faculty of School of Legal Studies, CUSAT for their valuable support and motivation.*

*I am deeply grateful to Professor. V.D. Sebastian, Adjunct Professor, KIITS Bhubaneswar, Professor R. Venkata Rao, Vice Chancellor, National Law School of India University, Bangalore, Professor V.S. Mallar, Professor B. B. Pande, Delhi University and Professor Sitaram Kakraala Visiting Professors, National law School of India University, Bangalore in helping me to maintain the focus of the study. I express profound gratitude to Professor Douglas E. Beloof, Lewis & Clark Law School with whom I shared a class lecture on the topic and for encouraging and guiding me with the insights on the topic from Western jurisdictions.*

*I am also thankful to the Librarian and staff of School of Legal Studies Library, the Librarian and staff of National Law School Library, Bangalore for all the help they have extended. I am indebted towards all the research scholars and my colleagues at School of Legal Studies for their immense support and encouragement. Visits made to Sakhi, and Centre for Development Studies, Trivandrum, High Court Library, Kerala proved to be very helpful in locating the materials and I extend my sincere heartfelt gratitude for the same. I gratefully acknowledge Indu Offset Printing at Kalamassery, Kochi in getting this work neatly printed.*

*I place on record my profound gratitude towards my parents, my son and well wishers for their blessings and support. I am grateful to Professor T. Devidas and Professor T.V. Subba Rao who stood with me in thick and thin for coaxing me through all my hesitations with moral support and suggestions for improvement.*

*I cannot forget the help and support rendered to me in person and in kind by Anitha O.S, Research Scholar, School of Legal Studies, CUSAT, and Dr. Lovely Varghese, Head of the Department of Hindi, Kendriya Vidyalaya, Naval Base who are more than sisters to me. I am thankful to all others who directly or indirectly helped me to complete this work.*

*I owe my work to my grandfather Late Capt. M.V.R. Varier who is no more with me physically but whose words and deeds guide me from heaven. Above all, I acknowledge the grace of Lord Almighty, without whose blessings this work would ever have materialised.*

*Anuja S.*

## **PREFACE**

Domestic violence is a gender based violation of human rights having multi- dimensional repercussions in the well- being of individuals in family and society. The Indian legislation to protect the women from domestic violence is significant in providing a mechanism for enforcing positive civil rights of protection and injunction orders to the victims of domestic violence along with the existing remedies of criminal sanctions. However the Act was brought in the backdrop of an established tradition of cohesive and stable family setting. This, in turn, results in the emergence of new issues and challenges which necessitates deeper understandings of indigenous socio-cultural institutions in India i.e., marriage and family. This study is an attempt to analyse the Indian law on domestic violence and to assess whether the law addresses and answers the problems of domestic violence effectively in the culture specific setting of India.

The thesis consists of nine chapters. The first chapter is an introduction to the various concepts relating to the study. Objectives of the study, hypothesis, research questions and scope and limitations of the study are dealt with in this chapter. It analyses different theories explaining the causative factors of domestic violence against women. Causes of domestic violence in the Indian context are also examined.

The focus of the second chapter is on the historical and philosophical perceptions on gender inequality in the Western and Indian society. It contains the philosophical overviews of Greek, Natural Law, Common Law, Utilitarianism, Marxism and Feminism. These theories are analysed to identify and understand the role and status conferred on the woman in the society. The dominant Indian thinking originating from Hindu texts, the teachings of Christianity and Qur'an are also analysed in this chapter.

The third chapter discusses the human rights perspectives of domestic violence against women. The human rights jurisprudence comprising of International Conventions, Treaties and case laws are analysed to find out the significant contribution made by the European Court of Human Rights and

Inter-American Commission of Human Rights in bringing out the state's accountability in cases related to domestic violence.

A comparative study of western jurisdictions i.e., U.S.A and U.K is undertaken in the fourth chapter. It discusses the legislations and multi-agency responses in USA and UK, in addressing the legal strategies resorted to by them in dealing with the issue.

A critical analysis of the pre-2005 scenario relating to the legal protection offered against domestic violence in India is the topic covered under the fifth chapter. The mandates of the Constitution of India, civil and criminal law remedies, statutory offences relating to domestic violence etc., are discussed in this chapter to understand the limitations and inadequacies felt in the system.

The sixth chapter is an appraisal of the Protection of Women from Domestic Violence Act 2005. The scope and the extent of the Act, the concepts envisaged therein, the role of implementation machinery, the reliefs guaranteed, the procedures involved and the consequences of breaching of orders made under the Act are the main focus of the chapter

The seventh chapter is an evaluation of the judicial interpretations on various provisions of the Act. It comprises of questions relating to the constitutionality of the Act, rights of women in relationships in the nature of marriage, right to matrimonial residence, woman as a respondent, interpretation of procedural requirements etc., which are discussed with a view to tracing the judicial wisdom in realising the objectives of the Act.

Various unresolved issues and challenges that have emerged in the course of implementation of the Act are the topics discussed under the eighth chapter. Conceptual disarrays, procedural dichotomies and deficiencies in the Act are critically analysed in the chapter.

The ninth chapter summarizes the findings and conclusions of the study. Certain proposals are placed at the end of the chapter leading to the need for change in the system.



## Contents

<b>Chapter 1 Introduction .....</b>	<b>1</b>
1.1 General Understandings of Violence and Domestic Violence .....	3
1.2 Specific Understanding of Domestic Violence .....	7
1.3 Understandings as to Causes of Domestic Violence and Some Explanatory Models.....	8
1.4 Causes of Domestic Violence in the Indian Context .....	12
1.5 Indian and Western Concepts on Familial Relationships.....	16
1.6 Objectives of the Study .....	20
1.7 Hypotheses.....	20
1.8 Research Questions.....	21
1.9 Methodology.....	22
1.10 Scope and Limitation of the Study.....	22
<b>Chapter 2 Historical Perceptions on the Concept of Domestic     Violence against Women-Indian and Western     Overview .....</b>	<b>24</b>
2.1 Gender inequality-Philosophical Underpinnings on Roles, Rights and Domestic Violence .....	27
2.1.1 The Greek Philosophy.....	28
2.1.2 The Natural Law Thinking .....	31
2.1.3 The Social Contract Thinking .....	31
2.1.4 The Enlightenment Thinking.....	33
2.1.5 The Utilitarian Thinking .....	33
2.1.6 The Marxist Thinking .....	34
2.1.7 The Teachings of Christianity.....	35
2.1.8 The Common Law Thinking.....	36
2.1.9 The Feminist Theories .....	38
2.2 Ideological Perceptions on Women in Domestic Relations-The Indian Scenario .....	42
2.2.1 The Hindu Texts on Woman's Dharma.....	43
2.2.2 The Christian Teachings and its Reflections.....	49
2.2.3 The teachings of Qur'an.....	50
<b>Conclusion .....</b>	<b>53</b>

<b>Chapter 3 The Nature of Domestic Violence – A Human Rights</b>	
<b>Discourse.....</b>	<b>55</b>
3.1 <i>International Human Rights Responses to Domestic Violence in the</i> <i>Context of Sex Equality and Sex Discrimination.....</i>	62
3.2 <i>Exploring the Internationalizing Elements of Domestic Violence .....</i>	63
3.3 <i>International Concern and Standards on Family and Domestic</i> <i>Violence .....</i>	67
3.4 <i>Domestic Violence in International Law - Historical Overview and</i> <i>Status Quo.....</i>	71
3.4.1. 1946: <i>Commission on the Status of Women .....</i>	72
3.4.2. 1975: <i>First World Conference on Women in Mexico City, Mexico .....</i>	73
3.4.3. 1979: <i>Convention on the Elimination of All Forms of</i> <i>Discrimination against Women .....</i>	73
3.4.4. 1985: <i>UN Resolution .....</i>	75
3.4.5. 1990: <i>UN Resolution .....</i>	77
3.4.6. 1992: <i>General Recommendation Number 19 .....</i>	77
3.4.7. 1980: <i>Second World Conference on Women, Copenhagen .....</i>	79
3.4.8. 1985: <i>Third World Conference on Women, Nairobi .....</i>	79
3.4.9. 1993: <i>World Conference on Human Rights, Vienna .....</i>	80
3.4.10. 1993: <i>The Declaration on the Elimination of Violence against</i> <i>Women.....</i>	81
3.4.11. 1995: <i>Beijing Declaration and Platform for Action .....</i>	82
3.4.12. 2000: <i>The CEDAW Optional Protocol .....</i>	84
3.4.13. 2000: <i>UN General Comment No.28 .....</i>	89
3.4.14. 2004: <i>General Assembly Resolution on the Elimination of</i> <i>Domestic Violence against Women.....</i>	91
3.4.15. 1994-2009: <i>Reports of the Special Rapporteur on Violence</i> <i>against Women, Its Causes and Consequences.....</i>	92
3.5 <i>Regional Legal and Policy Instruments and Jurisprudence</i> <i>Relating to Domestic Violence .....</i>	95
3.6 <i>Analyses of Landmark Decisions on Domestic Violence in Courts</i> <i>Around the World .....</i>	98
3.7 <i>India's Obligations under International Human Rights Treaties.....</i>	109
<b>Conclusion .....</b>	<b>113</b>

<b>Chapter 4 Domestic Violence Legislation and Its Implementation in USA and UK</b> .....	<b>115</b>
4.1 The USA Experience .....	116
4.2 The UK Experience .....	140
Conclusion .....	154
<b>Chapter 5 Legal Protection against Domestic Violence in India – Pre-2005 Scenario</b> .....	<b>156</b>
5.1 Constitutional Framework.....	156
5.2 Civil Law Responses on Domestic Violence.....	161
5.2.1 Domestic violence under the Law of Torts.....	161
5.2.2 Domestic Violence under the Family Courts Act, 1984.....	162
5.3 Cruelty as a Matrimonial Offence .....	163
5.4 Judicial Approach on Matrimonial Cruelty.....	165
5.5 The General Criminal Law Responses on Domestic Violence.....	176
5.5.1 Hurt and Grievous Hurt .....	177
5.5.2 Criminal Breach of Trust.....	178
5.5.3 Wrongful Restraint and Wrongful Confinement .....	179
5.5.4 Outraging the Modesty of a Woman.....	179
5.5.5 Insulting the modesty of a woman .....	179
5.5.6 Causing Miscarriage and Other Offences .....	180
5.5.7 Bigamy .....	181
5.5.8 Adultery .....	181
5.5.9 Defamation .....	183
5.5.10 Death .....	183
5.5.11 Rape .....	184
5.5.12 Marital Rape.....	185
5.6 Specific Criminal Law Responses in the Context of Domestic Violence. ....	186
5.6.1 Implication of ‘dowry death’ as a form of domestic violence. ....	187
5.6.2 Implication of Abetment of Suicide in Domestic Violence.....	190
5.6.3 Cruelty by Husband or his Relatives for Dowry as a Form of Domestic Violence .....	192
5.7 Specific Legislations in the Context of Domestic Violence .....	197

5.7.1	<i>The Child Marriage Restraint Act, 1929</i> .....	197
5.7.2	<i>The Dowry Prohibition Act, 1961</i> .....	198
5.7.3	<i>The Commission of Sati Prevention Act, 1987</i> .....	201
5.7.4	<i>The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994</i> .....	202
5.7.5	<i>Maintenance Laws</i> .....	203
5.7.6	<i>Laws Relating to Custody of Children</i> .....	204
5.8	<i>Domestic Violence –The National Policy Scenario</i> .....	204
5.9	<i>Limitations of the Pre - 2005 Legal Regime</i> .....	206
<b>Chapter 6 <i>The Protection of Women from Domestic Violence Act, 2005 – An Appraisal</i>.....</b>		<b>210</b>
6.1	<i>The Evolution of Protection of Women from Domestic Violence Act, 2005</i> .....	211
6.2	<i>The Constitutional Basis of the Act</i> .....	214
6.3	<i>Aims and Objects of the Act</i> .....	218
6.4	<i>The Act: An Analysis of its Provisions and its Implications</i> .....	220
6.4.1	<i>The Scope of Domestic Violence Expanded</i> .....	221
6.4.2	<i>The Concept of Domestic Relationship</i> .....	222
6.4.3	<i>The Concept of Shared Household</i> .....	225
6.4.4	<i>The Concept of ‘Domestic Violence’ Widened</i> .....	227
6.4.5	<i>The Novel Machinery for Implementation: Role of Protection Officers and Service Providers</i> .....	234
6.4.6	<i>The Reliefs provided Under the Act: Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders</i> .....	245
6.4.7	<i>The procedures of Implementation: A Mix of Civil Remedies and Criminal Procedure</i> .....	253
6.4.8	<i>The Consequences of Breaching the Judicial Orders</i> .....	259
6.5	<i>Analyzing the Merits of the Act</i> .....	260
6.6	<i>The Act- A Critical Analysis</i> .....	267
6.7	<i>Indian Experience juxtaposed with the U.S.A and U.K Experiences</i> .....	276
<b>Chapter 7 <i>Judicial Decisions on the Protection of Women from Domestic Violence Act, 2005–A Critique</i>.....</b>		<b>282</b>
7.1	<i>Challenges to the Constitutionality of the Act</i> .....	283

7.2 Recognition of Rights of Women in Relationships in the Nature of Marriage .....	287
7.3 Right to Matrimonial Residence and Property.....	299
7.4 Whether a Woman can be a Respondent Under the Act. ....	316
7.5 Interpretation of Procedural Requirements.....	323
7.6 Procedure in Invoking Appeal Provisions .....	330
7.7 Retrospective Operation of the Law .....	331
7.8 Effectiveness of Counseling Procedure.....	336
7.9 Judicial Interpretations-An Analysis.....	337
<b>Chapter 8 The Emerging Issues and Challenges .....</b>	<b>341</b>
8.1 Conceptual Dichotomies and Disarrays in the Act .....	342
8.1.1 The concept of Sexual Abuse Versus Marital Rape immunity in India .....	343
8.1.2 The Concept of Right to Residence Versus Status of Matrimonial Property to Women in India.....	344
8.1.3 The Concept of Relationship in the Nature of Marriage Versus Rule of Monogamy.....	345
8.1.4 The Complaint System Versus Restorative Justice to the Victims.....	346
8.1.5 Libertarian ideals Versus Utilitarian Goals .....	347
8.1.6 Reliefs Envisaged Versus Restorative Justice to Victims .....	350
8.2 Procedural Dichotomies and Deficiencies in the Act.....	352
8.3 The Act-A western Apism .....	356
8.4 An Attempt to Make Man Moral by Legislation .....	358
8.5 Apathy of the Society at Large.....	359
8.6 Abuse of the Act.....	359
Conclusion .....	360
<b>Chapter 9 Conclusions and Suggestions.....</b>	<b>365</b>
9.1 Findings of the Study.....	369
9.2 Suggestions.....	369
<b>Bibliography.....</b>	<b>375</b>
<b>Table of Cases .....</b>	<b>386</b>
<b>Appendix .....</b>	<b>.....</b>

Contents	<i>1.1 General Understandings of Violence and Domestic Violence</i>
	<i>1.2 Specific Understanding of Domestic Violence</i>
	<i>1.3 Understandings as to Causes of Domestic Violence and Some Explanatory Models</i>
	<i>1.4 Causes of Domestic Violence in the Indian Context</i>
	<i>1.5 Indian and Western Concepts on Familial Relationships</i>
	<i>1.6 Objectives of the Study</i>
	<i>1.7 Hypotheses</i>
	<i>1.8 Research Questions</i>
	<i>1.9 Methodology</i>
	<i>1.10 Scope and Limitation of the Study</i>

Violence against women is a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women. Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men<sup>1</sup>. Violence against women is always legitimised by arguments of ‘culture’ as no society is devoid of culture. The patriarchal culture inevitably validates violence as an acceptable, even desirable, attribute of masculinity tends to de-values women and all attributes considered feminine and thereby intervening into relationships. The age old philosophical perceptions on the role of women permeate in all man-woman relationships within the four walls of the home which is considered as the repository of love, warmth and affection.

Family forms the basic unit of social organization. It is an inevitable part of human society. It is the primary institution of any society and is formed by the ceremonial marriage of males and females, resulting later in the birth of offspring. All the societal forces are used for its support and protection, for

---

<sup>1</sup> The U.N. Declaration on the Elimination of Violence against Women 1993, Art.1.

through it, societies perpetuate themselves both culturally and biologically. The family, therefore, is a socially recognized unit of people related to each other by kinship, marital, and legal ties. The World Population Plan of Action which emerged from the World population Conference 1994 recommended that a) family to be protected by appropriate legislation, b) family ties to strengthened by giving recognition to the importance of love and mutual respect within the family units, and c) measures to be taken to protect the social and legal rights of spouse and children in the case of dissolution or termination of marriage by death or other reason.

Every society implies its ultimate control over this unit by its institutionalization of marriage and the definition of rights and obligations that arise as a result of marriage and consequent reproduction. Through this ideology, women are constructed as wives and mothers, having vested with the duty of child rearing and domestic labour. Men on the other hand are constructed as husbands and fathers, responsible for the financial welfare of the family. The sexual division of labour was closely associated with the emergence of the family wages. In the process it led to women's economic dependency on their husbands.

The emergence of the private i.e., domestic sphere and the public sphere was a natural outcome of the familial ideology. Women's role within the domestic realm as wives and mothers was regarded as a natural self-evident product as to their biological role in reproduction. These ideas nurtured and reinforced the public/private distinction, and the construction of family and domestic relations as something private. Family has been understood as beyond the state intervention operated to immunize the oppression of women within this domestic sphere. Thereby the authority structure came to be considered as patriarchal; succession to be patrilineal and living arrangements to be patrilocal, marked by unequal gender relations of power running along the

gender lines in which man's powerful position and woman's subordination is accepted as a social norm to be conformed<sup>2</sup>.

### **1.1 General Understandings of Violence and Domestic Violence**

Questions of how family violence is defined, how commonly it occurs, and how gendered are its origins and its expressions, go to the heart of our understanding of and our responses to this phenomenon. Though considerable progress has been made, none of these questions are settled. Therefore legislative definitions continue to vary, as do definitions employed by the social sciences and health and welfare service providers. Differing definitions also reflect differing assumptions and differing emphases regarding the broad nature of violence, particularly family violence.

The evolutionary motive force for human rights is the mankind's demand for decent civilized life in which the inherent dignity of each human being is well respected and protected. There is no universal agreement about the definition of violence. Definitions reflect societal values, which are subject to historical and cultural change. Furthermore, definitions are influenced by philosophical, juridical, sociological and criminological debates. Domestic violence or violence within the family is a universal phenomenon, though its manifestation varies depending on the social, economic and cultural background. It is one of the most insidious forms of violence against women, and is an issue which is often shrouded in silence and cloaked with societal shame.

Collins Dictionary defines violence as: (1) "Behaviour which is meant to hurt or kill people;" (2) "a great deal of energy used in doing something-usually because you are very angry;" (3) "words ,actions or other forms of

---

<sup>2</sup> In the Indian household, lines of hierarchy and authority are clearly drawn, and ideals of conduct help maintain family harmony. All family members are socialized to accept the authority of those above them in the hierarchy. The eldest male acts as family head, and his wife supervises her daughters-in-law, among whom the youngest has the least authority. Reciprocally, those in authority accept responsibility for meeting the needs of other family members. See Suranjita Roy, *Understanding Patriarchy*, B.A Programme; Foundation Course, "Human Rights Gender and Environment", University of Delhi (2009),p.8



expression which are critical or destructive.” The Oxford Dictionary defines violence as (1) “the quality of being violent;” (2) “violent conduct or treatment, outrage, injury;” 3(a) “the unlawful exercise of physical force;” 3(b) “intimidation by the exhibition of this.” The Roget’s Thesaurus adds few dimensions to the concept offered by the earlier two dictionaries. It indicates that the noun violence connotes vehemence, impetuosity, vigorousness, excess, destructiveness, vandalism, turbulence, turmoil, roughness, severity, brute force, brutality, savagery, mercilessness, exacerbation, and explosion. The adjective ‘violent’ is explained by the terms aggressive, charging, disorderly, intemperate, immoderate, anarchistic etc.<sup>3</sup>

Violence in general is a coercive mechanism to assert one’s will over another, in order to prove or feel a sense of power. Violence is an act committed to put down, silence, and to keep under control someone with the intention of hurting or humiliating the person. It can be perpetuated by those in power against the powerless, or by the powerless in retaliation against coercion by others, to deny their powerlessness. The power exerted by the state is accepted as legitimate means of resolving a problematic situation. One of the core elements of violence is that the coercion involved is neither legitimately nor socially acceptable. Any hierarchical system of social organization, where there are categories of dominant groups and subordinate groups, is inevitably accompanied by the victimization of the latter through various means- subtle pressure, through the power ideology, through mechanism of socialization that reward compliance and punish non- compliance and also through open force. Any individual or group facing the threat of coercion or being disciplined to act in a manner required by another individual or group is subject to violence.

Domestic violence is violence that takes place between people on private territory. The term domestic violence depicts violence between individuals who are usually bonded through law, blood or personal intimacy.

---

<sup>3</sup>ShirinKudchedkar, Sabiha Al-Issa (Eds.), *Violence Against Women: Women Against Violence*, Pencraft International, Delhi (1998) p.13.

Psychologists assert that people deal with their own insecurities and inadequacies by abusing and controlling the lives of others within the safe precincts of domestic walls. The domestic situation usually makes the abused very vulnerable and fragile. Violence on the domestic front has been a part of human society since times immemorial<sup>4</sup>. Violence does not only include beatings, rape or sexual abuse, it is anything which infringes on the rights of the person to be treated as human being. Those violence which occurs within the periphery of household is domestic violence.

The term domestic violence is often held synonymous with terms like 'family violence', wife battering, wife beating, husband beating, husband abuse, wife abuse etc. In recent times words like "battering" and "battered" are less accepted because they do not cover other forms of violence which go beyond physical abuse. These other forms of abuse also have the potential create to severe mental and emotional disorders in individuals which can escalate in to acts of suicide and self-damage .According to the myth of family sanctity, in which tranquility and family harmony reign supreme, domestic violence exists as a veritable incongruity. Taking into account the economic dependency of women in the family ant the so called patriarchal family system in existence, it is invariably a gendered crime perpetrated by men against women.

In contemporary legal definitions, the issues of power, domination, and control are also explored to discover the intent behind domestic violence.<sup>5</sup> The World Health Organization has defined partner violence as any behaviour within an intimate relationship that causes physical, psychological or sexual harm, including:

1. acts of physical aggression, such as slapping, hitting, kicking and beating;

---

<sup>4</sup>[http:// www.domesticviolence](http://www.domesticviolence). Last visited on 18<sup>th</sup> May 2010

<sup>5</sup>Shahidullah, Shahid M. and Nana Derby, "Criminalisation, Modernisation, and Globalisation: The U S and International Perspectives on Domestic Violence", 10( 3), *Global Crime*,198 (2009)

2. psychological abuse such as intimidation, constant belittling and humiliation;
3. forced intercourse and other forms of sexual coercion; and
4. various controlling behaviours such as isolating a person from their family and friends, monitoring their movements, and restricting their access to information or assistance<sup>6</sup>

Domestic violence, as the Office on Violence Against Women of the US Department of Justice defines it, is a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, coerce, threaten, blame, hurt, injure, or wound someone.<sup>7</sup>

The Children and family court advisory and support service in Britain uses the term domestic violence to refer to a wide range of abusive and violent behavior in its “domestic violence policy”. It defines domestic violence as “patterns of behavior characterized by the misuse of power and control by one person over another who are or have been in an intimate relationship.”<sup>8</sup>

The contemporary definition of domestic violence is multidimensional, space-neutral, and inclusive in nature. Laws are also increasingly defining domestic violence as a process of domination, exploitation, and de-humanisation. This broader definition of domestic violence that has gained ground in law and of the world engaged in legal reforms in domestic violence.<sup>9</sup>

---

<sup>6</sup> World Health Organization, *World Report on Violence and Health*, Geneva, 2002.

<sup>7</sup> Office of Violence Against Women, ‘The Fact Sheets About the Office on Violence against Women Focus Areas’ (2009), 1, <http://www.usdoj.gov>. Last visited on 2<sup>nd</sup> February, 2009

<sup>8</sup> [http://definitions on domestic violenceuk.org](http://definitions.ondomesticviolenceuk.org). Last visited on 23<sup>rd</sup> December 2009

<sup>9</sup> L. Waldorf, C. Arab, and M. Guruswamy, *CEDAW and the Human Rights-Based Approach to Programming* (United Nations Development Fund for Women (UNDFW), (2007), available at <http://www.unifem.org> .Last visited on 10 th December, 2008).

## 1.2 Specific Understanding of Domestic Violence

In the following chapters the terms, ‘domestic violence’ and ‘abuse’, will be used to refer to the physical, emotional and/or sexual abuse of a woman by a male with whom she has or has had an intimate relationship. The women victims are considered irrespective of their status they hold within the household like sister, mother, daughter in law etc. The violence addressed against the women is envisaged as violence in a man and woman relationship within the domestic precincts of family. The family includes both natal and matrimonial family system. Domestic violence is what happens among persons in domestic relationships and generates within the privacy of the four walls of a home. It encompasses abuse of all kinds of physical, psychological, sexual, economic, emotional and verbal. Domestic violence is all about power relations and the abuse of power in a household. It is perpetrated by one member or members collectively on another to gain control. It leads to the violation of series of human rights guaranteed to her by virtue of various international, national and regional human rights instruments.

As opposed to the general construction, domestic violence in the study refers to violence occurring within a man-women relationship<sup>10</sup>. While recognizing that other forms of violence are equally worthy of attention, this study does not cover the violence inflicted on women by strangers outside the home – in public places such as streets, workplaces or in custody, or in situations of civil conflict or war and violence against immigrant women.

---

<sup>10</sup> Domestic violence has five salient features: Firstly, it is perpetuated by someone in domestic proximity and relationship to the victim, generally her life partner or some other intimate family member; secondly, it happens in domestic settings which are generally outside the law because the precincts are presumed by society to be sites of support and care and within private province and not for public discourse; thirdly, it is marked by a recurrence generally falling into a cycle; the abuse is followed by a lull of prelude after which tensions build up again precipitable as another violent episode; fourthly, the abuser uses domestic premises to control and coerce the victim; and finally the abuse leaves profound emotionally and psychologically harmful effects on the victim.

The term private used throughout the study refers to the familial/territorial space where members of the family are associated and linked together by ties of blood, consanguinity and marriage (intimate hierarchical relationships) symbolic to Indian culture. The study does not make any difference between the nuclear families that have arisen as a result of industrialization and the old joint families or the extended families. In this study, the use of term *Indian family set up* refers to the dominant Hindu culture, the largest cultural group in India.

### **1.3 Understandings as to Causes of Domestic Violence and Some Explanatory Models**

Just as there is a lack of consensus on a single definition for domestic violence, “there is no single recognized causal theory for domestic violence. Why a woman becomes more vulnerable is to be explained in relation to the specific socio cultural context she has to exist. It is often difficult for a woman to report violence, pursue legal action or end the relationship because of: fear for her safety or that of her children, fear that her children will be apprehended or taken away by the husband if it is alleged that she is in some way an unfit mother, influence of her extended family or children, emotional attachment and loyalty to the abuser, low self-esteem and self-blame, economic dependency on the abuser, religious values or pressure from the cultural community ,for immigrant women, fear of deportation, social isolation and lack of a support system, authorities denying, minimizing or rationalizing the severity of the violence and above all lack of legal information about victims’ rights<sup>11</sup>.

A number of explanatory models have been postulated to explain violence within the family. Initially, intra-personal models focused on theories of violence originating in the psychological abnormalities of the perpetrator,

---

<sup>11</sup> Maya Majumadar, *Social Status of Women in India*, Dominant Publishers and Distributors, New Delhi (2004),p.23

frustration because expectations about family members are not met, or the result of dysfunctional familial relationships. In contrast, socio cultural models emphasize social structure, norms, and values as causal variables in the emergence of family violence. For example, the socio-learning approach to violence emphasizes the influence of such variables as occupational status and parent modeling. In particular, gender-sensitive approaches emphasize gender roles and expectations and the devaluation of women's work inside and outside the home as crucial to understanding family violence.

The ecological model combines these various elements in a systematic manner. This model is based on the understanding that domestic violence is the result of a combination of social and individual factors and can best be visualized as four concentric circles. The innermost circle represents the biological and personal history that each individual brings to relationships. The second circle represents the immediate context in which abuse takes place, the family and/or intimate relationship. The third circle represents the formal and informal institutions and social structures in which relationships are embedded such as neighborhoods, workplaces, social networks, and peer groups. The fourth outermost circle is the economic and social environment, including cultural norms. These last two circles combine to include such things as socio-economic status and education level. In the ecological model, violence is usually associated with more than one factor and is not narrowly characterized by specific behaviors but encompasses the range of physical, emotional, and psychological behaviors that can harm an individual in the home.<sup>12</sup>

---

<sup>12</sup> *Domestic Violence in India- A Summary Report of a Multi- Site Household Survey*: International Center for Research on Women and The Centre for Development and Population Activities, Washington, DC,(2000) pp.1-3

Literature on domestic violence has extended a hand full of theories to explain the causes of domestic violence in a society<sup>13</sup>. The major theories that highlight the causes are:

1. *Feminist theory*: Giving much stress to gender and power, the theory states that domestic violence reflects the unequal power of men and women in the society and which is reflected in the personal relationships. The patriarchal structure of the society plays a dominant role in all most al the social institutions including the family.
2. *Family system theory*: The advocates of this theory highlight the sociological perspective emphasizing family structure as the cause of domestic violence. The family represents a unit of social relations with unique properties that make it a fertile ground for violence. The vulnerability of each of the members of the household is ascertainable and the membership in a family structure is not voluntary. The legal intervention in the familial domain is not acceptable. All these serve to cloak violence inside home.
3. *Psychological and physiological theory*: The individual problems are highlighted as the cause of domestic violence under this theory. It holds that personality disorders or early experiences of trauma predispose some individuals to domestic violence. People with such underlying problems or disorder may choose partners with whom they can re-enact the dysfunctional relationship they had with their parents. This refers to the neuro- biological sub traits of a human being having a predominant domination over the life situations of the individual. This theory refers to the behavior of the batterer/abuser in cases of domestic violence. It emphasizes the factors such as brain structure, chemical imbalance, dietary deficiency and hormonal factors as the root cause of

---

<sup>13</sup> Sheeba S. Dharr, "Domestic Violence Against Women: A Conceptual Analysis", 31(1&2) *The Academy Law Review* 122 (2007).

violent behavior which needs to be rectified first to put an end to such violent attitudes.

4. *Socio-psychological theory*: This theory stress external environment factors having impact on individual offender. Stressful situations or family interactional patterns are held as precursors to violence. This theory includes; frustration aggression theory, perversion theory, self - attitude theory, cycle theory of violence, theory of learned helplessness<sup>14</sup> and survivor theory.<sup>15</sup>
5. *Socio-cultural theories*: These theories highlight macro level analyses of violence perpetrated against the household members in a family. These theories state domestic violence in terms of socially structured inequality, socio-cultural attitudes and norms regarding anti-social behavior and interpersonal relations. It includes various sub theories like: structural–functional theory<sup>16</sup>, resource theory<sup>17</sup>, patriarchal theory<sup>18</sup>, social learning theory<sup>19</sup> and exchange theory<sup>20</sup>.

<sup>14</sup> This theory states that a women’s experience of non- contingent nature of attempts t control violence would, over a period of time, produce learned helplessness and depression as the repeated violence diminishes her motivation to respond. Hence there will be passive acceptance of the exploitative situation.

<sup>15</sup> Survivor theory views women are not passive victims but pro-active help seekers and survivors. This theory in contrast to the social helplessness theory credits women with the capacity to innovate newer strategies of coping and acknowledges the efforts of survivors in seeking help from formal and informal sources.

<sup>16</sup> It asserts that social groups differ in respect t their typical levels of stress, deprivation, frustration and in the sources at their disposal to deal with these stresses. Those individuals with low resources tend to be more violent, Stress can arise out of economic imbalance, bad housing, lack of job opportunities, frustrating work conditions etc. Men and women are particularly attached certain determined social roles and expectations

<sup>17</sup> The theory assumes that family like other social systems rests on some degree of force and power which is necessary to control behavior of members. The family as per the theory has 4 set of resources to maintain stability such as economic variables, prestige or respect, love and force of threat of force. Violence is employed either to dominate the position of torturer or for dealing with imbalance in family interactions.

<sup>18</sup> This theory is the product of historical pattern of systematic violence directed against females in the household.

<sup>19</sup> This theory hold s that those who witness violence between parents or who themselves experience abuse as children are likely to resort to violence in adulthood. This problem refers to the ‘inter-generational transmission of violence’. It means an individual resorts to violence through imitation.



From the analysis of various scientific theories, it is apparent that not one theory can fully explain the causes for perpetration of domestic violence. Rather than a single factor theory a multifactor theoretical approach or an integrated approach would explain causes of all types of violence related to domestic violence.

#### **1.4 Causes of Domestic Violence in the Indian Context**

The family and marriage are institutions in India where women and men are socialised to perform strictly defined gender roles. These institutions remain the foundational stones of the Indian society. At one end of the spectrum, the causes may be personal or individual but they also have roots in the political, economic, social and cultural arrangements. The probable causes are multiple and have to be explored in all its dimensions in the Indian cultural backdrop.

##### ***1) Patriarchal engendering and shaped understandings***

In a patriarchal society, like India women generally do not possess and have access and control over the entire spectrum of resources be it physical, financial, intellectual, and technological social or political. The decision making capacity of women as to labour, fertility and sexuality are supposed to be with the males in the family. Patriarchal attitudes and paternalistic attitude of the society also denies access and control over ideology to women. Ideology is a complex structure of beliefs, values, attitudes and ways of perceiving and analyzing social reality--virtually, ways of thinking and perceiving.

The Indian culture upholds the sanctity of family and simultaneously privacy within families. The duty of preserving family honor is vested in women. The female who endures and suppresses her feelings and expressions is considered to fulfill her duty to protect the 'honor' of her husband and his

---

<sup>20</sup> This theory explains growth of anger and violence when the principle of distributive justice is violated. The theory describes violence on the basis of interaction between intimates that is guided by the pursuit of rewards and avoidance of punishment and costs. By applying the theory to the family violence, it may be said that people will use violence in a family if the cost of being violent does not outweigh the rewards.

family. Again the notion that nobody needs to intervene when a man is violent towards his wife, sister or mother is a norm. All this ensures a very intervention free environment for men to perpetrate violence on women.

This shaped understanding leads to the outcome that in patriarchal set up, women have lot to lose if they do not conform to the norms and beliefs of the society and everything to gain if they conform. The patriarchal ideology is so insidious that women themselves become the propagators. Women who are in advantageous position in patriarchal set up like the mother in law and sister in law internalize the ideology and values, and become perpetrators themselves.

Another common feature of patriarchal set up in India is the son preference. In a patriarchal culture daughter is a *paraayadhan*, a prospective outsider once she is married off. She is a burden for the natal family until she gets married. Any family assets given to her go out of the family. It is the developed notion that son is the one who looks after the parents in the old age. Thus there always has been a son preference in the patriarchal set up.

Dowry is a tool of patriarchal oppression. Dowry expenses gain priority over education expenses of the girl child. Due to the socio-economic and cultural deprivations, women are reared in an atmosphere which slowly but positively helps in the development of inferiority status. They become used to the institutional legitimation of their low status and find nothing wrong in crimes and exploitations committed against them. They bear the toll as their fate and duty to be chastised by male members and remain silent.

Viewed in the light of marital power theory<sup>21</sup>, the patriarchal underpinnings in India is akin to the power process as described under the theory. The accumulation of assets and resources that provide the bases for one partner's domination over another is vested with the male in the family. Marital

---

<sup>21</sup><http://wost201hdomviol.tripod.com/groupactionproject/id4.html>. Last visited on 18th February 2013.

power theory is wedded to resource theory at this juncture i.e., the decision making power within a given family derives from the value of the resources that each person brings to the relationship. This in turn leads to the male decision making process within the family. Accordingly those female partners who lack power will be more likely to domestic violence. These situations reinforce the culture violence theory.

## 2) *Psychological dimension*

According to psychiatric studies conducted, domestic violence can happen due to biological and bio-chemical causes also. Low serotonin, high dopamine, pre-frontal dysfunctions, low glucose metabolism, brain dysfunctions, seizure disorders can cause domestic violence. Personality disorders like anxieties, obsessions, frustrations, subordination, attitude about sex roles, guilty-conscience, jealousy, inferiority can cause Domestic Violence. Domestic violence can also be caused by psychiatric disorders e.g., psychosis (paranoiac, schizophrenic), obsessive compulsive disorder, mania, alcoholism and rug addiction<sup>22</sup>.

According to the Freudian concept, every person has a reservoir of natural drives of which an aggressive element is a major component, which is suppressed or transformed by the development of the ego element, which is the conscious part of the personality. If during the socialization process, the ego is not developed properly, the personality becomes faulty, and natural drives manifest overtly in the form of aggressive behavior. Aggression may be inflicted only on that person who will not react or question the authority. This cause of domestic violence naturally symbolize with the Indian set up where the family values rule the domain and a women is viewed as submissive.

---

<sup>22</sup>[http://www.napsipag.org/PDF/NEENA\\_JOSEPH.pdf](http://www.napsipag.org/PDF/NEENA_JOSEPH.pdf). Last visited on 9th June 2012.

The Bio- psychosocial perspective<sup>23</sup> reinforces the psychological theory and ties together biological (testosterone levels, alcohol abuse) factors, social factors such as the level of social stress, quality of the relationship, the income and extent of social support available; and psychological (antisocial tendencies, hostility, egocentrism, need for gratification or attention).

Traumatic bonding theory seeks to explain why Indian women remain with men who abuse them. As power relationships polarize over time, the powerless individual in the relationship becomes increasingly dependent on the dominator. In addition, moments in between abuse are times when positive displays of love and affection cement the legitimacy of the relationship presenting an vicious circle leading the victim to see the world from the abuser's perspective. Thereby a culture of silence is produced where violence is shrouded in silence due to fear of stigmatization<sup>24</sup>.

### **3) Socio-Cultural Dimension**

Prevalence of violence in family, broken home environment, parental alcoholism and drug addiction, poverty, low status mother, prostitution, unemployment, association with criminal gang can cause domestic violence.

All these above factors throw light on the probable causes to the issue of domestic violence perpetrated against women in India. To conclude, in simple terms, the plight of a victim of domestic violence in the Indian context is as expressed by Rebecca J. Burns in the following words:

“When I am asked why a woman doesn't leave abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving”.

---

<sup>23</sup>[http://wost201h\\_domviol.tripod.com/groupactionproject/id4.html](http://wost201h_domviol.tripod.com/groupactionproject/id4.html). Last visited on 18th February 2013.

<sup>24</sup> *Ibid.*

This implies that, an average Indian woman has a tendency to bear the harassment that is perpetrated against her either by the natal family or by her husband and his family. In a man women relationship within the household a common Indian house wife has a tendency to bear the harassment she is subjected to by her husband and the family.

Theories along the entire spectrum from individual to social structural reveal the causes of domestic violence against women in the society. The whole range of theories in one way or the other is attributable to instances of domestic violence decipherable in India and each theory needs to be well acknowledged to understand the problem holistically.

### **1.5 Indian and Western Concepts on Familial Relationships**

India is a multifaceted society where no generalization could apply to the nation's various regional, religious, social and economic groups. In India, the family is the most important institution that has survived through the ages. A multi-generational household has always been an integral part of the Indian culture. It acts as: the transmission belt for the diffusion of cultural standards to the next generations, a psychological agent of society, a shock absorber, and an institution of many enhancing and valuable qualities. Indians relate themselves with the relational world view<sup>25</sup>. The concept of *Dharma* is understood and assimilated in the Indian context as a way of life and not sermonic preaching. Science and spirituality co exists without antagonism unlike the west.

In comparison with the West, Indian family structures are based on different world views and ideas of self and are organized in different ways. In

---

<sup>25</sup> Values group and collective survival, with a focus on working interdependently toward the good of all in the community; Values a holistic, ongoing process of growing and learning, where grey areas are well tolerated and accepted; Tends to value being as one with nature; Tends to value being in the here and now. The underlying question is "How?" as in how can things be better or how can I help.

the western culture, the idea of ‘separateness’ is considered as more central than the ‘connectedness’ that may exist between members of a system<sup>26</sup>. The familial self is the basic, inner psychological organization of family members that enables them to function adequately within the intimate hierarchical relationships of the extended family. The predominant western mode of viewing self and family relationships appears to be contradictory here. There the individualized self (autonomy of the individual) is the dominant note, with background chords of the familial self<sup>27</sup>. This type of system reflects the linear world view<sup>28</sup>.

The Indians grow up in the extended families with members engaged in the activities necessary to maintain the group as a cohesive and co-operating unit. The ordering principles of this hierarchical set up are age and sex i.e., older persons decide and generally man make decisions in the household. The goal is to promote the survival and collective welfare of family members and to protect them from the incursions of the outside world. The overriding principles of this hierarchical system are experiences of the aged and the capabilities relating to the sex<sup>29</sup>. It follows that the organizations of sub systems in India families will be different to those considered normal in western nuclear families. Marriages are between families not individuals, as per the Indian culture. The elevation of marital bond, their decision making power, is rather discouraged in the Indian set up. Therefore the intergenerational sub systems such as the mother-son dyad take precedence over the marital dyad.

---

<sup>26</sup> Val Gillies, “Family and Intimate Relationships: A Review of the Sociological Research” Families & South Capital ESRC Research Group South Bank university, London 15 (2003).

<sup>27</sup> *Ibid.*

<sup>28</sup> Values individual survival, with a focus on achieving independence as a hallmark of success Tends to value having power, ownership, and control over nature; Tends to value doing, with a focus on planning for the future; The underlying questions is “Why?” as in why did you do that or why did something happen.

<sup>29</sup> Older family members have more authority than younger members and men have greater authority than women.

In India, when a bride enters her new family home, she occupies a very low position within the family hierarchy. She is naturally highly dependent on the goodwill of her in-laws, which mean she is potentially very vulnerable. In a traditional Indian family, the wife is typically dependent, submissive, compliant, demure, nonassertive, and goes out of her way to please her husband. Women are entrusted with the responsibility of looking after the home and caring for the children and the elderly parents and relatives. In the Indian scenario, relationship between a man and his wife continue to be sacred one and are usually covered with secrecy, excluding the possibility of any authoritative intervention in violent cases, being a husband and wife private relationship issue. In addition to this, women of a family, whether it be the mother or wife, is considered to carry the dignity of the family. This fact worsens the problem much more and suppresses the consciousness of women to a great intensity, so much so that, they in many a case, despite their well-off social and economic status find themselves unable to voice against the atrocities inflicted on them.

In short the Indian family systems differ significantly from those in the West. Hence both the cultures will offer distinctive solutions to problem of emancipation from domestic violence against women. Both have specific conceptions of what constitutes healthy family, healthy relationships and of how social relations should be organized to achieve this ideal. It is within these power relationships that the conceptual adequacy of the Act is studied.

The whole thesis encapsulates the understanding that domestic violence is a human rights issue which sufficiently stands acknowledged. The difficulty exists in reconciling the fact in carving out a solution to make it applicable in the Indian scenario. Domestic violence or more simply violence at home is an invasion on one's right to live safely. It infringes on one's basic right to feel comfortable within the confines of one's house which to all domestic violence victims is not a home, a home where one can live without any fear or insecurity. This form of violence predominantly harms a discrete group-women who are particularly vulnerable in part because of the way that group has been

treated historically and it is pervasive in every society worldwide<sup>30</sup>. It leads to a multi-dimensional human rights violations, social, economic, physical, mental and so on. How the human rights violations occur in the process is explained with the help of the following diagram showing different violations that are likely to happen in a domestic violence case<sup>31</sup>.

### Wheel of Control: Forms of Violations



(Source: Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN 55802)

<sup>30</sup> UN Centre for Social Development and Humanitarian Affairs, 'Violence against women in the family' (1989) UN Doc ST/CSDHA/2, 14

<sup>31</sup> This diagram represents a teaching tool that is made use of in the western countries by feminist advocates and social workers to explain the cycle of domestic violence perpetrated against a woman within the family atmosphere. This diagram is the first point of understanding the different forms of power and control exerted when domestic violence is perpetrated by the man against a woman within a household. See [www.ncdsv.org/images/powercontrolwheelno shading.pdf](http://www.ncdsv.org/images/powercontrolwheelno%20shading.pdf). Last visited on 8 the August, 2013



The intimate context of the violence produces an almost visceral reaction that what happens within the home is venerable, impervious to the strictures of law and law enforcement. The oppression of women in the family results in the maintenance of women as second-class citizens thus depriving the country of women's full potential for taking part in the developmental process. This is a serious developmental problem for the country. Identifying the vulnerabilities that are peculiar to women is a necessary precondition to formulating applicable legal remedies to end systemic intimate violence. It is in this wider framework, that the violation of human rights of women occurring at the basic cell of the society needs to be viewed as a specific human rights violation from a larger sociological framework.

### **1.6 Objectives of the Study**

1. To highlight the historical perspectives on the status of women;
2. To analyze the interface between domestic violence and human rights discourse;
3. To make a comparative study of the strategies to contain domestic violence in other western societies;
4. To examine the pre-enactment legal framework relating to domestic violence;
5. To make a critical assessment of the Act; and
6. To make suggestions for suitable changes in the policy.

### **1.7 Hypotheses**

1. Domestic violence against women affects human rights adversely.
2. The Protection of Women from Domestic Violence Act is conceptually flawed in the Indian context resulting in extreme incidence of domestic violence against women.

3. The inadequacy of the provisions of the Act may disintegrate the cohesiveness of family system.
4. The manner of implementation of the Act fails to answer the current understandings of domestic violence holistically.
5. The Act is a mere adoption of western law out of tune with Indian cultural ethos and its established ideals resulting in systemic failures.

### **1.8 Research Questions**

1. Does cultural and religious identity play a significant role in ordering man woman relationships in a shared space?
2. How does the International Human Rights discourse on domestic violence against women address the issue?
3. Does western models offer any solution or are they consistent in the Indian context?
4. What are the parameters of the pre-enactment provisions on this aspect?
5. Is the Act an efficient tool in solving the problem of women who are victims of domestic violence?
6. Do the rights guaranteed to the victims by the Act lead to restitutive /restorative justice?
7. What are the merits and demerits of the Act in its implementation process?
8. Do the judicial interpretations facilitate in promoting the objectives of the Act?
9. What are the issues and challenges emerging out of the new enactment?
10. Does the Act integrate or disintegrate the family relationships?

## **1.9 Methodology**

The study is both doctrinal and analytical in nature. The doctrinal part examines the theoretical bases and legal solutions offered to deal with domestic violence. The legal provisions of Protection of Women from Domestic Violence Act are analyzed in detail and the problems and flaws therein are identified. The analytical part examines the need for culture specific treatment of the issue which is driven by family based culture of protection and care as an alternate mechanism to address the issue. The consequences of resort to criminal sanctions and alternate dispute resolution mechanisms in handling delicate familial matters are critically examined.

The relevant material is collected from primary and secondary sources. Apart from the statutes and judicial decisions, following are the sources: Scholarly books on domestic abuse in general and UK, USA and India in particular; Peer-reviewed papers in academic journals of various disciplines; Government publications, Reports and policy papers, relevant websites and databases newspaper articles, newsletters and domestic violence manuals and guidelines.

## **1.10 Scope and Limitation of the Study**

The study is an analysis on conceptual adequacy of Protection of Women from Domestic Violence Act, 2005 in comparison with the socio cultural realities of India .The study starts from a historical analysis as to the perpetuation of gender inequality in Indian and western jurisdictions. The international perspective or overview of international developments in the field of acknowledging the problem of domestic violence against women is analysed being the major premise of the study. In order to understand the Indian legal structure concerning domestic violence, a survey of the available existing legal options is made. The different kinds of laws and strategies, and their advantages and disadvantages are to be explored in the Indian cultural context which is the next task taken up in the study. The research evaluates the impact of major legislations on the positions of the women enduring domestic violence

in general legal regime. The study deals with the working and problems of the Act in the Indian cultural set up, the motivations and legal remedies guaranteed. A brief overview of U.S. and U.K. models are done to show the contrast and extent of the acknowledgment of the issue in developed countries. The major task undertaken through the study is to find out the loopholes existing in the present Indian legal scenario to combat the issue and suggest suitable recommendations in consonance with the specific Indian cultural values to overcome the same. The study ascertains the problem areas and challenges in the working of the Act.

The focus is limited to a doctrinal study on the topic because of the inherent limitations in attempting an empirical study. Moreover the non-reliable data is likely to come forth in, on the issue of domestic violence as it will be viewed as an invasion into familial privacy. Exhaustive case illustrations on domestic violence are not decipherable from the judgments that have been rendered by the courts in India. The law and practice of domestic violence in United States of America and United Kingdom is discussed briefly and the comparative analysis is made with giving only a cursory glance and not a comprehensive one, due to the existence of variety of laws on the same issue in different jurisdictions within the same countries. While discussing the issue of domestic violence, the law, its implementation and the outcome is the only ambit of the study. The multidimensional plight of the victims including physical and psychological impact of domestic violence on women and children is analyzed to the extent of concern of access to justice and not from a medico-legal point of view.

In short, keeping these limitations and theoretical framework in mind, this research study attempts to review the historical/philosophical trends of domestic violence in India, the existing legal remedies to combat the problem of domestic violence, the changed situation with the advent of the new Act on domestic violence and to enquire upon as to what extent the Act serves its purpose.



## HISTORICAL PERCEPTIONS ON THE CONCEPT OF DOMESTIC VIOLENCE AGAINST WOMEN- INDIAN AND WESTERN OVERVIEW

Contents	2.1 <i>Gender Inequality-Philosophical Underpinnings on Roles, Rights and Domestic Violence</i>
	2.1.1 <i>The Greek Philosophy</i>
	2.1.2 <i>The Natural Law Thinking</i>
	2.1.3 <i>The Social Contract Thinking</i>
	2.1.4 <i>The Enlightenment Thinking</i>
	2.1.5 <i>The Utilitarian Thinking.</i>
	2.1.6 <i>The Marxist Thinking</i>
	2.1.7 <i>The Teachings of Christianity</i>
	2.1.8 <i>The Common Law Thinking</i>
	2.1.9 <i>The Feminist Theories</i>
	2.2 <i>Ideological Perceptions on Women in Domestic Relations-The Indian Scenario</i>
	2.2.1 <i>The Hindu Texts on Woman's Dharma</i>
	2.2.2 <i>The Christian teachings and its reflections</i>
	2.2.3 <i>The Teachings of Qur'an</i>
	<i>Conclusion</i>

Life's greatest moments occur behind closed doors. So, too, do some of modern life's most outrageous exploitations. The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. Family is a concept which is often taken for granted as representing a group of people related by blood and marriage. It is asserted throughout the national and international Human Rights documents as the basic and fundamental unit of the society<sup>1</sup>. Family is the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized. Fletcher rightly said:

---

<sup>1</sup> International Covenant on Civil and Political Rights, 1966, Art.23 states "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

“Family’ is a small, relatively permanent group of people, related to each other in the most intimate way, bound together by the most personal aspects of life, who experience among themselves the whole range of human emotions...who experience continual responsibilities and obligations towards each other, who experience the sense of ‘belonging’ to each other in the most intimately felt sense of that word.<sup>2</sup>”

This definition maintains and projects the warmth and heat of the emotions through which the man-woman relationship in the domestic relations is often portrayed. These ‘most intimate’ and, ‘most personal’ dynamics of family life are the unstated core of Fletcher’s idea of the ‘family’.

Murdock defines family as follows:

“The family is a social group characterized by common residence, economic co-operation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults. ”

He termed four basic functions of a family in all societies i.e., sexual, reproductive, economic and educational<sup>3</sup>.

The concept of family and household needs to be distinguished in this context. Household can be considered as co-resident units in which the distribution and exchange of commodities and services such as wages and domestic work are organized primarily through relations of kinship. Family on the other hand, can be defined as those kinship based relations that are located within co-residential groups and to the particular ideological forms taken by kinship structures. By the ideological discourse in the concept of family, we

---

<sup>2</sup> Richard Collier, *Masculinity, Law and the Family*, Routledge, London and New York (1995), p.51.

<sup>3</sup>Holborn, *Sociology Themes and Perspectives*, Harper Collins Publishers Limited, London (5th edn.,2000),p.504.

refer to a representative process whereby beliefs, norms and explanations are constructed historically in conjunction with and in relation to material and cultural conditions and power relations, but are presented as natural, inevitable and necessary.<sup>4</sup> Thus the concept of familial ideology forms an important focus in exploring the role of family in the oppression of women.

Through this ideology, women are constructed as wives and mothers, having vested with the duty of child rearing and domestic labour. Men on the other hand are constructed as husbands and fathers, responsible for the financial welfare of the family. The sexual division of labour was closely associated with the emergence of the family wages. In the process it led to women's economic dependency on their husbands. Therefore the emergence of the private i.e. the domestic sphere and the public sphere was a natural outcome of familial ideology. Women's role within the domestic realm as wives and mothers was regarded as a natural self-evident product as to their biological role in reproduction. These ideas nurtured and reinforced the public/private distinction, and the construction of family and domestic relations as something private. Family has been understood as beyond the reach of State intervention operated to immunize the oppression of women within this domestic sphere. Thereby, the authority structure came to be considered as patriarchal, succession to be patrilineal and living arrangements to be patrilocal, marked by unequal gender relations of power running along the gender lines in which man's powerful position and woman's subordination is accepted as a social norm to be confirmed.

Women's subordinate position in the home makes their experience different from men. The image of the family as a protective retreat has been created largely through male eyes, disregarding women's oppression and the extensive discrimination against them which is inherent to the patriarchal structure

---

<sup>4</sup> Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagement with Law in India*, Sage Publications, New Delhi (1996) p.89.

and the functioning of the family.<sup>5</sup>The significance of family for women is also more vital than that of men, because while a man is allowed an independent existence, woman's identity and survival is not socially conceivable without family. Human rights violations from foeticide, incest to women, battering and murder are committed within the safe confines of the home, making woman highly vulnerable in families. They remain largely invisible, being considered as family matter. The emphasis is always on preservation of the family at all cost even if it compromises women's safety and security.<sup>6</sup>

As relationships are universal, so is the form of co-residence, intimacy, sexuality and emotional bonds. But the forms they take can be infinitely variable. So the rights and freedoms guaranteed to women in the family depends on how the familial ideology reacts to it.

## **2.1 Gender Inequality-Philosophical Underpinnings on Roles, Rights and Domestic Violence**

Simone de Beauvoir has said:

“... she is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential, he is the Subject, he is the Absolute--she is the other.<sup>7</sup>”

The core running through the work *The Second Sex* (1949), is that of woman being the 'other' (sex). Accordingly women are socially constructed rather than biologically determined i.e., .the construction of society, of language, thought, and religion and of the family all rests on the assumption that the world is male.

The historical and traditional position of women in domestic relations has its own ramifications when viewed from a broad sociological and

---

<sup>5</sup> Saroj Iyer, *The Struggle to be Human :Women's Human Rights*, Books for Change, Bangalore(1 st edn.,1999),p.3.

<sup>6</sup> *Id.*, p.4.

<sup>7</sup> Hilaire Barnett (Ed.), *Introduction to Feminist Jurisprudence*, Cavendish Publishing Ltd. , London(1998),p.27.



philosophical perspective. Law does not exist in a vacuum. It is rather intimately connected with the society. The biological fact of being female and all the associated implications and consequences of it got translated itself early into cultural norms which distinguished between men and women. Men, having superior physical strength took control of the public sphere of life i.e., law and government. Having asserted dominance in the public sphere women became relegated to the private domain of home and family. The refusal of society and law to recognize the realities of patriarchy have far too long rendered women, vulnerable to abuse, manipulation and violence.

Domestic violence inflicted by a family member on a woman whether she be a wife, daughter or elderly woman; represents the perpetuation of formerly socially accepted norm of controlling women and is the manifestation of the abuse of power relations over women. Being perpetuated in the private sphere of family it is a prime manifestation of patriarchal authority. Use of violence against women silences her and it thereby reinforces male authority. Thus it becomes important to have an overall view of the position of women in philosophical angles, both western and Indian, which ultimately reflects as to what extent it influences the very bed rock of existence--the man-woman relationship and the manner in which it shapes women's lives.

### **2.1.1 The Greek Philosophy**

Throughout the centuries, from ancient Greece, to the current time, women have been portrayed as in some sense different from men and generally in an inferior social and legal position to men i.e., women are either invisible, or excluded or relegated to a position of social and political inferiority. Family organization being the core of a given society's norms and values, often contributes to her subordinated role in a system of rights, duties, privileges of the members and control over resources. Throughout the civilizations, man was allowed an independent existence, but woman's survival was not socially conceivable without family.

Plato<sup>8</sup> and Aristotle<sup>9</sup> sought to analyse the actual and appropriate role of women in society. In the Republic, Plato sets out his vision of an ideal state. Woman's position freed from the demands of domesticity, Plato tells through Socrates, is one of equality in which she is fitted to do all the tasks in society.<sup>10</sup> According to him, private family presents an obstacle to the best serviced of the state, as it was antithetical to civic harmony, encouraging selfishness and greed. In such an ideal state, women and children are to be owned in common. The appropriate role of women is determined, not by biological characteristics, but by abilities. The best women are to be treated as guardians, the ruling class. With the abolition of private family among guardian class, women and men were to mate in order to produce children of highest quality, whom would be fit to rule. The traditional domestic role was preserved for the women of lower class. She was not in any sense equal to her husband, but a mere subordinate. The husband had all the powers that her father had, plus the right to sexual intercourse on demand. After the death of her husband, she returned to the custody of her father, whose power over her was absolute. Here women were most clearly identified as property: a thing to be kept or given away. Women were not eligible to own property, being regarded by law as lacking legal capacity in the same manner as children.

In the third century BC, Aristotle formulated his central concept of justice: namely that equal cases should be treated alike and that unequal cases should be treated differently. The effect of this doctrine was that not only women were treated differently but as second class citizens also. Aristotle disassociated himself from Plato's concept of abolition of the private family and the communalization of women and children. According to him the private family is the natural and best unit for the preservation of the state. But within

---

<sup>8</sup> 427-347 BC as cited in Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company Lucknow (2005), p 325.  
<sup>9</sup> 384-322 BC, *ibid*.

<sup>10</sup> *Supra* n.7, p. 85.

that family unit, it is the husband who is the master of the household, as he is by nature more fitted to rule than the female. Thus his approach to women was also functional. He declared the Greek city state (Polis) to be natural and Greek family with the subordination of wife, children and slaves as the best form of family structure. Slavery was a natural state for him. It could be either male or female. He prescribes the role and status of a female and a slave. Neither women nor slaves participate in polis<sup>11</sup> but in the private sphere of life, each has a different role to play.<sup>12</sup> Thus a female was characterized as having a female body and deliberative capacity without authority. Similarly a female slave has a female body but no deliberative capacity. The slave's primary function was to serve his or her master while the female's primary natural function was reproduction and the maintenance of the family. The functions ascribed to females depend on the extent of their rationality, which was conclusive to be inferior with men. To Aristotle, women were imperfect men.<sup>13</sup>

For both Plato and Aristotle, the issue of gender difference was one of justification i.e., How was the unequal treatment of women to be justified? And to both, the question received the same answer: the inferior treatment of women was to be by women's inferior nature. According to Confucius, the subordination of woman to man was one of the supreme principles of government.<sup>14</sup>

---

<sup>11</sup> The public/private distinction derives from ancient Greek thought which drew a distinction between the polis, the public sphere and the 'oikis', the private; the public world was meant for male governance, the private is that of the home occupied by women and children.

<sup>12</sup> *Supra* n.5, p.88.

<sup>13</sup> The result of something wrong with the conception that created them-either their parents were too young or too old or too diverse in age or one of them was not healthy. Nature always aimed at perfection, and Aristotle termed woman as a deformity but one which occurs in the ordinary course of nature. Merry E. Wiesner, *New Approaches to European History: Women and Gender in Early Modern Europe*, Cambridge University Press(2008),p.18.

<sup>14</sup>Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company Lucknow (2005), p.1.

### **2.1.2 The Natural Law Thinking**

An early and famous formulation of the dictates of natural law was offered by Cicero.<sup>15</sup> According to St. Paul, citing Genesis 2, states that ‘while man is the image and glory of God,’ the woman is the glory of man’; ‘... the man was not created for the woman’s sake, but the woman for the sake of the man,’<sup>16</sup> The first and the most obvious inequality lies in the gendered identity of god.<sup>17</sup> According to St. Thomas Aquinas, while there was no distinction between men and women in the primary sense, women were placed in a secondary sense in a position of inferiority. In his ‘Summa Theologica’, it is quoted: “...for the man is the beginning and end of woman; as God is the beginning and end of every creature.”

Despite Augustine’s declared position that men and women are spiritually equal he perpetuated the alignment of maleness with superiority and femaleness with inferiority. Augustine in his ‘Confessions’, remarks that “women is cast in the role of ‘helpmate’ to the man. Woman is equal to man in so far as she has been made in the God’s image but in respect of her helpmate role she is not in God’s image.”

### **2.1.3 The Social Contract Thinking**

Positivism brought with it the age of modernity. The autonomy and freedom of the person was the central focus of liberal thought. As reason and rationality replaced superstition and irrational belief, the mind took priority over nature. The social contractualists had their own version as to the women’s role.

---

<sup>15</sup> True law is right reason in agreement with nature; it is of universal application, and is everlasting. The appeal to a higher divine law as a control over the naked power has been apparent throughout the history.

<sup>16</sup> I C or 11:7-9.

<sup>17</sup> According to Elaine Pangels, “... while it is true that Catholics revere Mary as the mother of Jesus ,she cannot be identified as divine in her own right, she is ‘ mother of God’ ,she is not ‘God the Mother’ on an equal footing with ‘God the Father’”. *Supra* n.3 at p.91.

Thomas Hobbes deviated from the patriarchy<sup>18</sup> of the seventeenth century. To him, sharing of power was impossible as one cannot serve two masters and supreme power is indivisible. Reading the version of Hobbes reveals that the subordination of women was due to conventions and human conduct.

John Locke assumed that familial authority belonged to the mother as much as to the father. Parents have a joint dominion over their children. According to him the paternal power of the society ought to be called the parental power. Locke was clear as to women's natural equality on the one hand and on the other hand, the ultimate decision making power over matters of common interest was to be vested with the husband.

Jean Jacques Rousseau's explanation to the position of women with their differing physical attributes in the light of rationality and equality being universal components was very clear i.e., women's role was determined by biology. In his 'Emile' he has written, "The male is male only at certain moments; the female is female her whole life... everything constantly recalls her sex to her, and to fulfill its functions, an appropriate physical constitution is necessary to her...she needs a soft sedentary life to suckle her babies. How much care and tenderness does she need to hold her family together!... the rigid strictness of the duties owed by the sexes is not and cannot be the same." The general implication of his work consider woman as the source of evil. Modesty is the only virtue of a woman according to him and man has the absolute rule over his wife attributed by reasons like single authority, women's incapacity at times and certainty of paternity. He bases his thoughts upon the view that nature intended women for domestic functions only.<sup>19</sup> He tried to sanctify marriage as a training ground for a good son, husband or father. The family he

---

<sup>18</sup> Patriarchy is a form of social organization in which a male is the head of the family and descent. Kinship and title are traced through the male line; any society governed by such a system. *Harper Collins English Dictionary* (3<sup>rd</sup> edn.,1991),p.143.

<sup>19</sup>Rama Mehta, *Socio Legal Status of Women in India*, Mittal Publications,1987, Delhi (1987),p.16.

thought must have a sentimental foundation which demands chastity which can be ensured by the husband's rule.<sup>20</sup>

According to Hegel, "when women held the helm of government, the state is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions." He stressed on the 'status of manhood', which was acquired by the stress of thought and technical exertion. And so that male selfhood or manhood need to be delineated from women.

#### **2.1.4 The Enlightenment Thinking**

A dichotomic view was taken by the Enlightenment thinkers such as Voltaire and Montesquieu. They held that women were capable of equality with men and should not be regarded as being under the authority of the husband and represented as capable only of maternal functions.

Justification for women's confinement to domesticity can again be noticed in the writings of Freud. He write: 'for women the level of what is ethically normal is different from what it is in men. Their super ego is never so inexorable, so impersonal, so independent of its emotional origins as we require it to be in men...They show less sense of justice than men, they are more influenced in their judgments by feelings of affection and of hostility...'<sup>21</sup>

#### **2.1.5 The Utilitarian Thinking**

To Jeremy Bentham, sensibility of women is greater than men, they are inferior in physical strength and are more sympathetic by nature. On the whole, she is fit for a family life and man for the outward life.<sup>22</sup> He never advocated exclusion of women from public sphere.

---

<sup>20</sup> *Supra* n.7, p.7.

<sup>21</sup> Maya Majumdar, *Social Status of Women in India*, Dominant Publishers and Distributors, New Delhi (2004), p.43.

<sup>22</sup> *Bentham's Theory of Legislation*, N.M.Tripathi, Bombay(1979),p.24.

John S. Mill in his book, *The Subjection of Women* has considered the relationship between the sexes as one characterized by the 'legal subordination of one sex to the other'. According to him it was not the result of any conscious thought or experimentation with differing forms of social organization. Based on the physical inferiority women were subjugated by men in the earliest twilight of human society and it later on got concretized into rules of law. He propounded that the emancipation of women to a level of equality with men was not solely for the happiness of women themselves, but was a prerequisite for the improvement of mankind. Liberty, individuality, democracy and justice run like a golden thread cherishing equal rights to women except when some recognised social expediency required otherwise. He considered family as a "school of sympathy in equality, of living together in love, without power on one side and obedience on the other."<sup>23</sup> Slavery having been abolished, Mill considered marriage as the last vestige of slavery in the society.

### **2.1.6 The Marxist Thinking**

In the *Origins of the Family, Private Property and the State*, Friedrich Engels argues that the position of women in society has been determined by the changing structures of marriage which itself is determined by economic forces. In the early society, women determined the line of succession. This 'mother right' needed to be destroyed if male supremacy was to be secured. With the successful destruction of 'mother right', women's subordinate status in society was ensured. The introduction of machinery which facilitated more efficient agriculture enabled man to enslave other men and to exclude women from their traditional economic role. Thus women were confined to the 'domestic sphere'-- to the hearth, home and children. The introduction of private property and the destruction of 'mother right' represented the greatest historical defeat of the feminine sex.'<sup>24</sup> Bacon in his book *Abridgement of the Law* (1736) has

---

<sup>23</sup> *Supra* n. 7, p.8.

<sup>24</sup> *Supra* n.9, p.137.

quoted that "...the husband hath by law the power and dominion over the wife, and may beat her, but not in violent or cruel manner.

### **2.1.7 The Teachings of Christianity**

Patriarchy and patriarchal theory originated in ancient Greek thought may be traced in English political theory at least to the seventeenth century which represented its high watermark. Christianity, encompassed with ideas from Judaism was the most important source of ideas about women for early modern Europeans. Jewish tradition and commentaries contained in Hebrew scripture viewed women in a largely negative light. The authors of Hebrew scripture had a clear idea of the ideal woman. She was the mother of many children, up working before sunrise to provide food and clothing for her household, making no objections when her husband brought home concubine or a second wife totally obedient and deferential.<sup>25</sup> Jesus preached that men and women were equally capable of achieving life after death and that women as well as men should not let their domestic responsibilities come before spiritual well being. Church on becoming hierarchical excluded women from church offices and priestly functions.

Legal scholars like Jean Bodin defended for the list of female vices to prove that women were naturally inferior and so should men be allowed to hold public offices. Protestant reformers did not break sharply with medieval scholastic theologians and cited three purposes of marriage i.e., procreation of children, the avoidance of sin and mutual help and companionship. The mutuality in marriage pronounced in the marriage sermons all stressed the importance of husbandly authority and wifely obedience. Men were also given specific advice as to how to enforce their authority and often it included physical coercion, in both Continental and English marriage manuals. Marriage was a woman's highest calling, even though it brought physical dangers and

---

<sup>25</sup> *Supra* n.12, p.15



restraints in her freedom. Thus opinions of learned catholic authors about women as well as marriage, tended to reaffirm traditional negative ideas.

### **2.1.8 The Common Law Thinking**

Ideas about women on the backdrop of religion, biology or tradition influenced the legal systems and law codes in early modern Europe. Laws thus reflected male notions. The traditional medieval law codes had set up limitations on women's legal rights because of feudal obligations.<sup>26</sup> Marriage was also held out as a reason for restricting woman's legal role. Women were not considered as independent persons as their duty to obey their husbands prevented them from acting so. Women in the nineteenth century were governed by the doctrine of 'one flesh'. Under the 'one flesh doctrine' enshrined in law, wife impliedly consented to sexual intercourse 'on demand'.<sup>27</sup> Women's confinement to the 'private'--to the domestic world, traditionally unregulated by law ensured that women were largely invisible to the law. Thus the invisibility of women marked the absence of women's rights.<sup>28</sup>

Pateman had brought out the legal ambiguity of women's position within the marriage contract by comparing it with the slave contract and the employment contract. According to her, the problem within the marriage contract was that the contracting parties enter into relationship of subordination

---

<sup>26</sup> It had accorded a secondary legal status based on the inability to perform feudal military service. So any unmarried women was to have a legal guardian to undergo such procedures or a trial by ordeal for her. This gender based guardianship gradually died out in the later Middle Ages as court proceedings replaced physical trials and unmarried women and widows gained the right to hold land on their own and appear in court on their own behalf. But they could not serve as witnesses to a will.

<sup>27</sup> Until 1884, a wife refusing her husband's sexual demands could be imprisoned for such refusal and the husband could apply for an order of restitution of conjugal rights against his wife. Moreover until 1891, to enforce his rights, husband was entitled to imprison his wife in the matrimonial home.

<sup>28</sup> The law only became alert to the problem of domestic violence in the 1970s attests to that invisibility. See e.g., Domestic Violence and Matrimonial Proceedings Act , 1975,s.1.; Domestic Proceedings and Magistrate's Courts Act, 1978,s.16.

because the weaker party purported to contract something which cannot be separated from his /her body.<sup>29</sup>

Historical justifications as to the acceptance and development of marital rape exemptions are rooted in three important common law fictions: the theory of “women as chattel”, “unities” theory and “implied consent” theory.<sup>30</sup> “Women as chattel” theory stated that a woman as a property was first with her father and on marriage she became the property of her husband. The “unities theory” was a derivative of the feudal ‘covertures’ doctrine. Sir William Blackstone articulated in his “Commentaries”: By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband].”Although the “Unities doctrine” posited that the husband and wife became one upon marriage, in reality “the one” [was] the husband<sup>31</sup>.

The position of wives under English law with regard to marital sexual intercourse i.e. “implied consent theory” was determined by Lord Mathew Hale in *The History of the Pleas of the Crown*: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”<sup>32</sup> The exemption of marital rape from the purview of the criminal law sustained the dominant familial ideology that the wife was the exclusive property of the husband. The same concept was applied in *Popkin v. Popkin* (1794) in which Lord Stowell opined that “The husband has a right to the person of his wife but not if her health is

---

<sup>29</sup> Janice Richardson, *Selves, Persons and Individuals: Philosophical Perspectives on Women and Legal Obligations*, Ashgate Publishing Co.,(2004),p.104.The case of *R v R* ,(1991)4 All E R. 481 can be used as an illustration of the way in which marriage has been discussed in terms of contract.

<sup>30</sup>Suman Saha, *Sleeping with Enemy?-Recognizing Marital Rape*,10(2) *Women’s Link* 3 (2004).

<sup>31</sup> See *United States v. Yazell*,382 U.S.341,361 (1966). (Black ,J., dissenting ).

<sup>32</sup> M. Hale, *Hale’s History of the Pleas of the Crown*(1736), vol.1,ch.58,p.629.According to him, a woman surrenders her right to consent to sexual relations at the time of entering into a marriage and the husband is given an unconditional ,unqualified right of sexual access to her. Every act of sexual intercourse is deemed to be consensual as such consent is considered to be given at the time of marriage.

endangered.<sup>33</sup> It was a noteworthy use of the term ‘person’ given that women were not viewed as ‘persons’ until the courts declared that they had achieved personhood in the *Person’s Case*.<sup>34</sup> Blackstone in his *Commentaries on the Laws of England* (1775) stated that the husband was empowered to correct his wife in the same moderation that a man is allowed to correct his apprentice or children”. Blackstone’s codification “limited” a man’s right to chastise his wife with stick no thicker in circumference than his thumb, and this right came to be known in popular parlance as the “rule of the thumb”.<sup>35</sup>

Early modern jurists were selective in what they took from Roman law in regard to women projecting them as depended or neglected. The concept of ‘patria potestas’<sup>36</sup> was cited frequently and women lost the right of guardianship over their children if they remarried. Honor was considered as highly gender specific and in case of men class-specific.<sup>37</sup> For women honor was a sexual matter. Because of the ideas of female sinfulness, irrationality and weakness drawn from tradition, religion and science women were never regarded as able to defend their own honor completely without male assistance. Thus the concepts of feudal obligation, wifely obedience, Roman law and the honor resulted in shaping women’s legal rights in early modern Europe.<sup>38</sup>

### **2.1.9 The Feminist Theories**

Feminist analyses exposing domestic and sexual violence as a form of sex discrimination figured centrally in the wave of reform that began in the

---

<sup>33</sup> Cited in *R v. R*, (1991) 4 All E.R. 481, p.604.

<sup>34</sup> *Edwards v. Attorney General of Canada*, (1930) A.C.124). The meaning of the term ‘person’ has a legal, as well as philosophical history in the U.K. Women were not classified as ‘persons’ until the *Persons Case*. Women challenged their position as non persons that prevented them from voting, taking part in government or the profession or receiving education. Women were denied rights, because the courts failed to classify them as ‘persons’ and, at the same time companies began to be viewed as legal persons. *Supra* n.28, p.43.

<sup>35</sup> Note, “Scream Silently or Neighbours Will Hear. The Crying Need for a Law against Domestic Violence”, 6(4) *The Lawyers Collective* 5 (1991).

<sup>36</sup> The concept, ‘*Patria potestas*’ refers to absolute rights of the father.

<sup>37</sup> For upper class men, it revolved around notions of physical bravery and loyalty, for bourgeoisie it was primarily related to honesty, good craftsmanship and integrity.

<sup>38</sup> *Supra* n.12, p.40.

1960s. Feminists argue that the biological difference might lead to some difference in their roles, but the former should not become the basis of a sexual hierarchy in which men are dominant. They address the problem of gender discrimination through various angles. The traditionalist view<sup>39</sup> accepts patriarchy as biologically determined and as the biological functions of men and women are different, the social roles and tasks assigned for women are also different. The concept of domestic violence revolved in terms of psychological pathologies and individual personality disorders<sup>40</sup>. This attitude or theory justifies the public-private divide.

Since the origin of patriarchy and establishment of male supremacy can be traced to different factors and forces feminists differ in their approach to understand patriarchy and adopt different strategies to abolish it. One way to understand the various dimensions of feminist theories and their theoretical approaches to understand patriarchy is to locate them within the broader philosophical and political perspectives that have been broadly classified as Liberal, Marxist, Socialist and Radical.<sup>41</sup>

*Liberal Feminism:* Liberal feminists have championed equal legal and political rights for women to enable them to compete with men in the public realm on equal terms. The philosophical basis of liberal feminism lies in the principle of individualism and they campaigned for all individuals to participate in public and political life<sup>42</sup>.

---

<sup>39</sup> According to the traditional view in feminist thinking sexual or domestic violence is privatized, pathologised and de-politicised.

<sup>40</sup> Julie Goldscheid, "Elusive Equality in Domestic and Sexual Violence Law Reform", 35(4) *Florida State University Law Review* 731(2007).

<sup>41</sup> Suranjita Ray, *Understanding Patriarchy, BA Programme II; Foundation Course, Human Rights, Gender & Environment*, University of Delhi (2009), p.4.

<sup>42</sup> Several women's movement demanded female suffrage during the 1840s and 1850s in United States and United Kingdom. The famous Seneca Falls Convention in 1848 marked the birth of women's rights movement which among other things called for female suffrage. Women were granted the right to vote in the US Constitution in 1920.

*Marxist Feminism:* Marxist feminist believed that both subordination of women and division of classes developed historically with the development of private property.<sup>43</sup>

*Socialist Feminism:* socialist feminism aims at transforming basic structural arrangements of society so that categories of class, gender, sexuality and race no longer act as barriers to share equal resources<sup>44</sup> Women's subordination within capitalism results from their economic exploitation as wage labourers and their patriarchal oppression as mothers, consumers and domestic labourers.

*Radical Feminism:* Radical feminists aim at the need to redefine individual identity, free language and culture from the clutches of masculinity, re-establish political power, re-evaluate human nature/ behaviour and challenge the traditional values<sup>45</sup>.

The new feminist traditions such as psychoanalytical feminism, eco feminism, post modern feminism, black feminism, lesbian feminism have emerged since the 1980s. Psychoanalytical feminists analyse the psychological process through which men and women are engendered. They do not hold biological factors as responsible for the construction of sexual difference. Eco-

---

<sup>43</sup> Frederick Engels in *The Origin of Family, Private Property and the State* (1884) stated that with the emergence of private property, women's housework sank into insignificance in comparison to man's productive labour. Thus maternal authority gave place to paternal authority and property was to be inherited from father to son and not from woman to her clan. The bourgeois families which owned private property emerged as patriarchal families where women were subjugated. Such patriarchal families became oppressive as men ensured that their property passed on only to their sons. Therefore bourgeois family and private property as a byproduct of capitalism subordinated and oppressed women.

<sup>44</sup> Socialist feminists deny the necessary and logical link between sex and gender differences. They argue that the link between child bearing and child rearing is cultural rather than biological and have challenged that biology is destiny by drawing a sharp distinction between 'sex and gender'. The relationship between sexes is rooted in the social and economic structure itself. Therefore women can only be emancipated after social revolution brings about structural change.

<sup>45</sup> For radical feminists sexual relations are political acts, emblematic of male/female power relationships. The traditional political theory which divide personal and political spheres and believe that family is nonpolitical and personal has been questioned by radical feminists who argue that family is that space where maximum exploitation of women takes place. It is this 'public-private divide' which legitimizes exploitation of women. In fact, it is essential that the private sphere must be mapped in terms of the same values of justice, equality and freedom which are necessary in the public sphere

feminists accept women's attitudes and values as different from men. They believe that in certain respects women are superior to men and possess the qualities of creativity, sensitivity and caring which men can never develop. Postmodern feminists claim that there is no fixed female identity. The socially constructed identities can be reconstructed or deconstructed.

Lesbian feminism and cultural feminism are two types of feminist separations advocating the creation of women identified world through the attachments women have to each other. They believe that since patriarchy is organized through men's relations with other men, unity among women is the only effective means for liberating women<sup>46</sup>. The prioritization of safety and accountability over autonomy is consistent with the school of feminist thought that has coloured a great deal of domestic violence theory and policy making. Dominance feminism focuses on women's subordinated and victimized status and argues that the legal system can best serve those victims of violence by enforcing policies that ensure safety, regardless of what an individual women's preferences might be<sup>47</sup>.

The feminist analysis examines characteristics of domestic violence, in the light of international legal understanding of what constitutes torture and cruelty, the inhuman and degrading treatment it entails. They affirm that process, purposes, and consequences of torture and that of domestic violence are startlingly similar. That whether torture committed in domestic context or that inflicted officially, does not reduce its intensity of violence, nor does it demand different standards of judgments and actions on part of state. The existing international human rights instruments, has both a separate provision for women's rights (i.e. Convention on the Elimination of All Forms of

---

<sup>46</sup> Therefore while earlier feminists struggled for a legally equal position for women and demanded democratic rights, which included right to education and employment, right to own property, right to vote, right to birth control, right to divorce, today feminists have gone beyond demanding mere legal reforms to end discrimination between men and women. They have raised issues of violence against women, rape, unequal wages, discriminatory personal laws, the sexual division of labour, distribution of power within the family, use of religion to oppress women.

<sup>47</sup> Leigh Goodmark. "Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases", 37(1) *Florida State University Law Review* 4,5 (2009).

Discrimination against Women, CEDAW), and other general mechanisms which stressed formal equality of women and men. While this development is important, it is not adequate to address issue of women's subordination.

Feminist understandings of gender discrimination locate several of its beginnings in socialization processes and family becomes the *locus situs* for the perpetration of the same. Consequently an entire range of social practices that are inimical to women are brought under the rubric of 'violence'.

All these western perceptions on domesticity of women defended the fact that women had been denied recognition in male jurisprudence. Law being the crystallized common sense of the community adopted such social constructions of gender and translated it into legal norms. Humanity developed gender and sexual identity and dominion arose out of the inability to recognize, appreciate and nurture differences, not simply out of the failure to see all as the same.

## **2.2 Ideological Perceptions on Women in Domestic Relations- The Indian Scenario**

Diversity has been India's most prominent feature which is a common thread running through the social structure of the country. This diversity factor is prevalent in the form of marked differences in the customs, social traditions and beliefs of people separated by mere political boundaries of states. One such feature which is analogous to our society is the dominance of males in our social system. Since time immemorial, the power of decision making is single handedly bestowed on the physically stronger sex in almost all realms of life whether it is economic, family related, political etc. Such prejudice had weakened the status of women in India who were reduced to mere child bearing tools. India being an abode to many civilizations has been influenced by multifarious religions, their traditions, and socio-cultural settings and in turn had adopted a mixed approach as to the granting of rights to women in domestic relations. The cultural identity of Indian women is being a wife and mother, subordinate to her husband and his family, forbearing to her family,

moral, obedient, chaste, and one who upholds cultural traditions and family unity.

The status of woman is the yardstick for assessing the standard of culture of any age of any nation; the term 'status' refers to the position of an individual in a social system. It encompasses within itself the notions, rights and obligations of superiority and inferiority in terms of power, authority and grading. Her rights, privileges and their determination, her access to power and authority, the state of her position when compared to that of man, manifests her status in the society. So when compared to man's position, Indian woman always occupied a status inferior to man<sup>48</sup>.

In most of India, both north and south, and among both Hindus and Muslims, the family is mainly patriarchal, patrilocal and patrilineal. Women are defined as inferior; husbands are assumed to 'own' women, and to have the right to dominate them, including through the use of force. Domestic violence is thus deeply embedded in patriarchal norms and attitudes about gender relations in India. These attitudes are reinforced by the lack of government attention, either directly through the protection of victims of domestic violence and prosecution of violent husbands, or indirectly, by upholding laws on minimum age at marriage and inheritance. This combination of factors serve to both legitimise and perpetuate violence.

### **2.2.1 The Hindu Texts on Woman's Dharma**

Hinduism originated in India and is thus the most common and seemingly most representative of Indian culture. The entirety of Hinduism focuses on the balance between the masculine and feminine. India exemplifies the patriarchal system in which women and men are expected to fulfill distinctly different roles from birth. Women are trained, from a young age, to

---

<sup>48</sup>K. Uma Devi, *Women's Equality in India: A Myth or Reality?* Discovery Publishing House, New Delhi (2000), p.15.



submit and acquiesce to the desires of their valued male counterparts while men are trained to dominate and guide their female counterparts.<sup>49</sup>

Patriarchy is all about the power equation between women and men, and when seen through the prism of history, it has been a complex array of strictures and strategies often wearing the legitimacy of religion. It lays down the ground rules for what women should do what is enjoined upon them i.e., what is their dharma?<sup>50</sup> This idea of dharma, forms the bedrock of women's various roles--both within the larger construct of society and the smaller, the private domain of family i.e., the relationship to the other-the man in her life.

The reference to Sastras, Brahmanical normative texts accompanied by its various interpretations produced the first in a series of pronouncements about the scriptural understanding of woman in early Indian society. It was taken for granted that woman as such can have no rights and privileges. The code and conduct of a woman and her duties towards the husband were prescribed and reinforced on the basis of woman characters of the epics. And accordingly marriage was held at the highest helm in the society and since the marriage takes place in the presence of fire, the husband was to be the wife's highest deity. And if husband was gratified with her, all the deities will also be gratified with her<sup>51</sup>.

In Halhed's book, the chapter "Of What Concerns Women" began with a prefatory statement on the relations between the sexes. A man, both day and night, must keep his wife in so much subjection that she by no means be mistress of her own actions, if the wife has her own free will notwithstanding she be sprung from a superior caste.<sup>52</sup> It clearly marked women as a category

---

<sup>49</sup> Lauren L. Tichy & Judith V. Becker & Melissa M. Sisco, "The Downside of Patriarchal Benevolence: Ambivalence in Addressing Domestic Violence and Socio-Economic Considerations for Women of Tamil Nadu, India".<sup>24</sup> *Journal of Family Violence* 547 (2009).

<sup>50</sup> Amita Sahaya, "Religion and the Patriarchal Lens," 13(3) *Women's Link* 28( 2007).

<sup>51</sup> Referring to verses in the Mahabharata's *Anusasana Parva* and *Santi Parva*. *Ibid*.

<sup>52</sup> Halhed, *A Code of Gentoo Laws* ixv. *A Code of Gentoo Laws* is an English rendering of *Vivadarnavasetu*, compiled under the direction of Warren Hastings by a team of Brahmana

of people who had few rights; and was an attempt to homogenize the category of women as who deserved only to be subordinated and controlled. Women's natural urges or wrongs i.e., lust for sex, jewels, fine furniture, handsome clothes etc., were compared to evil as a fire not satisfied with the burning fuel. It was in this context Manu's famous injunction was understood. i.e., 'her father protects her in childhood, her husband protects her in youth, her sons protect her in old age: a woman does not deserve independence.'<sup>53</sup> The woman was regarded as a species of property which passed on into the husband's family on her marriage.

Despite the family being patriarchal and patrilineal, women were accorded a significant place within the family and society. Role of wife and mother were of supreme importance. The term referred was *Dampathi*, meaning 'married pair'. Her varied roles were indicated by terms such as ' *Jaya*, *Jani* and *Patni*. 'Jaya' has the special sense of a sharer of the husband's affection, *Jani*, the mother of children; and *patni*, the partner in the performances of sacrifices.<sup>54</sup> Marriage being the ideal upheld in the vedic religion, and home being the centre of religious practice, the woman was indispensable from both the domestic and religious point of view.

The aim of the Hindu marriage was to help full growth and development of the husband and the wife and to promote the preservation and progress of society and its culture by enjoining upon the couple the procreation of children and their proper education.<sup>55</sup> Marriage was regarded as a religious necessity to both the man and the woman neither could reach heaven without being

---

legal experts, done by N.B.Halhed and published in the year 1776. See B.D. Chattopadhyaya (Ed.), *Readings in Early Indian History-Women in Early Indian Societies*, Manohar Publishers (1999),p.113.

<sup>53</sup>Janaki Nair, *Women and Law in Colonial India: A Social History* (Published in collaboration with National Law School of India University, Bangalore) Kali for women ,New Delhi (1996),p.32.

<sup>54</sup>S.R.Shastri, *Women in the Vedic Age*, Bharatiya Vidya Bhavan, Bombay(1954), pp.17,18.

<sup>55</sup>A.S.Altekar, *The Position of Women in Hindu Civilization From Pre-Historic Times to the Present Day*, Motilal Banarsidass Publishers Private Limited, Delhi (1959),p.100.

accompanied by his duly married consort. Landed property could be owned only by one who had the power to defend it against actual or potential enemies. As women were unable for it they could hold no property. Patriarch was its sole owner and guardian. It was well recognized that the wife was the ornament of the house<sup>56</sup> nay, the wife herself was the home.<sup>57</sup> The normal relations between the husband and the wife were determined by the principle that there should be an absolute identity in their aesthetic, material and moral interests. It was recognized in the Vedic age and is approved by later Dharmasastra writers like Manu and Apasthamba.<sup>58</sup> The absolute identity of interests of couple was a natural corollary from the recognition of the fact that the husband and the wife are the compliments of each other. Buddhist thinkers had also accepted this view. Husband was to be true to his vow of conjugal fidelity, its violation being the greatest sin he can commit.<sup>59</sup> The position of woman in the Vedic age was held to be one of honourable subordination. The general freedom and better status which women enjoyed in the Vedic age were largely due to men being engrossed in the work of conquest and consolidation.<sup>60</sup>

During the age of later Samhitas, Brahmanas and Upanishads, there took place a continual and gradual deterioration in the position of women as a whole. There was a gradual decline in female education, their proprietary rights continued to be unrecognized, the only exception being in favour of marriage gifts of movable property. Divorce was permitted to the wife though the permission was not extensively availed of.

At the outset of Aryan conquest, the neglect of education and lowering of the marriage age produced disastrous consequences upon the position and status of women. Marriage became an irrevocable union, however only so far as the wife was concerned. The husband could discard his wife for the grave

---

<sup>56</sup> R.V.1,66,3.

<sup>57</sup> R.V.III,53 .4.

<sup>58</sup> *Supra* n. 40, p.95.

<sup>59</sup> Manu, ix,101.

<sup>60</sup> *Supra* n. 13.p.54.

offence of not being sufficiently submissive. The differential treatment was due to the simple fact that women were no longer able to effectively oppose these absurd theories and claims as they were uneducated and ignorant about it.<sup>61</sup>

The general adoption of the Purdah system by the ruling and aristocratic families of Hindu community was subsequent to the advent of the Muslim rule. It was seen as a mark of high status and prestige. Naturally husbands began to claim and exercise a greater control over them which proved detrimental to their participation in the social and public life activities. This created a favourable atmosphere for the spread of the theory that woman should lead a life of seclusion.

Despite the prevalence of monogamy in the Hindu society polygamy was rampantly common in the Vedic literature. The main reason for the perpetration of the same was the great anxiety that was felt for the preservation and continuance of the family.

For offering the prescribed oblations to ancestors so as to secure their continuance in heaven, a son was absolutely necessary, and so society permitted the husband to take a second wife, if the first was barren. A son's birth supposedly elevates the family status, ensures happiness in the afterlife and continuity of name in the present; conserves family wealth, with the opportunity of adding to it as well as by accepting dowry. While in the case of girls, all the opposites of this idyllic scenario weigh heavily on the minds of family elders.<sup>62</sup>

The authors of legal texts reflect a profound sense of ambivalence in their attitude to women. On the one hand, she is elevated to the status of a goddess, but on the other, she is seen as a temptress and seducer, Christianity also upheld similar views on women. Women's love and devotion to her husband are exalted but at the same time she is seen as incapable of these virtues.<sup>63</sup> As mother she is most revered, but as sexual partner she is seen as an

---

<sup>61</sup>*Id.*, p.59.

<sup>62</sup> *Supra* n. 52 ,p. 29.

<sup>63</sup> Manu 2.213-214.

obstacle to man's spiritual quest.<sup>64</sup>The ideal conduct of a housewife i.e. *pativrata*, devotion to the husband, came to be seen as the only 'Stridharma' or duty of the wife. Her individuality was merged and she had no separate existence apart from him. Accordingly she was to be open hearted to her husband, respectful to his brothers and sisters, devoted to his mother, affectional towards his relations, considerate towards the servants, smiling even to her co-wives, courteous towards her husband's friends and hateful to his enemies. A wife who discharged all these duties was held to be a true *pativrata*. The sanctity of gods, sages and holy places were all centered in her. The ideal love and harmony between the husband and wife is described by Bhavabhuti.<sup>65</sup>To maintain and support his wife was the most sacred duty of the husband, which must be discharged at all cost; otherwise would have no right at all to be called a husband.<sup>66</sup>

An ideal notion of womanhood and preservation of a patriarchal household was prescribed for. According to Manu, the wife's marital tie and duty do not come to an end even if the husband were to sell or abandon her.<sup>67</sup> This ideal later transformed itself into the practice of 'Sati'.<sup>68</sup> The reason attributed to such inhuman practice was that total fidelity to their husband was expected of women and this could be established by becoming 'Sati'. Women's salvation was weighed in terms of being reunited with their husband and hence was re-birth oriented. Men's salvation was in terms of release from the cycle of births and deaths.<sup>69</sup>

---

<sup>64</sup>Paul Bowen (Ed.), *Themes and Issues in Hinduism*, Cassell, London and Washington(1998),p.67.

<sup>65</sup> *Uttararamacharita*,Act,vi,39:Their love is uniform both in prosperity and adversity, and adjusts itself to surrounding circumstances; it affords the best solace to each others' hearts; old age does not diminish its flavour; when the veil of reserve drops down in course of time, it develops into an ever-abiding affection.

<sup>66</sup> Manu, ix, 101.

<sup>67</sup> Manu, ix, 46.

<sup>68</sup> *Sati*-A virtuous woman practice of immolation on the funeral pyre of one's husband.

<sup>69</sup> *Supra* n. -49,pp.74,75.

The custom of *niyoga*, had religious sanctity. In case of death of husband or incapacity to procreate children, the husband's brother or any of his relations would take her as wife, or raise children on her. Often it occurred when a person died without leaving any male issue behind. As it was a great spiritual calamity to die without a son, it was held to be the sacred duty of the brother to see that a son was raised on his sister-in-law to perpetuate his brother's memory and to ensure him a seat in heaven. Moreover a son by *niyoga* was always preferred to a son by adoption in early Hindu societies. Women under the pressure of in-laws often had to surrender to their wishes of progeny and her reproductive rights and freedom in decision making was totally denied to her.

According to the Hindu law no portion of the parental property was allowed to be shared by female children and therefore a part of compensation--gifts and presents--were given to daughters at the time of their marriage. These gifts over a period of time became institutionalized as 'dowry'.<sup>70</sup> This practice gradually became imbedded and the bridegroom and his family started insisting for dowry as matter of right. The institution of dowry has negatively impacted the status of women leading to rampant rise in female infanticide, female foeticide and abuse of girl child cutting across various social groups. Dowry even today remains one of the most important reasons why the birth of a girl child is lamented.

### **2.2.2 The Christian Teachings and its Reflections**

Christianity, brought within it to India the negative ideological perceptions as to women's role in the family .Inspired by the teachings and interpretations as to the religious texts women in India was relegated to the realm of occupying secondary status . The inextricable bond between religion and family, with women at its helm, was most visible in the interpretations

---

<sup>70</sup>Jeebanlata Salam, "Women and Domestic Violence: Human Rights Perspective,"10(1) *Women's Link* 7 (2004).

from the west. A cursory reading of some of the passages in the Bible, clearly reveals the fact: "...God by creating Adam first<sup>71</sup> and also by creating woman for man,<sup>72</sup> has set the gender based role and responsibility of males in the most basic unit of society (the family) to be that of leader, provider and self-sacrificial protector,<sup>73</sup> and likewise has set the gender based role and responsibility of females to be that of help and nurture<sup>74</sup> and life-giving<sup>75</sup> under male leadership and protection..."<sup>76</sup>

### **2.2.3 The Teachings of Qur'an**

Muslim believers cannot conceive nor accept a system of rights which excludes religion. Religion for them suffuses every facet of life.<sup>77</sup> The Islamic tradition can be inferred from sources like the Qur'an,<sup>78</sup> the Sunnah,<sup>79</sup> the Hadith,<sup>80</sup> the Fiqh<sup>81</sup> and the Sharia or code of law which regulates the diverse aspects of a Muslim life. The Qur'an points out that, in essence the life of each individual is comparable to that of an entire community and needs to be treated with utmost care.<sup>82</sup> Human beings are deemed worth of esteem because of all creations they alone chose to accept the 'trust' of freedom of the will.<sup>83</sup>

---

<sup>71</sup> Gen.2:18;Cor.11:8.

<sup>72</sup> Gen.2:18,20,22;1 Cor.11:9.

<sup>73</sup> Eph.5:25; 1 Peter 3:7.

<sup>74</sup> Gen.2:18.

<sup>75</sup> Gen.3:20

<sup>76</sup> 1 Peter 3:7. *supra* n. 49, p.29.

<sup>77</sup> R.S. Verma (Ed.), *Human Rights-Burning Issue of the World*, Vol. III, Indian Publishers & Distributors, Delhi (2000), p.647.

<sup>78</sup> The Book of Revelations which Muslims believe to be God's words transmitted through the agency of Angel Gabriel to the Prophet Mohammed. It is regarded as the Magna Carta of Human Rights as it concerns itself to free human beings from the bondage of traditionalism, authoritarianism ;political, economic or other; tribalism, racism, sexism, slavery or any thing that prohibits or inhibits human beings from actualizing the Qur'anic vision of human destiny embodied in the classic proclamation; "Towards Allah is thy limit."

<sup>79</sup> The practical traditions of the Prophet Mohammed.

<sup>80</sup> The oral Revelations attributed to the Prophet Mohammed.

<sup>81</sup> Jurisprudence (schools of law).

<sup>82</sup> Surah5:Ma' dah:32.

<sup>83</sup> Surah 17:Al-Isra': 70.

The idea of ideal society or community (ummah) envisaged by the Qur'an comes from the root ('umm') or mother. The symbols of a mother and motherly love and compassion are also linked with two attributes of God named 'Rahim' and 'Rahman' both of which devolved from the root 'rahm', meaning womb. The Qur'an recognizes the need for privacy as a human right and lays down rules for protecting an individual's life in the home from undue intrusion from within or without.<sup>84</sup> The fruits of labour belong to the one who has worked for them, regardless of whether it is a man or a woman.<sup>85</sup>

Underlying much of the Qur'an's legislations on women related issues is the recognition that women have been disadvantaged persons in history to whom justice needs to be done by the Muslim 'ummah'. For Muslims, family is the central institution; it is at the centre both of theology and sociology. The family is considered as a divinely inspired institution that came into existence with the creation of man. The proper behaviour of all the family members is constantly emphasized in the Qur'an and Hadith. Ideal behaviour encourages dignity and modesty in the family. The father, the mother, the children and the elders have a positive and defined role to play. The Prophet was both the ideal son and later the ideal husband and father. The women of his household-like Khadija and Fatimah-provides the ideal Muslim women.

Marriage is considered a sacred contract. This was a sharp contrast to the principles of Christianity and Hinduism where marriage was traditionally viewed as an indissoluble sacrament. The Qur'an is very clear that the basis of a marital relationship is love and affection between the spouses, not power or capital. Marital rape is unacceptable in such a relationship.<sup>86</sup> The household affairs should be conducted based on consultative process between the spouses, and not autocratically.<sup>87</sup> Superiority is determined by righteousness of character

---

<sup>84</sup> *Supra* n. 52. p.659.

<sup>85</sup> Surah 4:An-Nisa.

<sup>86</sup> Qur'an 2.223,30:21,2:187,4:19.

<sup>87</sup> Qur'an 2:233.



and not by gender, race, colour, lineage, wealth etc.<sup>88</sup>Equal human dignity by birth was proclaimed as a Divine Decree.<sup>89</sup>Gender equity is a basic theme of the scripture.<sup>90</sup>Thus, patriarchy is not inherent in the Qur'an but rather has been read into it throughout the centuries of patriarchal dominance of Muslim societies.

The continuing popularity of Ahadith amongst Muslims articulated the deeply embedded belief that women are derivative and secondary in the context of human creation. The motherly role of women is essential for the continuation of human existence and this function becomes the primary only with regard to women since they are the only ones capable of doing so.<sup>91</sup>The Muslim societies regarded son as a gift and a daughter as a trial, from god. In a married life women cannot claim equality with their husband. The husband in fact came to be regarded as his wife's gateway to heaven or hell and the decider of her final destiny .Muslim societies have made divorce extremely difficult for women, both legally and through social penalties .Practices like seclusion (Purdah),child marriage, poverty, and illiteracy contributed to the vulnerableness of Muslim women .Polygamy which was intended by the Qur'an to be for the protection of orphans and widows, got transformed into a sword of Damocles which kept women under constant threat. To give wealth to a woman in preference to a man was highly looked down upon and hence disapproved by the society. One of the distinctive characteristics of Muslim sexuality is its territoriality, which reflects a specific division of labour, and a specific conception of society and of power. The territoriality of Muslim sexuality sets ranks, tasks and authority patterns. Thus women came to be taken care of materially by the man who possessed her in return for her total obedience and her sexual and reproductive services. This Muslim practice of

---

<sup>88</sup> Qur'an 49:13.

<sup>89</sup> Qur'an 17:70, 95:4.

<sup>90</sup> Qur'an 4:32, 33:35, 3:195,4:124, 16:97,40:40,6:139-140,2:232.

<sup>91</sup> V.A .Mohamad Ashrof, "Is Male a Degree above Females in Status?" 7(4) *Al-Harmony :A Journal on Islamic Thought and Ethics* 14,17 (2007).

treating a women in home appears to be both a profound irony and a great tragedy, as when Qur'an regarded the home as a microcosm of the "ummah" and emphasized the importance of making it the ' abode of peace' through just living.

## **Conclusion**

Female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as politically constructed reality maintained by patriarchal interests, ideology and institutions. Recognition of the complex ways in which culture, religion and systems of oppression interact, creating qualitatively different abuse experiences creates overwhelming impact on feminine identity formation. A women's sense of self is greatly dependent on how the society or fellow beings behave to her and how she is treated by them. The fundamental difference in identity formation between the sexes has deep roots in the socialization processes. The self-identity roles and obligations are worked out fairly early in a woman's life and leave no stage without change and questioning. Thus feminine identity and a woman's position within the family continue to be open for assessment and modifications, depending on her situation in the life cycle. The natural outcome is the suppression of individual self-expression. This understanding is the springboard from which more effective assessment and intervention strategies with vulnerable abused women of diverse backgrounds can emerge.

Culture is a macro concept, which subsumes religion as an aspect of culture. Culture and with it, religion are the sources of gender construct. The two specific types of cultures that is to be taken note of in the Indian context is one, the social culture that relates to people's form of organization i.e., How people interact and organize themselves in groups especially the domestic gatherings and the second one the ideological culture that relates to what

people think, value and believe, something which they hold as ideals<sup>92</sup>. The idea of religion and all that entails is perhaps more central to human kind, its quest and reinforcement of identity, than other forces. It is the point of reference that dictates and influences our socio cultural norms and the sub-texts of our existence, in a variety of ways more insidious and encompassing than even the identification through nation or nationhood.



---

<sup>92</sup> Frances Raday, *Culture Religion, and Gender*, Oxford University Press and New York University School of Law (2003), p.1: Con. Volume, No.4 (2003), p.666.

## THE NATURE OF DOMESTIC VIOLENCE – A HUMAN RIGHTS DISCOURSE

Contents	3.1 International Human Rights Responses to Domestic Violence in the Context of Sex Equality and Sex Discrimination.
	3.2 Exploring the Internationalizing Elements of Domestic Violence
	3.3 International concern and Standards on Family and Domestic Violence
	3.4 Domestic Violence in International Law - Historical Overview and Status Quo
	3.4.1 1946: Commission on the Status of Women
	3.4.2 1975: First World Conference on Women in Mexico City, Mexico
	3.4.3 1979: Convention on the Elimination of All Forms of Discrimination against Women
	3.4.4 1985: UN Resolution
	3.4.5 1990: UN Resolution
	3.4.6 1992: CEDAW Committee General Recommendation Number 19
	3.4.7 1980: Second World Conference on Women, Copenhagen
	3.4.8 1985: Third World Conference on Women, Nairobi
	3.4.9 1993: World Conference on Human Rights, Vienna
	3.4.10 1993: The Declaration on the Elimination of Violence Against Women
	3.4.11 1995: Beijing Declaration and Platform for Action
	3.4.12 2000: The CEDAW Optional Protocol
	3.4.13 2000: UN General Comment No.28
3.4.14 2004: General Assembly Resolution on the Elimination of Domestic Violence against Women.	
3.4.15 1994-2009: Reports of the Special Rapporteur on Violence against Women, its Causes and Consequences	
3.5 Regional Legal and Policy Instruments and Jurisprudence Relating to Domestic violence	
3.6 Analyses of Landmark Decisions on Domestic Violence in Courts Around the world	
3.7 India's Obligations under International Human Rights Treaties	
Conclusion	

The increasing recognition of domestic violence as a social problem is due to two reasons. Firstly, the causes of violence have social roots and secondly the phenomenon erodes the social fabric regardless of its private origin behind closed doors. Violence in the family exists as an absolute inappropriateness vis-a-vis the peaceful image of the home. The fundamental problem that women face is not discriminatory treatment vis-à-vis men. Rather women are in inferior position because they have no power either in public or private worlds, or in international human rights law. Thus the problem of domestic abuse as a human rights issue will have to be seen as a part of larger

reality of subordination of women--their powerlessness in terms of defining the human rights discourse

Women's subordinate position in the home makes their experience different from men's. The image of the family as a protective retreat has been created largely through male eyes, disregarding women's oppression and the extensive discrimination against them which is inherent to the patriarchal structure and functioning of the family.<sup>1</sup> The significance of family for women is also more vital than that of men, because while a man is allowed an independent existence, woman's identity and survival is not socially conceivable without family. In behavioural terms, violence against women ranges from simple oppression to abuse, aggression, exploitation and severe oppression. Human Rights violations from female foeticide, infanticide, marital cruelty, dowry murders, child abuse, incest to women, battering and murder are committed within the safe confines of the home making the women highly vulnerable in families. They remain largely invisible, being considered as family matter.

Universal Declaration of Human Rights, the Magna Carta of the mankind exhorts that "All human beings are born free and equal in dignity and rights". Human right to dignity, worth of human person and freedom from discrimination and recognition of violence as a form of discrimination are the pre requisites to protect and preserve the human rights of women placed under special circumstances.

The right to be free from domestic violence includes within its ambit the right to equality and right to live with human dignity. The Constitution of India running along in the same spirit upholds the ideal of equality under Article 14 and right to live with human dignity under Article 21. Equality is the foundation on which all other rights are built. Since domestic violence primarily targets women, it violates the concept of equality and non-

---

<sup>1</sup>Saroj Iyer, *The Struggle to be Human: Women's Human Rights*, Books for Change, Bangalore (1999), p.3.

discrimination on the grounds of sex. The Supreme Court's decision in *Vishaka's* case emphasizes the fact that violence against women amounts to discrimination, which violates a woman's basic human rights.<sup>2</sup> The evolutionary motive force for human rights is the mankind's demand for decent civilized life in which the inherent dignity of each human being is well respected and protected.

Domestic violence against women is a violation of the right to live with human dignity and identity, as it reinforces and reproduces the subordination of women and thus obstructs the developmental process. Amartya Sen defines "capabilities" as the freedom to choose what you have reason to value. "Development" as he opines is a process of expanding the real freedoms that people enjoy<sup>3</sup>. Domestic violence against women is an obstacle in the developmental process of the country. The expansion of human capabilities if it leads to development the freedom from domestic violence is to be viewed as integral to any exercise for evaluating developmental progress. The conventional standards for assessing well-being and development has been indicators such as income, education and health(longevity).The broader attempts of including the criteria of gender empowerment in a country necessarily includes the effective property rights and freedom from physical and mental abuse. Domestic violence manifests itself in the denial of the right to equal protection of the law to which every human being is entitled. Denial of the state to recognize such offence committed against women also denies her right to simple and prompt recourse to a competent court for protection against acts that violates her rights.<sup>4</sup>

---

<sup>2</sup>*Vishaka and Others v. State of Rajasthan*, A.I.R. 1997 S.C. 3011

<sup>3</sup>Bina Agarwal and Pradeep Panda-"Toward Freedom from Domestic Violence: The Neglected Obvious" ,18(3) *Journal of human Development and Capabilities*; Routledge Publishing Ltd. ( 2007),p.360

<sup>4</sup> Universal Declaration of Human Rights (UDHR), Art. 1 adopted by the United Nations General Assembly in December 1948 and which all UN members, including India, are expected to honor, specifically states: "All humans are born free and equal in dignity and rights." Article 2 states that all are entitled to these rights and freedoms "without distinction of

Domestic violence can undermine woman's capabilities and her functionings in a range of ways. Familial violence manifests in the form of deprivation of economic freedoms, social opportunities and political freedoms. The economic freedom indicates her capability to earn a living or acquire property. The international mandates designate the inherent "right to life, liberty, and security of person."<sup>5</sup> The victims of domestic violence are in constant fear for their lives, and are perpetually under the control of their abusers. The right to personal liberty and security is endangered where victims are deprived of their liberty of free existence and their right to security. Her mobility is restricted, her self-expression is monitored and her thoughts influenced by others in her milieu. A woman suffering actual physical and mental injury can affect her functioning in the job market by disrupting the regularity of her work, life, her productivity, efficiency and her chances of upward mobility or promotion. The country thereby loses a potential economic contribution of a substantial section of the population of the country.

Simultaneously, domestic violence can erode women's social opportunities by undermining her ability to build social relationships and social capital. Withdrawal from the society due to the shame attached to the continuous violence going on in the family atmosphere is another outcome of it. It suppresses her right to associate freely and the most fundamental attribute of the human beings i.e., the right to freedom of expression. Thereby, the right to have a respected physical, mental and moral integrity is denied. Thereby the sense of self of women is disrupted that justifies the learned-helplessness theory<sup>6</sup> related to the domestic violence concept. The notions of self-respect

---

any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status." In addition, Art. 7 states that "all are equal before the law and are entitled without any discrimination to equal protection of the law."

<sup>5</sup>UDHR, Art. 3 and ICCPR, Art. 6 and 9

<sup>6</sup> This theory means insecurity and dependence on the males aggravates the situation of a woman within a household and she is confined to the feelings that she is helpless and that there is no recourse wherein she endures pain and suffering.

can be double edged in relation to domestic violence. Notions of self-respect can prevent women from revealing such violence in order to maintain their own and their family's social status. The threat of dis-possession from family aggravates the situation making her vulnerable to incompatible adjustments within the household. Domestic violence is a denial of right to social and political participation, by subjecting the victim to home confinement.

Woman who is a victim of domestic violence within the family loses her ability to be an active citizen or seek her entitlements as a citizen the undermining of her sense of self gets reflected in the assumption that violence she face within the family is something personal and not political. And more over the issue of domestic violence has not been targeted a good political option. Thus the right to equal access to the public service of the country and to take part in the conduct of public affairs, including decision- making is restricted. The relative silence on domestic abuse in society and in the media underlines the failure of transparency guarantees on this front. The dynamics of domestic violence if ignored leads to non- effective functioning of a range of public policy interventions in the field.

An important corollary to what is above discussed as to the developmental obstacles there is the threat that it can be carried over to future generations. Violence during pregnancy can cause miscarriages, low-birth-weight infants and even foetal and maternal deaths. The studies reveal that children who witness domestic violence tend to suffer from higher emotional and behavioural problems than other children. The seeds of it are carried on to their adult lives. For example a high proportion of street children report marital violence in their family life. Such long term consequences on the children reduce the productivity of future generations as well. The adolescent in violent family situation undergo a period of identity crisis where he or she is unable to



arrive at a defined self understanding and left unable to choose and invest energy into the right careers.<sup>7</sup> And often some of them might end up at suicide.

The prevalence of domestic violence violates any guarantee of protective security. It undermines the whole notion of the home as a protective space. It adversely affects individuals, their families and the wider society. The problem of domestic violence is symbolic to the law of jungle, where might is right. The reconciliation with the subjugation and hopelessness harms the woman more than the violence itself, as it erodes her personality and also that of the children. This brings us to the crux of the whole problem of familial violence. It is the sense of inadequacy, of vulnerability, of helplessness, of weakness and fear of violence that often destroys the women's sense of self.

Marital violence accounts for serious health implications in the victim. According to the World Report on Violence and Health by the World Health Organisation, Geneva, 2002, domestic violence accounts for a substantial but largely unrecognized proportion of maternal mortality. Another disintegrative effect of the domestic violence need to be understood on the basis of greater demand on health care systems, temporary or chronic economic and psychological dependence of victims on the welfare system. It leads to adverse economic burden on the society's welfare system.

International mandate requires the state 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'<sup>8</sup>. The standard international definition of torture comes from the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>9</sup> The right not to be subjected to torture is also denied in cases

---

<sup>7</sup>Bhargavi V. Davar, *Mental Health: From A Gender Perspective*, Sage Publications, New Delhi (2001),p.236.

<sup>8</sup> UDHR, Art. 5 ; ICCPR, Art. 7

<sup>9</sup> It requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official. even though India has yet to ratify the

involving domestic violence against women. Domestic violence manifests all the dynamics of terrorism i.e. seemingly random but actually well planned, psychological and physical warfare and creation of an atmosphere of intimidation. What the abuser wants is a sense of power and control over the victim who is seen as a threat to the abuser who is inwardly weak and insecure. All methods are used to keep the victim under Power and Control: using isolation, using coercion threat and intimidation, sexual abuse, using children, economic abuse, and minimizing, denying and blaming, emotional abuse, treating the wife or other female members like a servant or child using all the patriarchal privileges of a male.

There is the denial of the right to optimum standard of physical and mental health as the victim undergoes prolonged physical and mental trauma. The right to affection and enriching personal relations required for the basic human existence suffers a setback .The denial of personal development restricts a woman's right to participate in various activities, curtails her prosperity in career or working field, academic field etc. Viewed from a human rights perspective it is the general denial of women's human right to be human. The concept of human rights evolved largely from ideas of western political theory about rights of individuals to autonomy and freedom.

Swami Vivekananda has rightly remarked: "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."The oppression of women in the family results in the maintenance of women as second-class citizens thus depriving the country of women's full potential for taking part in the developmental process. This is a serious developmental problem for the country. It is in this wider framework, that the

---

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), provisions regarding torture in the UDHR and ICCPR which generally adopt CAT's definition of torture, and both under which India has obligations, can be used to support Indian domestic violence claims.

violation of human rights of women occurring at the basic cell of the society i.e. the family needs to be viewed from a larger sociological framework.

### **3.1 International Human Rights Responses to Domestic Violence in the Context of Sex Equality and Sex Discrimination**

The phenomenon of domestic violence against women was identified primarily as a private concern. From this perspective, violence was seen to be a matter of individual responsibility, and the woman was perceived to be the one responsible for either adjusting more adequately to the situation as dictated by cultural norms or developing an acceptable method of suffering silently. This basic understanding of domestic violence as a personal issue has limited the extent to which legal resolution to the problem has been actively pursued.

In most societies, domestic violence against women has typically not been perceived as a crime. Through much of the international legal history, women have been invisible in the development and growth of international law. It took a long journey to adopt the policy that women's rights are human rights. Recognising the importance of the social costs of gender directed violence, the international agencies working on women's development have taken the lead in attempting to fill critical gaps in efforts to promote and protect women's human rights. Historically, stark distinctions were apparent as between the 'public sphere'-the political, legal and social institutions and the 'private sphere'-the home and the family. Doctrine of privacy and protection of the family reinforced this artificial divide.<sup>10</sup> As a result the international human rights treaties offered protection to women against violence that occurred only in the public realm.

---

<sup>10</sup> The domain of International law was held to be governing only the relationship between nation states or the treatment of individuals by the government or public officials. The traditional view was that international law is applicable only to governments and their representatives, but not to private actors as in the case of family violence. Domestic violence against women occurring within the four walls of the family was defined as a private issue and was thus kept outside the ambit of International law.

The gross human rights violations against women within the family remained invisible and ignored. To break the barriers between the violence against women in the public life and private life were one of the greatest challenges undertaken by the United Nations Organization and its affiliated agencies. The necessary theory of accountability of states<sup>11</sup> for their inaction in cases of violence against women within the home led to the gradual acceptance of the notion that the state making little or no effort to stop violence is tacitly condoning it.<sup>12</sup> This inter-relationship between the accountability of international law and its inactiveness in private matters turned it into a constructive act of the state.<sup>13</sup> A state also has an obligation under human rights law to apply its laws without discriminating against women and to provide an adequate remedy for acts done by private individuals. A state's institutionalized inaction in the face of a pervasive domestic violence problem violates international obligations. This analytical shift in the international community, allowing domestic violence to be identified and addressed as a human rights violation led to the development of specific international legal obligations directly addressing domestic violence.

### **3.2 Exploring the Internationalizing Elements of Domestic Violence**

There exists a dilemma in the notion that domestic violence, something so intimate in nature, could constitute a human rights violation that needs to be

---

<sup>11</sup> The theory of due diligence, equal protection of laws, freedom from torture that upholds the right of the individual to live with human dignity and security emphasized the theory of accountability of states to ensure the human rights of its members.

<sup>12</sup> The Inter American Court of Human Rights has issued a judgment in the case of *Velásquez Rodríguez*, which articulates one of the most significant assertions of State responsibility for acts by private individuals; this represents an authoritative interpretation of an international standard on State duty. The opinion of the Court could also be applied, by extension, to article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires States parties to ensure to all individuals the rights recognized in that Covenant. In the same case, the Inter American Court further reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]". It discussed the scope of the duty of States, under article 1 of the American Convention on Human Rights, "to ensure" the rights within the treaty to all persons within their jurisdiction.

<sup>13</sup> Kelly D. Askin, Dorean M. Koenig (Eds.), *Women and International Human Rights Law*, Transnational Publishers, Inc, Ardsley, New York, Vol-1, (1999), p.243.

discussed about at the international level. This happens as we have not yet analyzed what types of violence constitute domestic violence for which a state is responsible for. In this context I would like to import the concept of “patriarchal terrorism” referred to by sociology theorist Michael Jhonson to refer to a violence which is the product of patriarchal traditions of men’s rights to control the women that results in the form of terroristic control of women by their male heads of family that involves the systematic use of not only violence, but economic subordination, threats, isolation and other control tactics. The term domestic violence is applicable to a miscellany of harms. Exempting a very few minor harms it is very necessary to understand and acknowledge the concept of ‘systemic intimate violence within the family’ qualitatively constitutes and has a significant and ever present negative effect on our society within the term domestic violence which caters to its internationalizing factor. Distinguishing between types of violence is objectionable but necessary in this context. Grievous bodily harm and attempted murder; rape and sexual assault; torture and ill-treatment; etc. requires a response at the international level and review of national legal systems through the lens of international law. It encompasses violence which is invasive of the victim’s mental and physical autonomy in away that is particularly destructive of the individual’s dignity.

Systemic intimate violence within the four corners of the family and between inmates consists of five elements which together constitute an extreme violation of an individual’s human rights that ought to trigger the provisions of international law. These elements are

1. *The severe emotional or physical harm or the threat which is experienced by the victim:* The underlying premise is that every person has an interest in the maintenance of her or his physical autonomy and an essential right to be free from fear. This is reflected in International treaties, declarations, other international instruments and many states’ constitutional and legal

systems<sup>14</sup>. Assessing severity of a violence that is perpetrated in a private space to fix international responsibility is a difficult task. The level of severity in cases of domestic violence albeit in a context of love, intimacy and domesticity, is such that it shocks human conscience. According to the European Court of Human Rights, the severity of the harm depends on all the circumstances of the case, like the nature and context of the treatment, its duration, and its physical and mental effects and in some cases, the sex, age and state of health of victim etc.<sup>15</sup>. To fix the culpability of the accused it must depend not on the gravity of the act but on the sensitivity of the victim.<sup>16</sup> Here again the challenge of non identifiability of such harm creeps in making it insufficiently serious to warrant hospitalization or police intervention or to prove in judicial proceedings. The incorrect assumption that because the violence is committed in private, by a non-state official and often within the context of a relationship, the violence is neither severe nor extreme is to be done away with. Where a victim suffers lasting physical or emotional damage, and the state fails to provide effective police intervention and basic shelters to help mitigate the consequences thereof, the state reasonably can, and should, be held accountable for its failings.

2. *A continuum of violence experienced by the victim rather than a single incident*: Acts of violence that are not in and of themselves may become severe and debilitating if they induce an ongoing environment of fear and control from which the victim is unable to escape. Emotional and physical harm may operate separately, but generally are combined to spin a web of abuse in which the exigency of violence escalates. The continual nature of systemic intimate

---

<sup>14</sup>See e.g., UDHR, ICCPR, ICESCR, CEDAW, DEVAW, the African Charter, the Rome Statute etc.

<sup>15</sup>*A v. The United Kingdom*, (App NO100/1997/884/1096):1998 27 E H R R 611, para 20. The severity of acts of domestic violence was recognized by the E C H R in the case of *Opuz v Turkey*. (App No.33401/02) ECHR 9 June 2009

<sup>16</sup>The intensity of harm is measured not from an inconvenience or discomfort level but rather consists of physical and psychological abuse and outrages that any human being would have experienced as such. (Discussion on mens rea component in respect of criminal liability in *Prosecutor v. Kunarac*, Judgment) ICTY -96-23-T (22 February 2001) paras 508-514; See also *Prosecutor v. Aleksovski*, ( Judgment) ICTY-95-14/1-T (25 June 1999), para 54.

violence has been recognized to varying degrees in the domestic violence legislation of foreign jurisdictions<sup>17</sup>.

3. *Violence which is being committed predominantly by men against women within an intimate relationship*: The intimate relationships between the woman and the man masks the harm, complicate and distorts the victim's and society's understandings of the violence, her ability to escape and the approach of society to her experience. It is this element that distinguishes domestic violence from other forms of violence in society. The issue of domestic violence is cloaked with societal shame Hence encapsulated within the relationship, the recurrent violence becomes normalized, preventing the abused from reporting the violence and authorities from recognizing it.

4. *Vulnerability of women*: The victim i.e., the woman is a member of a vulnerable group susceptible to vulnerability backed by societal misunderstanding of the nature of the violence inflicted leading to victims isolation. The aggravating factors that contribute to the vulnerability of women are traditional roles of hegemony between men and women, private nature of systemic violence within the four corners of the family, the concomitant escalation of extreme violence upon separation, economic difficulties restraining women's freedom and the acquiescence of women's community to the violence. The right to be treated equally by the state also requires equality of protection against violence where it occurs most frequently ie. the private space.

5. *The failure of the State to help the victims*: The violence inflicted is 'systemic' in the sense that it occurs in a society in which the state in question has omitted to satisfy the standards that will help to remedy such violence. This failure gets manifested in deficient police services, inaccessible or inefficient

---

<sup>17</sup> E.g., Mexico and Nicaragua. In Mexico, the Law of Assistance and Prevention of Domestic Violence 1996 defines the violence as 'an act of power or omission that is recurring, intentional and cyclical, and is aimed at dominating, subordinating, controlling or harming any member of the family through physical, verbal, psycho-emotional or sexual violence'.

court processes, poor health services and lack of economic assistance in the form of welfare systems or laws<sup>18</sup>.

The nature of the harm inflicted being silent effectively removes the existence of the harm from the realm of reality. As far as the state is concerned, the abuse or violence disappears. The systemic failure of the state to protect victims of severe intimate violence and punish its perpetrators constitutes an endorsement of the harm, implicit or otherwise. The conduct of the state, therefore by virtue of its failure to act, perpetuates the violence, creating an atmosphere of impunity<sup>19</sup>. It is in this manner that the State's role is triggered in International Law.

### **3.3 International Concern and Standards on Family and Domestic Violence**

The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. It is asserted throughout the national and international Human Rights documents as the 'basic and fundamental unit of the society'<sup>20</sup>. The significance of 'family' in a society as a provider of natural environment for the growth and well being of all its members,<sup>21</sup>the need for giving social ,legal and economic protection to the basic unit of the society,<sup>22</sup>the inter relationship

---

<sup>18</sup> The seriousness of the element of state failure is clearly explained in the case of *Opuz v Turkey* in which the ECHR held that Turkey had violated its obligations under Art.2 (right to life), Art.3 (right to be free from torture and cruel, inhuman or degrading treatment)and Art.14(right to equal enjoyment of the Convention Rights) by failing to assist the applicant and her mother when they had sought the assistance of the State to prevent abuse by the applicant's husband. This case exemplifies how the state can be responsible for continued acts of violence between intimate family members.

<sup>19</sup>Bonita Meyersfeld, *Domestic Violence and International Law* ,Hart Publishing Ltd.UK(2010), p.142

<sup>20</sup> UDHR, Art 16 and 3; The International Covenant on Civil and Political Rights,1966, Art. 23 ; The International Covenant on Economic, Social and Cultural Rights,1966,Art10 ; American Convention on Human Rights,1969,Art 17; African Charter on Human and Peoples' Rights,1981; ARAB Charter on Human Rights,2004,Art 33.

<sup>21</sup> See Preamble of International Covenant on Economic, Social and Cultural Rights,1966; Art 4 of Declaration on Social Progress And Development,1969; adopted by General Assembly Resolution 2542 (xxiv) on 11 th december.1969.

<sup>22</sup> European Union Charter of Fundamental Rights,2000, Art.33.



between the family ,the child and the woman,<sup>23</sup> have all been affirmed throughout the standards set by the United Nations Organisation. Family is upheld as the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized.

The International Bill of Human Rights<sup>24</sup> and the other Core UN Human Rights Treaties<sup>25</sup> forms the basic guideline to the fundamental rights and freedoms of human beings in the international arena. These documents do not explicitly address the issue of domestic violence. Yet its principles articulate the concepts of fundamental rights and freedoms that are commonly violated in domestic violence cases. Those rights include the right to equality, right to equal protection of the laws, right to life, liberty and security of the person, right to physical and mental integrity, and right to be free from discrimination, torture, degrading and inhuman treatment. The mandates set up under the International Bill of Rights and the efforts of the United Nation Organisation ,through international conventions, declarations, and conferences has brought to light the issue of domestic violence and the need to evolve laws to combat it both in the international and regional forums.

The preamble of the United Nations Charter, 1945 begins by referring to faith in fundamental human rights, in the dignity and worth of the human persons, and in the equal rights of men and women. The Universal Declaration of Human

---

<sup>23</sup> Chapter ii –Global Framework of Beijing Declaration And Platform For Action, adopted at the Fourth World Conference on Women: Action for Equality, Development and Peace,1995 held at Beijing ,on 15 th September 1995.

<sup>24</sup> It consists of The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights(ICESCR),which entered in force in 1976

<sup>25</sup> It consists of the International Covenant on the Elimination of All Forms of Racial Discrimination,1965;the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),1979;the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment t or Punishment,1984;and the Convention on the Rights of the Child,1989.

Rights<sup>26</sup> - proclaimed in 1948 by the General Assembly is considered as the cornerstone of UN's human rights system .It upholds and protects the dignity and integrity of human beings. The golden thread of fundamental human rights and freedom is embedded in its provisions when it exhorts that all human beings are born free and equal in dignity and rights.<sup>27</sup> All the rights and freedoms set forth therein are held entitled to all human beings without distinctions of race, colour, sex, language, religion, national origin, property, political opinion etc.<sup>28</sup>

Right to life,<sup>29</sup> liberty and security of person<sup>30</sup> and the right to be recognized as a person before the law<sup>31</sup> are conferred by the Declaration. Freedom from torture is fundamental to allowing an individual to live a life of dignity and security The Declaration provides freedom from torture or cruelty, in human or degrading treatment or punishment.<sup>32</sup>The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in the year 1984 defines torture<sup>33</sup> as “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a purpose such as obtaining or a confession, punishment, intimidation, or coercion “or for any reason based on discrimination of any kind”. Domestic violence is a violation of a woman's rights to bodily integrity, to liberty, and often right to life itself. This approach equates domestic violence to a form of torture. Article 5 of the UDHR and Article 7 of the ICCPR both state, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

---

<sup>26</sup> The Declaration consisting of 30 articles was written by Eleanor Roosevelt, chair of the UN Commission on Human Rights, and 17 other international delegates. It is held to be the primary international articulation of the fundamental and inalienable rights of all human beings.

<sup>27</sup> Universal Declaration of Human Rights, Art. 1

<sup>28</sup> *Id.*, Art. 2

<sup>29</sup> International Covenant on Civil and Political Rights, Art. 6(1)

<sup>30</sup> , Universal Declaration of Human Rights, Art. 3; International Covenant on Civil and Political Rights, Art. 9(1)

<sup>31</sup> Universal Declaration of Human Rights, Art. 6

<sup>32</sup> *Id.*, Art. 5; International Covenant on Civil and Political Rights, Art. 7

<sup>33</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1

punishment. The standard international definition of torture comes from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official. The first two elements should not be too difficult for domestic violence victims to show: evidence of egregious domestic abuse including severe and repeated beatings, sexual assaults, and repeated insults and mental abuse may satisfy the first element, and the intentional infliction of this abuse may be shown through examples of the abuser demonstrating or referencing his control over the victim.

In the U.S. in order to satisfy the third element, the victim must be in the control or physical custody of the offender, and a public official must have awareness of the torture prior to the fact and has breached his legal responsibility to intervene to prevent the torturous activity. Physical control can be contended to mean not just imprisonment or detention but also as overpowering or domination of the body. Moreover, a police officer who receives abuse complaints from domestic violence victims and does not intervene to prevent future abuse may meet the involvement of a public official criterion. Thus, even though India has yet to ratify the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, provisions regarding torture in the UDHR and ICCPR which generally adopt CAT's definition of torture, and both under which India has obligations, can be used to support Indian claims on domestic violence<sup>34</sup>.

---

<sup>34</sup> [www.combatlaw.org/?p=627:Combat Law>>Archive>>Interpreting Rights](http://www.combatlaw.org/?p=627:Combat Law>>Archive>>Interpreting Rights), July 2010. Last visited on 29th September, 2011

The Declaration further ensures the right to marry, to found a family and equal rights as to marriage and at its dissolution<sup>35</sup>. It exhorts free and full consent in entering into marriage.<sup>36</sup> Moreover the family is upheld as the natural and fundamental group unit of society and emphasizes on its protection by both society and the state.<sup>37</sup> The family, as being acknowledged as the basic unit of the society, the violence perpetrated against women within the family and their right to personal dignity, life and security within the family receives recognition in the international and national platform.

Thus it can be inferred that any form of violence against women which is seen as a threat to their life, liberty or security of person or which is torture or cruel, inhuman or degrading treatment is a violation of the international human rights obligations of the member states, and thus contrary to the principles of the Universal Declaration. The International Bill of Rights resorts to a gender neutral terminology while pronouncing the rights of individuals. The provisions contained therein begins with terms like ‘no one’, ‘every one’, all etc., which means that they are equally applicable to women and implicitly refers to the protection to be accorded to them in cases of domestic violence.

### **3.4 Domestic Violence in International Law - Historical Overview and Status Quo**

Efforts rendered by the United Nations from 1975 to 1995, through conventions and conferences, addressing violence against women, brought to light the specific issue of domestic violence against women as a topic for consideration in the international field. The International bodies such as the Human Rights Committee monitoring the International Covenant on Civil and Political Rights, 1976 and Committee on the International Covenant on Economic Social and Cultural Rights considered the issues of violence against

---

<sup>35</sup> Universal Declaration of Human Rights, Art. 16(1).

<sup>36</sup> *Id.*, Art. 16(2).

<sup>37</sup> *Id.*, Art. 16(3).

women by the state, in the community or in the family, as an infringement of gender equality, civil liberties and socio economic rights. Domestic violence violates a number of other rights, including the right to life and liberty, the right to self-determination, the right not to be subjected to torture or other cruel and degrading treatment, etc. Many of these rights are enshrined in the International Covenant on Civil and Political Rights (ICCPR), which India has signed and ratified. In light of this legally binding international obligation, the failure of a government to prohibit acts of violence against women constitutes a failure of state protection. The main provisions of the ICCPR that can be applied to cases of domestic violence are as follows: Articles 1, 2, 3, 6, 7, 16, 23, 26. The first Optional Protocol to the ICCPR allows individuals, whose countries are party to the ICCPR and the protocol, who claim their rights under the ICCPR have been violated, and who have exhausted all domestic remedies, to submit written communications to the UN Human Rights Committee. In a number of cases<sup>38</sup> women have used the communication procedure under the first Optional Protocol to the ICCPR to complain to the Human Rights Committee of the UN about sex discrimination which breaches the ICCPR.

The following analysis examines the international instruments and institutions that address domestic violence in one form or the other. The analysis is divided into two periods: 1946-200 and 2000-2009. The development of domestic violence as a subject in international law from 1946-2000 is stilted and haphazard. From 2000, onwards the lens of International Law begins to focus on domestic violence as a specific manifestation of violence against women.

### **3.4.1. 1946: Commission on the Status of Women**

As the initial international body responsible for developing women's rights the Commission on the Status of Women was established as a part of the

---

<sup>38</sup>*The Mauritian Women Case* (Communication No. 35/1978); *Broeks v. The Netherlands* (Communication No. 172/1984); *Avellanal v. Peru* (Communication No. 202/1986)

Economic and Social Council which falls under the purview of ICESCR, the object being ‘to promote implementation of the principle that men and women shall have equal rights’. The ICESCR was considered as the weakest Covenant due to a fear of judicial intervention in the policies of the executive branch of government and the fact that it requires state resources and governments to fulfill their socio economic obligations and that too it provided only for progressive realization depending on the resources of the concerned governments. The CSW had a communications mechanism which allowed it to hear communications that reveal ‘a consistent pattern of reliably attested injustice and discriminatory practices meted out against women’. The highlight activity of the CSW was to take into account forms of violence against women in developing its policy work rather than at engaging and remedying specific violations of women’s rights.

#### **3.4.2. 1975: First World Conference on Women in Mexico City, Mexico**

In 1975, United Nations sponsored the first world conference in Mexico City, and declared the period 1976 to 1985 to be the UN Decade on Women. Activities undertaken during the period provided a foundation for the creation of an international awakening on violence perpetrated against women both in the public and private life.

#### **3.4.3. 1979: Convention on the Elimination of All Forms of Discrimination against Women**

The most extensive instrument dealing exclusively with the rights of women is the Convention on Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly in 1979. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The Convention affirmed the principle of equality by requesting the state parties to take all “appropriate measures, including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing

them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”<sup>39</sup>. It has been described as an International Bill of Rights for women as it sets out detailed information that aids in the recognition of discrimination against women and the measures that have to be taken in order to eliminate discrimination.<sup>40</sup> General Recommendation No.19<sup>41</sup> forwarded by the Committee on the Elimination of All forms of Discrimination against Women dealt exclusively with violence against women and made clear that states were obliged to eliminate violence perpetrated by public authorities and by private persons. It stated that certain traditions customs and practices had perpetuated the stereo typed subjugated role of women and often justified the gender based violence.

The Recommendation categorically stated that; CEDAW extrapolates a prohibition on violence by stating:

“Gender-based violence ,which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination....These rights and freedoms include: a)the right to life; b)the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; c)the right to equal protection according to humanitarian norms in time of international or internal armed conflict; d)the right to liberty and security of person; e)the right to equal protection of the law; f)the right to equality in the family; g)the right to the highest standard attainable of physical and mental health; h)the right to just and favourable conditions of work.”<sup>42</sup>

---

<sup>39</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Art. 3

<sup>40</sup> Aameena Hussein; -Some Times There Is No Blood: Domestic Violence and Rape in Rural Sri Lanka; International Centre for Ethnic Studies Report; Sri Lanka (2000), p.10.

<sup>41</sup> U.N.Doc A/47/38 (1992).

<sup>42</sup> *It's in Our Hands-Stop Violence Against Women*, Amnesty International Publications, U.K. (2004), p.69.

CEDAW calls on states to change the way public and private entities and individuals treat women. This is important in relation to domestic violence because it brings the state into the private realm. It compels the State to equalize private relationships (i.e., the way individuals treat women and not only the way the State treats women) and to intervene when discrimination marks both public and private affairs.

Allowing the states to enter reservation to its own obligations can, and does impede the extent to which the treaty benefits the individuals in crisis. The injunction in the Vienna Convention on the Law of Treaties that reservations may not be ‘compatible with the object and purpose’ of a treaty has not stopped some states from entering reservations against CEDAW’s core provisions. There is a profound omission in the treaty that the goal of eradication of violence against women is not expressly stipulated in the treaty itself. The result is treaty though on its face prohibits the discrimination of women but member states actively and openly discriminate against their female citizens<sup>43</sup>. CEDAW does important policy work leading to political and legal reforms. It sets a precedent for the development of women’s rights in International Law. As a signatory to CEDAW in 1980, India is legally bound to put its provisions into practice.

#### **3.4.4. 1985: UN Resolution**

In 1985 the UN General Assembly passed Resolution 40/36 on domestic violence, inviting states to ‘take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof’<sup>44</sup>. The resolution was the first of its kind to refer to the public effects of domestic violence. It focuses on the negative impacts of domestic violence on children, the family and the victim and invites governments to make broad changes to their justice systems to deal with the punishment of abusers and the

---

<sup>43</sup>E.g., sex discriminatory laws in countries such as Nigeria, Mali, Sudan etc.

<sup>44</sup> 1985 UN Resolution (n 76), Art.2.



protection of victims<sup>45</sup>. The member states were held responsible for preventing domestic violence and assisting victims. The Resolution invites the member states to be more sensitized towards the civil and criminal sanctions to be used against the domestic violence. To be clearer it was an important expression of minimal government action and invited the member states to introduce civil and criminal legislation addressing domestic violence, enforce the same, protect battered family members and punish the offenders.

The resolution identified the special and delicate position of the victim referred to as ‘specialized assistance’ and compels states to be respectful of victims, in particular the manner in which the victim is treated.<sup>46</sup> The delicacy of the victim’s position includes the recognition that urgent and temporary solutions are required such as shelters and other facilities and services for the safety of the victims<sup>47</sup>. The Resolution also identified the preventive steps that the states should take and exhorted to provide support and counseling to families ‘in order to improve their ability to create a non-violent environment, emphasizing the principles of education, equality of rights and equality of responsibilities between men and women, their partnership and peaceful resolution of conflicts’<sup>48</sup>.

States should oppose the normalization of domestic violence through social endorsement, recognize the connection between inequality, ignorance and gender-based harm and address each link in the chain of violence<sup>49</sup>. The resolution raised the tension between intervention on the one hand and the protection of privacy on the other<sup>50</sup>. The legislations on domestic violence that

---

<sup>45</sup>*Id.*, Art.7.

<sup>46</sup> *Id.*, Art.7(b).

<sup>47</sup> Art. 7(f) and 7(g) refers to specialized training and units for those who deal in some capacity with victims of domestic violence.’

<sup>48</sup>*Id.*, Art.7(c).

<sup>49</sup> Art. 7(d) (n 76).

<sup>50</sup>*Id.*, Art.7(i) (inviting states to make ‘legal remedies to domestic violence more accessible and, in view of the crimino-genic effects of the phenomenon ,in particular on young victims, to give due consideration to the interests of society by maintaining a balance between intervention and the protection of privacy’)

are being enacted in different parts of the world are in consonance of the views prescribed by the Resolution of 1985.

### **3.4.5. 1990: UN Resolution**

The 1990 Resolution took a tentative step in the direction of recognizing domestic violence as having an impact not only on the immediate lives of the victims but also on ‘broader society’. This public component is reflected in the Resolution’s proposal that domestic violence be combated through ‘multi-disciplinary policies, measures and strategies, within and outside the criminal justice system’<sup>51</sup>. The implementation of the Resolutions both of 1985 and 1990 was left to the autonomy of member states which made the injunctions vague and non-specific. The 1990 Resolution marked a remarkable progress in terms of understanding the psychological components of domestic violence, the negative impact it has on the other family members and the fact that intimate nature of violence should not preclude a public and if necessary criminal response.<sup>52</sup> Neither resolution came up with domestic violence as a violation of woman’s human rights.

Despite the resolutions lacking an authoritative status under a traditional approach to customary International Law they contribute to the body of evidence that proves that domestic violence is an international concern, requiring attention at the international level, and that the activities of private individuals in the context of domestic violence are in fact the responsibility of the states.

### **3.4.6. 1992: General Recommendation Number 19**

General Recommendation No.12 referred to legislation to protect women from all kinds of violence including domestic violence and drew out a statistical data on the incidence of violence against women. In 1992, during the 11th session of the CEDAW committee, the United Nations issued General Recommendation

---

<sup>51</sup> UN Resolution 1990, Art.1

<sup>52</sup>*Id.*, Art.4.

Number 19, which pertains specifically to the issue of violence against women. Gender-based violence is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’<sup>53</sup>. The General Recommendation No. 19 can be of particular importance in cases of domestic violence, as it creates an express link between discrimination and violence, makes a bold statement about cultural autonomy and prohibits a wide range of violence.. It clarifies that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths....(etc). Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. The Recommendation also brings out how violence against women as a group inhibits that group’s ability to enjoy rights and freedoms. This is a logical extrapolation of CEDAW to violence against women.

‘Family violence’ forms a separate heading within the Recommendation. The General Recommendation 19 recognized the violence in the family as:

“one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of

---

<sup>53</sup>General Recommendation 19(No. 20) Art.6. General Recommendations are not formal parts , but integral explanatory sources for the interpretation and full implementation of CEDAW.

violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality<sup>54</sup>.”

The Recommendation also covers violence perpetrated by public authorities but it is not restricted to action by or on behalf of Governments. States are also required to protect women from violence by ‘any person or organization or enterprise, including private persons’<sup>55</sup>. To a certain extent, General recommendation 19 closes the textual gap in the CEDAW text and makes it clear that the obligation to end discrimination against women includes the duty to prevent violence against women. It also formed the basis for DEVAW, and can therefore be seen as one of the triggers which brought violence against women into the mainstream of International law.

Although the provisions of this recommendation are not automatically and legally binding on states, as a signatory to CEDAW, India has a general obligation to take cognizance of these recommendations

### **3.4.7. 1980: Second World Conference on Women, Copenhagen**

In 1980, the UN sponsored the Second World Conference on Women, held in Copenhagen. For the first time domestic violence was explicitly referred to in an official document of the UN.<sup>56</sup> The conference also produced a resolution titled “Battered women and Violence in the Family,” which emphasized that domestic violence was a complex problem and constituted an intolerable offense to the dignity of human beings.<sup>57</sup>

### **3.4.8. 1985: Third World Conference on Women, Nairobi**

The Third World Conference on Women Held in 1985 in Nairobi adopted by consensus the ‘Nairobi Forward looking Strategies’. It mainly

---

<sup>54</sup>*Id.*, para 23.

<sup>55</sup>*Id.*, Art.9.

<sup>56</sup> Report of the World Conference of the United Nations--Decade for Women: Equality, Development and Peace, Copenhagen, July 1980, U.N. Doc.A/CONF.94/35 (80. IV.3).

<sup>57</sup>*Supra* n.13, p.245.

focused on violence against women in the home and recognized it as a serious impediment to the objectives of the Decade of Women .It called for guidance to be given to the law enforcement authorities to deal with the victims, sensitively. By the end of the Decade on Women in 1985, the United Nations, through its various conferences had identified domestic violence as a major obstacle to development and peace. United Nation’s General assembly adopted two resolutions directly addressing the issue of domestic violence.<sup>58</sup>

### **3.4.9. 1993: World Conference on Human Rights, Vienna**

The Third World Conference on Human Rights held at Vienna provided a global platform in acknowledging and affirming that the human rights of women as ‘inalienable, integral and indivisible part of human rights’ and thereby expanded the international human rights agenda to understand gender specific violations. It exhorted that ‘women’s rights are human rights’ and led to the articulation of the concept of domestic violence as a human rights violation for the first time. It reiterates and expands upon principles outlined in the Universal Declaration on Human Rights and the United Nations Charter, and it represents a landmark in the recognition of women’s rights as being indivisible from human rights. Adopted by consensus at the World Conference on Human Rights in 1993, it marks a renewed commitment to “remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world.” Moreover, this declaration is unique in the sense that it set a new international norm, namely that human rights ought to be considered indivisible, independent, and interrelated. Prior to it, issues affecting women disproportionately, such as domestic violence, sexual harassment, and female

---

<sup>58</sup> The first resolution on domestic violence, i.e. Resolution 40/36 of November 29,1985, called for criminological research on the problem of domestic violence and requested the member states to implement specific measures to address it; The second resolution i.e. Resolution 45/114 of 1990 urged member states to develop and implement policies, measures and strategies both within and outside the criminal justice system to respond to the problem of domestic violence.

genital mutilation, was rarely addressed by human rights treaties. By acknowledging women's rights, the rights of the "girl-child," and the prevalence of gender-based violence, the Vienna Declaration of Platform of Action (VDPA) successfully widened the scope of 'human rights.' States were urged to withdraw any reservations from the Convention on the Elimination of all Forms of Discrimination against Women and the VDPA strengthened mechanisms for monitoring the implementation of women's rights worldwide. Furthermore, proceedings at the World Conference on Human Rights ended with a resolution to integrate women's rights into more UN activities. This, in turn, has resulted in the subject of women's rights becoming part of the mainstream discourse on human rights.

#### **3.4.10. 1993: The Declaration on the Elimination of Violence against Women**

In 1993, there were two major developments that furthered the application of the due diligence standard within the domestic violence context: the issuance of the Declaration on the Elimination of Violence Against Women (DEVAW) based largely on the provisions of General Recommendation 19 by the U.N. General Assembly and the appointment of a Special Rapporteur on Violence Against Women. In the wake of Vienna, the General Assembly adopted the UN Declaration on the Elimination of Violence Against Women (DEVAW) in 1993<sup>59</sup>. The Declaration in its Preamble recognized violence against women as a manifestation of unequal power relations between men and women and defined violence against women as;

“Any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to

---

<sup>59</sup> G.A Res.48/104 (1993). This landmark document was a result of efforts within the United Nations Commission on the Status of Women (CSW) and the Economic and Social Council (ECOSOC).

women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>60</sup>

This definition refers to the gender-based roots of violence, recognizing that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men." It broadens the definition of violence by including both the physical and psychological harm done towards women, and it includes acts in both private and public life. It sets an International precedent that violence against women is objectionable. DEVAW provided that state should investigate and punish acts of domestic violence, develop comprehensive legal, political, administrative and cultural programs to prevent violence against women, provide training to law enforcement officials and promote research and collect statistics relating to the prevalence of domestic violence.

As a declaration, however its authority is limited. It acts as a guide to how states ought ideally to prevent and address violence against women. It is possible to conclude that DEVAW was never intended to be the end of this process, but rather a first solid foundation on the basis of which states were supposed to take actions at all levels designed to eliminate violence against women<sup>61</sup>. The Declaration is held as the first international instrument to express international political consensus that states have human rights obligations to prevent gender-based violence and to redress the harm caused.

### **3.4.11. 1995: Beijing Declaration and Platform for Action**

The Beijing Platform for Action was a turning point in International Women’s Law. The Fourth World Conference on women 1995, held in Beijing, China was a significant step in addressing the issue of domestic violence. It reaffirmed the conclusions of the Vienna Conference and put women’s human rights even more firmly on the world agenda. The Beijing Declaration followed

---

<sup>60</sup> The Declaration on the Elimination of Violence Against Women, Art. 1.

<sup>61</sup> *Supra* n.10, p. 38.

by the Platform for Action (1996-2001)<sup>62</sup> identified Domestic violence as a human rights violation.<sup>63</sup> Undoubtedly the key strength of Beijing was its representative value. It acknowledged the long standing failure of governments to promote and protect a woman's human right to be free of violence in their homes. Recommended actions included the strengthening of legal system's response to all forms of violence against women including, domestic violence. Areas of concern for another five years were laid down (2002-2006) fixing the responsibility upon the UN Commission on the Status of Women to annually report to the UN of the plan of action in each country.

In June 2000, the UN General Assembly reviewed the implementation of the Beijing Platform (Beijing +5) and reaffirmed government's commitment to work for the realization of women's rights. The new document (Women 2000/Beijing +5 Outcome Document) reaffirmed the 150-page Platform for Action at the landmark 1995 UN Women's Conference and moved forward with tougher measures to combat domestic violence and trafficking of women. The Outcome Document calls for prosecution of all forms of domestic violence, now including marital rape.<sup>64</sup> The traditional practices of forced marriage and honor killings were addressed for the first time in an international document. These documents and programs of action do not have the status of international law, yet they carry political and moral weight as policy guidelines for the UN governments and other international organizations. was adopted by consensus in 1995, at the Fourth World Conference on Women. The conference and the resulting documents were framed around an agenda for promoting women's social, economic, and political empowerment. The Beijing Declaration embodies an

---

<sup>62</sup> U.N. Doc. A/Conf.177/20 (1995). The document outlined many specific actions governments, NGO forum and others should take to confront and combat violence against women. It's preamble expressed its determination to advance the goal of equality, development and peace for all women everywhere in the interest of humanity.

<sup>63</sup> The Platform for Action affirmed that violence against women whether occurring in the private sphere or in the public sphere, is a violation of human rights.

<sup>64</sup> Pradeep Kumar Panda- *Rights –Based Strategies in The Prevention of Domestic Violence*; Working Paper Series 344, ,Centre for Developmental Studies Tvm, Kerala (2003), p.16



international obligation to the advancement of women, with a particular emphasis on ensuring that a gender perspective is reflected in state policies and programmes. Adjunct to the Declaration is the Platform for Action, which outlines a series of measures for action in the hopes of improving the status of women at the state and international level. The Platform ended with a call for states to reconvene every five years, in order to assess the degree of progress made towards affirming and reinforcing women's rights. This review process has been carried out faithfully, with states meeting in 2000 (Beijing+5) as well as in 2005 (Beijing+10). The Fourth World Conference on Women was noteworthy because it drew considerable attention to the severity of the issue of violence against women. The resulting documents stressed the seriousness of violence against women, while simultaneously acknowledging that the true scope of the problem was still unclear. The Platform for Action admitted that a lack of gender-disaggregated data made it difficult to ascertain the extent to which women are the victims of violence. By requesting states to develop improved data and statistics, the Platform for Action in effect gave a voice to the abused women whose suffering was going unnoticed. The collection of more comprehensive data on violence against women, including domestic violence, is central to revealing the actual situation of women in society. Thus, the Beijing Declaration and Platform for Action contributed extensively to the effort to unearth inequalities and improve the condition of women across the globe.

#### **3.4.12. 2000: The CEDAW Optional Protocol**

The Optional Protocol is an addendum to CEDAW and requires signature and ratification like any other treaty. It was adopted by the General Assembly on the 6 th October 1999 and entered into force on 22 nd December 2000. As of 8 th March 2009, 79 states had ratified the Optional protocol. It enables the CEDAW Committee to receive communications by or on behalf of individuals who have grievances falling within the scope of CEDAW.

Another method of using human rights law in relation to the issue of domestic violence involves using the statements made by international human rights bodies to place pressure on governments to take further steps to combat domestic violence. Although the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not explicitly mention domestic violence, the CEDAW Committee has nevertheless interpreted the Convention's provisions in such a manner as to bring this issue within its scope

The CEDAW Committee has also produced important jurisprudence on the issue of domestic violence. The Optional Protocol to CEDAW<sup>65</sup> allows individuals or groups of individuals who are victims of any breaches of CEDAW to submit complaints to the Committee<sup>66</sup>. Under a communications procedure, the Committee will be able to focus on individual cases when considering CEDAW. It would be able to say what is required from States in individual circumstances. This would help States to understand better the meaning of the obligations they have undertaken by acceding to CEDAW. Crucially, communications may also be submitted on behalf of individuals with their consent, unless acting on their behalf without their consent may be justified. This is a much wider test of standing than that which is contained in the European Convention on Human Rights. As one of the categories of

---

<sup>65</sup> The Optional Protocol to CEDAW is the first gender specific international complaints procedure. As well as putting CEDAW on a par with human rights treaties which have complaints procedures, it enhances existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures. The Committee's views on communications would amount to what is called jurisprudence. Jurisprudence is the term used for a body of case law about any particular subject. It is used for guidance in interpreting laws. Jurisprudence from communications would provide clarification and guidance for States and for individuals about States' obligations under CEDAW. This has occurred with the ICCPR in regard to the publication of the Human Rights Committee's views on the cases that have been brought to it under the Optional Protocol to the ICCPR.

<sup>66</sup> *Id.*, Art. 2 provides a Communications Procedure which allows either individuals or groups of individuals to submit individual complaints to the Committee. Communications may also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.

sources of International law identified in the International Court of Justice Statute, the decisions of international and national judicial bodies and tribunals are an important source to consider in determining whether domestic violence is a violation of International Human Rights Law.

Three important communications on the issue of domestic violence have been considered by the Committee and they are discussed below:

In *A.T v. Hungary*<sup>67</sup> the Committee on the Elimination of Discrimination Against Women along with the independent experts who monitor the implementation of the Convention on the Elimination of Discrimination Against Women noticed that the complainant, although she sought help from Hungarian civil<sup>68</sup> and criminal courts<sup>69</sup> and child protection authorities, did not receive any assistance or protection from the Hungarian government. The case involved allegations of severe domestic violence. The Committee found that Hungary had violated the rights of A.T. under the Convention, and made recommendations to Hungary that it must act to protect the safety of the author and act more generally to effect the rights granted under the Convention. Hungary did not dispute the allegations and indicated that it would take steps to improve its laws and policy regarding domestic violence. The CEDAW Committee concluded its opinion with the recommendations that Hungary was to take immediate and effective measures to guarantee the physical and mental integrity of the claimant and her family. It was directed that the claimant be given a safe home for her to live with her children. The Committee acknowledged the need of the victim to receive appropriate child support and legal assistance and that she be given reparation

---

<sup>67</sup> Communication No:2/2003. Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. (Views adopted on 26 January 2005, thirty-second session)

<sup>68</sup> At that time, 2003 Hungary had no system of protection orders or restraining orders, with the result that there were no state institution or laws that prevented the domestic violence from continuing.

<sup>69</sup> The criminal proceedings were lengthy and provided no immediate protection to the victim.

proportionate to physical and mental harm undergone and to the gravity of violations of her rights.

The case posited domestic violence as a serious consideration for the CEDAW Committee, which recognized, the systemic nature of the violence and the social and legal reluctance of this form of gender-specific and intimate violence. The Committee had made clear that the state had an obligation to protect the individuals from such violence invoking the due diligence principle and where it failed to do so, it was held to be in breach of International Law. Significantly, Hungary made specific reference to standards of protection that are internationally expected and as a result of its interaction with the CEDAW Committee, Hungary had made amendments to its domestic violence laws, significantly to incorporate protection orders, which prior to the submission of communication, did not exist.

The other notable communications were made against Austria in *Goekce(deceased)v. Austria*<sup>70</sup> and *Fatima Yildirim v. Austria*<sup>71</sup>.

*Goekce v. Austria* was a case relating to domestic violence which ended in the death of the victim at the hands of her husband. The petitioners claimed that Sahide Goekce was a victim of a violation by the State Party under CEDAW, when the State Party failed to take appropriate measures to protect Sahida's right to personal security and life and failed to prosecute her husband as an extremely violent and dangerous offender under criminal law. There was also lack of coordination between law enforcement and judicial personnel. The committee held the complaint admissible. The police were found to be

---

<sup>70</sup>The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce (descendants of the deceased) v. Austria Communication No5/2005 UN Doc CEDAW/C/39/D/5/2005; (Decision)CEDAW Committee (views adopted 6 August 2007)

<sup>71</sup>The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gulen Khan and Melissa Ozdemir (descendants of the deceased), alleged victim Fatima: *Fatima Yildirim V Austria* Communication No.6/2005 UN Doc CEDAW/C/39/D/6/2005; (Decision) CEDAW Committee (views adopted 1 October 2007)

accountable for failing to exercise due diligence to protect Sahide Goekce. The committee also stated that the perpetrator's rights cannot supersede women's human rights to life and physical and mental integrity and that the public prosecutor should not have denied the request of the police to arrest the perpetrator<sup>72</sup>.

*Fatima Yildirim v. Austria* was a case relating to domestic violence which ended in the death of the victim at the hands of her husband. The petitioners argued that the state party had failed to take appropriate measures to protect Fatma Yildirim's right to life and personal security as a victim of domestic violence. Poor communication between the police and the Public prosecutor did not adequately allow the prosecutor to assess the danger posed by Fatima's husband. There was a lack of due diligence since the criminal justice system, particularly prosecutors, considered domestic violence as a minor offence. Hence criminal law was not applied to such violent behavior because law enforcement authorities did not take the danger seriously. The committee found that Fatima had made positive and determined efforts to save her life and failure to detain her husband was considered to be a breach of the State Party's due diligence obligation to protect Fatima. Once again, the committee held that a perpetrator's basic rights, such as the presumption of innocence, private and family life, right to personal freedom cannot supersede women's human rights to life and to physical and mental integrity<sup>73</sup>.

Notably, both the *Goekce* and the *Yildirim* communications were brought by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, on behalf of the family members of victims of domestic violence who had been killed by their husbands. Şahide Goekce and Fatima Yildirim were both murdered by their husbands following years of brutal abuse. Despite reporting the violence to the police and obtaining

---

<sup>72</sup>[http://www.karat.org/op\\_cedaw/cases.html](http://www.karat.org/op_cedaw/cases.html). Last visited on 17th April ,2012 For a detailed discussion see *supra* n.13.

<sup>73</sup> *Ibid.*

protection orders, the Austrian authorities repeatedly failed to ensure the women's safety. The 2007 decision of the CEDAW Committee under the Optional Protocol was of global significance because it was found that Austria had failed to implement the law and therefore failed in their duty to provide 'due diligence.'

Violations of CEDAW were found by the Committee in all three instances and the Committee set out the duties which states should fulfill in relation to victims of domestic violence, such as the provision of a safe home, child support and legal assistance. All allegations of domestic violence should be investigated in a thorough manner and victims provided with sufficient access to justice. The Committee's opinions provided the states guidance as to how to fulfill its obligations in respect of domestic violence. It also shows quite systematically the ways in which a legal framework can break down and fail to protect victims of domestic violence. Where communications and recommendations are made public, a powerful tool develops. It is through condemnation and public damnation that change potentially takes root. The policy of shaming and condemning a violation of human rights specifically of women victims is the predominant role played by the Committee recommendations.

### **3.4.13. 2000: UN General Comment No.28**

General Comment No.28 was adopted by the UN's human Rights Committee which is the committee responsible for the implementation of the ICCPR. The major thrust areas of the Comment was to ensure that the rights of women and men are equally protected both in the public and private sector. The comment protested against the governments who rely on to the cultural, historical and religious justifications in order to stay in power. The comment required the states to take account of the factors that impede equal enjoyment by women of the rights contained in the ICCPR. Specifically the states were to provide information on legal measures to protect women with regard to

domestic violence, rape, safe termination of pregnancies occurring as a result of rape, forced abortion sterilization etc and analyses laws that confine women to the home. This request was made in the context of Art.9 of the ICCPR which prohibits arbitrary arrest and detention, usually associated with state incarceration. The Comment refers to ‘any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house’.

This is an example of the integration of domestic violence into the work of the other UN Committees. It helps to demonstrate that the confinement of domestic violence victims to their homes (either through physical force, coercion or threats, economic need or as a result of depression) is of the same manner as state detention. This form of detention though not perpetrated by state authorities now falls within the scope of ICCPR’s arrest and detention provisions. The connection made between formal arrest and the isolation engendered by domestic violence is a major step forward in recognizing the fact that intimate violence is no less cruel than violence committed by state authorities. General Comment in Referring to equal access to justice and legal aid insisted that women should be able to overcome the barriers in giving evidence as witnesses on the same terms as men and that their testimony should not be pitted against that of men. It emphasizes the importance of this in ‘family matters’, thereby acknowledging that this is the realm in which women need particular legal assistance.

The General Comment No.28 appears to be more assertive in its recommendations and explanations as to the need for taking positive steps to ensure that women are able to enjoy the rights provided under the ICCPR. This represents a significant step in the direction that reflect the emergence of a concrete, definitive and authoritative norm in the International law prohibiting domestic violence.

### **3.4.14. 2004: General Assembly Resolution on the Elimination of Domestic Violence against Women**

The General Assembly Resolution 58/147 invoked the connection between domestic violence and discrimination against women. The Preamble identified domestic violence against women and girls as a human rights issue and approaches the domestic violence as violence that occurs in the private sphere between ‘individuals who are related through blood or intimacy’<sup>74</sup>. This widens the scope of the Resolution as the domestic violence is identified as a ‘public concern’ and attempts to embrace violence that occurs in all manner of intimate contexts, and not solely restricted within marital relationships. Within the concept of domestic violence, the Resolution includes physical, psychological, sexual and economic harm and importantly reference is made to the isolation of the victim, all of which results in imminent harm to the safety, health or well-being of women<sup>75</sup>.

The Resolution makes recommendations regarding legislative steps to strengthen legislation or enact legislation, spanning criminal and civil measures, such as social assistance, restraining orders<sup>76</sup> and the establishment of ‘one-stop center’s and safe havens for domestic violence victims’<sup>77</sup>. This recommendation is extremely important due to its pragmatic nature, confirming that all levels of state may have a role to lay in addressing one incident of domestic violence while also dismantling the systemic obstacles that prevent domestic violence victims from obtaining public assistance, such as re-victimisation and gender insensitive laws and practices<sup>78</sup>. In September 1994, the International Conference on Population and Development was held at

---

<sup>74</sup> UNGA Res 58/147 UN Doc A/RES/58/147 ,para7(m).

<sup>75</sup> *Id.*, para1(c) and (e).

<sup>76</sup> *Id.*, para7(a)-(e).

<sup>77</sup> *Id.*, para7(f)-(g).

<sup>78</sup> *Id.*, para7 (h)-(I).



Cairo. The major focus of the conference was the right to health including reproductive choices for women.

### **3.4.15. 1994-2009: Reports of the Special Rapporteur on Violence against Women, Its Causes and Consequences**

Thematic Rapporteurs are held as one of the most effective tools within the United Nations to monitor human rights violations. In 1994, Radhika Coomaraswamy was appointed by the U.N. Commission on Human Rights as the first Special Rapporteur on Violence against Women, Its Causes And Consequences. In her preliminary report, she emphasized that states have a duty under international human rights law to protect women from violence in their homes.<sup>79</sup> It held that all states were not only responsible for their own conduct or of its agents alone but also were responsible for their failure to take necessary steps to prosecute private citizens for their behaviour when found incompatible with the international mandates. The United Nations framework for a model law on domestic violence<sup>80</sup> was forwarded on the basis of the report on the causes and consequences of violence against women. The definition on domestic violence was widened to encompass all forms of gender inequality and gender discrimination existing within the family. “All acts of gender based violence i.e. Physical psychological and sexual abuse by a family member against women in the family ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating, verbal abuse forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry related violence, female genital mutilation, violence related to exploitation through prostitution,

---

<sup>79</sup>*Preliminary Report of the Special Rapporteur on Violence against Women to the Commission on Human Rights* E/CN.4/1995/42 (1994), paras. 99-107.

<sup>80</sup> A Framework for Model Legislation on Domestic Violence, Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, E/CN.4/1996/53/Add.2, February 2 nd, 1996.

violence against household workers and attempts to commit such acts shall be termed as domestic violence.

The UN Special Rapporteur on Violence against Women has recommended “A Framework for Model Legislation on Domestic Violence”, 1996 (UN Model Code), which provides valuable guidance on the provisions that should be included in domestic violence legislation. The purpose as envisaged by the United Nations is to

- a. Comply with international standards sanctioning domestic violence,
- b. Recognise that domestic violence is gender-specific violence directed against women,
- c. Recognise that domestic violence constitutes a serious crime against the individual and society, which will not be excused or tolerated,
- d. Establish specific legislation prohibiting violence against women within interpersonal and family relationships, protecting victims of such violence and preventing further violence,
- e. Create a wide range of flexible and speedy remedies (including remedies under special domestic violence legislation, penal and civil remedies) to discourage domestic violence and harassment of women within interpersonal relationships and within the family and protect women where such violence has taken place,
- f. Assure survivors of domestic violence the maximum protection in cases ranging from physical and sexual to psychological violence,
- g. Establish departments, programmes, services, protocols and duties, including but not limited to shelters, counselling programmes and job training programmes to aid victims of domestic violence,
- h. Facilitate enforcement of the criminal laws by deterring and punishing perpetrators of domestic violence,

- i. Enumerate and provide by law comprehensive support services, including but not limited to:
  - ii. Emergency services for victims of abuse and their families,
  - iii. Support programmes that meet the specific needs of victims of abuse and their families
  - iv. Education, counselling and therapeutic programmes for the abuser and the victim
  - v. Programmes to assist in the prevention and elimination of domestic violence which includes raising public awareness and public education on the subject.
- i. Expand the ability of law enforcement officers to assist survivors, to enforce the law effectively in cases of domestic violence and to prevent further incidents of violence,
  - j. Train judges to be aware of the issues relating to child custody, economic support and security for survivors in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence
  - k. Provide for and train counsellors to support police, judges and the victims of domestic violence and to rehabilitate perpetrators of domestic violence,
  - l. Develop a greater understanding within the community of the incidence and causes of domestic violence and encourage community participation in eradicating domestic violence<sup>81</sup>.

---

<sup>81</sup>E/CN.4/1996/53/Add.2 A framework for model legislation on domestic violence. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85-Domestic Violence Legislation and its Implementation-An analysis for ASEAN countries based on international standards and good practices-<http://cedaw-seasia.org/docs/DomesticViolenceLegislation.pdf>. Last visited on 12/7/2013

### **3.5 Regional Legal and Policy Instruments and Jurisprudence Relating to Domestic Violence**

#### **Inter- American System**

The international legal and policy framework outlined above has been accompanied by the adoption of various legal and policy frameworks at the regional level. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994 otherwise known as the Convention of *Belém do Pará*, is the first legally binding only international Convention directed solely at eliminating violence against women. It recognizes that every woman has the right to be free from violence in both public and private spheres. It refers to physical, sexual and psychological violence that ‘occurs within the family or the domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse<sup>82</sup>.

It is the first regional human rights treaty to focus exclusively on gender based violence and to prohibit violence within the home. It requires that States parties apply due diligence to prevent, investigate and impose penalties for violence against women and contains detailed provisions regarding the obligations of States to enact legislation. States parties are obligated to adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman; take all appropriate measures, including legislative measures, to amend existing laws or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; establish fair and effective legal procedures for victims; and establish the necessary legal and administrative mechanisms to ensure that victims have effective access to just and effective remedies<sup>83</sup>.

---

<sup>82</sup> Convention of *Belem Do Para* Art.2(a).

<sup>83</sup> Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women, Art. 7.

## **European System**

The European Parliament and Council in 2007 established the ‘Daphne III Programme’, as specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk as part of the General programme ‘Fundamental Rights and Justice’. In 2007 the European Council issued a recommendation on the prevention of injury and the promotion of safety, calling on member states to take measures to prevent injuries, including those caused by international violence, particularly domestic violence against women and children<sup>84</sup>. The European Court of Human Rights has made some of the more progressive decisions vis-à-vis state responsibility for harm committed by private actors which will be described later in the chapter.

One of the most recent developments in the area of human rights law and domestic violence is the adoption by the Committee of Ministers of the Council of Europe of the Convention on Preventing and Combating Violence against Women and Domestic Violence in April 2011. The Convention was opened for signature in Istanbul on 11 May 2011 and was signed by 13 states. The Convention defines “domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim<sup>85</sup>. The convention is the first legally binding instrument in the region that creates a comprehensive legal framework to combat violence against women through prevention, protection, prosecution, and victim support. It defines and criminalizes multiple forms of violence against women: physical, sexual and psychological violence, as well as forced marriage and female genital mutilation. The treaty also establishes an international group of independent experts to monitor its implementation at the national level. The provisions of

---

<sup>84</sup> Council Recommendation of 31 May 2007 on the Prevention of injury and the Promotion of Safety (2007/C 164/01)

<sup>85</sup> Article .3(b) Definitions.

the Convention are comprehensive in nature, encompassing not only criminal justice responses, but also areas such as awareness raising and the provision of social support measures to victims. The Convention relies primarily on a reporting mechanism to monitor implementation, a strategy similar to that which is used as regards the UN human rights treaties such as CEDAW.

### **African System**

The right of women to enjoy a safe home environment earlier existed only as a sub right, forming part of the larger right to have a family unit based on 'traditional values recognized by the community'. This had placed the women and children under the authority of male household member whose control was rarely subject to intervention. In July 2003, the African Union adopted its own regional treaty relating to the human rights of women- the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, as a supplement to Banjul Charter which came into force in 2005. This is a powerful statement in International Law regarding the right of women to be free from domestic violence and a corresponding obligation on the states to protect that right. It requires states parties to take measures to suppress all forms of violence against women, identify the causes, punish the perpetrators, and ensure effective rehabilitation and reparation for victims.

By the year 2007, out of 185 signatories of United Nations CEDAW, about 87 countries have adopted specific legislations to criminalise domestic violence, of which 13 are in Latin America: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nicaragua, Peru, Puerto Rico, Uruguay and Venezuela. The signing of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994 provided the momentum to enact such legislation. Thus aroused the need to undertake the international obligations by the state parties to comply with the international standard through legislative interventions or by policy change.

### **3.6 Analyses of Landmark Decisions on Domestic Violence in Courts Around the World**

In addition to the development of legal and policy instruments at the regional level, there is also an increasing body of jurisprudence on violence against women under the regional human rights treaties. Cases heard by the European Court of Human Rights and the Inter-American Commission on Human Rights have directed States to, create appropriate criminal legislation; review and revise existing laws and policies; and monitor the manner in which legislation is enforced. A closer look at the international case law on domestic violence reveals a distinct trend towards its interpretation so as to provide more protection to victims of domestic violence, as well as to support the efforts of police officers and social workers. In selecting cases, preference was accorded to verdicts that were frequently cited or referred to by other judgments. In addition, ground-breaking cases taking place in international courts and tribunals, such as the European Court of Human Rights or the Inter-American Commission on Human Rights, have been included. Indeed, each of the decisions appears to have either set a legal precedent, or exemplifies the implementation of progressive domestic violence laws.

In *Valesquez-Rodriguez v. Honduras*<sup>86</sup> the Inter-American Court of Human Rights specifically commented on state tolerance of human rights violations and stressed:

“What is decisive is whether a violation of rights recognized by the American Convention on Human Rights has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without measures to prevent it or to punish those responsible.”

---

<sup>86</sup>Case 4, Inter-Am.C.H.R., OAS/ser.C (1988)

Further the Court added that where human rights violations by private parties are not seriously investigated, the parties were to be taken as, aided by the government making the state responsible under international law. This situation can be made equally applicable in cases where domestic violence is perpetrated by a single individual and who is not represented by the governmental power.

The importance of appropriately enforcing legislation was emphasized by the Inter-American Commission on Human Rights in the case of *Maria da Penha v. Brazil*<sup>87</sup> in which the Commission found the Brazilian Government in breach of its human rights obligations due to significant judicial delay and incompetence in the investigation of domestic violence. The Brazilian *Maria da Penha Law* (2006) states that “domestic and family violence against women is defined as any action or omission based on gender that causes the woman’s death, injury, physical, sexual or psychological suffering and moral or patrimonial damage.”<sup>88</sup> More specifically, the Commission found that Brazilian law enforcement officials had violated the petitioner’s right to a fair trial and judicial protection because of the unwarranted delay and careless processing of this case of domestic violence. In its decision, the Commission recommended prompt compensation for the victim, and urged the adoption of measures at the national level to eliminate the tolerance of domestic violence in the Brazilian legal system.

The need to review and revise existing laws and policy to eliminate discrimination against women was addressed by the Inter-American Commission on Human Rights in the case of *Maria Mamerita Mestanza Chávez v. Peru*<sup>89</sup> which dealt with forced sterilization.

The European Court of Human Rights (ECHR) has been responsible for passing a number of landmark statutes in cases of domestic violence. One of its

---

<sup>87</sup>*Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

<sup>88</sup>The Brazilian *Maria da Penha Law* 2006, Art. 5

<sup>89</sup>*Maria Mamerita Mestanza Chavez v. Peru*, Inter-American Commission on Human Rights, Petition 12.191, Report No. 71/03, 2003.



earliest judgements, passed in 1979 in the case of *Airey v. Ireland*<sup>90</sup>, pertained to the responsibility of states to abide by the Convention for the Protection of Human Rights and Fundamental Freedoms. In this case, the petitioner sought to dissolve her marriage on the grounds of her husband's alleged physical and mental cruelty to her and their children. However, due to the prohibitively high costs of seeking a judicial separation order, she was unable to find a lawyer willing to act on her behalf.

ECHR upheld the legal notion of positive obligations, and stated:

“The substance of Airey's complaint is not that the State has acted, but that it has failed to act... not having been put in a position in which she could apply to the high court...she was unable to seek recognition in law of her de facto separation from her husband.”

Therefore, the court found that Ireland had violated Airey's rights by failing to provide her with a means of accessing the nation's legal system and had thus breached the 'right to access courts' and 'respect for family life'<sup>91</sup>

Domestic violence constitutes a clear violation of several of the rights contained in the European Convention on Human Rights; it was not until 2007 that the European Court of Human Rights dealt substantively with a case involving this issue. In *Bevacqua and S. v. Bulgaria*<sup>92</sup> the appellant filed for divorce and custody after enduring years of domestic violence, but Bulgarian authorities were exceptionally slow in processing the case. As a result of this bureaucratic incompetence, the appellant and her son lived in constant fear of harassment by the husband over the course of the proceedings. The decision, issued by the European Court of Human Rights in 2008, found that, in the specific circumstances of this case, Bulgaria had violated its obligations under Article 8 of the Convention for the Protection of Human Rights and

---

<sup>90</sup>*Airey v. Ireland* (European Court of Human Rights, Application no. 6289/73).

<sup>91</sup> European Convention on Human Rights Convention Articles. 6 and 8.

<sup>92</sup>European Court of Human Rights Application no.71127/01.

Fundamental Freedoms by requiring the domestic violence victim to prosecute the case. The Court awarded costs and damages to the applicants. The case is significant as the first domestic violence case to be decided in the European Court of Human Rights.

In *M C v. Bulgaria*<sup>93</sup> the European Court of Human Rights highlighted the importance of monitoring the manner in which legislation is enforced. The case found that although the article prohibiting rape in Bulgaria's penal code did not mention any requirement of physical resistance by the victim, physical resistance appeared to be required in practice to pursue a charge of rape.

By a series of cases, the European Court has clearly established that domestic violence can constitute a violation of the right to life (article 2); the right to be free from torture or inhuman or degrading treatment (article 3); the right to respect for private and family life (article 8); and the prohibition of discrimination (article 14). One example of this jurisprudence is the case of *Opuz v. Turkey*.<sup>94</sup> It was a case in which the applicant alleged that the authorities had failed to protect herself and her mother from domestic violence on the part of her husband, which had resulted in the death of her mother and her own ill-treatment. The Court held that there had been a violation of Article 2, due to the failure of the authorities to safeguard the right to life of the applicant's mother. The applicant had been subjected to violence, injury and death threats and she alleged that the authorities were negligent towards her situation, which caused her pain and fear in violation of article 3 of the Convention. She argued that the injuries she had suffered amounted to torture within the meaning of article 3. The Court held that the violence suffered was sufficiently serious to amount to ill-treatment within the meaning of article 3, although it did not specify whether it amounted to torture, as opposed to

---

<sup>93</sup>*M C v. Bulgaria*, European Court of Human Rights 39272/98, 4 December 2003.

<sup>94</sup>Application No.33401/02ECHR 9 June 2009; Facts of the case was brought by Nahide Opuz who with her mother suffered years of brutal domestic violence at the hands of her husband. Despite their complaints the police and prosecuting authorities did not adequately protect the women, and ultimately Ms. Opuz's mother was killed by him.

inhuman or degrading treatment. The Court concluded that there had been a violation of article 3. It reads:

‘...as a result of the State authorities’ failure to take protective measures in the form of effective deterrence against serious breaches of the applicant’s personal integrity by her husband.’<sup>95</sup>

In addition, the applicant claimed that there had been a breach of article 14 of the Convention, an argument which was also upheld by the Court. The applicant demonstrated through statistical data that domestic violence affected mainly women, and established that judicial passivity in Turkey created a climate conducive to domestic violence.

The judgment is a call to European States to take domestic violence seriously. In the pioneering ruling *Opuz v Turkey*, the European Court of Human Rights recognized for the first time that domestic violence is a form of discrimination against women, and that states are required to eliminate and remedy it. The case also recognized that domestic violence is not a “private family matter” but that it is in the public interest to ensure state protection from it. The continual nature of domestic violence and the harm to women’s integrity caused was specifically recognised in this case<sup>96</sup>. The effect of the judgment was to mitigate the effects of normalization process and the impact of repeated violations on women subjected to men. The connection between discrimination and violence was confirmed through this case where ECHR held that state’s failure to protect women against domestic violence constitutes a breach of their right to equal protection of the law.

The opinions in *Bevacqua* and *Opuz* represent a significant progression in the articulation of the due diligence standard. Specifically, as the Court held

---

<sup>95</sup> *Id.*, para 176.

<sup>96</sup> It was opined in the case that “although there were intervals between the impugned events...the overall violence to which the applicant and her mother were subjected over a long period of time cannot be seen as individual and separate episodes and must therefore be considered together as a chain of connected events”.

in these cases, states party to the European Convention must provide individuals with the means to obtain some form of enforceable protective measure, such as an order of protection, a restraining order, or an expulsion order. Member states must also establish the legal framework to enable criminal prosecutions of domestic violence when it is in the public interest, even if the victim withdraws her complaint. Through the holdings in *Bevacqua* and *Opuz*, these basic standards have gained binding legal authority within the jurisdiction of the ECHR<sup>97</sup>.

The European Court of Human Rights is certainly to be commended for its jurisprudence in this area, which is having an important impact on the international level, as evidenced by the recent Jessica Lenahan case. In July 2011 the Inter-American Commission on Human Rights referred extensively to the jurisprudence of the European Court in its decision in the case of *Jessica Lenahan (Gonzales) v. United States*<sup>98</sup>. This is the first case brought by a domestic violence survivor against the U.S. before an international human rights court. The facts of this case involved the abduction of Ms. Lenahan's three daughters by her estranged husband. Ms. Lenahan had a domestic violence restraining order against her estranged husband and called the police on numerous occasions following her daughters' disappearance. Despite the existence of the restraining order<sup>99</sup>, the police refused to act. Simon Gonzales then arrived at the police station and opened fire. The police returned fire, resulting in his death. They later found the bodies of the three children in the back of his truck. Gonzales sued the Castle Rock Police Department for failing to protect her daughters, particularly since Gonzales had a restraining order

---

<sup>97</sup> Lee Hasselbacher, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection", Vol 8, Issue 2 *Northwestern University Journal of International Human Rights*, 215 (Spring 2010).

<sup>98</sup> *Jessica Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07,OEA/Ser.L./V/II.128, doc. 19 (2007)

<sup>99</sup> A restraining order can include provisions restricting contact; prohibiting abusive behavior; determining child custody and visitation issues; mandating offender counseling; and even forbidding firearm possession.

against her ex-husband. The case went to the U.S. Supreme Court, where, in 2005, the Court ruled that Gonzales did not have a constitutional right to protection, and that the police's failure to enforce her protection order was not unconstitutional. Gonzales then took her case to the IACHR, alleging the U.S. violated her human rights. The petitioners alleged that the American Declaration imposes a duty on State parties to adopt measures to respect and ensure the full and free exercise of the human rights enumerated therein; a duty which under certain circumstances requires State action to prevent and respond to the conduct of private persons. They furthermore invoked the 'due diligence' principle to interpret the scope of State obligations under the American Declaration in cases of violence against women; obligations they consider the State failed to discharge in this case.

The State rejected the arguments presented by the parties related to the American Declaration and the applicability of the due diligence principle to the facts of this case by claiming that: a) the American Declaration is a nonbinding instrument and its provisions are aspirational, b) that the American Declaration is devoid of any provision that imposes an affirmative duty on States to take action to prevent the commission of crimes by private actors, and that b) even though the due diligence principle has found expression in several international instruments related to the problem of violence against women, its content is still unclear. The Commission considered that the issuance of a restraining order signals a State's recognition of risk that the beneficiaries would suffer harm from domestic violence on the part of the restrained party, and need State protection. This recognition is typically the product of a determination from a judicial authority that a beneficiary – a woman, her children and/or other family members – will suffer harm without police protection. It is a key component in determining whether the State authorities should have known that the victims were in a situation of imminent risk of domestic violence upon breach of the terms of the order.

The Inter-American Commission held that the failure of the police to protect Jessica Lenahan and her children constituted a violation of various provisions of the American Declaration of the Rights and Duties of Man, specifically the right to life<sup>100</sup>, (the right to equality<sup>101</sup>, relating to the special protection of children<sup>102</sup>, the right to judicial protection<sup>103</sup>. *Jessica Gonzales v. United States* marks the first time the Commission has been asked to consider the nature and extent of the U.S.'s affirmative obligations to protect individuals from private acts of violence under the American Declaration on the Rights and Duties of Man. The commission acknowledged and affirmed the failure of due diligence of state authorities to take necessary action to provide security and legal help to the victims in the case. In its decision the Commission recommended that a range of reforms be implemented on the federal and state levels in order to protect women and children from domestic violence.

Ms. Gonzales' Inter-American petition and her related advocacy have triggered a reframing of domestic violence as a human rights problem in the U.S. This new configuration may have reverberating effects on how our legal

---

<sup>100</sup>American Declaration of Rights and Duties of Man, Art. I. Every human being has the right to life, liberty and the security of his person. Petitioners contention was that the State's duty to protect these victims from domestic violence was of broad reach, also implicating their right to life and their right to special protection under Articles I and VII of the American Declaration, given the factual circumstances of this case.

<sup>101</sup>*Id.*, Art. II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor. The petitioners contended that the State's failure to adequately respond to Jessica Lenahan's calls regarding the restraining order, to conduct an investigation into the death of Leslie, Katheryn and Rebecca Gonzales, and to offer her an appropriate remedy for the police failure to enforce this order, all constituted acts of discrimination and breaches to their right to equality before the law and non-discrimination under Article II of the American Declaration.

<sup>102</sup> *Id.*, Art. VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

<sup>103</sup>*Id.*, Art. XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered

and political framework addresses and how the public perceives violence against women<sup>104</sup>.

Some national courts have endeavored and emphasized the idea of supporting the interference of law enforcement officials in cases of domestic violence. In *R v. Godoy*<sup>105</sup>, the Supreme Court of Canada ruled in favour of police officers who, after receiving a call from the respondent's home, forced their way in and arrested the man for assaulting his wife. . Initially, it was held that the arrest was illegal, since the officer's presence on the private property was unauthorized. Although the police entered the respondent's private residence without a warrant, the court found that the intrusion and subsequent arrest were justified based on the duty of law enforcement officials to respond to emergency calls. It was held: "The police duty to protect life is engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined. The importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. This interference is authorized at common law as it falls within the scope of the police duty to protect life and safety."

In *Thurman v. City of Torrington*,<sup>106</sup> the plaintiff here insured the city, arguing that the police department had violated her constitutional right to equal protection under the law. She claimed that officers failed to enforce her estranged husband's probation orders, and ignored his assaults against her. The decision ruled that the city and twenty-four of its officers violated Thurman's

---

<sup>104</sup> Caroline Bettinger-Lopez, "Jessica Gonzales V. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States", 21 *Harvard Human Rights Journal*, 195 (2008).

<sup>105</sup> *R v. Godoy* [1999] 1 S.C.R. 311 Canada, Supreme Court, 1999.

<sup>106</sup> (595 F. Supp. 1521 D. Conn. 1984) United States, Connecticut District Court, 1984 held: "If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. [A] police officer may not knowingly refrain from interference in such violence.... Such inaction on the part of the officer is a denial of the equal protection of the laws."

right to equal protection under the 14th Amendment. Thurman repeatedly notified the police of her husband's threats. Police failed to arrest him despite assurances that they would. Eventually, her husband brutally stabbed her, leaving her disfigured and partially paralyzed. The court concluded that a police officer "may not automatically decline to make an arrest simply because the assailant and his victim are married to each other."<sup>107</sup> The first landmark case in 1984 in Torrington, Connecticut awarded Tracy Thurman \$2.3 million and following the case, many police departments strengthened their policies on responding to domestic violence.

In *Estate of Maria Teresa Macias v. Mark Ihde*<sup>108</sup>, after the death of Mrs. Macias at the hands of her abusive husband, her family filed a case alleging that her constitution rights had been violated. This initial claim was dismissed after the Court found that murder was not a "constitutional deprivation". The Court of Appeals reversed this judgment, on the grounds that the violation of equal protection was the constitutional deprivation, not murder. The Court held:

"The alleged constitutional deprivation in this matter was the alleged denial of equal police protection to Mrs. Macias... The district court erred in concluding that the alleged constitutional deprivation was the murder of Mrs. Macias. The district court also erred in dismissing the action without determining whether the Appellees' conduct deprived Mrs. Macias of her right to equal protection."

---

<sup>107</sup>*Domestic Violence: Best Practices for Law Enforcement Response -A Model Policy Manual* Prepared Under the Violence Against Women Act North Carolina Governor's Crime Commission Violence Against Women Committee January 1998prepared by The Violence Against Women Committee of the Governor's Crime Commissionviewed in [www.ncgccd.org/pubs/dvproto.pdf](http://www.ncgccd.org/pubs/dvproto.pdf). Last visited on 1<sup>st</sup> January, 2013.

<sup>108</sup>219 F.3d 1018 (9th Cir. 2000) United States, U.S. Court of Appeals for the Ninth Circuit, 2000.



In the South African case of *S. v. Bayoli and Ors*,<sup>109</sup> the respondent argued that existing legislation on domestic violence was unconstitutional since it placed the burden of disproving guilt upon the shoulders of the accused. In this particular case, the respondent was punished for violating an order of protection based solely on his wife's testimony; he appealed this decision on the grounds that the state had not proved his guilt beyond reasonable doubt. While the eventual judgement defended the value of presumption of innocence, the court also found that in cases of domestic violence fairness to the complainant required that the enquiry proceedings be speedy and dispense with the normal process of charge and plea.

Domestic violence has now been clearly recognised as a human rights issue, the European Court's jurisprudence being extremely significant in this regard. The decision of the Inter-American Commission in the Jessica Lenahan case is certainly very much to be welcomed, as is the adoption of the new Council of Europe Convention. The challenge is in ensuring that human rights law is used to its full potential in contributing to the movement to combat domestic violence. International case law on domestic violence has aided in establishing the notion that domestic violence is a systemic violation of women's rights and that the justice system has a responsibility to prevent and persecute incidents of domestic violence.

All these cases come to us a reminder that State is to be made accountable for the violations of human rights happening between the private parties. In the cases referred above they never set precedence of norms to be followed by the State for failure to protect liability suits in domestic violence cases. Instead courts have recognized a duty to protect the citizens from the harm done by against others. If law enforcement officers refuse to make an arrest, when a request for assistance is made, a protective order exists, or a history of violence is known, the officers, department and jurisdiction may be

---

<sup>109</sup>*S. v. Bayoli and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) (3 December 1999).

held liable. No where the role of State is envisaged or emphasized as a part to be played in the life of two private individuals. The life of two individuals together may arise out of blood relationship consanguinity, marriage ties or adoption. That which is happening among them is specifically understood as private. The state plays a very limited or rather no role in what is happening between them. There exists no foundational philosophy followed as to the familial relations mentioned in the above cases cited. State cannot moralise human beings within their relationships. Rather these aberrations happening within the human behaviours can be viewed as products of their nurturing, their beliefs, environment, attitudes and the interests that govern them. The Various pieces of legislations, policies and approaches that are developed explicitly acknowledge violence against women as a form of discrimination in general and domestic violence in particular as a violation of human rights. But no significant foundational philosophy is being brought out to work magic within two individuals ie. “respecting the rights of each other”; through these developments that assure a violence free atmosphere to the women at home.

### **3.7 India’s Obligations under International Human Rights Treaties**

India acceded to the ICESCR and the ICCPR in 1979. India is a party to both ICCPR and ICESCR and is therefore bound to respect and implement the standards set by the same. The International Covenant on Civil and Political Rights (ICCPR) has the following provisions that are relevant in the context of domestic violence: equal rights of men and women to the enjoyment of all civil and political rights set forth in it; inherent right to life, and right against arbitrary deprivation of life; equality before the law and equal protection of the law; prohibition of discrimination on grounds including sex; the right not to be subjected to torture or cruel, inhuman and degrading treatment or punishment; the right to liberty and security of person; the right to hold opinions without interference; equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

The relevant provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR) applicable to the context are: equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the treaty, right to work, including the right to opportunity to gain one's living by work that is freely chosen or accepted, widest possible protection and assistance to the family and special protection to mothers for a reasonable period before and after childbirth; right to adequate standard of living, right to be free of hunger, right of everyone to the highest attainable standard of physical and mental health; and right to take part in cultural life.

The Supreme Court had recognized its obligations regarding international law in its decisions in *Kesavananda Bharati v. State of Kerala*<sup>110</sup> the Court held that international covenants and conventions could inform the scope of certain fundamental rights. The Court in *Sheela Barse v. The Secretary, Children's Aid Society*<sup>111</sup> went further and observed that India's international obligations be incorporated into its domestic legislation. In *Vishaka v. State of Rajasthan*<sup>112</sup> the Court explained that recognizing international conventions and norms and construing domestic law whenever they were not inconsistent with each other and domestic law did not address the issue, was an accepted rule of judicial construction." In *Gita Hariharan and another v. Reserve Bank of India & Another*<sup>113</sup> Supreme Court has upheld the need and significance to adhere to the international obligations:

“The message of international instruments:- Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW

---

<sup>110</sup> (1973) 4 S.C.C. 225.

<sup>111</sup> A.I.R.1987 S.C. 656,658.

<sup>112</sup> A.I.R 1997 S.C. 3011,3015.

<sup>113</sup> A.I.R. (1999) 2 S.C.C. 228:1999 (1) C.T.C. 481 para .14.

having accepted and ratified in June, 1993. The interpretation that we have placed ... gives effect to the principles contained in these instruments. The domestic Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.”

### **Ratification of India to CEDAW- Special Ramifications**

India became a signatory to the UN Convention on Elimination of Discrimination Against Women (CEDAW), in 1980 and ratified it in 1993. India has ratified CEDAW with reservations as to Art 5(a), 16(1) and Article – 29(1).<sup>114</sup> Articles 5 (a) and 16(1) of CEDAW is to be specifically highlighted in the Indian context.

Article 5 (a) of the Convention exhorts the state parties to take appropriate measures as to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Article.16(1) exhorts the states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a. The same right to enter into marriage;
- b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- c. The same rights and responsibilities during marriage and at its dissolution

---

<sup>114</sup>Reservation: With regard to Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 relating to arbitration agreements with state parties in matters of interpretation of provisions of CEDAW.

- d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; and
- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.<sup>115</sup>

By entering reservations in these two aspects, the Government of the Republic of India reserves with itself and acknowledges the peculiar socio cultural patterns existing in India and follows policy non-interference in the personal affairs of any Community without its initiative and consent. This reservation was entered into by Indian Government upon the sole satisfaction of the fact that any upheaval of existing socio cultural patterns in the societal fabric is likely to overthrow the whole cultural heritage upon which the Indian civilization thrives. This reservation made by the Government of India sends out the message that the existing socio cultural patterns are unique to India and are to be preserved. The difficulty of enactment of a Uniform Civil Procedure Code for all the communities in India is the best exemplification of the consequence faced in any attempt to up root the existing cultural settings. The

---

<sup>115</sup><http://www.un.org/womenwatch/daw/cedaw/text/econvention.html>. Last visited on 22/nd December 2012.

country acknowledges the socio-cultural institutions of marriage and family and the sanctity of familial relations as inviolable and tries to preserve a *sui generis* model of its own.

CEDAW spells out the state obligation in three broad categories as outlined: firstly, to respect, this implies recognition of the issue of domestic violence by enacting laws and formulating policies<sup>116</sup>; secondly, to fulfill i.e., to actually realize the standards set through laws and policies and ensuring that women are not subjected to domestic violence<sup>117</sup> and thirdly, to protect i.e., to set up institutional frameworks and mechanisms for implementing the standards set through law and policy, and to ensure that such mechanisms function in an efficient manner<sup>118</sup>.

## **Conclusion**

Human rights instruments had effectively acknowledged the issue of violence against women. Apart from violence the specific issue of domestic violence is recognized as a developmental issue through the General Recommendation No.19. Through the decided cases, states are being made accountable for not resorting to protective measures in combating the menace. The trilogy of human rights instruments, cases and commentaries in International law makes a compelling argument that the right to be free from domestic violence is a Human Right for which states can be held accountable.

---

<sup>116</sup>A law on domestic violence enacted by the Indian state sends out a clear message that domestic violence will not be tolerated and that it is both a crime and a civil wrong. However, enacting a law alone is not enough. It should be supported by condemnation of domestic violence from important people in power when a violation takes place

<sup>117</sup>This would mean that the government is obliged to create an environment where women can enjoy secure and peaceful existence within their homes. In its obligation to fulfill, the state has a duty to provide counseling centres, make shelter homes available, raise awareness among key players such as the police, medical professional and members of judicial services and take efforts to change the power relations and attitudes that are some of the root causes for domestic violence.

<sup>118</sup>In the case of domestic violence, the obligation to protect requires the government to appoint, register and allocate funds for different agencies set up under the domestic violence law and to provide them with necessary facilities for their proper functioning.

There appears to have no foundational philosophy laid down though neither the international human rights instruments nor by the decisions laid by Courts that can be made applicable to the familial relations existing within four walls of the home. An examination of national legal framework on domestic violence against women becomes imperative to determine the national responses to the International mandates on the issue. Those issues are addressed in Chapters five and six of the thesis respectively.

.....✂.....

## DOMESTIC VIOLENCE LEGISLATION AND ITS IMPLEMENTATION IN USA AND UK

A Comparative analysis with the western jurisdictions as to how the issue of domestic violence is addressed legally and the strategies adopted to condemn the issue of domestic violence is an important task in understanding the problem and solutions comprehensively. This chapter provides an overview of the comparative legal positions on domestic violence in western jurisdictions specifically U.S.A and U.K, the scope and coverage of the concept, the implementation mechanisms within and the judicial attitude to create an effective Domestic Violence Response System. These jurisdictions have been chosen for the reason that their legislations, policies and approaches have had become models in all over the world. Moreover the concept of coordinated response system was, to a large extent, pioneered and developed into a successful strategy in the US and UK.

The study in the two jurisdictions is categorized into five categories for easy understanding of the topic

1. How is the concept of domestic violence defined and what are the relationships included?
2. What is the scope of the legislative framework?
3. What are the strategic community interventions initiated?
4. What are the merits and demerits?



## 4.1 The USA Experience

Historically the common law of U.S imported from England permitted the ‘rule of the thumb’ and the principle of ‘public- private divide’ within the home from being reported and publicized<sup>1</sup>. The laws known as coverture, which merged a married woman's identity with that of her husband was in rule. As an individual she was held incapable to own property, vote, sign contract, or keep wages earned by employment outside the household. The Mississippi Supreme Court in *Bradley v. State*<sup>2</sup>voiced approval of the husband's role as disciplinarian<sup>3</sup>.

The period from 1960 to 1980 with the support of the feminist agenda was critical in building up an informed citizenry on the issue in U.S.A. During the 1960s, the women's liberation movement started drawing attention to violence committed against women, and the battered women's movement began to form. At its core was the outrage of women who argued that individual cases of violence against women in the home added up to an enormous and unacceptable social problem. By the end of the 1970s, the need for protective measures was felt reflecting the inadequacy of society's response. The Battered Women's Movement emerged out of the feminist perspective, becoming one of the most powerful social justice and service movements in United States history<sup>4</sup>.The legislative reform efforts which started in the mid

---

<sup>1</sup> See *State v. Black* 60 N.C.262, (Win.1864)wherein, Pearson C.J., held that “husband is responsible for the acts of his wife, and he is required to govern his household ,and for that purpose ,the law permits him to use towards his wife such a degree of force, as is necessary to control an unruly temper, and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence or such a degree of cruelty as shown that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.”

<sup>2</sup> 1 Miss. 156 (1824) (U.S. Commission on Civil Rights, 1982).

<sup>3</sup> This decision reinstated the belief that the law should not disturb that role: Let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.

<sup>4</sup> See for details in “Developments in the Law Legal Responses to Domestic Violence”, 78 Harv.L.R. 1499 (1993) See for a detailed discussion, Diane Mitsch Bush, “Women’s

1970's therefore had the goals of improving police, prosecutor and criminal court response to battered wives, creating or enhancing civil legal remedies for battered wives and establishing refuges for battered women and their children.

### **Definition of Domestic Violence and Relationships Covered**

The US Office on Violence Against Women defines domestic violence as a "pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner". The definition adds that domestic violence "can happen to anyone regardless of race, age, sexual orientation, religion, or gender", and can take many forms, including physical abuse, sexual abuse, emotional, economic, and psychological abuse<sup>5</sup>.

This definition refers to a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner .It can consist of physical, sexual, emotional, economic, or psychological acts that serve to intimidate, manipulate, humiliate, isolate, coerce, threaten, or hurt someone.

Legal definitions across the States generally describe specific conduct or acts that are subject to civil and criminal actions, and the specific language used may vary depending on whether the definition is found in the civil or criminal sections of the State's code. In all States, the District of Columbia, Puerto Rico, and the U.S. territories, the statutes specify that only persons who have some sort of personal relationship are protected by the domestic violence laws. The most common relationships listed include spouses and former spouses, persons who are currently living together, who have previously lived together, are involved or were previously involved in a dating or intimate

---

Movements and State Police Reform Aimed at Domestic Violence against Women-A Comparison of the consequences of Movement mobilization in the U.S A and India” , 6 (4) *Gender and Society* 599(1992).

<sup>5</sup> U.S. Dep't of Justice, Office on Violence Against Women, <http://www.ovw.usdoj.gov/ovw-fs.html>. Last visited on 7th December 2008

relationship, or who have a child in common, whether or not they have ever lived together<sup>6</sup>.

Generally, the federal law recognizes an intimate partner as a spouse, a former spouse, a person who shares a child in common with the victim, or a person who cohabits or has cohabited with the victim<sup>7</sup>. The original Violence Against Women Act of 1994 was restricted to only married and co-habiting couples. But the 2000 reauthorization of the Violence Against Women Act broadened the definition to encompass dating couples. This notion is now reflected in many state laws<sup>8</sup>. More recently, a number of states have broadened the definition of “domestic” beyond relationships that are intimate or even romantic in nature<sup>9</sup>. Now in most jurisdictions the class of eligible victims is much broader; including the victim who is divorced, who is a current or former family or household member of the perpetrator, who is related by blood or marriage to the batterer, who is the parent of a child of the abuser, and someone who has been sexually or otherwise intimate with the abuse. Gay and lesbian people in intimate relationships are eligible for relief in about half of the states

An extended definition of domestic violence was inserted into the Violence against Women Act of 1994 by section 3(a) of the Violence against Women and Department of Justice Reauthorization Act of 2005. The term 'domestic violence' includes felony or misdemeanor crimes of violence

---

<sup>6</sup> <http://www.childwelfare.gov/systemwide/laws/policies/statutes/defdomvio.cfm>. Last visited on 20 th February 2012

<sup>7</sup> According to the VAWA Act, a domestic violence misdemeanor is one in which someone is convicted for a crime "committed by an intimate partner, parent, or guardian of the victim that required the use or attempted use of physical force or the threatened use of a deadly weapon" (s. 922 (g)[9])

<sup>8</sup> In Rhode Island, for example, persons who “are or have been in a substantive dating or engagement relationship within the past one year” are considered to be governed by the state’s domestic abuse statute.

<sup>9</sup> Under Colorado law, for example, the civil statute states: “Domestic abuse means any act or threatened act of violence that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship”.

committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction<sup>10</sup>.

The common approach resorted to in U.S.A has been to define violence and harassment in terms of its alleged psychological impact. This is done both by expanding the definition of physical assault to include emotional distress, and by establishing new categories of offenses that are defined in large part by their psychological impact, such as harassment and stalking<sup>11</sup>. The crime of stalking is of recent vintage. The first anti-stalking statute was enacted in California in 1990. There is no standard definition for stalking, but, like harassment, fear plays a pivotal role.<sup>12</sup> Stalking refers to harassing or threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person's home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person's property. Though stalking is a gender-neutral crime, women are the

---

<sup>10</sup> 42 U.S.C. § 13925(a)(6).

<sup>11</sup> Different interpretations to manifestations of violence is adopted in different states. In only five states—Connecticut, Kansas, Idaho, Nebraska, and South Carolina—do statutes define domestic violence simply in terms of overt actions that can be objectively proven or refuted in a court of law. In the other states, the concept of domestic “violence” has become broader. In Hawaii, the statute requires the psychological abuse to be “extreme.” The law reads: “extreme psychological abuse” means an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress. The Michigan statute states: “Harassment” means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. In Oklahoma, causing mere annoyance to the partner can be included under the term harassment.

<sup>12</sup> Special Report on Expanding Definitions of Domestic Violence by Stop Abusive and Violent Environments, November 2010 <http://www.saveservices.org/downloads/SAVE-Expanding-Definitions-of-DV.pdf>. Last visited on 21st February 2012.

primary victims of stalking and men are the primary perpetrators<sup>13</sup>. Stalking when it happens between intimate partners creates a strong link with domestic violence against women. Stalking in most jurisdictions is being addressed as an integral component of an overall strategy to handle domestic violence cases.

### **State Legislations and Issues Addressed**

The first stage of law on domestic violence goes back to the civil protection order, first adopted in 1976, within thirteen years, all 50 states and the District of Columbia passed similar legislation. Initially, in most statutes only married people or individuals living in a committed relationship were eligible to petition for relief.

In the United States the laws that deal with domestic violence may be classified under both Criminal law and Tort law, and certain aspects overlap with Family law. Domestic violence cases are treated as criminal offences and at times it has civil remedies also. Criminal offenses may be classified as felonies or as misdemeanors, although most domestic violence crime is charged and prosecuted as a misdemeanor<sup>14</sup>. All states, territories, and the District of Columbia have statutory provisions for civil protection orders. These statutes provide processes for domestic violence victims to seek relief from domestic violence directly from the court and outside the criminal justice system<sup>15</sup>.

A majority of the states have adopted statutes requiring courts to consider domestic violence as a factor in custody and visitation determinations. In

---

<sup>13</sup><https://www.ncjrs.gov/pdffiles1/ovw/172204.pdf>. Last visited on 13<sup>th</sup> May 2012

<sup>14</sup> In some statutory schemes, subsequent misdemeanor offenses may become enhanced to felony status. In many state criminal codes, domestic violence crimes are addressed in separate code sections (e.g., Alabama) and include specific definitions of what behaviors and relationships constitute domestic violence. In many states, the violation of a civil protection order (restraining order) is a misdemeanor crime. All states and the District of Columbia have separate stalking statutes (National Center for Victims of Crime, Stalking Resource Center). In some states (e.g., Pennsylvania), domestic violence crimes are included in general criminal code provisions (e.g., assault, aggravated assault, sexual assault, rape, kidnapping, theft, burglary, trespassing).

<sup>15</sup> Although the actions brought under civil protection statutes are not criminal matters, violations of protection orders are criminal offenses in many states and the existence of a protection order against an offender raises several issues for the supervision of that offender.

Washington State if the court concludes that a parent has engaged in child abuse or domestic violence, it is precluded from awarding joint legal custody and it may limit unsupervised residential time of the offending parent with the child<sup>16</sup>.

Criminal offenses may be classified as felonies or as misdemeanors, although most domestic violence crime is charged and prosecuted as a misdemeanor<sup>17</sup>. All states, territories, and the District of Columbia have statutory provisions for civil protection orders. These statutes provide processes for domestic violence victims to seek relief from domestic violence directly from the court and outside the criminal justice system<sup>18</sup>.

All the states in USA has its own state laws to deal with domestic violence encompassing its own notions of what forms domestic violence, the relationships to be included in its purview, its own courts of jurisdiction to deal such cases, the orders and remedies passed, the methods of implementation etc. Most state statutes provide that orders of protection may be enforced by police officers, and authorize them to arrest spouses alleged to have violated these orders on the same basis that persons alleged to have committed a crime may be arrested<sup>19</sup>. Additionally many states have enacted legislation that requires police officers to make an arrest 'mandatory arrest provision' when there is probable cause to believe that someone has engaged in specified domestic

---

<sup>16</sup> Prior to the adoption of these provisions, custody judges routinely concluded that the abuse of a parent by the other was irrelevant in custody proceedings; that violence toward a spouse/partner had nothing to do with one's ability to adequately parent

<sup>17</sup> In some statutory schemes, subsequent misdemeanor offenses may become enhanced to felony status. In many state criminal codes, domestic violence crimes are addressed in separate code sections (e.g., Alabama) and include specific definitions of what behaviors and relationships constitute domestic violence. In many states, the violation of a civil protection order (restraining order) is a misdemeanor crime. All states and the District of Columbia have separate stalking statutes (National Center for Victims of Crime, Stalking Resource Center). In some states (e.g., Pennsylvania), domestic violence crimes are included in general criminal code provisions (e.g., assault, aggravated assault, sexual assault, rape, kidnapping, theft, burglary, trespassing).

<sup>18</sup> Although the actions brought under civil protection statutes are not criminal matters, violations of protection orders are criminal offenses in many states and the existence of a protection order against an offender raises several issues for the supervision of that offender.

<sup>19</sup> Majory D. Fields, "Rape and Domestic Violence Legislation: Following or Leading Public Opinion" in Shimon Scetret (Ed.), *Women In Law*, Hebrew University of Jerusalem, Kluwer Law International (1998), pp. 365-377.

violence crimes or has violated a restraining order. These “mandatory arrest laws” (also sometimes referred to as “pro-arrest laws”) were intended to reduce police discretion in responding to domestic violence.

Domestic violence victims could file tort actions against their abusers, in the form of assault and battery, stalking, intentional infliction of emotional distress, and fraud, among others. Perceptions about domestic violence<sup>20</sup> are gradually changing and the inter-spousal immunity doctrine has been abolished in all but two states, providing today’s domestic violence victims with a range of potential tort causes of action. Assault and battery and infliction of emotional distress claims against perpetrators constitute the majority of domestic-violence related torts. The latter, which is recognised in a number of states, is particularly useful where the abuse alleged is non-violent. In cases of negligent infliction of emotional distress, many jurisdictions require that the victim exhibit physical manifestations of emotional distress. Most jurisdictions do not have a similar requirement for cases alleging reckless or intentional infliction of emotional distress.

Creation of Battered Woman syndrome as a civil tort for domestic violence victims was decided in the New Jersey Case *Giovine v. Giovine* in 1995. This was the first case in U.S.A to recognize that separate acts of assault and battery related to domestic violence consisted of a continuous tort that tolls the statute of limitation<sup>21</sup> until the tortuous conduct desists.

The Court has laid down the elements of a battered woman’s syndrome cause of action.

1. Involvement in a marital like intimate relationship;
2. Physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time;

---

<sup>20</sup> In the past, a legal doctrine known as inter-spousal immunity, combined with misguided perceptions of domestic violence as being a private matter, limited a woman’s ability to obtain compensation for abuse committed by a spouse.

<sup>21</sup> Statute of Limitation for most torts of assault and battery was only few years.

3. The above stated abuse has caused recurring physical and psychological injury over the course of relationship; and
4. A past and present inability to take any action to improve or alter the situation unilaterally<sup>22</sup>.

The inability referred is the complete helplessness and mental incapacitation of the abused. This situation is in consonance with the learned helplessness theory as a causative theory behind the perpetration of domestic violence against women. The impact of this decision was to provide the domestic violence victims the legal vehicle to initiate a civil tort. Tortuous conduct giving rise to a mental condition is thus considered a continuous tort. This sends out the message that domestic violence torts are to be separately treated.

Court cases marked the first attempts to challenge and change police procedure in the United States.<sup>23</sup> Arrest policies do differ by jurisdiction even in the same state. Some states, such as New York, Wisconsin, and Minnesota, have adopted mandatory/presumptive arrest policies<sup>24</sup> which dictate that an officer must make an arrest at a domestic situation. Such policies were adopted after it was realized how serious domestic situations could be for the victims and their children. An arrest is usually made after the following conditions have been satisfied: 1. There is probable cause of a crime; 2. The suspect and the

---

<sup>22</sup> Stanley B. Yeldell, "Battered Women's Syndrome :Civil Remedies for the Victims of United States of America" in P. Madhava Soma Sundaram, K. Jaishankar and S. Ramdass (Eds.), *Crime Victims and Justice-An Introduction to Restorative Principles*, Serials Publication, New Delhi (2008), p.339

<sup>23</sup> See for more details, Diane Mitsch Bush, "Women's Movements and State Police Reform Aimed at Domestic Violence against Women-A Comparison of the consequences of Movement mobilization in the U.S and India", 6 (4)*Gender and Society* 594 (1992).

<sup>24</sup> The police should arrest domestic violence perpetrators when probable cause for misdemeanor violence exists, even if the violence does not occur in the officer's presence and even if the victim does not desire prosecution. The proponent of mandatory arrest policies and no-drop prosecution stress that domestic violence is a public harm in which the State should be involved. The psychological state of learned helplessness(theory referred to in the first chapter of this thesis while explaining theories that are causative factors to domestic violence ),the repetitive Nature and cyclical nature of domestic violence and threats perpetrated against the children are the driving factors behind such strategic interventions.



victim fit the definition of having a domestic relationship; 3.The suspect's alleged act fits the definitions of domestic assault;4.There is reason to believe that the domestic abuse will continue if the suspect is not arrested and/or there evidence of injury; 5.The incident was reported within 28 days of occurrence. Usually, if any of these conditions is not satisfied, the officer may use his or her discretion in deciding whether to make an arrest. The expansion of arrest authority to include domestic violence crimes has given law enforcement a powerful tool for domestic violence intervention in situations in which they previously concluded (erroneously or otherwise) that they had no authority to act. In some jurisdictions, police may be required to use strict crime scene investigation and evidence gathering techniques as to do away with the victim's testimony by the prosecutors<sup>25</sup>.

Criminal prosecution constitutes another tool for ensuring victims' safety. Changes in the police response to domestic violence have also influenced the changes in prosecutorial practices. Prosecutors across the country has enormous discretion and they resort to either no-drop policies wherein they can proceed without victim's co-operation or allow the victims to drop charges on completion of counseling and an official explanation to the court.

Civil restraining orders or protection orders developed in response to the inefficiency of criminal justice system to deal with the issue of domestic violence. Prior to 1970's it could be obtained only on filing divorce proceedings. Before the federal interventions came up to address violence against women in USA the passage of civil protection order statutes<sup>26</sup> at the

---

<sup>25</sup> Roberta L. Valente, Barbara J. Hart ,Seema Zeya and Mary Malefyt, "The Violence Against Women Act of 1994 The Federal Commitment to Ending Domestic Violence, Sexual Assault, Stalking and Gender-Based Crimes of Violence" in Clire M. Renzetti Jeffrey L. Edleson, Raquel Kennedy Bergen(Eds.), *Source Book on Violence Against Women*; International Educational and Professional Publishers Thousand Oaks London, Sage Publications New Delhi (2001),p.304

<sup>26</sup> Advantages of civil protection order statutes areas follows: Protection order statutes are designed to allow victims to proceed on their own, without an attorney, and in some cases (e.g.,

state level precipitated a great change in social attitudes, In many states for the first time there was a legal recognition that certain patterns of action engaged in by a spouse or other intimate partner, including physical violence, sexual assault, financial deprivation, threats, stalking, and harassment constituted a prohibited activity called domestic violence<sup>27</sup>. These orders which are in the nature of injunctions directed abusive spouses to cease beating and threatening their spouses and children, order the respondent to stay away from the petitioner, her workplace or school and the children and their schools, not contact her, move out of the petitioner's residence, follow custody and visitation orders, and pay child support if children are involved. Child custody may be awarded and visitation prohibited or limited to supervised settings to assure the safety of the children as well as their mother. Abusive spouses may be ordered to pay the medical bills and legal fees incurred by the abused spouse. This relief is available on an immediate, temporary basis prior to the time set for a full hearing and before notice is given to the accused spouse<sup>28</sup>.

An order in the nature of temporary restraining order could be granted by the court on request by the battered spouse. A victim who is threatened with imminent harm or has already been harmed by the abuser and/or already has an order of protection against the abuser has no other legal remedy than to seek a restraining order. Violators of such orders are subject to civil contempt as well as criminal penalties. Like domestic abuse, laws governing these orders are also enacted on the state level and vary among the different states.

---

Family Court) without the involvement of the criminal justice system. The procedures for obtaining an order and the types of orders vary, and may include emergency orders, temporary orders, and final or permanent orders. Orders issued through a civil process can provide critical relief for domestic violence victims. Civil protection orders can be obtained relatively quickly, providing a wide range of relief needed to support distance, protection, and independence from an abuser as well as providing an alternative to the criminal justice system. For more details refer Cheryl Thomas, "Domestic Violence" in Kelly. D Askin and Dorean M.Koeing (Eds.), *Women and International Human Rights Law* 235 (1999), Transnational Publishers, Inc.Ardsley, New York.

<sup>27</sup> *Supra* n. 21 at p.283.

<sup>28</sup> *Supra* n. 18 at p.376.

## **The Violence Against Women Act-An Overview**

The problems that cropped up due to weak enforcement of protection orders<sup>29</sup> and an existence of different laws in different states to the disadvantage of victims led to the realization that changes to the state's family and criminal laws is not a sufficient remedy to eliminate violence against women. The Violence Against Women Act (VAWA)<sup>30</sup> is a comprehensive legislative package specifically addressing domestic violence, sexual assault and stalking first enacted in 1994<sup>31</sup> and reauthorized with new provisions in 2000<sup>32</sup> and 2005.<sup>33</sup> The intention behind the passage of VAWA was to influence state legislators, particularly in regard to arrest policy for domestic situations. In order to receive Federal funding, states must adopt certain responses. The Act aggressively attempted to: mandate the arrest and prosecution of domestic violence offenders; devote greater resources to domestic violence training for law enforcement; make certain domestic violence offenses federal crimes; and provide various civil remedies for victims. This Act has had a profound effect on state laws governing domestic abuse. The Act offers direction for a new collaborative approach between law enforcement, prosecutors, the courts and the judiciary, and the medical and

---

<sup>29</sup> Protection orders are criticized as having soft approach to women battering cases as it prevents the future conduct and has little enforcement effect with no effective sanctions. See *Supra* n. 4 at p.1511.

<sup>30</sup> The Violence Against Women Act of 1994 (VAWA) is a United States federal law. The enactment of the VAWA in 1994 focused national attention on domestic violence and "its detrimental effects on families, business, and society." The Act also led to the infusion of large sums of money into the nation's court systems, law enforcement, and communities "to improve access to justice and services for domestic violence victims and to increase batterer and system accountability" These efforts included the development of specialized judicial processes for domestic violence. It was passed as Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994 HR 3355 and signed as Public Law 103-322 by President Bill Clinton on September 13, 1994.

<sup>31</sup>Pub.L. No. 103-322, Tit. IV, 108 Stat. 1796 (1994).

<sup>32</sup>Pub.L. No. 106-386, 114 Stat. 1464 (2000).

<sup>33</sup>Pub.L. No. 109-162, 119 Stat. 2960 (2005).

health community, social service agencies, community leaders, and the private sector. A federal domestic violence victim has the following rights<sup>34</sup>

1. The right to be treated with fairness and with respect for the victim's dignity and privacy;
2. The right to be reasonably protected from the accused offender;
3. The right to be notified of court proceedings;
4. The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at the trial;
5. The right to confer with the attorney for the Government in the case;
6. The right to restitution;
7. The right to information about the conviction, sentencing, imprisonment, and release of the offender.

Of the many portions of VAWA, five sections have the potential for having the greatest impact on improving the handling of crimes of violence against women in USA. These include:

The full faith and credit provision<sup>35</sup> means if one court issues a protection order, all other states, territories, and tribes must enforce it as vigorously and completely as they would enforce their own orders<sup>36</sup>. States have adopted legislation to make sure the basic rules of Full Faith and Credit provision are followed. This is equally applicable to protection orders issued during criminal proceedings. The interstate crimes of domestic violence<sup>37</sup> suggests that States and territories only have the authority to address crimes committed completely within their borders. Congress crafted three new federal

---

<sup>34</sup> 42 U.S.C. S. 10606(b).

<sup>35</sup> (18U.S.C Ss. 2265,2266).

<sup>36</sup> *Supra* n. 18, p.286.

<sup>37</sup> (18 U.S.C. Ss. 2261,2262).

crimes Interstate Travel to commit Domestic Violence<sup>38</sup>, Interstate Violation of a Protection Order<sup>39</sup> and Interstate Stalking<sup>40</sup> as one of the crimes related to domestic violence envisaged under the VAWA is that of Stalking<sup>41</sup>. This new law makes it a federal crime to cross a state line or to travel within areas of special federal jurisdiction with the intent to injure or harass any person if, during the course of or as a result of the travel, the offender place as the person or a member of the person's immediate family in treasonable fear of death or serious bodily injury. There is no requirement under this statute that actual bodily harm occur for a conviction to result<sup>42</sup>. An abuser can no longer use the confusion of multiple jurisdictions to evade justice.

VAWA has effectively addressed the problems faced by battered immigrant women under the user friendly provisions of the Immigration and Naturalization Service and has sought to reduce the barriers to permanent residency and citizenship. For the first time for many of these women, their immigration decisions and processes are under their own control, not subject to the harassing whims of the abusive spouse<sup>43</sup>. VAWA also resulted in changes to the Immigration and Nationality Act so that now it is possible for abused spouses, children, and parents of U.S. citizens or lawful permanent residents (green card holders) to petition on their own (self-petition) for lawful

---

<sup>38</sup> [18 U.S.C. S. 2261(a) (1)-(2)] An abuser may commit a crime of interstate domestic violence when he decides intentionally to travel from one state, tribal land or territory to another to threaten or harm a spouse or an intimate partner. An abuser may also commit this crime by forcing a spouse or intimate partner to cross a state, tribal or territorial line to threaten or harm that spouse or intimate partner. In both cases the abuser must cause bodily injury to the victim. This crime covers actions that take place when a protection order has not been issued. An abuser can no longer evade prosecution just because it is unclear in which state, tribe or territory the harm to the victim began.

<sup>39</sup> [18 U.S.C.Ss.2262(a)(1)-(2); This section recognizes the crime of travelling across a state, territorial or tribal border with the intent to violate a protection order; when the violation of the order occurs, the crime is complete. Only violations of certain provisions within a protection order can trigger the application of this law-specifically behavior constituting threats of violence, repeated harassment or bodily injury to the protected persons.

<sup>40</sup> [18U.S.C.S. 2261A].

<sup>41</sup> See for more details, *supra* n. 18 at p.292.

<sup>42</sup> *Supra* n. 18, p.293.

<sup>43</sup> For more details, see *supra* n. 21, p.294-295.

permanent resident status/obtain a green card. This is significant because it means the abused immigrant no longer needs to rely on the abuser to obtain or maintain legal immigration status in the U.S.

The gun control provision<sup>44</sup> is yet another major development in VAWA. In 1994, Congress recognized the risk that firearms present to victims of domestic violence when it amended the Gun Control Act<sup>45</sup> to include four firearm prohibitions related to domestic violence. These amendments make it a federal crime for people to, possess a firearm or ammunition if they are subject to certain types of protection orders or have been convicted of certain types of misdemeanor domestic violence crimes<sup>46</sup>.

The enactment of VAWA led to the creation of 3 new grant programmes; the Grants to encourage Arrest<sup>47</sup>; the Law Enforcement and Prosecution Grants to Reduce Violent Crimes Against Women (popularly known as STOP Violence Against Women Formula Grant Program and STOP Violence Against Indian Women Grant Program<sup>48</sup>);and the Rural Domestic Violence and Child Abuse Enforcement Assistance Grants<sup>49</sup>. VAWA also issues grants to support domestic violence shelters, rape prevention courses, domestic violence prevention and intervention programs, and programs aimed at strengthening law enforcement, victim services, and prosecutorial/judicial responses domestic violence<sup>50</sup>. These grant programmes are administered by the U.S Department of Justice's Violence Against Women Office.

---

<sup>44</sup> [18 U.S.C.S.922(g)(8)].

<sup>45</sup> [18U.S.C.S.921,et seq.].

<sup>46</sup> 18U.S.C.S. 922(g)(1)-(9) Exemption;]Law enforcement and military personnel who are subject to qualifying protection orders are exempt from this section while on duty. Transfer of firearm to a second person with full knowledge or has reasonable cause to believe the second person is subject to one of the types of protection orders covered by this law is also a federal crime.[18U.S.C.S.922(d)(8)].

<sup>47</sup> (42U.S.C. S.3796hh).

<sup>48</sup> (42U.S.C. S. 3796gg).

<sup>49</sup> (42U.S.C. S. 13971). See for details, *supra* n. 21, p.297.

<sup>50</sup> *Supra* n.18, p.297.

The uneven framework of laws existing across the country leading to unjust differences in the outcomes of cases addressing violence against women, the historical bias of the law and the legal professionals as to the legally inferior status of women compared to men led to the creation of civil rights remedy to address the discriminatory injustices. The civil rights remedy was primarily designed to give the victim of a gender motivated crime the right to sue in federal or state court for monetary damages<sup>51</sup>.

However, in 2000, the United States Supreme Court in a case of *United States v. Morrison*<sup>52</sup> held that the United States Congress did not have the authority to enact the civil law remedy in the Violence against Women Act. The basis of this decision was, inter alia, that gender-motivated crimes of violence are not “economic activity” nor do they affect interstate commerce for the purposes of the commerce clause in the United States Constitution. Of course, if women are deemed to be on the margins of public life, their abuse would not constitute a retardation of the economy. Because women are not perceived as pivotal public or economic players, they do not warrant the same status and consideration as men by public structures. The United States Supreme Court revealed that women are not relevant to the public sphere: that violence against women, and therefore women themselves (as what could be a greater curtailment of an individual’s commercial participation than violence) cannot and do not fall within the purview of a commercial conversation. This case further highlights the failure of the domestic legal system to take steps towards curing private torture. It struck down a portion of the Violence Against Women Act (the more formal title of which is the Civil Rights Remedies for Gender-Motivated Violence Act). The act was an attempt by Congress to allow

---

<sup>51</sup>See for details *supra* n. 21, p.298. Monetary damages was presumed to be necessary to cover the costs borne by victims of violence against women, including medical and mental health treatment, job retraining, loss of property and assets and a host of other financial and physical injuries arising from the offenders commission of crimes of violence.

<sup>52</sup> 529 U.S.598 (2000) *United States v. Morrison* invalidated the section of the Violence Against Women Act (VAWA) of 1994 that gave victims of gender-motivated violence the right to sue their attackers in federal court, although program funding remains unaffected.

a person to sue for damages if another person “commits a crime of violence motivated by gender.” The Supreme Court, although sympathetic to issues of domestic violence, held that domestic violence did not involve a sufficient connection to economic activity to be justified under the Commerce Clause of the U.S. Constitution. It also held that since the conduct the act sought to prevent was private conduct rather than conduct of the state government, the act also was not a proper exercise of power under the Constitution’s Fourteenth Amendment<sup>53</sup>. Although the Court held that Congress did not have the power to create a remedy for domestic violence, victims of domestic violence still can use state laws seek to prevent further violence and collect damages for violence that already has been done.

### **Community Intervention Strategic Models**

The Community Organizing Model has proved to be highly effective in several communities in the U.S. Under this model, each individual member of the community is encouraged to actively engage in the effort to prevent domestic violence. An unambiguous message is combined with greater awareness-raising on the manner in which the entire community can adopt practices and undertake tasks on an individual basis to further the goal<sup>54</sup>.

One of the areas of co-ordinated strategy implemented in United States as a part of VAWA (Reauthorized in 2005) has been the provision relating to federal public housing, based on the recognition that women facing violence

---

<sup>53</sup> Another option desperate women have used in response to unchecked violence and abuse is to sue the police for failing to offer protection, alleging that the police violated their constitutional rights to liberty and equal protection under the law. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” This clause prohibits states from arbitrarily classifying individuals by group membership. If a woman can prove that a police department has a gender based policy of refusing to arrest men who abuse their wives, she can claim that the policy is based on gender stereotypes and therefore violates the equal protection laws.

<sup>54</sup> Indira Jaisingh, Asmita Basu, Brototi Dutta- Research Paper on Domestic Violence Legislation and its Implementation—An Analysis For ASEAN Countries based on International Standards and Good Practices United Nations Development Fund for Women and Women’s Rights Initiative Lawyer’s Collective India p.43. See for details available at <http://cedaw-seasia.org/docs/DomesticViolenceLegislation.pdf>. Last visited on 20<sup>th</sup> February, 2012



need to be empowered in multiple ways. Title VI of VAWA therefore extends the protection provided to vulnerable sections under the Public Housing Scheme by providing protection specifically to survivors of domestic violence who utilize such public housing and emergency shelters. The title says that a survivor of domestic violence cannot be evicted from her shelter provided by housing programmes on the basis that she is facing domestic violence. This step aims to counter the problem of women being evicted from housing on the grounds of a crime being committed by a occupant or guest, even though that crime may constitute an act of domestic violence. The tenancy rights of a survivor of domestic violence are protected under the law because of recognition of her vulnerable situation. Domestic violence against immigrant women has been a major source of concern in the United States. Policy makers have acknowledged the need for protective measures to address the vulnerability faced by immigrant women and their children. This was achieved through two different provisions: firstly by allowing self-petitions by women for lawful permanent resident status. In order to avail of this provision, the woman is required to prove, in addition to the immigration status of her spouse that she has suffered extreme cruelty or abuse, and that among other things, she and her children will face extreme hardship if deported.; and secondly by applying for VAWA suspension of deportation. This provision has the same requirements as the self-petitioning provision, except the additional requirement of three years of physical presence in the United States. This provision entitles women who were not covered under the first clause to get protection from being deported, like divorced women or women whose husbands have lost lawful immigrant status due to unlawful activities.

The Office on Violence Against Women (OVW), a branch of the U.S. Department of Justice, has established the “VAWA Measuring Effectiveness Initiative” to collect qualitative data on victim services, staffing, criminal justice case processing, and other VAWA program services in order to determine the law’s progress, enable long-term planning to combat violence

against women, and to report these results to the U.S. Congress. Although organizations such as the Lawyers Collective and National Commission of Women have played a monitoring function for the PWDVA, their important role needs to be supported and strengthened to create more accountability<sup>55</sup>.

The OVW also administers government funding for the Family Justice Center Initiative, which brings together NGO's, victim service providers, law enforcement officers, forensic medical professionals, lawyers, and community-based organizations under one roof in order to make victims' quest for justice within the criminal justice system more efficient and effective<sup>56</sup>. A one-roof system for service providers in India may enable increased monitoring and effectiveness of the Act.

An interesting feature of the VAWA 2005 STOP programme is the grant eligibility requirement that states should incorporate, as part of their strategies, the forging of partnerships between the justice system and survivor advocacy organizations, and include non-profit, faith-based and community organizations as partners. It is important to note that a majority of the programmes that have emerged as good practices have been aided by the VAWA grant programme

Another development in the field of domestic violence is the specialized courts. Compared to other problem-solving courts, the offenses involved are violent, not non-violent; court proceedings are primarily adversarial, not therapeutic; and the perpetrator's behavior is viewed as learned rather than rooted in treatable addiction. The promise of domestic violence courts is that they can institutionalize procedures that promote victim safety, ensure accountability for domestic violence perpetrators and enhance informed, educated judicial decision-making. The first identifiable court of the kind was

---

<sup>55</sup>[http://www.hrln.org/hrln/pdf/intern\\_work/PWDVA%20Article%20Rakhi%20Lahiri\\_formatte d%20by%20Karuna\\_.pdf](http://www.hrln.org/hrln/pdf/intern_work/PWDVA%20Article%20Rakhi%20Lahiri_formatte d%20by%20Karuna_.pdf). Last visited on 22 nd October,2012.

<sup>56</sup> U.S. Department of Justice, Office on Violence Against Women Special Initiatives, available at: <http://www.ovw.usdoj.gov/pfjci.htm>.

the integrated (civil and criminal) domestic violence division established in Dade County (Miami), Florida in 1992<sup>57</sup>. To sum up, the law is imperfect because the application of statutory and case law are uneven. Courts, prosecutors, police, parole boards and crime victim compensation boards all exercise a great deal of discretion in implementation of the law.

### **Specialized Domestic Violence Courts**

Specialized Domestic violence courts were developed as part of the coordinated response of the justice system to the issue of domestic violence in American jurisdictions like Dade County, Florida, Duluth, Minnesota, and La Crosse, Wisconsin. Court specialization in the US has been grounded in ‘problem-solving’ or ‘therapeutic’ approaches to domestic violence. The American courts have, for the most part, served as models for the Canadian domestic violence courts. Based on the principles of therapeutic jurisprudence<sup>58</sup>, preventive law and restorative justice, the two model courts have both criminal and civil jurisdictions with the express purpose of ensuring victim safety and holding the perpetrator accountable. The emphasis is on treatment of perpetrators rather than punishment. Batterer intervention programmes assume significance under this approach. The combining of traditionally separate systems into a single integrated approach contributes to the comprehensive provision of services by supplying a single forum within which both criminal and civil matters can be addressed. The judges also form part of the larger community initiatives and provide sensitization training. Benefits of specialisation were in terms of increased judicial understanding of

---

<sup>57</sup> Dade County’s Domestic Violence Division hears all criminal misdemeanors involving domestic violence and petitions for civil protection orders. Dade County addresses domestic violence from a community-wide perspective and incorporates into the court process referrals for counseling, batterer intervention programs, and other resources for victims, batterers, and their families.

<sup>58</sup> Conference of Chief Justices and Conferences of State Court Administrators of America 2000 has equally agreed upon the concept of therapeutic approach and have included the same approach in drug courts and mental health courts. See for more details, Susan Elley, “Changing Practices: The Specialised Domestic Violence Court Process”, 44(2) *The Howard Journal* 113(2005).

domestic violence issues, perpetrator accountability and more comprehensive support for victims at an early stage. Hence, both the initiatives utilize an integrated community approach to domestic violence cases that comprises support and advocacy services for survivors, and form a comprehensive response in providing a single forum where women facing domestic violence can seek access to justice.

The Core Components of Specialist Domestic Violence Courts identified by the Family Violence Prevention Fund<sup>59</sup> are access to advocacy services<sup>60</sup>, coordination of partners<sup>61</sup> victim and child friendly court<sup>62</sup> specialist personnel<sup>63</sup> even handed treatment<sup>64</sup>; integrated information systems<sup>65</sup> evaluation and accountability<sup>66</sup> protocols for risk assessment<sup>67</sup> ongoing training<sup>68</sup> compliance monitoring<sup>69</sup> and sentencing.<sup>70</sup>

Specialised Domestic violence Courts themselves may be seen as grounded in principles of what has been termed ‘therapeutic approach’. This signals a welcome move away from traditional adversarial principles and instead adopts a coordinated and problem-solving approach in an effort to meet the needs of victims, their families and the community. Confined within

---

<sup>59</sup> <http://www.britsocrim.org/volume7/008.pdf>. Last visited on 9<sup>th</sup> June, 2012.

<sup>60</sup> Advocates act as a ‘liaison, buffer and contact’ between the victim and the court, a source of referrals to other services and, with consent, a conduit of information to the court.

<sup>61</sup> This was accomplished with regular meetings and joint training

<sup>62</sup> Security at the court should be reviewed and if necessary improved, building on best practice (e.g., separate waiting areas, child care facilities, security guards trained in domestic violence).

<sup>63</sup> Specialist domestic violence training for all magistrates/judges, court administrators, prosecutors and other key personnel.

<sup>64</sup> Both parties should be adequately represented and the court’s tone should indicate that domestic violence is being treated seriously.

<sup>65</sup> Systems and protocols in place for sharing and accessing information, to connect the court with community-based service providers and ensure compliance with orders

<sup>66</sup> Plans for evaluation (and the systems to carry it out) should be in place from the outset

<sup>67</sup> All agencies should gather information on factors known to increase risk to facilitate risk assessment.

<sup>68</sup> Training should be on a continuous rolling basis and be joint training (to increase each agency’s understanding of each other’s roles).

<sup>69</sup> Through submission of reports to the court or regular review hearings, defendants’ compliance with court orders should be monitored.

<sup>70</sup> It is to be consistent and promote accountability from domestic violence offenders.

specialist courts, cases on domestic violence are regarded as having higher status, top priority cases requiring skilled lawyers<sup>71</sup>. The therapeutic approach posits that the legal system can promote the well-being of both survivors and perpetrators of domestic violence.

### ***The Merits and Demerits***

The attitude of the police and prosecution in most jurisdictions has generally been that of hesitant enforcement, based on the notion that domestic violence is a “private matter” where the State has no role to play. The battered women’s movement in the United States initiated and campaigned for a stronger criminal justice response as part of systemic reforms on the issue of domestic violence that resulted in a sea change in official policy in most states, providing for mandatory arrest and prosecution of domestic violence offenders. A mandatory arrest policy clearly states that, as far as the State and the society are concerned, there is zero-tolerance for domestic violence<sup>72</sup>. Mandatory prosecution is considered to be essential as having a deterrent effect in a society where domestic violence is a public policy concern and where women face severe barriers in access to justice.

The prosecution of the new federal crimes and enforcement responsibilities created by VAWA caused an enormous shift in how seriously these crimes were treated on the state level. Prior to the passing of VAWA, specialized units in police departments, prosecutor’s office or courts to deal with domestic violence, sexual assault and stalking. It defined new national standards and expectations regarding community responses to domestic

---

<sup>71</sup> This is the opinion collected from the literature review on specialized domestic violence courts. The three primary benefits of specialization of courts have been identified by American Bar Association, 1996 are the following 1. fostering improved decision making by having experts decide complex cases 2. reducing backlog of cases in general courts by shifting complex cases to specialized courts and 3. decreasing the number of judge hours required to process complex cases by having experts deciding on such issues. Refer for more details to Supra note 53 at p.121

<sup>72</sup> Scholars have opposed mandatory arrest on many grounds. For more details, see *supra* n. 4 at pp.1538,1539

violence, sexual assault and stalking. In the absence of any substantive federal remedy for failure to protect women's rights, VAWA's role in preventing and punishing violence against women is limited primarily to making grants to state and local police and advocacy organizations who seek to implement training or programming, funding domestic violence service provision and training, providing immigration relief to non-citizen victims of violence, and coordinating interstate recognition of protective orders.

The Reauthorized VAWA 2005 has introduced new provisions and programmes to provide survivors of violence further housing rights. Amended various laws to ensure that survivors of domestic violence would not be evicted from or denied public housing because they are survivors and provided funding for educating and training public housing agency staff, developing improved housing admissions and occupancy policies and best practices, and improving collaboration between public housing agencies and organizations working to assist survivors of violence<sup>73</sup>.

Children of abusive families are also protected under VAWA. In addition to the federal legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIA) also relaxed norms, particularly with regard to the 3-10 year ban on re-entry into the United States. VAWA was reauthorized in 2000 and 2005, further expanding the scope of protection given to battered immigrant women, by extending immigration relief to a larger group of survivors of violence, including survivors of elder abuse and adolescent children.

Another important measure was the authorization of the Legal Services Corporation funded programmes to use any source of funding to assist survivors of domestic violence<sup>74</sup>. Legal aid, including independent legal advice,

---

<sup>73</sup><http://www.hrln.org/hrln/womens-justice-/reports/641-national-consultation-on-the-protection-of-women-from-domestic-violence-act-2005.html>. Last visited on 20<sup>th</sup> February, 2012.

<sup>74</sup>*Supra* n. 49 available at <http://cedaw-seasia.org/docs/DomesticViolenceLegislation.pdf> Last visited on 20<sup>th</sup> February, 2012.

are critical components of complainants/survivors' access to, and understanding of, the legal system and the remedies to which they are entitled. Legal representation has proven to increase the likelihood of a positive outcome for the complainant/survivor in the legal process. In various jurisdictions in the United States, Government-funded domestic abuse service centres are located in court buildings to provide efficient and easy access to legal advice and other services, in various languages, for domestic violence complainants/survivors.

Of all the changes created by VAWA, the grant programs had the greatest impact on social and system responses to domestic violence, sexual assault and stalking. With its legal authority and financial supports, it has created a new climate that promotes victim safety, offender accountability, and a responsive system of justice. Funds are channeled towards sensitivity training programs for law enforcement, lawyers, the judiciary, and court personnel on domestic violence issues and in the importance of responding to domestic violence calls and civil protection order violations, as well as training medical staff on detecting signs of domestic violence. Funds have also been allocated to various initiatives helping domestic violence victims receive legal aid, maintain housing and employment, retain confidentiality, assist rural populations, older women, immigrant women and children, and women with disabilities in accessing victim services, and maintain a national domestic violence hotline<sup>75</sup>.

The specialized domestic violence court has the advantage of ensuring victim safety and it offers greater consistency in sentencing. It offers fast track access to programmes for perpetrators intended to control their violent behavior and with proven efficiency<sup>76</sup>.

The criticism leveled against the effectiveness of VAWA is that it is non-binding on states and is primarily a source of grants. Multiple and

---

<sup>75</sup> U.S. Department of Justice, Office on Violence Against Women Facts About VAWA, available at: <http://www.ovw.usdoj.gov/docs/vawa.pdf>. Last visited on 20/ th February, 2012.

<sup>76</sup> For advantages of specialized court, see *supra* n. 53, p.114.

overlapping jurisdictions and multiple legal actions pending in different courts of different states has complicated the supervision of domestic violence offenders. Litigating domestic violence disputes at the state level also has an important impact on judicial understanding of domestic violence; each jurisdiction adopts its own method of judicial education, as well as its own remedy. States differ on the type of relationship that qualifies under domestic violence laws. In many states the laws are still not encompassing the totality of the effects of violence on women.<sup>77</sup> The mandatory arrest policies are likely to be counter-productive and may lead to increased violence in certain situations<sup>78</sup>. Non Cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases<sup>79</sup>.

Many local government domestic violence programmes have received scholarly treatment and publicity, including the San Francisco Family Violence Project, Quincy Plan (Massachusetts) and programmes in Duluth and Minneapolis<sup>80</sup>. The community intervention strategies can be highly successful in an empowered society and enlightened citizenry. Therapeutic approach as contemplated through specialized domestic violence courts to be made workable requires commitment from all parties – from police and judiciary to healthcare and voluntary and community sector support workers. Way back from 1980's police non-cooperation, prosecutorial non-cooperation and judicial

---

<sup>77</sup> Some states still don't recognize that domestic violence involving pregnant women should be treated as a violent felony because it also affects the unborn child. Even when domestic violence involves a pregnant woman, the abuser is often still awarded custody rights after the child is born because the law does not recognize the abuse against the pregnant woman as abuse against the unborn child

<sup>78</sup> For more details, see "Developments in the Law: Legal Responses to Domestic Violence" 106 Harv.L.Rev.1498 (1993).An opposing argument is given by in favour of mandatory Arrest. Evan Starke, "Mandatory Arrest of Batterers : A Reply to its Critics", in Eve Buzawa & Carl G.Buzawa (Eds.), *Do Arrest and Restraining Orders Work?* (1996), pp.115-149.

<sup>79</sup> For more details, see Douglas E.Beloof & Joel Shapiro , "Let the Truth Be Told: Proposed Hearsay Exceptions to admit Domestic violence Victims Out of Court Statements as Substantive Evidence."11 Colum. .J. Gender &L.1(2002)

<sup>80</sup> See for details, *supra* n. 4,pp.1516,1517,1525.



non cooperation added with victim non cooperation has led to the difficulties in dealing with the issue of domestic violence in U.S.A.<sup>81</sup>

Given the legislation social change is not instantaneous. It is a complex process that can be accelerated by legislation. Given the force of law and the necessary funding for programs, it is highly possible to attain the goal of combating domestic violence

## **4.2 The UK Experience**

National laws in European countries are based either on Roman law (e.g. Germany) or the French “code civil” (e.g. France, Belgium, Italy, Portugal, and Netherlands). The historical and philosophical underpinnings as to the treatment of women in society was more or less similar<sup>82</sup>.

### **Definition of Domestic Violence and Relationships Covered**

There is no specific criminal offence of domestic violence –but there exists a government-backed definition agreed in 2004.

“Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”<sup>83</sup> The definition is supported by an explanatory text in the following lines:

The definition acknowledges that domestic violence can go beyond actual physical violence. It can also involve emotional

---

<sup>81</sup> For more details see, Maureen McLeod, “Victim Noncooperation in the Prosecution of Domestic Violence” 21 *Criminology* 395 (1983)

<sup>82</sup> With marriage, women were subject to the husband’s guardianship. According to §213 of civil code, the husband was obliged to protect his wife, whereas her duty was to obey. In Roman law, family, house and courtyard were subordinated to ‘major domus’, the man of the house (patria potestas). He had the unrestricted right to issue corporal punishment to his subordinates (ius vitae necisque).

<sup>83</sup> This is the Government definition of domestic violence agreed in 2004. It is taken from Policy on Prosecuting cases of Domestic Violence, Crown Prosecution Service, 2005.[http://sentencingcouncil.judiciary.gov.uk/docs/web\\_domestic\\_violence.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_domestic_violence.pdf). Last visited on 20<sup>th</sup> February, 2012

abuse, the destruction of a spouse's or partner's property, their isolation from friends, family or other potential sources of support, control over access to money, personal items, food, transportation, the telephone and stalking. Violence will often be witnessed by children and there is an overlap between the abuse of women and abuse (physical and sexual) of children. The wide adverse effects of living with domestic violence for children must be recognised as a child protection issue. They link to poor educational achievement, social exclusion and to juvenile crime, substance misuse, mental health problems and homelessness from running away. It is acknowledged that domestic violence and abuse can also manifest itself through the actions of immediate and extended family members through the perpetration of illegal activities, such as forced marriage, so-called 'honour crimes' and female genital mutilation. Extended family members may condone or even share in the pattern of abuse<sup>84</sup>.

This definition recognizes same sex relationships. Family members are defined as mother, father, son, daughter, brother, sister, and grandparents, whether directly related, in laws or stepfamily. Domestic violence is acknowledged as occurring across society regardless of age, gender, race, sexuality, wealth and geography. Since in the UK adults are defined as any person aged 18yrs and over, cases of domestic violence do not cover the violent acts of juveniles against parents or vice versa. Usually child abuse is excluded from domestic violence.

The Crown Prosecution Service definition is more extensive in the sense that the definition includes within itself any criminal offence arising out of physical, sexual, psychological, emotional or financial abuse by one person

---

<sup>84</sup> [http://www.cps.gov.uk/publications/prosecution/domestic/domv\\_guidance.html#a01](http://www.cps.gov.uk/publications/prosecution/domestic/domv_guidance.html#a01). Last visited on 12July,2012

against a current or former partner in a close relationship, or against a current or former family member.

### ***The Legislative Framework***

The status of women in U.K during 1950's was similar to that of the U.S.A counterparts<sup>85</sup>. Unless there was an indisputable claim divorce as a relief was dependent on the court's view of her morality. In cases of proved immorality custody orders could be granted in favour of husbands<sup>86</sup>. Obtaining maintenance payments from the abusive husbands was problematic and stigmatizing. The issue of domestic violence within the household was only a private matter. The remedy available between 1945-1970 was a civil remedy to stop the violence, that too only if she had already filed for divorce<sup>87</sup>. No unified social or medical services nor counseling services were promoted at the cost of the Government.

Since the 1970's, both the criminal and civil legislation aimed at supporting and protecting those experiencing domestic violence have been piecemeal, unclear and inadequate.<sup>88</sup>The Domestic Violence and Matrimonial Proceedings Act 1976<sup>89</sup> and Domestic Proceedings and Magistrate's Court Act 1978 failed to introduce a valuable power of arrest in instances where offenders committed assault. This lack of the power of arrest coupled with the use of police discretion provided little protection for women. The lack of power of arrest, coupled with the use of police discretion, provided little protection for

---

<sup>85</sup> The common justification was lack of compliance by the wives to their husbands and traditional idea of rightful authority.

<sup>86</sup> See more details in Gill Hague; Claudia Wilson, "The Silenced Pain :Domestic Violence1945-1970" 9(2) *Journal of Gender Studies* 159 (2000).

<sup>87</sup> This situation changed with the enactment of Domestic Violence and Matrimonial Proceedings Act 1976.

<sup>88</sup> Amy Musgrove and Nicola Groves, "The Domestic Violence, Crime and Victim's Act 2004: Relevant or 'Removed' Legislation?" 29 *Journal of Social Welfare and Family Law*, 234(2007).

<sup>89</sup> The Act empowered county courts to grant restraining orders or injunctions to women experiencing violence and to exclude one party from the home. Repealed and replaced in 1997

women<sup>90</sup>. In the mid 1990's all previous legislations were consolidated under the auspices of Family Law Act 1996. This Act introduced measures such as molestation orders, to improve protection under civil law for those experiencing domestic violence. These included two new remedies: non-molestation orders and occupation orders. The 1996 Act was significant to the extent that it recognized physical sexual or psychological molestation or harassment as having serious detrimental effect upon the health and wellbeing of the victim but failed to apply to those who have ever co-habited or same sex couples.

The Protection from Harassment Act 1997<sup>91</sup> although not specifically targeted at those experiencing domestic violence, it introduced four new criminal, arrest able, offences viz; applicable to women experiencing harassment<sup>92</sup> to fear of violence<sup>93</sup>, to breach of civil injunction,<sup>94</sup> and to breach of restraining order<sup>95</sup> punishable by up to five years imprisonment on indictment.

The National Assistance Act of 1948 relieved the victims from the issue of homelessness to an extent by providing residential care and limited access to temporary accommodation<sup>96</sup>. Housing legislation with provisions for victims of domestic violence specifically also developed from the 1990s. The Housing Act, 1996 broadened the definition of homelessness for those who are eligible for accommodation, including victims of domestic violence and articulating

---

<sup>90</sup> *Supra* n. 80 , p.235

<sup>91</sup> It extends to both civil and criminal law, deals with violence from outside the home. Whilst the Protection from Harassment Act 1997 was originally designed to combat the problem of stalking, it is used by those who cannot apply for any order under the Family Law Act 1996. The Protection and Harassment Act 1997 is useful when dealing with post-separation harassment or violence with a non-cohabitant partner and for stalking. The limitations of this Act are that it did not include occupation orders, or consider children; or the possibility that the attacker is a close relative (e.g. father, son or brother).

<sup>92</sup> Protection from Harassment Act 1997 s.2.

<sup>93</sup> *Id.*, s.4.

<sup>94</sup> *Id.*, s.3(6).

<sup>95</sup> *Id.*, s.5(5).

<sup>96</sup> *Supra* n. 81, p.162.

this explicitly. This legislation provides for housing assistance to victims by engaging with their landlords (supported housing), who can take special measures to assure the accommodation. The Homelessness Act, 2002 broadened the definition of violence to include all types of violence, not only domestic violence. In April 2003 the '*Supporting People*' housing programme for vulnerable people was launched and specifically included victims of domestic violence within eligible groups which could be supported by local authority area based grants (Department for Communities and Local Government, 2003). In 2006, new schemes including sanctuary schemes<sup>97</sup> and panic rooms<sup>97</sup> were developed as placing a victim in temporary accommodation was recognised by some as less.<sup>98</sup>

The psychological trauma of the children affected by witnessing domestic violence within homes received attention through the Adoption and Children Act, 2002, when it amended the definition of significant harm provided by the Children Act 1989, by adding a new category of impairment suffered from seeing or hearing the ill-treatment of another recognising the impact of domestic abuse on children. This legislation enabled courts to remove a suspected child abuser from his or her property, as a part of an application for an Emergency Protection Order or Interim Care Order. The Children Act, 2004 promoted a multi-agency approach to local service delivery. This Act promoted consultation among different parties (e.g. schools, health services) regarding children's safety and calls for closer cooperation between children's services and the police in the identification and investigation of domestic abuse. The Adoption and Children Act 2005 makes it clear that when a family court is considering whether a child has suffered or is

---

<sup>97</sup> The sanctuary scheme is defined as a possibility for the victim to remain in the accommodation by setting up additional protection measures (e.g. internal doors, safety glass, smoke alarms as well as immediate delivery of legal solutions under Family Law Act 1996 etc.)

<sup>98</sup> A. Matczak, E. Hatzidimitriadou and J. Lindsay, *Review of Domestic Violence Policies in England and Wales*, Kingston University and St George's, University of London (2011), p. 9.

likely to suffer harm, it must consider harm that a child may suffer not just from domestic violence, but from witnessing it<sup>99</sup>.

The Domestic Violence, Crime and Victims Act 2004 provided a new focus for the criminal justice system response to domestic violence, aiming to improve support and protection offered to women and introducing new powers to enable both police and courts to deal more effectively with offenders<sup>100</sup>. The Domestic Violence National Action Plan contains substantial policy proposals to improve its functioning. The UK Government has set up a Domestic Violence Advisory Group in 2005 made up of police officers, lawyers, justices, social workers and other agencies to ensure a concerted approach in tackling the problem<sup>101</sup>

The Act focuses its attention on the criminal justice system and has led to following developments within its jurisdiction: firstly by making common assault an arrestable offence.

Secondly, by introducing significant new police powers to deal with domestic violence including making it an arrestable, criminal offence to breach a non-molestation order, punishable by up to five years imprisonment; thirdly, by strengthening the civil law on domestic violence to ensure cohabiting same-sex couples have equal access to non-molestation and occupation orders as opposite sex couples, and extending the availability of these orders to couples who have never lived together or been married; and fourthly, providing for stronger legal protection for victims of domestic violence by enabling courts to impose restraining orders when sentencing for any offence. Until then, such orders could only be imposed on offenders convicted of harassment or causing fear of violence.

---

<sup>99</sup> Ursula Smartt and Helmut Kury, "Domestic Violence : Comparative Analysis of German and UK. Research Finding," 88(5) *Social Science Quarterly* 1275 (2007).

<sup>100</sup> Domestic Violence, Crime and Victims Act 2004 s.10 of the Act.

<sup>101</sup> *Supra* n. 94, p.1275.

The courts are enabled to impose restraining orders on acquittal for any offence (or when a conviction has been overturned on appeal) if they consider it necessary to protect the victim from harassment. This will deal with cases where the conviction has failed but it is still clear from the evidence that the victims need protection. A system is put in place to review domestic violence homicide incidents, drawing in the key agencies to find out what can be done to put the system right and prevent future deaths. A code of practice<sup>102</sup> that is binding for all criminal justice agencies, so that all victims receive the support, protection, information and advice they need is introduced. If in case if they feel the code has not been adhered to by the criminal justice agencies, victims can take their case to the Parliamentary Ombudsman. An independent Commissioner for Victims to promote the interests of victims and witnesses, encouraging the spread of good practice and reviewing the statutory code is set up. The victims of mentally disordered offenders are guaranteed the same rights to information as other victims of serious violent and sexual offences. The Criminal Injuries Compensation Authority is given the right to recover from offenders the money it has paid to their victims in compensation. A surcharge is made payable on criminal convictions and fixed penalty notices which will contribute to the Victims Fund. A new offence of causing or allowing the death of a child or vulnerable adult is created. The offence establishes a new criminal responsibility for members of a household where they know that a child or vulnerable adult is at significant risk of serious harm. The Law Commission recommendation for a two-stage court trial to ensure that high volume crimes like fraud and internet child pornography can be

---

<sup>102</sup>Witnesses and victims of domestic violence appearing in criminal courts can apply for special measures like being screened off from the rest of the court; giving evidence by live television links; allowing witnesses to give their evidence in pre-recorded interviews; having the victim's/witness's name withheld from the press (through CPS application); the public being asked to leave the courtroom when the victim is giving evidence (sexual offences or cases involving intimidation); deriving information from the Witness Liaison Officers who act as a main point of contact etc.

punished in full is brought into effect. Specialist Domestic Violence Courts<sup>103</sup> were introduced to consider only cases of domestic violence and offer tailored support and advice from trained magistrates and prosecutors.

To coincide with the implementation of the Act, the Labour Government, in collaboration with organisations such as women's domestic violence charities Refuge and Women's Aid, launched a national 24-hour free phone helpline and associated awareness raising publicity. Although there is no separate offence of "domestic violence" under the law, the Domestic Violence, Crime and Victims Act, 2004 puts survivors in the centre of the criminal justice system and provide tougher powers for the police and courts to protect victims and prosecute abusers. Current criminal law does not explicitly criminalise domestic violence. Under sections 33 to 41 of the Family Law Act (1996) in the United Kingdom, a complainant/survivor may apply for an occupation order, in addition to a protection order, which would entitle her to remain in the home and "bar" the offender from the premises or restrict him to a particular part of the home. In India there does not exist the concept of occupation order in addition to protection order. Instead Indian legislation has restraining orders to prevent the respondent from interfering with the privacy of the aggrieved person.

### ***Governmental and Community Interventions in UK***

Recognizing domestic violence as a crime has become an increasingly important part of government policy on crime control. The Home Office is the leading government agency for publishing and co-ordinating policy and legislative developments on domestic violence and violence against women is seen as one of the key priorities in its agenda<sup>104</sup>. Inter-ministerial groups that

---

<sup>103</sup> The first British specialist court was established in 1999 in Leeds. The aim of the Specialist Domestic Violence Courts is to combine criminal and civil settings in order to deal with domestic abuse more effectively. They take a multi-agency approach to domestic violence with criminal justice agencies, magistrates and specialist support services for victims working together in partnership. They aim to have a clear focus assessing and reducing the risk to victims and supporting victims through the court process.

<sup>104</sup> *Supra* n.79 p.12.



were first established in 1992 co-ordinates across the governmental departments the cause of preventing domestic violence<sup>105</sup>.

Police Domestic Violence Units were introduced in early 1990s and were consolidated at a national level with staff specially trained to help people experiencing domestic violence (Domestic Violence Liaison Officers). These Units are now renamed as Community Safety Units. Police officers are tasked to work closely with other statutory and non-governmental organisations to prevent domestic violence.

Independent Domestic Violence Advisors<sup>106</sup> (IDVA) are funded by the Home Office and the non-governmental sector to provide specialist support to victims of domestic violence. The group is made up of police officers, lawyers, justices, social workers and other agencies to ensure concerted approach to tackling domestic violence.

Sexual Assault Referral Centres (SARCs) are safe locations where victims of sexual assault can receive an integrated service of medical help, legal advice and counseling from professionally trained staff. Once again, SARCs as a multi-agency approach brings together various legal, medical agencies and departments in one place which helps both the victims and those investigating the crimes. The Independent Sexual Violence Advisors<sup>107</sup> (ISVA) provide independent support to victims of sexual abuse through the criminal justice process and are also funded by the Home Office<sup>108</sup>.

---

<sup>105</sup> See for details, Gill Hague and Ellen Malos, "Inter-agency Approaches to Domestic Violence and the Role of Social Services" 28 Br. J. of Social Wk. 369,386 (1998).

<sup>106</sup> Their responsibilities are serving as a victim's primary point of contact, IDVAs normally work with their clients from the point of crisis to assess the level of risk, discuss the range of suitable options and develop safety plans. They are pro-active in implementing the plans, which address immediate safety, including practical steps to protect themselves and their children, as well as longer-term solutions.

<sup>107</sup> The advisors are based in the Sexual Assault Referral Centres or within voluntary organisations.

<sup>108</sup> *Supra* n.78, p.14.

The Ministry of Justice is the government department responsible for criminal, civil and family justice, democracy, rights and the constitution and its remit includes safeguarding human rights<sup>109</sup>. The Crown Prosecution Service<sup>110</sup>, HM Courts & Tribunals Service<sup>111</sup>, Probation Service and the Prison Service come under the guidance of Ministry of Justice. The Family Justice Review 2011 (Ministry of Justice)<sup>112</sup> and Children and Family Court Advisory and Support Service (CAFCASS)<sup>113</sup> is yet another government initiative that takes into account the best interests of family and children involved in family proceedings<sup>114</sup>. The Women's Aid federations of England, Scotland, Wales and Northern Ireland are the key agencies promoting the protection of women and children experiencing domestic violence and co-ordinating the provision of refuge, support and advocacy services .

Domestic violence has long been recognised as an important public health issue with significant implications for health service delivery in accident and emergency units, primary care, maternity services and mental health services. The Department of Health is involved in the domestic violence policy making process concerning both public health (improving the health and well-being of the population and protection from serious ill health) and health

---

<sup>109</sup> Domestic violence policy and strategy cuts across each element of the justice system and the Ministry of Justice has a broad aim to increase the rate that domestic violence is reported and brought to justice and to make sure that victims of domestic violence are adequately protected and supported.

<sup>110</sup> They prosecute offences investigated by the police.

<sup>111</sup> HM Courts & Tribunals Service administers courts in England and Wales and provides administration and support for the Magistrates' courts, County Courts, the Crown Court, the High Court, and the Court of Appeal. Victims of domestic violence can apply for civil or criminal remedies.

<sup>112</sup> They are upto produce a system which allows families to reach easy, simple and efficient agreements which are in the best interests of children whilst protecting children and vulnerable adults from risk of harm.

<sup>113</sup> An independent agency of the Department of Education, which was established under provisions of the Criminal Justice and Court Services Act (2000) to safeguard and promote the welfare of children involved in court proceedings. CAFCASS provides expert independent advice to courts on the interests of children involved in family proceedings. CAFCASS

<sup>114</sup> *Supra* n.79, p.16.

service delivery<sup>115</sup>. The National Action Plan sets out priorities for the Health Service which can be seen as having four distinct focus like awareness raising of domestic violence as a public health issue; training and developing the health service workforce to offer an improved standard of service to those experiencing domestic violence (e.g. training for health visitors to provide support to families when they suspect violence against women or children may be a factor); improving the quality of service provision and finally developing information and research frameworks.

The Crime and Disorder Act 1998 places a statutory requirement on local authorities to monitor the level of domestic abuse in their communities and establish partnerships in order to reduce the problem as well as to pressurize more reluctant agencies Crime and Disorder Reduction Partnerships bring together the representatives of statutory, voluntary and private organisations which deal with crime reduction including domestic violence<sup>116</sup>.

The Greater London Domestic Violence Programme, started in 1997, is a groundbreaking instance of a multi-agency initiative to develop strategies, identify common goals, minimum standards and good practices in order to raise awareness and increase effectiveness of domestic violence responses. The Project coordinates Domestic Violence Forums (consisting of representatives of every governmental and voluntary agency dealing with domestic violence) in each Borough<sup>117</sup>.

The London Domestic Violence Forum, operating in the Borough of London, has become a model for other boroughs working in the area of inter-agency cooperation in tackling domestic violence. The London Domestic Violence Forum consists of various other significant initiatives within its mandate, and implements the Mayor's Second London Domestic Violence Strategy, launched in 2005. The London Domestic Violence Forum works as

---

<sup>115</sup>*Id.*,p.17.

<sup>116</sup>*Id.*,p.19.

<sup>117</sup> *Supra* n. 50, p.44.

the coordinating body, ensuring that the progress in implementation is communicated to each agency. Membership to the forum is open to all service providers and policy staff within the area of London<sup>118</sup>.

Women survivors of domestic violence or violence in the workplace whose immigration status in a country is tied to their marital, family or employment status are often reluctant to report such violence to the police. UK Domestic Violence Concession Rules in the United Kingdom permit a woman whose residency status is dependent on a perpetrator of violence to apply for leave to remain in the United Kingdom indefinitely.

The Association of Chief Police Officers “ Guidance on Domestic Violence” model indicates that risk assessment in domestic violence cases are complex process requiring training to be used to promote victim safety and improve the standard of investigation<sup>119</sup>.

Multi-Agency Risk Assessment Conference (MARAC)<sup>120</sup> is an innovation in improving multi-agency coordination, with service delivery and risk management as its goal. The programme was first mooted by the Cardiff Women’s Safety Unit in 2003, and are regular conferences on a case of domestic violence. All agencies, including criminal justice organizations including the local authority, the police, probation, local refuges and independent women’s support services and other voluntary sector

---

<sup>118</sup> *Id.*, at p.44.

<sup>119</sup> *Supra* n. 94, p.1276.

<sup>120</sup> See <http://www.nordaf.co.uk/public/Editor/assets/Library/SDVC%20Resource%20Manual.pdf>. Last visited on 20<sup>th</sup> February, 2012: Aims of MARAC envisaged are to share information to increase the safety, health and well-being of victims – adults and their children; to determine whether the perpetrator poses a significant risk to any particular individual or to the general community; to construct jointly and implement a risk management plan that provides professional support to all those at risk and that reduces the risk of harm; to reduce repeat victimization; to improve agency accountability; to improve support for staff involved in high risk DV cases. The responsibility to take appropriate actions rests with individual agencies; it is not transferred to the MARAC. The role of the MARAC is to facilitate, monitor and evaluate effective information-sharing to enable appropriate actions to be taken to increase public safety.

organizations/agencies involved in the case and providing support services encompasses a collectivity to discuss on the issue. The actions taken on each problem is discussed and they collectively decide on measures to improve safety and better access to justice for the complainant. The significant aspect of the MARAC is that the conference involves “high-risk” cases of domestic violence and is intended to reduce the possibility of repeat victimization. “By sharing information and working together through the MARAC process the outcomes for the survivors of domestic violence incidents can be improved. The conference is usually held on the complainant’s behalf and they will not usually attend but there may be some cases where the complainant’s attendance becomes necessary”. The decision to take a case to a MARAC lies with the agencies involved. While the complainant has the right of refusal, she will have to provide sufficient reason. However, even in such a case, the agency may still decide to refer it to the MARAC. The woman is updated as to the course of action decided upon by the agencies, and the case is given priority within the system. Hence, the MARAC is an innovative tool to ensure coordinated handling and improved risk management of a case by agencies.<sup>121</sup>.

Another significant risk assessment programme of U.K to prevent victims of domestic violence from suffering further abuse is called as SPECS<sup>122</sup> introduced in 2003 (Separation(child contact);Pregnancy; Escalation(aggravated attacks);Cultural issues; Stalking; SexualAssault.)

The Corporate Alliance against Domestic Violence aims to raise awareness of and take action to reduce the social and economic impact of domestic violence in the workplace as well as shape policy in this matter<sup>123</sup>.

---

<sup>121</sup> Amarsanaa Darisuren and Sarah Fortuna(Ed.,) – “Domestic Violence Legislation and its Implementation: An analysis for ASEAN Countries based on International Standards and Good Practices”- UNIFEM and Lawyers Collective Women’s Rights Initiative, India (2009), p 49.

<sup>122</sup> *Supra* n. 94,p.1275.

<sup>123</sup> *Supra* n. 70, p.22.

## **Merits and Demerits**

The acknowledgment of many consequent individual costs of domestic violence like the child abuse, the mental health, homelessness etc. through the Government's definition on domestic violence effectively addresses the problem of domestic violence in its holistic sense. Such a kind of definition is the first of its kind and not followed by U.S.A. The inclusion of housing programme in the Housing Act of 1996 effectively addresses the homelessness issue related to the victims of domestic violence. Adoption and Children Act 2005 is a right step in acknowledging child abuse in cases of children witnessing and experiencing domestic violence<sup>124</sup> and is in consonance with the *best interest* principle of the child. The vulnerability and psychological trauma of women and children victims is adequately taken care of in the U.K legal regime. As compared to U.S.A brings in a much more refined proposal of combating the issue of domestic violence.

Compared to the U.S.A legislation there is no protection guaranteed as to women subject to Immigration control. Sexual Assault Referral Centres provides the trilogy of services much needed for a victim of domestic violence is a good practice to be emulated by other jurisdictions. The community intervention model and the corporate alliance programme to raise awareness on the issue is applaudable. The co-ordination of the Home Ministry Office and the Woman's aid federations in U.K is significant in the context of public participatory process. The multi agency work at the local community level has added to the commendable performance of U.K in the field of combating domestic violence<sup>125</sup>. The inter agency domestic violence forums engage in five main types of work namely, co-ordinating local agency responses, attempting to improve the practice of agencies, facilitating development of women's refuge and advocacy services, engaging in public education and

---

<sup>124</sup> *Supra* n. 99, p.377.

<sup>125</sup> *Id.*, p.371.

awareness raising campaigns and engage in preventive works<sup>126</sup>. The risk assessment programmes enunciated by U.K is commendable. The experience of MARAC can be regarded by the victims as a programme for access to justice. The other side of the argument is that when such conferences are held the privacy issues of victim may come up. The insensitivity in dealing with the issue can lead to counterproductive consequences.

## **Conclusion**

The recommendations of United Nations as to the model suggested for legislation for violence against women emphasizes on the funding of programmes related to the issue. It has opined that Legislation should: mandate the allocation of a budget for its implementation by creating a general obligation on Government to provide an adequate budget for the implementation of the relevant activities; and/or requesting the allocation of funding for a specific activity, for example, the creation of a specialized prosecutor's office; and/or allocating a specific budget to non-governmental organizations for a specified range of activities related to its implementation. In the United States, the Violence Against Women Act and its reauthorizations, provides a significant source of funding for non-governmental organizations working on violence against women. It is important that any budgetary allocation be based on a full analysis of funding required to implement all measures contained in the legislation. Such a funding plan or strategy can really work well in India.

Trained staff, known as victim advocates, help victims and witnesses of crime to navigate the criminal justice system, inform them of court proceedings and court dates, provide crisis intervention and safety planning, ensure specific rights under specific victim rights bills are met, and assist them in accessing

---

<sup>126</sup> *Id.*, pp.374, 375. E.g., the South Bristol Domestic Violence Forum is running multi-agency training courses on domestic violence in its own area.

other service providers for economic security, protection, housing, counseling, and post-conviction services.

Breaking up the number of responsibilities into different subgroups of individuals, while maintaining lines of communication between the groups, seems to play a positive role in the effectiveness of domestic violence reform. The governments in England and Wales have developed a domestic violence national action plan in response to domestic violence, where subgroups working on reducing the prevalence of domestic violence and increasing abuse reports are managed by government officials who submit quarterly progress reports to an inter-ministerial group. Additionally, members of key government agencies and NGOs hold multi agency risk assessment conferences to share information about their cases. Furthermore, in 2005 the home secretary launched the Corporate Alliance against Domestic Violence, bringing together a group of companies and organisations in order to address the impact of domestic violence at the workplace and to identify and protect staff from their perpetrators.

Critically viewed the legislations on domestic violence in USA and UK do not highlight all the essential domestic relationships within its coverage and scope of study. The significance that can be attributed to these two jurisdictions in dealing with domestic violence issue is in evolving community integrity models and their contribution towards the concerted community response to the issue thereby promoting the accountability of judicial system in approaching the issue.

.....✂.....



## LEGAL PROTECTION AGAINST DOMESTIC VIOLENCE IN INDIA –PRE-2005 SCENARIO

Contents	<i>5.1 Constitutional Framework</i>
	<i>5.2 Civil Law Responses on Domestic Violence</i>
	<i>5.3 Cruelty as a Matrimonial Offence</i>
	<i>5.4 Judicial Approach on Matrimonial Cruelty</i>
	<i>5.5 The General Criminal Law Responses on Domestic Violence</i>
	<i>5.6 Specific Criminal Law Responses in the Context of Domestic Violence</i>
	<i>5.7 Specific Legislations in the Context of Domestic Violence</i>
	<i>5.8 Domestic Violence –The National Policy Scenario</i>
	<i>5.9 Limitations of the Pre - 2005 Legal Regime</i>

The existing legislative measures to protect women from domestic violence prior to the passing of the Act of 2005 is to be understood as to analyze and differentiate the limitations felt and the need to enact a new legislation on the issue. The starting point for the discussion is the overarching mandate ie. the Constitution of India ,the supreme law of the land. Several enactments that originated during the British colonial rule are also to be discussed. The broad framework of civil and criminal remedies that existed prior to 2005 in India is the subject matter of this chapter.

### 5.1 Constitutional Framework

The Indian Constitution is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. One of the golden ideals of the Constitution is the Fundamental Rights which are guaranteed and comprises of the natural basic human rights, inherent in human beings. The rights of women have the originating source in the Constitution as all Indian laws emerge from and are clothed with sanctity by the Constitution. Protection of women from domestic violence as a specific right was not specifically conferred to women in India until the enactment of the Protection of Women

from Domestic Violence Act, 2005. The Constitution of India has focused on the general rights of women as individuals and citizens of the country. As a consequence of the provisions under the Fundamental Rights and Directive Principles of State Policy, the overall participation and productive quality of women in the developmental process of the country is ensured.

The Indian Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women.<sup>1</sup> The constitutionally guaranteed fundamental right to equality before the law<sup>2</sup> and non-discrimination on the ground of sex<sup>3</sup> has received wide judicial interpretations to ensure gender justice to women.<sup>4</sup> In the sphere of right to equality no uniform judicial approach has been followed by the Indian judiciary in analyzing the legal position of women. In the early cases, the courts have employed a differential analysis in classifying between men and women as a group and in upholding legislations that conferred advantageous position to women.<sup>5</sup> Gradually in cases relating to public employment, discriminatory provisions favourable to men etc., the differential approach was disregarded and assured a welcoming step in ensuring gender justice.<sup>6</sup>

---

<sup>1</sup>Anjani Kant, *Women and the Law*, A.P.H. Publishing Corporation, New Delhi (1997), p.130

<sup>2</sup> Constitution of India, Part III, Art. 14 confers the equality before the law or the equal protection of the laws to every person.

<sup>3</sup> *Id.*, Art. 15 (1) prohibits any kind of discrimination on the grounds of religion race, caste, sex or place of birth.

<sup>4</sup>E.g., *State of Madras v. Champakom Dorairajan*, A.I.R. 1951 S.C. 226; *Giani Ram v. Ramjilal*, A.I.R. 1969 S.C. 1144; *Manshan Ram v. Taj Ram*, 1980 S.C. 558.

<sup>5</sup>*Raghuban v. State of Punjab* A.I.R. 1972 P&H 117; (for the purpose of employment in prisons.); *Sucha Singh v. State of Punjab*, A.I.R. 1974 P&H 162; *Nalini Ranjan v. State of Bihar*, A.I.R. 1977 Pat 171; (for deciding the extent of land holding); *Shahbad v. Abdullah*, A.I.R. 1967, J&K 120; (for serving court summons); *Yusuf Abdul Aziz v. State of Bombay*, A.I.R. 1954, S.C. 321; *Soumitri Vishnu v. Union of India*, 1985, Supp S.C.C. 137; (in the matter of sanctity of marital bed).

<sup>6</sup>*AIR v Nergesh Mirza* 1987 SC 1829; *C.B. Muthamma v. Union of India* A.I.R. 1979 S.C. 1868; *Ammini E.J v. Union of India* A.I.R. 1995 Ker 252,268.

The protective discrimination guaranteed to women provides a large space for negotiating the right for women.<sup>7</sup> Legislations that discriminate in favour of women have also been upheld under Article 15(3) of the Constitution of India.<sup>8</sup> Freedom of speech and expression<sup>9</sup> and the freedom to practice and carry out any occupation, trade or business<sup>10</sup> applicable both to men and women provide the much needed space for mental and economic empowerment and personality development to women.

The Supreme Court had lamented upon the women folk in the specific Indian cultural context<sup>11</sup> when it opined:

“Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. *Self- sacrifice and self -denial are their nobility and fortitude* and yet they have been subjected to all inequities, indignities, inequality and discrimination”.

Human dignity is the quintessence of human rights. Women’s rights as human rights are elusive in the absence of right to live with human dignity. The

---

<sup>7</sup> Constitution of India, Part III Art. 15(3) is an enabling provision and empowers the state to make any special provision for women and children. The reason forwarded for this positive discrimination to women is that a women’s physical structure and the performance of maternal functions places her to a disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race. This position was upheld in *Muller v. Oregon*, 52 L.ed.551. In *Gita Hariharan v R.B.I.*, (1999) 2S.C.C. 228; Interpretation of the guardianship law in the light of Article 15 of the Constitution of India by the Supreme Court equated the position of mother to that of the father in the matter of guardianship. Other cases on protective discrimination are. *Dattatraya Motiram v. State of Bombay*, A.I.R. 1953 Bom.842; *Cracknell v State of U.P.*, A.I.R. 1953, All.746; *Government of A.P v. P.B. Vijaya Kumar*, A.I.R. 1995 S.C. 1648.

<sup>8</sup> Numerous laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women in advertisements and films, female child marriage, atrocities, molestation, abduction etc. Egs. The Dowry Prohibition Act, 1961; The Maternity Benefit Act, 1961; The Equal Remuneration Act, 1976; Family Courts Act, 1984; The Indecent Representation of women (Prohibition) Act, 1986; The Commission of Sati (Prevention) Act, 1987; The National Commission for Women Act, 1990. All these legislations have served to bring about the changes in the position of women in the existing socio cultural set up of the country.

<sup>9</sup> Constitution of India Part III Art. 19 (1)(a) .

<sup>10</sup> *Id.*, Art. 19(1)(g) .

<sup>11</sup> *Madhu Kishwar v. State of Bihar*, (1996)5 S.C.C. 148. Emphasis added

ILO set up in 1919, aiming at social justice and to promote gender equality, states that extensive discrimination against women violates the principle of equality of rights and respect for human dignity. In consonance with the spirit, the Constitution of India guarantees the right to life and personal liberty.<sup>12</sup> Several judicial interpretations have broadened the scope of right to life and it means not merely an animal existence but includes within itself the right to live with human dignity.<sup>13</sup> While extending the protection of right to live with human dignity to protect women from suppression and oppression, the offence of rape was held as a crime against the basic human rights and also violative of the fundamental right to life enshrined under Article 21 of the Constitution of India.<sup>14</sup> It was held to be the crudest and sure mode of entirely destroying her personality, self-confidence and self-respect, and throwing her into deep emotional crisis. Keeping up with the spirit the Constitution of India prohibits traffic in human beings, involuntary forced labour, beggary etc.<sup>15</sup>

The Supreme Court while upholding the spirit of right to bodily integrity of woman held:

“Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is equally entitled to the protection of law.”<sup>16</sup>

The Directive Principles of State Policy of the Constitution of India visualizes a society in which everyone will have the place of dignity and recognition of identity. It lay down certain social and economic goals to be

---

<sup>12</sup>Constitution of India Part III Art. 21.

<sup>13</sup> It was so declared under the case of *Francis Corailie Mullin and Maneka Gandhi* 's case.

<sup>14</sup>*Bodhisattwa Gautam v. SubhraChakraborty*, (1996) 1 S.C.C. 490; *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 S.C.C. 14.

<sup>15</sup>Article 23 of part III of the Constitution of India. The state in pursuance of of the said provision enacted the SITA 1956 and now it is known as the PITA. In *Vishal Jeet v. Union of India*, A.I.R. 1990 S.C. 1412; Court held that traffic in human beings includes Devadasi system. Forced labour was absolutely forbidden not only for men but also for women; it was so held in *Neerja Chowdhary v. State of M.P.*, A.I.R. 1984 S.C. 1079.

<sup>16</sup>*State of Maharashtra v. Madhukar Narayan*, (1991) 1 S.C.C. 57.

achieved by the central and state governments in India. These Directives impose certain obligation on the state to take positive action to promote the welfare and betterment of women in the society.<sup>17</sup> Through judicial interpretations the ambit of right to equal pay for equal work has been elevated as a part and parcel of right to live with human dignity under Article 21 of the Constitution of India.<sup>18</sup> The judiciary has also recognized the necessity of the uniformity in the application of civil laws like law of marriage, succession, adoption, maintenance etc which aimed towards the achievement of gender justice.<sup>19</sup> The right of women in India to eliminate gender based discrimination particularly in respect of property so as to attain economic empowerment has been highlighted through the apex court judicial interpretation.<sup>20</sup>

The Constitution of India exhorts that it is the fundamental duty of every citizens to renounce practices derogatory to women's dignity.<sup>21</sup> It in turn upholds the spirit of right of a woman to live with human dignity.<sup>22</sup> The 73 rd and 74 th Amendments to the Constitution of India effected in 1992 provided for reservation of seats to women in election to the panchayats and municipalities with a view to enhancing the women's role in the democratic process. Thus social and individual responsibilities are contemplated in the Constitution of India in addition to democratic solutions.

---

<sup>17</sup> Constitution of India, Part IV Art. 38(2) says "the state shall.... Endeavour to eliminate inequalities in status, facilities and opportunities not only against individuals but also as against group of people residing in different areas or engaged in different vocations." Article 39 (a) provides equally to both men and women the right to adequate means of livelihood; The state has enacted the Equal Remuneration Act, 1976, and the Maternity Benefit Act, 1961 to give effect to Art. 39(d) and Art. 42 respectively.

<sup>18</sup> *Randhir Singh v. Union of India*, A.I.R 1982 S.C. 877; *Bhagwan Das v. State of Haryana*, A.I.R. 1987 S.C. 2049.

<sup>19</sup> E.g., *Sarala Mudgal v. Union of India*, A.I.R 1995 SC 1531 ; ( 1995 ) 3S.C.C. 635; Article 44 directs the state to secure for the citizens a uniform civil code throughout the territory of India. The court in later cases like *Pannalal Bansilal Pitti v. State of Andhra Pradesh* , (1996) 2S.C.C. 498 ; *Lily Thomas v. Union of India*, (2000) 6S.C.C. 224. etc have acknowledged the difficulties involved in introducing Uniform Civil Code.

<sup>20</sup> E.g., *C.M. Mudaliyar v. Idol of Sri S. Swaminathaswami Thirukoil*, (1996) 8S.C.C. 525.

<sup>21</sup> Constitution of India, Part IV-A, Art. 51 A (e).

<sup>22</sup> *Noor Mohammed v Mohammed Jijauddin*, A.I.R. 1992 M.P.244.

Article 51A(e) in Part IV imposes a fundamental duty to renounce practices derogatory to women.

## **5.2 Civil Law Responses on Domestic Violence**

Indian Civil Law does not recognize domestic violence as an issue in itself. The only specific recognition of domestic violence is the concept of 'cruelty' as a ground for divorce or judicial separation under the matrimonial proceedings. Theoretically it is possible to obtain certain injunctions under the Civil Procedure Code, the Specific Relief Act<sup>23</sup>, the Law of Torts and the Family Courts Act.

### **5.2.1 Domestic violence under the Law of Torts**

Tort law, which is based on the concept of injury / harm, is yet another law that provides remedies to aspects of domestic violence. A tort is any action or inaction that damages or injures another person. It can be towards the person or property of another person. Since acts of domestic violence cause harm, they are considered torts or civil wrongs. Any person can bring a claim for tort action, irrespective of relationship. Some of the common torts that apply in the domestic violence context are trespass<sup>24</sup>, assault<sup>25</sup> and battery<sup>26</sup>, false imprisonment<sup>27</sup> and negligence<sup>28</sup>. Granting damages and injunctions are the remedies available in tort cases. Remedies under tort law include monetary compensation / damages and injunctions that direct a person to do or not to do something.

---

<sup>23</sup>Injunctions can be obtained by applying under sections 37 to 44 of the Specific Relief Act, 1963. Under this provision one can apply for restraining orders from the court restraining her husband from abusing her physically and mentally and also in cases where one fears that he will commit abusive and violent acts against the other.

<sup>24</sup> Trespass to the person in the broad term is used to denote various forms of physical and psychological injury committed upon a person.

<sup>25</sup> Any action that causes a person to fear that a battery will be committed upon him is an assault.

<sup>26</sup> Battery denotes any physical interference with a person.

<sup>27</sup> False imprisonment is the infliction of any unlawful bodily restraint upon a person.

<sup>28</sup> The failure to take proper care is termed 'negligence'. Negligent conduct counts as domestic violence, when a person fails in his /her legal duty to take care. In the domestic violence context, ill treatment and particularly harassment for dowry may cause such a tort.

The main pitfall of civil injunction orders is that there is no effective means for enforcing them. A violation of a civil injunction can only be countered by filing a Contempt of Court case against the violator and at the end the abuser may well get off with a few days imprisonment or fine. The exorbitant litigation costs and complicated procedures involved in the filing and hearing of a court case makes a vulnerable woman more conscious of her powerlessness and helplessness. However there is no precedent in Indian law of women being awarded damages against their husbands for trespass against the person. Other common law jurisdictions have begun to award damages in actions for battery between spouses which can be cited to persuade the judges to similarly develop the law<sup>29</sup>.

### **5.2.2 Domestic Violence under the Family Courts Act, 1984**

The Family Courts Act, 1984 was enacted with an object of promoting conciliation in and secure speedy settlement of disputes relating to marriage and family affairs as it involves serious emotional aspects. The Act makes it possible for a victim of family violence, to seek matrimonial reliefs without delay as family courts follow a less formal and more active investigational and inquisitorial procedure. All family law matters such as marriage, matrimonial causes, maintenance, custody, education and support of children, settlement of property come within the jurisdiction of the family courts.<sup>30</sup>

The main criticism against the object of the Act is that it places primary emphasis on the preservation of family in tune with patriarchal culture. The Act ignores the existing power structure dominating conjugal relation and negates the vulnerable position of women within the family and society. It does not take into account the fact that in most cases of marital dispute women opt for legal recourse when other efforts for conciliation have failed to yield

---

<sup>29</sup>*Church v. Church*, 1983 N.L.J. 317.

<sup>30</sup>Family Courts Act, 1984. Explanation to s. 7.

result<sup>31</sup>. Intense stress on reconciliation has proved to be counter-productive. The Act refuses to recognize the situation of irretrievable breakdown of marriage. The Act takes resort of conciliation and mediation methods which can become counter-productive in serious instances of domestic violence.

The so called para-familial matters such as inter spousal assaults, and other offences of criminal nature between the spouses<sup>32</sup>, inter-spousal tort and contracts have not been brought under the jurisdiction of family courts. Thus no matter under the Dowry Prohibition Act, 1961 or under the Indian Penal Code, 1860 can be tried by a family court. It follows that disputes relating to violence between spouses will not come under family courts', jurisdiction unless some matrimonial relief, divorce or judicial separation or maintenance<sup>33</sup> is sought under the petition. Another argument that has been brought out against the Family Courts is that they tend to place cases of domestic violence within the field of family 'disputes'. Thus, in the interests of preserving the family, abuse up to a certain limit is tolerated by women, as a part and parcel of wear and tear in marital life.

### **5.3 Cruelty as a Matrimonial Offence**

Marriage is the oldest social institution of the world which influences the moral and social values of man. The dimensions of marital relationship are ever changing resulting in socio-legal problems relating to marriage such as domestic violence, dowry, annulment, child marriage, divorce etc. Under patriarchy, wife came under the control of the husband and he had the right to use force against her in order to ensure that she fulfilled her wifely obligations which included the consummation of marriage, co-habitation and maintenance of conjugal rights, sexual fidelity, general obedience and respect for his wishes.

---

<sup>31</sup> Agnes, Flavia. "A Toothless Tiger: A Critique of Family Court", 9 (17) *Manushi* 66 (1991).

<sup>32</sup> Such as offence under s. 498 A of the Indian Penal Code, 1860.

<sup>33</sup> Family Courts Act, 1984 s. 7 (2) (a). The Family courts have and exercise the jurisdiction exercisable by a Magistrate of first class under Chapter ix relating to order for maintenance of wife, children and parents of the Code of Criminal Procedure Code, 1973.



She was considered a 'mere chattel'<sup>34</sup>. The customs and traditions which upheld the womanly obligations later got moulded into the personal laws governing the matrimonial matters of the people in India.

The Hindu Marriage Act 1955 is the first all Indian enactment dealing with matrimonial causes specifically governing Hindus. The Indian Divorce Act 1869, the Special Marriage Act 1954, Hindu Marriage Act, 1955 are the three most important matrimonial causes statutes, in India. Besides these, three important matrimonial statutes there are other matrimonial statutes in force in India, namely, Parsi Marriage and Divorce Act, 1936 applicable to the members of Parsi community, Dissolution of Muslim Marriage Act, 1939, the part of Muslim Personal Law in force in India and permits Muslim wife to seek divorce on certain grounds. An analogous provisions of Hindu Adoptions and Maintenance Act, 1956 also reflects the concern of the legislators as to women treated with cruelty from being deprived of shelter and maintenance<sup>35</sup>. All these Acts prescribe cruelty as one of the grounds for obtaining matrimonial relief. Cruelty is a ground for divorce as well as judicial separation under all the personal laws in India.<sup>36</sup>

---

<sup>34</sup> Suppression of women's status in household and society in the Indian context is detailed under Chapter Two of this thesis.

<sup>35</sup> Hindu Adoptions and Maintenance Act, 1956 s. 18 (2) (b) provides that a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance if he has treated her with such cruelty as to cause reasonable apprehension in her mind that it will be harmful or injurious to live with her husband. s. 18 (2) (g) of the Act also provides that a Hindu wife is entitled to live separately and claim maintenance if there is any other cause justifying her living separately. In *Subbegowda v. Honnamma*, A.I.R 1984 Kant. 41; it was held that under this clause wife's claim for maintenance can be sustained on the grounds of acts of violence which are covered by the 'cruelty clause' substantially but not fully.

<sup>36</sup> Dissolution of Muslim Marriage Act, 1939 s. 2 (viii) states six conditions that constitute cruelty to wife. Namely, 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 woman of ill-repute or leading 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; Ill-treatment, not in accordance with the Quranic injunctions, if the man has more than one wife. S. 13 (1) (ia) of the Hindu Marriage Act, 1955 provide, "the other party has, after solemnization of marriage, treated the petitioner with cruelty; The Hindu Marriage Act, 1955, as originally enacted prescribed cruelty as a ground for judicial separation only ie. s. 10 (1)(b) of the Hindu Marriage Act, 1955. Later in 1976, Marriage Laws (Amendment) Act 1976 has been inserted and prescribed cruelty to be a

Under the Dissolution of Muslim Marriage Act, 1939, cruelty has been included as a ground on which a man can obtain divorce under the six conditions stipulated. It is the only personal law which enables a woman to divorce if her husband attempts to dispose of her legal property or prevent her from exercising rights over her property. It also expressly recognizes physical violence as cruelty, and as a ground for divorce. The negative aspect relating to the Muslim law is that a man can divorce his wife without resorting to the grounds stipulated through the practice of 'talaq', whereas a Muslim woman can only secure divorce only through the above grounds of the Act. Some of the grounds as to the definition of cruelty are considerably progressive than other personal laws.<sup>37</sup>

The limitations recognized while defining cruelty by the personal laws is that it addresses only the spousal abuse within a matrimonial set up which forms only a portion of the larger framework of the problem of domestic violence. Human rights violations of other family members occurring within a family has been discarded with. And hence matrimonial laws in India have also proved to be unsuitable in addressing domestic violence as they deal mainly with issues surrounding marriage and its dissolution.

#### **5.4 Judicial Approach on Matrimonial Cruelty**

The concept of 'cruelty' in matrimonial law essentially captures the concept and elements of domestic violence. Cruelty is a common ground of divorce under all matrimonial laws, though it is worded differently and its legal

---

ground for judicial separation as well as for divorce. It is now laid down in S. 13 (1) (ia) of the Hindu Marriage Act, that the respondent has treated him or her with cruelty. Our Parliament has borrowed the language of the English Matrimonial Causes Act, 1950].S. 10 of the Indian Divorce Act, 1869 substituted by the Amendment Act 51 of 2001; S. 10 (1) (x) of the Indian Divorce Act.1869, Sec 10 of the Act was amended in 2001 to make adultery and cruelty two distinct and independent grounds for divorce for the woman. S. 27 (1) (d) of the Special Marriage Act, 1954 prescribes that if the respondent has since the solemnization of marriage, treated the petitioner with cruelty, it will amount to a ground for divorce. The provisions of S. 27 (1) (d) of the Special Marriage Act, 1954 is similar to that of S. 13 (1) (ia) of the Hindu Marriage Act.1955.

<sup>37</sup>RatnaKapur& Brenda Cossman, *Subversive Sites- Feminist Engagements with Law in India*, Sage Publications, New Delhi (1996), p.111.

requirements differ from law to law. Cruelty has been interpreted in a variety of forms and could be infinite in its species. It could be physical or mental, direct or indirect, intended or unintended. A reference may be made of some cases which are indicative of how the concept of cruelty is interpreted, as also how it was evolved over a period of years so as to keep in tune with changing times.

Black Stone dictionary defines ‘cruelty’ as the “intentional and malicious infliction of physical suffering upon living creatures and particularly human beings or as applied to the latter, the wanton malicious and unnecessary infliction of pain upon the body or the feelings and emotions.” The cruelty as interpreted by the Courts are of two kinds, namely physical and mental cruelty. Some of the classic cases relating to cruelty are as follows:

In *Birch v. Birch*<sup>38</sup> cruelty was equated with a character that is dangerous to life health or limb. In the leading case of *Russel v. Russel*<sup>39</sup>, it was held that cruelty between spouses is behaviour which must be shown to be detrimental to body or mind, or both, either in fact or in justifiable anticipation of the particular injured spouse actually complaining. The dictum laid therein has consistently been followed and continues to be a leading case for the test and definition of “matrimonial cruelty” both in England and India.

*Britt v. Britt*<sup>40</sup> is one of the very early English case which recognized physical violence as cruelty which is a part of domestic violence. *Munshree Buzloor Rehman v. Shamsoonisa Begum case*<sup>41</sup> of Privy Council can be said to have laid the foundation of the rule that cruelty as a ground for judicial separation and later it became the guide and precedent that the High Courts followed. The case of *N. Sripadchandra v. Vasanta*<sup>42</sup> provides a very good

---

<sup>38</sup>(1873)28 L.T.R. 540.

<sup>39</sup>L.R (1897) A.C. 395.

<sup>40</sup>(1953) 3 All E.R. 769.

<sup>41</sup>(1867)11 M.I.A 551.

<sup>42</sup> A.I.R. 1970 Mys. 232.

illustration of mental cruelty. It was held that wilful, unjustifiable interference by one spouse in the sphere of the life of the other constitutes a species of cruelty.

As early in 1971, in *KashinathSahu v. Smt. Devi*<sup>43</sup>, the Orissa High Court held that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. In *Kanna v. Krishna Swamy*<sup>44</sup>, describing upon the dignity to be bestowed on a wife within the four walls of a home, the High Court of Madras has upheld that a woman of modern times is entitled to insist that her husband should treat her with dignity and self respect befitting the status of a wife and that her life with the husband will be peaceful and happy. Keeping in pace with the changing norms of the society, the judiciary have over the years widened the scope of matrimonial cruelty.

*Dastane v. Dastane*<sup>45</sup> was a high watermark case on mental cruelty. Supreme Court had clarified that the burden of proof lies on the petitioner to prove the fact of cruelty and the degree of proof required is preponderance of probabilities. The court differentiated the Indian and English requirements<sup>46</sup> as to prove the nature of cruelty. The court observed:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the *petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.*"<sup>47</sup>

---

<sup>43</sup> A.I.R. 1971 Ori 296.

<sup>44</sup> A.I.R. 1972 Mad. 247 at p.249.

<sup>45</sup>(1975) 2 S.C.C. 326, p. 337, para 30

<sup>46</sup> English Law requires to constitute cruelty such a character as to cause danger to life, limb or health so as to give rise to a reasonable apprehension of such a danger.

<sup>47</sup> Emphasis added. Indian court's concern is to enquire whether the burden of proof is discharged by the petitioner alleging cruelty as to cause a reasonable apprehension in the mind of the respondent that it will be harmful or injurious to live together, keeping into consideration the resultant possibilities of harm or injury to health, reputation, the working career etc.

In *Shobha Rani v. Madhukar Reddy*<sup>48</sup>, a new dimension has been given to the concept of cruelty and it was held by the Supreme Court that the demand of dowry by husband or his parents amount to cruelty. In our society, where dowry demand is increasing day by day, this judgment reveals a positive step. A new thinking was developed about the concept of cruelty by the introduction of matters of sexual dissatisfaction of the spouses.<sup>49</sup> Various causes related to sex such as sexual weakness, impotency and persistent refusal to consummate the marriage<sup>50</sup>, incapability to bear a child, abortion without the knowledge of the husband<sup>51</sup>, sex perversion and unnatural offences<sup>52</sup> were some of the causes held to be cruelty by the judiciary.

Under the Hindu Marriage Act, 1955 intention or motive is not held as an essential element of cruelty.<sup>53</sup> It was upheld by the court that to punish a spouse for the past is not the duty of the court but to protect her for the future. Therefore cruelty need not be proved beyond all reasonable doubts and that it may be proved on balance of probabilities.<sup>54</sup> This judgment shows the necessity to view the cases of matrimonial cruelty beyond technical and mechanical application of evidence and mind.

The Karnataka High Court took a practical and broad view in conformity with the recent trend and development of matrimonial law as it observed that the failure to comply with one of the essential obligations of marital life or any conduct of either spouse which causes disgrace to the other or subjects him or her to annoyance and indignity, amounts to legal cruelty.<sup>55</sup>

---

<sup>48</sup>A.I.R. 1988 S.C. 121.

<sup>49</sup>*Srikanth v. Anuradha*, A.I.R. 1980 Kant 8.

<sup>50</sup>*Jyotish v. Meera*, A.I.R. 1970 Cal 266; *Praveen Mehta v. Inderjit Mehta*, A.I.R. 2002 S.C.2582.

<sup>51</sup>*Kalpana v. Swendra*, A.I.R. 1985 All. 253.

<sup>52</sup>*Vineeth v. Vaishali*, A.I.R. 1998 Bom 73.

<sup>53</sup>*Bhagwant v. Bhagwant*, A. IR. 1967 Bom 90.

<sup>54</sup>*Dastane v. Dastane*, A.I.R. 1975 S.C. 1534 p.1540. It was held that “satisfied” means “satisfied on preponderance of probabilities” and not satisfied under “beyond reasonable doubt” particularly where in adultery, desertion and cruelty direct evidence may not be possible as to the alleged cruel conduct.

<sup>55</sup>*Supra* n. 49.

*In Keshaorao v. Nisha*,<sup>56</sup> it was held by the Court that the broad test to determine cruelty is whether the conduct of the respondent is of such type that the petitioner cannot be reasonably be expected to live with the respondent or living together of the spouses has become incompatible. The acts of violence against wife, however minimal, will, therefore amount to cruelty in case the acts cause distress, humiliation or indignity to wife or the acts affect her mental or bodily health. This decision holds well as to the concern over the right to human dignity and identity of a woman within the marital ties.

*In Rajani v. Subramaniam*<sup>57</sup> the Kerala High Court remarked that judged by the standards of modern civilization wives are not expected to endure harassment in domestic life whether mental or physical like women in older days.

“Her sentiments have to be respected and her aspirations and ambitions are to be taken into account in making adjustments according to the life the wife is accustomed to lead.”

The acts and behaviour of human beings are diverse and infinite and so it was held by the court that the interpretation and definition of the concept of cruelty depends upon the character, way of life of the parties, their social and economic conditions, their status, customs and traditions.<sup>58</sup> The non limitation of the definition of ‘cruelty’ within a straight jacket formula holds good in the present globalised world where human values and culture are getting eroded.

Where out of a sense of vindictiveness, the husband instituted vexatious litigations against his wife and she was feeling humiliated and tortured by reason of execution of such warrants and seizure of property, it was held that the section was wide enough to encompass a cruelty committed through an abuse of the litigative process.<sup>59</sup>

---

<sup>56</sup> A.I.R. 1984 Bom. 413.

<sup>57</sup> A.I.R. 1990 Ker. 57.

<sup>58</sup> *Sukumar Mukherjee v. Tripti Mukherjee*, A.I.R 1992 Pat 32.

<sup>59</sup> *MadhuriMukundChitniss v. M.M. Chitniss*,1992 Cri.L.J.111,Bom.

The case of *V. Bhagat v. D. Bhagat*<sup>60</sup> related to a husband filing petition against the wife for divorce on the ground of adultery<sup>61</sup>. The court held that extreme allegations of wife against itself was in the nature constituting mental cruelty. The Court observed:<sup>62</sup>

“Mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. *While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively.* What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

During the period of 2000, the difficulty in proving mental cruelty as against physical cruelty in domestic violence or matrimonial discord was emphasized to be looked into in relation with the circumstances of each case. Coming to *Chetan Dass v. Kamla Devi*<sup>63</sup> the court acknowledged that the matrimonial matters includes delicate human and emotional relationship that

---

<sup>60</sup> A.I.R.1994 S.C. 710 ; 1994(1) S.C.C. 337

<sup>61</sup>Wife had filed a written statement alleging that her husband suffered from mental hallucination, paranoid disorder etc. that required psychiatric treatment.

<sup>62</sup> *Supra* .47, p. 347 at para 16. Emphasis added

<sup>63</sup> (2001) 4 S.C.C. 250, para 14 at pp.258-259. See for discussion on irretrievable breakdown of marriage under 71 st Law Commission Reports.

demands trust, regard, respect, love and affection with sufficient space for mutual adjustments between the spouses. Such a relationship is required to be accepted within the social norms. The court clearly recognized the role of law in matrimonial relationships as to control matrimonial relationship in a healthy perspective promoting peace in the society. The court stressed on the role of marriage as an institution and observed:

“The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.”

In *R.Prakash v. Sneha Lata*<sup>64</sup> the court emphasized the concept of complete equality of the spouses. The remarks of the court are pertinent as to uphold the rights of woman to equality, and to live with human dignity. “...The orthodox concept of wife and expectations from her to subject herself to husband’s wishes has undergone a revolutionary change with education and high literacy in women and with recognition of equal rights to women in the Constitution and abolition of sex distinction in all walks of life. She is a partner in marriage with equal status and equal rights with the husband.” Here in this case, the wife’s insistence on her continuing with her employment and refusal to leave the job was held not to constitute cruelty.

In *Savitri Pandey v. Prem Chandra Pandey*, the Supreme Court confirmed the nature of mental cruelty test laid down in Bhagat’s Case: The Court has said that cruelty as a ground for divorce under matrimonial law requires the “treatment of the petitioner with such cruelty as to cause a

---

<sup>64</sup>A.I.R. 2001 Raj. 269.



reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.”<sup>65</sup>

In *Parveen Mehta v. Inderjit Mehta*<sup>66</sup> the Supreme Court held:

“Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse, caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be the correct approach to take an instance of misbehaviour in isolation and then pose the question of whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.”

---

<sup>65</sup> (2002) 2 S.C.C. 73.

<sup>66</sup>(2002) 5 S.C.C. 706 at pp.716-17 para 21 per D.B. Mohapatra. J. What is the meaning and import of the expression 'cruelty' as a matrimonial offence was the core question coming up under this case. It was a case of cruelty alleged against the wife who was suffering from some ailment at the time of marriage. Allegations made by the husband were that right from the day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically she refused. As the condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations and even abused him. The court referred to the case of *Dastane v. Dastane* to clarify on the concept of cruelty. 'Cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause an apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status environments and social values, as also the customs and traditions governing them.

A welcoming approach was taken into account in the approach taken towards inferring mental cruelty in *Mohd Hoshan v. State of Andhra Pradesh* wherein the Supreme Court held:<sup>67</sup>

“The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, *mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty.* (emphasis added) In other words, each case has to be decided on its own facts, to decide whether mental cruelty was established or not.”

False or unfounded allegations of adultery have been held to be cruelty giving the offended spouse the right to divorce.<sup>68</sup> In *Vijay Kumar Bhate v. Neela Bhate*<sup>69</sup> the Supreme Court clarified that disgusting accusation of unchaste and indecent familiarity with a person outside wedlock and allegation of extra marital relationship was a grave assault on the character, honour, reputation, status and health of the wife. And this accusation by itself amount to cruelty. Another notable point clarified by the court was that the section on cruelty does not stipulate any particular period or duration to be necessary to constitute cruelty and that the intensity, gravity and stigmatic impact of it on the mental attitude, necessary for maintaining a conducive matrimonial home was to be considered in such cases. Here the mental torture and pain caused by undue allegations on the conducive matrimonial setting has been recognized by the court.

---

<sup>67</sup> (2002) 7 S.C.C. 414,418, *per* S.V.Patil, J. It was a case relating to cruelty and abetment of suicide against a young lady within 11 months of her marriage.

<sup>68</sup> *R. Balasubramaniam v. Vijayalakshmi Balasubramaniam*, 1999 (7) S.C.C. 311.

<sup>69</sup> A.I.R. 2003 S.C. 2462, *per* D.Raju, J.

Supreme Court in *Vinita Saxena v. Pankaj Pandit*<sup>70</sup> has emphasized that in enquiring into what constitutes mental cruelty the numerical count of such incidence or need for perpetration of mental cruelty in a series is immaterial and irrelevant<sup>71</sup>. The real test will be to go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. This decision is a welcoming advance in the stages of understanding the concept of mental cruelty in specific cases of domestic violence wherein violence is perpetrated by someone in intimate relationships.

The Supreme Court's decision in *Samar Ghosh v. Jaya Ghosh*<sup>72</sup> has put forth a view contrary to the prevailing notion of saving a marriage at all costs, in the context of mental cruelty. It reads:

“Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. *The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.* In such like situations, it may lead to mental cruelty.”

Applying the factors enumerated to the present case<sup>73</sup>, the Supreme Court held the decision of the high court that mental cruelty had not been established was wrong.

---

<sup>70</sup> (2006) 3 S.C.C. 778.

<sup>71</sup> The same view is endorsed in the new Act of 2005 in India.

<sup>72</sup>2007 (5) SCALE 1, para 79.Emphasis added. It was a case of matrimonial dispute that lead to the destruction of 22 year old marital bond between two IAS Officers. The case attempts to summarize and put down the law with regard to mental cruelty as grounds for divorce in matrimonial law. The Supreme Court examined earlier judgments with regard to mental cruelty by the Indian courts. It also scrutinized English, American, Canadian and Australian judgments with respect to the issue of mental cruelty. The Court referred to legal texts like *Halsbury's Laws of England* and *Black's Law Dictionary*.

<sup>73</sup> The Court in the instant case has codified a long list of illustrative cases as to adjudging mental cruelty<sup>73</sup>. A husband undergoing sterilisation without medical reasons and without the

In the backdrop of the changing scenario of the world certain notable judicial interpretations has upheld the right of women to human dignity within the marital relationship. Starting from the *Munshree Buzloor Raheem's* case ending up with Samar Ghosh clearly shows the conceptual development of cruelty. Stage by stage the development is towards the liberal ideas of autonomy and rights. The concept of cruelty has undergone various interpretations as to inculcate its impact in the deprivation of identity in women's life. The development of concept of Cruelty started as a ground for judicial separation and divorce proceedings under matrimonial laws in the Indian context. Now the concept of cruelty has transformed itself into as violation of human rights and dignity of human beings and has acquired a formidable status of discussion in the human rights jurisprudence. 'Cruelty', no matter whether perpetrated by the husband or the wife seems to be recognized

---

consent or knowledge of his wife may lead to mental cruelty: A wife undergoing sterilisation or abortion without medical reasons or without the consent or knowledge of the husband may lead to mental cruelty, unilateral decision of refusal to have intercourse for a considerable period without any physical incapacity or valid reason may amount to mental cruelty, acute mental pain, agony and suffering to a degree that would not make it possible for the parties to stay with each other, on a comprehensive appraisal of the entire matrimonial life, if it becomes clear that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party, mere coldness of manner or lack of affection cannot amount to mental cruelty, however, frequent rudeness of language, petulance, indifference and neglect could reach a degree that makes married life for the other person intolerable, feeling of deep anguish, disappointment, frustration in a spouse caused by the conduct of the other over a long time may amount to mental cruelty, sustained abusive and humiliating treatment calculated to torture or render miserable the life of the spouse could amount to mental cruelty, sustained unjustifiable conduct affecting the physical and mental health of the spouse. However, the treatment complained about and resultant apprehension must be very grave, substantial and weighty, sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure could amount to mental cruelty, jealousy, selfishness, possessiveness which causes unhappiness, dissatisfaction and emotional upset may not be grounds for divorce on account of mental cruelty, trivial irritations, quarrels, normal wear-and-tear of married life would not be adequate for grant of divorce on grounds of mental cruelty, few isolated instances over a period of years would not amount to mental cruelty. Persistent ill conduct for a lengthy period, where the relationship has deteriorated to an extent that the wronged party finds it difficult to live with the other party may amount to mental cruelty, long period of continuous separation indicating that the matrimonial bond is beyond repair may lead to mental cruelty, etc.

by the judicial responses.<sup>74</sup> And thereby men alone have not been stigmatized as the perpetrator of violence within the marital bond. The Samar Ghosh case has tried to bring in certain conditions and definitions to constitute mental cruelty. But the question still remains as to how to make it applicable in the Indian cultural context given the higher levels of gender inequity and overarching patriarchal culture.

### **5.5 The General Criminal Law Responses on Domestic Violence**

In any country, authorities could combat domestic violence by using longstanding, broad criminal laws, which prohibit the behaviour for anyone who engages in the behaviour regardless of his relationship with the victim. Among such laws are those that make it a crime to threaten, beat, assault, kidnap, rape, or murder another human being. In theory, these laws can be used to prosecute husbands who beat or otherwise abuse their wives. In reality, there is a longstanding tradition that police and prosecutors do not use these laws when the behaviour occurs in the home, except in the most extreme cases such as murder. Women are subject to a great many forms of violence outside the family setting by strangers and acquaintances, but that is a far broader subject beyond the scope of the proposed study.

The Criminal law in India comprising of the substantive and procedural law does not specifically recognize domestic violence as an offence. The Indian Penal Code enacted in 1860 has afforded special provisions which give protection to a woman who might become a victim of offence relating to her sexual identity.<sup>75</sup> These special provisions relating to women have been

---

<sup>74</sup> Leading case on wife's cruelty towards husband is *Dastane v. Dastane*, (1975) 2 S.C.C. 326; A.I.R. 1975 S.C. 1534; and *Handa v. Handa*, A.I.R. 1985 Del., 76 is a case of husband's cruelty towards wife.

<sup>75</sup> The Indian Penal Code, 1860 has recognized certain specific offences against women such as offences affecting human body consisting of dowry death, causing miscarriage, outraging the modesty of a woman, kidnapping and abduction, sexual offence against woman; offences relating to marriage consisting of cohabitation by deceitful means, bigamy, adultery, enticing or taking away a married woman; cruelty by husbands or his relatives for dowry, insulting the modesty of women etc.

incorporated as not exceptions but to guard women against special offences which they might face both in her public and private life because of her womanhood and her social position.<sup>76</sup> All forms of physical violence and some forms of emotional abuse, such as threats of physical violence and demands for dowry falls within the definition of criminal conduct which could be attributed to the offence of domestic violence faced by women within four walls of the home.<sup>77</sup> They range from grave offences such as dowry death and suicide, to comparatively milder offences such as assault.

### **5.5.1 Hurt<sup>78</sup> and Grievous Hurt<sup>79</sup>**

Physical violence in every form is an offence. Any male or female member harassing a woman physically can be punished. Criminal Law in India recognizes two types of physical hurt i.e. simple and grievous hurt. Causing of simple bodily injury, or disease, or infirmity is considered under the former offence and the latter<sup>80</sup> is of causing offences of serious nature. The person inflicting the hurt need to have done it intentionally. Severe punishment is provided in the law to offence of hurt with the use of dangerous weapons or means which is of serious in nature.

---

<sup>76</sup>Nomita Aggarwal, *Women And Law in India*, Women's Studies and Development Centre, University of Delhi, New Century Publications, Delhi (2002),p.25.

<sup>77</sup> They are covered under various section of the Indian Penal Code; s. 323 (hurt); s. 324 (hurt by dangerous weapons; s. 325 (grievous hurt);s. 326 (grievous hurt by dangerous weapons; being a non bail able offence);s. 352 (assault);s 337 (assault in order to confine a person);ss. 342 and 346 (wrongful confinement); s. 506 (criminal intimidation).All others except s. 326 are bail able offences.

<sup>78</sup> *Id.*,ss.319, 321, 323 and 324.

<sup>79</sup>*Id.*, ss.320, 322, 325 and 326.

<sup>80</sup> *Id.*, s.405.It includes causing of emasculation, loss of sight in one or both eyes; loss of hearing in one or both ears; destruction or permanent impairment of the powers of any member or joint; permanent disfiguration of the head or the face; fracture or dislocation of a bone or tooth; any hurt which puts one's life in danger; any hurt that causes severe bodily pain for 20 days or more; any hurt because of which one cannot carry on with one's normal work or lifestyle for 20 days or more.

### **5.5.2 Criminal Breach of Trust<sup>81</sup>**

Another law that has been applied to situations of dowry harassment through judicial intervention is the concept of criminal breach of trust. Criminal breach of trust is an offence under the Indian Penal Code, and is intended to cover situations where a person entrusts a property in another, and that other person betrays the trust and misappropriates it. Though this provision is not specifically intended for dowry-related harassment, in *Pratibha Rani v. Suraj Kumar*,<sup>82</sup> the Supreme Court applied this general provision of law to a situation of dowry harassment. The Court said that such property was meant for the exclusive use of the wife and was only entrusted to the husband or his relatives for safekeeping. They were duty-bound to return the property to her if she asked for their return, failing which they could be prosecuted for the offence of criminal breach of trust.

*Stridhan* refers to any property that is gifted to the woman during and around the time of her marriage, or has been left to her will. It includes property that has been gifted to her by parents, siblings and in-laws. It has been upheld by the court that she is the absolute owner of that property and can deal with it in any way she likes and her husband has no ownership rights over the property<sup>83</sup> and therefore the husband is morally bound to restore the property or its value and the refusal to return it renders him guilty.<sup>84</sup> A wife deciding to move out of the matrimonial house can resort to the provisions dealing with

---

<sup>81</sup> *Id.*, s. 406.

<sup>82</sup> A.I.R. 1985 S.C. 628 More than a decade after the judgment in *Pratibha Rani's* case, a three-judge Bench of the Supreme Court took a fresh look at the judgment in *Rashmi Kumar v. Mahesh Kumar Bhada*, (1997) 2 S.C.C. 397, 1996, and said that the judgment requires no reconsideration.

<sup>83</sup> *Rashmi Kumar v. Mahesh Kumar Bhada*, (1997) 2 S.C.C. 397.

<sup>84</sup> *Pratibha Rani v. Saroj Kumar*, (1985) 2S.C.C. 370. The Supreme Court held that dowry given by the parents, articles given to woman by her in-laws and husband such as jewellery and clothes, which can be said to be for her exclusive use woman's personal property can all be said to be the woman's exclusive property and her *stridhana* and she is entitled to the same. The court further held that withholding a woman's *stridhana* and refusal to return the same on demand amounts to the offence of criminal breach of trust and is punishable under S.406 of the Indian Penal Code.

Criminal breach of trust in cases of misappropriation of the same by the husband or his relatives. The wife does not have to show any special agreement to prove that the property was entrusted.<sup>85</sup> The ingredients of the offence require that the property was entrusted with a third party and there was refusal by them to return it. In such circumstances another remedy would be to file a suit for recovery of *stridhana* articles either independently or if any other matrimonial proceedings are pending, as an ancillary relief in the same.<sup>86</sup>

### **5.5.3 Wrongful Restraint<sup>87</sup> and Wrongful Confinement<sup>88</sup>**

Wrongful restraint or confinement leading to the curtailment of the freedom and liberty of a person is considered as an offence under the Code. This offence in turn impairs the freedom of movement which is implicit under the right to live with human dignity guaranteed under the Constitution of India.

### **5.5.4 Outraging the Modesty of a Woman<sup>89</sup>**

The Indian Penal Code punishes an assault or criminal force on woman with intention to outrage her modesty and is punishable with imprisonment up to two years. No specific protection to woman who faces violence from other family members within a family has been provided under the section but rather it offers a general protection to woman from indecency meted out to them by the public.

### **5.5.5 Insulting the modesty of a woman<sup>90</sup>**

A man intending to outrage the modesty of a woman, if he exposes his person indecently to her or uses obscene words with the intention that she

---

<sup>85</sup>*Supra* n.83.

<sup>86</sup> Such a decree can be passed under s. 27 of the Hindu Marriage Act,1955;s. 3(1)(d) of the Muslim Women (Protection of Rights on Divorce) Act,1986;s. 42 of the Parsi Marriage and Divorce Act,1936;s. 27 of the Indian Divorce Act,1869; and s. 7 (1)(c) of the Family Courts Act,1984.*Balkrishna RamachandraKadam v. Sangeeta BalkrishnaKadam*,(1997)7S.C.C.500; *Rameshchand Daga v. Rameshwari Daga*, (2005) 4 S.C.C. 772.

<sup>87</sup>Indian Penal Code s.339

<sup>88</sup>*Id.*, s. 340.

<sup>89</sup>*Id.*, s. 354.

<sup>90</sup>*Id.*, s. 509.



should hear them or exhibiting to her obscene drawings is an offence punishable under the Code. It is held to be an intrusion into the privacy of the woman.

### **5.5.6 Causing Miscarriage and Other Offences**

The Indian Penal Code deals with offences of causing of miscarriage, injuries to unborn children and exposure of infants etc. The causing of miscarriage also called as abortion with the consent of the woman is an offence punishable up to a sentence of three years of imprisonment or with fine or both.<sup>91</sup>The termination of pregnancy done by a registered medical practitioner for the purpose of saving the life of the woman and in good faith is not attracted by the above section. Causing of miscarriage to a woman who is quick with child that is who experience the peculiar sensation about the fourth or fifth month of pregnancy amounts to an aggravated form of the offence punishable with a maximum of ten years of imprisonment. The offender is punishable with imprisonment of life or for ten years for the miscarriage caused without the consent of the woman irrespective of the state of pregnancy.<sup>92</sup>Causing death of a woman with child by any act done with the intent to cause miscarriage is also made punishable under the Code.<sup>93</sup>The Code prescribes a maximum punishment of ten years for any act done with the intention of preventing a child being born alive or to cause it die after the birth.<sup>94</sup>The Code also punishes an offender causing death of a quick unborn child by an act amounting to culpable homicide.<sup>95</sup>This has been made a specific offence on the principle that a foetus gets life after twelve weeks of

---

<sup>91</sup>*Id.*, s. 312A woman who causes herself to miscarriage also comes under the meaning of explanation to s. 312.

<sup>92</sup>*Id.*, s.313.

<sup>93</sup>*Id.*, s. 314.

<sup>94</sup>*Id.*, s. 315 .

<sup>95</sup>*Id.*, s. 316. This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where death is caused after the quickening and before the birth of the child.

conception<sup>96</sup>Exposure and abandonment of a child under twelve years by parents or persons having care of the child with the intention of wholly abandoning it is held punishable under the Code.<sup>97</sup>The Indian Parliament has passed the Medical Termination of Pregnancy Act, 1971 and the Pre- natal Diagnostic Technique (Regulation and Prevention of Misuse) Act,1994 to deal with the unlawful miscarriages and also the infanticide as well as the foeticide.

### **5.5.7 Bigamy<sup>98</sup>**

The law against bigamy<sup>99</sup> is designed to safeguard one of the basic institutions of society, marriage. With the exception of Muslims, bigamous marriages under personal laws of all other communities is void.<sup>100</sup>In India, in order to prove the charge of bigamy, the validity of the second marriage must be established, in the sense that the essential ceremonies prescribed by the relevant personal law have been performed.<sup>101</sup>Under the Criminal Procedure Code, only the person whose spouse has committed the offence must make a complaint for the court to take cognizance of the offence.<sup>102</sup>

### **5.5.8 Adultery<sup>103</sup>**

Adultery is an offence against marriage punishable under the Code. Adultery is also a ground for divorce under the Hindu Marriage Act, 1955,

---

<sup>96</sup>*Murugan v. State*, 1991 Cri.L.J.1680 Mad.

<sup>97</sup>Indian Penal Code. s. 317,

<sup>98</sup>*Id.*, ss. 494 and 495,

<sup>99</sup> 'Bigamy' meaning marrying again while one's spouse is still alive.

<sup>100</sup> S. 5 (i) of the Hindu Marriage Act,1955 prohibits bigamy. S. 11 makes a bigamous marriage void and s. 17 makes it a penal offence under ss. 494 and 495 of the Indian Penal Code; s. 19 (d) of the Indian Divorce Act,1872;S. 5 of the Parsi Marriage and Divorce Act,1936.In the case of *Lily Thomas v Union of India*, (2000) 6S.C.C 224,It was held that since bigamous marriage is prohibited under The Hindu Marriage Act,1955 and is an offence under s. 17, any marriage solemnized by the husband during the subsistence of his Hindu marriage ,would be void under s.11 and offence triable under s. 17 read with ss. 494 and 495 of the Indian Penal Code, regardless of such husband's conversion to another religion permitting polygamy. The same view was upheld in the case of *SarlaMudgal and President, Kalyani v. Union of India*, (1995) 3S.C.C 635.

<sup>101</sup>*B.S. Lokhande v. State of Maharashtra*, (1965) 2 S .C.R 837.

<sup>102</sup>Criminal Procedure Cod, s. 198 .

<sup>103</sup> Indian Penal Code, s. 497

Special Marriage Act, 1954, Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936. Under the Dissolution of Muslim Marriage Act, 1939 husband's association with women of evil repute or leading an infamous life is a ground though it is considered as amounting to cruelty under the Act- it is akin to living in adultery. Extra Marital sexual intercourse is an essential element of adultery. It presupposes carnal union between a man and a woman.<sup>104</sup> The validity of section 497 of the Indian Penal Code has been challenged number of times and the courts have held that this position is valid and constitutional. A division bench of Supreme Court has held that section 497 of the Indian Penal Code is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her.<sup>105</sup>

The offence of adultery reflects discrimination. It rests in larger part on the idea that a woman is the property of the male.<sup>106</sup> An analysis of Sec 497 along with the various observations by the Supreme court and High courts brings us to the conclusion that only a man can commit adultery. The married woman who is involved in the conduct is not punishable as the adulteress because she is treated as a 'victim' not as the 'author of the crime'. Woman is looked upon as an object, an inanimate property having no legal existence

---

<sup>104</sup> *Yousuf Abdul Aziz v. State of Bombay*, A.I.R. 1954 S.C.321. In the case of *Soumitri Vishnu v. Union of India*, A.I.R. 1985 S.C. 1618:1985 Cri L.J.1302 (S.C.) Supreme court has upheld the constitutional validity of S. 497 of the Indian Penal Code. The Supreme court justified its stand on the ground that in contemplation of the law the wife who is involved in illicit relationship with another man is victim and not the author of the crime. The court further held that definition of adultery does not discriminate between man and woman by conferring the right to prosecute only the husband and that Sec 497 of the Indian Penal Code is not violative of Articles 14 and 15 of the Constitution of India.

<sup>105</sup> *Revathi v. Union of India*, A.I.R. 1988 S.C. 835.

<sup>106</sup> Complaint for adultery can only be made by the aggrieved person and that person is none other than the husband of the woman according to s.198 of the Criminal Procedure Code. In exceptional cases, in the absence of the husband, some person who had the care of the woman on his behalf at the time when the offence was committed, may with the leave of the court, initiate prosecution on his behalf.

Moreover, if a married man has sexual intercourse with an unmarried woman it is no adultery because an unmarried woman does not belong to anybody as property and is not owned by anybody, not even by her parents or siblings because they hold her in trust and have no ownership rights to prosecute the person. And if a married wife is forced into adulterous intercourse by her husband, then she has no locus standi or status to prosecute either her husband or the other person involved in committing the offence of adultery. The law is thus blatantly biased against the woman and has put the man in a privileged position by treating the relationship between husband and wife as one of the owner and owned.

#### **5.5.9 Defamation<sup>107</sup>**

Defamation involves oral or written words, gesture or signs or visible representation made to a third person intending to harm or believing that this imputation will harm the reputation of the person before a third person. Lowering the reputation of the person by lowering the character of the person or credit of the person or making physical imputations against a person to a third person would amount to defamation. In a criminal trial defence can be forwarded that the imputation was made in good faith and not out of malice or bad faith to protect the interest of the person making the imputation or for public good.<sup>108</sup> A woman being harassed in such a way either within the natal family or the matrimonial house can take recourse of this provision of the code.

#### **5.5.10 Death**

When the death of a person is caused by acts of domestic violence, provisions on murder<sup>109</sup> and culpable homicide<sup>110</sup> comes into play. Attempts to

---

<sup>107</sup>Indian Penal Code,s. 499.

<sup>108</sup> *Id.*, Exception 9 of s. 499.

<sup>109</sup> *Id.*, s. 300.

<sup>110</sup> *Id.*, s. 299.

murder<sup>111</sup> and to commit culpable homicide<sup>112</sup> are also punishable under the Code.

### **5.5.11 Rape<sup>113</sup>**

The Indian Penal Code deals with various sexual offences against women<sup>114</sup>. Of these offences; rape is the most brutal, which violates not only the bodily integrity of woman but amounts to mental torture also. A minimum and mandatory punishment with imprisonment of not less than seven years extending to either ten years or even life imprisonment has been imposed by the Code.<sup>115</sup> The presumption of rape under the Indian Evidence Act, 1872 falls in favour of the victim alleging rape.<sup>116</sup> The reason for such presumption is that a rapist not only violates the victim's personal integrity but also degrades the very soul of the helpless female. The Criminal Procedural Code provides protection to the rape victim to the effect that the inquiry and trial of rape should be conducted in camera.<sup>117</sup> Granting of interim compensation to rape victims during the pendency of a criminal case if a prima-facie case is made out against the accused and the need to deal such cases with 'utmost sensitivity'<sup>118</sup> has been upheld by the Apex Court of the country.<sup>119</sup>

---

<sup>111</sup>*Id.*, s. 307.

<sup>112</sup> *Id.*, s. 308.

<sup>113</sup> *Id.*, s. 375. It denotes the sexual intercourse with a woman first, against her will; secondly, without her consent; thirdly, with her consent obtained by putting her in fear of death or hurt; fourthly, with her consent when man knows that he is not her husband and if consent is given under her misconception of his identity as her husband; fifthly, with her consent when at the time of giving consent she is under the influence of unsoundness of mind or administration of some substance to make her give consent; sixthly, with or without consent when she is under sixteen years of age.

<sup>114</sup> *Id.*, ss. 375 to 376 D, 377 and 509.

<sup>115</sup> *Id.*, s. 376

<sup>116</sup> Under s. 114 A of the Indian Evidence Act, 1872, in a prosecution of rape under Sec 376 of the Indian penal Code, if the alleged victim states that she was raped, the court shall always presume that she did not consent.

<sup>117</sup> Criminal Procedure Code 1973 s. 327 (2) *State of Punjab v. Gurmit Singh*, (1996) 1 S.C.C. 485.

<sup>118</sup> *State of A.P. v. Gangula Satya Murty*, (1997) 1 S.C.C. 272.

<sup>119</sup> *Bodhisattwa Goutham v. Subhra Chakraborty*, (1996) 1 S.C.C. 490.

### **5.5.12 Marital Rape<sup>120</sup>**

The law in India does not recognize ‘marital rape’ as an offence. In certain countries like United States of America, U.K., Denmark, Australia and Sweden, marital rape has been made an offence. Sexual intercourse by a man with his own wife if she is not under the age of fifteen years does not amount to Rape.<sup>121</sup> Forced sexual intercourse with a wife who is living separately under an order of judicial separation has been held to be an offence under the Indian Penal Code.<sup>122</sup>

Marital rape exemption in the criminal justice system really reflects a challenge to the fundamental right of women to live with human dignity under the Constitution of India.<sup>123</sup> The abolition of immunity for husbands would emphasize the society’s condemnation of sexual violence within the family. By permitting marital rape, the law unconstitutionally forces all women to surrender their right to bodily integrity, reproductive freedom and personal liberty on marriage. And as aftermath of marriage wives suffer legally sanctioned sexual violence in violation of their cherished right to life and are denied equality and equal protection of laws.<sup>124</sup>

While all the general criminal laws except the prohibition on rape could normally be used to prosecute husbands for domestic violence, the recent enactment of special domestic-violence criminal laws indicates that India has the same problem of non-enforcement of general criminal law by police and

---

<sup>120</sup>Indian Penal Code, s. 376A.

<sup>121</sup>*Id.*, Exception to s. 375.

<sup>122</sup> The most frequently cited basis for marital rape exemption is the doctrine of irrevocable implied consent that originated in the seventeenth century declaration by Sir Mathew Hale. Hale’s implied consent theory led to the belief that because a woman gave her consent to sexual relations with her husband at the time they were married, he could forever assume that the original consent still applied. This notion still undeniably undergirds the marital rape exemption in the Indian Penal Code.

<sup>123</sup>*State of Maharashtra v. Madhukar N. Mardikar*, (1991) 1 S.C.C. 57.

<sup>124</sup> Suman Saha, “Sleeping with the Enemy?- Recognising Marital Rape” 10(2) *Women’s Link* 6 (2004).

prosecutors in the domestic violence setting that other countries have confronted.

## **5.6 Specific Criminal Law Responses in the Context of Domestic Violence**

It was only as late as 1983, following the public outrage against 'dowry deaths' coupled with strong lobbying from women's organizations demanding legal reforms that domestic violence in India came to be recognized as a criminal act. Prior to 1983 only the general provisions of the Indian Penal Code could be invoked to book and penalize the offenders. Those general offences whose nature were attributable to the offence of domestic violence proved to be insufficient in facing the special circumstances of a woman facing violence in patri-local set up of the family. And hence it could be rarely made applicable against the husband or his relatives. A limited recognition of the criminal nature of domestic violence was reflected in Sections 498A and 304B of the Indian Penal Code which were introduced by the Criminal (Amendment) Acts of 1983 and 1986 respectively.

The Criminal Law Amendment Act of 1983 and the enactment of Section 498 A in the Indian Penal Code emerged as of special significance. This new provision for the first time criminalized domestic violence. Physical or mental violence inflicted on a woman by her husband and relatives was recognized as a cognizable and punishable act. As the two vital arms of the state the Police and the Judiciary are responsible for the successful implementation of these laws. A spate of other amendments also followed in the criminal justice system of India all of which reflected certain recognition of the seriousness of the problem of domestic violence in India namely:

- a) Under the Criminal Law (Second Amendment) Act, 1983, section 174 Criminal Procedure Code was suitably amended.<sup>125</sup>
- b) Under the Criminal Law (Second Amendment) Act, 1983, a new section namely 113 A, was inserted in the Indian Evidence Act.<sup>126</sup>
- c) The inclusion of section 304 B in the Indian Penal Code in the Dowry Prohibition (Amendment) Act, 1986 and the introduction of 'dowry death' as a new offence.
- d) A new section, 113 B was inserted in the Indian Evidence Act through the Dowry Prohibition (Amendment) Act, 1986.<sup>127</sup>
- e) Section 8A in the Dowry Prohibition Act, 1961, was introduced by the Dowry Prohibition (Amendment) Act, 1986.<sup>128</sup>

### **5.6.1 Implication of 'dowry death' as a form of domestic violence.**

In 1986, there was another amendment to the Indian Penal Code in the form of 304-B by which an entirely new offence, which had until then been unknown to criminal jurisprudence was recognized "dowry death". 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 marriage, and if it is established that the wife had been subject to cruelty for dowry by her husband or his relatives soon before her death, that death is termed as a 'dowry

---

<sup>125</sup>It provided for investigation by the police, of cases of suicide committed by women within seven years of marriage or where their death occurs under suspicious circumstances within seven years of marriage.

<sup>126</sup> Under this section when a woman commits suicide within a period of seven years from the date of her marriage, due to 'cruelty' by her husband or his relatives, the court may presume that such suicide has been abetted by her husband or by his relatives.

<sup>127</sup> Under the provision of this section, when a person has been responsible for the dowry death of a woman and it is established, that such a woman had been subjected by such person to cruelty or harassment prior to her death. The Court shall presume such person had caused the dowry death.

<sup>128</sup> The new section lays down that where any person is prosecuted for taking or abetting the taking of any dowry or demanding of dowry, the burden of proving that he had not committed such offence, shall be on him.



death'.<sup>129</sup> The dowry death provision applies only to married woman. This offence was made cognizable and non-bailable. The term dowry used in the Code has the same meaning as defined in the Dowry Prohibition Act and is not confined to only that given at the time of marriage. The Supreme Court has in a series of judgments held that 'soon before her death' is a relative term and that no time limit can be fixed for the same. The court looks at the proximate live link between the effect of cruelty based on dowry demand and the death concerned as the event should not be remote in time.<sup>130</sup> The burden of proof gets shifted to the accused to prove his innocence. After the ingredients of the offence gets established charges can be framed for offences under murder, abetment of suicide, dowry death and for cruelty to married woman by husband or by his relatives in the alternative. Since the introduction of dowry death law the judgments pronounced by the courts clearly reveal that maximum punishment should always be awarded.<sup>131</sup>

To invoke the legal presumption of the Indian Evidence Act, 1872 it is necessary to prove that the deceased was subjected to cruelty or harassment. The presumptions<sup>132</sup> apply only if the offence takes place within seven years of marriage. These sections, 113 B of the Indian Evidence Act and 304B of the Indian Penal Code read in conjunction shift the burden of proof from the prosecution to the husband or his relatives accused of the offence. This is a departure from the normal rule of evidence and has been introduced to strengthen women's position in vulnerable situations. But while dealing with such dowry death cases Courts have resorted to mixed interpretations of the

---

<sup>129</sup> Indian Penal Code, s. 304B.

<sup>130</sup> *Kaliya Perumal v. State of Tamilnadu*, (2004) 9 S.C.C. 157; *Vidhya Devi v. State of Haryana*, (2004) 9 S.C.C. 476; *Kamesh Panjiyar @ Kamlesh Panjiyar v. State of Bihar*, (2005) 2S.C.C. 388; *Balwant Singh and another v. State of Punjab*, A.I.R. 2005 S.C. 1504; 2004 S.C.C. (Cri)2057.

<sup>131</sup> *Surinder Kumar v. State, (Delhi Administration)*, (1980) 1S.C.C. 467.

<sup>132</sup> Indian Evidence Act, 1872 s. 113B and Indian Penal Code. 304B

provisions resulting in both negative<sup>133</sup> and positive judgments<sup>134</sup>. The ingredient of the lofty and much applauded offence of dowry death (section.304B) has made it impossible to prove the offence. Earlier a case of wife murder would be registered under section302. The prosecution needed to prove the accused in terms of his proximity to the scene of offence and motive for the murder. But after the amendment, a wife murder ceased to be a murder

---

<sup>133</sup> In the case of *Appasaheb v. State of Maharashtra*, (2007) 9 S.C.C.721. the Supreme Court overruled the conviction of the appellants (husband and in-law) under Sec 304 B of the Indian Penal Code combined with Sec 34 of the Code, and held that demand for money by the husband and his family was on account of some financial stringency or for meeting some urgent domestic expenses and that it cannot be termed as a demand for dowry as the word is normally understood. The Court observed that a strict interpretation must be given to the word “dowry” as defined in the Dowry Prohibition Act, 1961 and be necessarily be connected with the marriage. This judgment fails to take into account the reality of the way in which demand for dowry takes various forms even after the actual marriage ceremonies are completed, and how women continue to be harassed for dowry long after the initial demand at the time of marriage. In *Saro Ram v. State*, (2005) Cri. L.J. 457 A.P; where the demand of money for house construction was not held to be a dowry demand for the applicability of S. 304 B of the Indian Penal Code.

<sup>134</sup>*State of West Bengal v. Orilal and another*, (1994) 1S.C.C. 73.*Pawan Kumar v. State of Haryana*,(1998) 3S.C.C. 309. Supreme Court interpreted the circumstances where section 304B can be admissible, to include mental cruelty even in the absence of physical cruelty sufficient for charge under s.304B In this case the couple was married in 1985. There was demand of dowry right from the day of marriage. The wife was mentally tortured by various means. Two years later, the wife mentioned to her sister and brother in law that she was being ill-treated by her husband because of dowry. The following day, she committed suicide. The question that arose for consideration was that when there was no clear evidence of physical torture prior to her death, could the husband be held guilty for causing a dowry death. The Supreme Court held that mental cruelty is cruelty too and that ground was sufficient to meet the requirements of section 304B of the Indian Penal Code. It further held that dowry demands need not be related to the wedding. Persistent demands made thereafter would also amount to dowry demands.; *Beena Agarwal v. Anupam*, A.I.R. 2004 S.C.141. In *Smt Shanti and another v. State of Haryana*, A.I.R. 1991 S.C. 1226;Supreme Court held that even a case of suicide would be within the expression ‘death occurred otherwise than in normal circumstances’ and would attract the provision of Sec. 304 B of the Indian Penal Code if other ingredients of the section are proved. In *Hem Chand v. State of Haryana India*, 1994 (6) S.C.C. 727. Supreme Court interpreted the circumstances where S.304B, IPC can be admissible, to include suicide In this case, the wife stayed for two months in her matrimonial home and thereafter returned to her parents’ home. She complained that her husband was demanding more dowry. This demand of dowry continued for quite some time and after two years, the wife died of strangulation. The question that arose for determination in this case was whether S.304B2 of the Indian Penal Code which relates to dowry death, could be applied. The Supreme Court of India where the matter was heard eventually, reached the conclusion that it was indeed a case where S.304B was attracted, even if it was not conclusively proved, whether the strangulation had been caused by the husband, or was suicidal. It was held that the key test in these cases was to understand whether the death was a result of harassment for dowry or not.

and was relegated to 'dowry death'. A presumption of the occurrence of a dowry death may be raised under section 113-B, if the following conditions of section 304-B are proved:

- 1) the death of the woman has been caused by burns or bodily injury or otherwise than under normal circumstances;
- 2) the death of the woman has occurred within 7 years of her marriage;
- 3) she has been subjected to cruelty or harassment by her husband or his relative;
- 4) such cruelty or harassment was for or in connection with a demand of dowry;
- 5) and finally, that such cruelty or harassment was meted out to the woman soon before her death.

Only once these ingredients were proved the onus would shift on to the husband to prove that he did not commit the offence in order to seek acquittal. While resorting to negative interpretations by the courts, there is constant erosion of the basic human values of tolerance and the spirit of 'live and let live'.

It is to be noted that section 304B is used only in the cases when there is a death within seven years of marriage. Section 304B loses its applicability after that. In *State of Punjab v. Iqbal Singh and others*,<sup>135</sup> it was observed that period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. The section only deals with the situation that where there is a death which clearly brings in the limited application of section 304 B.

### **5.6.2 Implication of Abetment of Suicide in Domestic Violence**

The bodily and mental violence unleashed at the time of domestic violence against woman can drive her to suicide. In such cases, abuser cannot

---

<sup>135</sup>1991 Cri.L.J 1897 (S.C.).

be made responsible for the death of the woman under the provision of dowry death. It is at this juncture that punishment for abetment of suicide<sup>136</sup> comes into play. Cruelty meted out in such cases holds the same meaning as in the Section 498 A of the Indian Penal Code. Prosecution need only to prove the cruelty and that it in turn forced the woman to commit suicide and thereby shifts the burden of proof to the husband or his relatives. In cases where woman committed suicide after seven years had elapsed since the marriage, the prosecution will have to prove beyond reasonable doubt that the cruelty was of such nature that it drove the woman to commit suicide. This 'seven year limit' clause has proved to be a major impediment in prosecuting cases of dowry death. The provisions of abetment to suicide, with its positive rules of evidence, have failed to bring redressal as the court interprets the newer provisions in the most technical manner. Some important judgments would substantiate the above premise.

In the case of abetment to suicide under Section.306 of the Indian Penal Code, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abetment to suicide is available only if husband is proved guilty of cruelty towards the wife.<sup>137</sup> In certain cases of cruelty in which the death of the wife was suicidal or homicidal, the prosecution has been launched only under S. 498 A of the Indian Penal Code and the husband had escaped prosecution under S.304 B.<sup>138</sup>

Madhya Pradesh High Court set aside the conviction of three years and acquitted the mother in law. The Court held that since the deceased ended her life by self immolation when none of the in- laws were present in the house at

---

<sup>136</sup>Indian Penal Code. ss. 306 and 107.

<sup>137</sup>*Ashok Kumar v. State of Punjab*,1987 Cri.L.J,412.

<sup>138</sup>*BapuSubhdeo v. State of Maharashtra* (1992) 2 Bom CR 450;*Lal Mohan v. State* (1993) 1 Crimes 298.

the time of suicide it was committed in all probability out of frustration and pessimism due to her own sensitiveness.<sup>139</sup>

### **5.6.3 Cruelty by Husband or his Relatives for Dowry as a Form of Domestic Violence**

Section 498A<sup>140</sup> is a bold and progressive legal provision, in that it gives legal recognition to the torture, suffered by woman within the household in a patriarchal set up specific to Indian culture, meted out by the family members in the marital home and such conduct being condemned by the society as a crime. Any woman facing violence in the home can technically register a case in a police station without having to produce any proof. The onus lies on the man and his relatives to prove that they are not guilty so as to avoid arrest. Offences committed under this section are cognizable and non-bailable.

Keeping in view the misuse of this particular provision its constitutional validity was challenged as violative of Articles 14 20(2) of the Constitution of India in *Indraj Malik v. Sunita Malik*<sup>141</sup> and ultimately it was decided positively and constitutionality was upheld.<sup>142</sup> In *Sushil Kumar Sharma v. Union of India*,<sup>143</sup> it was held by the Supreme Court that section 498-A is

---

<sup>139</sup> *Padmavati v State of M.P.*, 1987 Cri.L.J.1573.

<sup>140</sup> The law states: Whoever being the husband or the relative of the husband of a woman, subjects such a woman to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. This section defines cruelty as: a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman or b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

<sup>141</sup> 1986 Cri.L.J 1510 Delhi.

<sup>142</sup> The contention was that the provision was violative of A.14 in as much as it gave an arbitrary power to the police as well as to the courts, that the word 'harassment' used in part (b) of the explanation was vague and thus any person can be arbitrarily arrested for harassment and this section violates the principles against Double Jeopardy guaranteed by Art.20(2) of the Constitution in view of the fact that the demand of dowry or any property was punishable under this section as well as Section 4 of the Dowry Prohibition Act, 1961.

<sup>143</sup> 2005(3)RCR(Criminal)745 S.C.

constitutionally valid and the object of this Section is to combat the menace of dowry deaths and cruelty.

The cumulative effect of sections 498A and 304B of the Code is that the offences under these sections have discriminatory protective clauses against the inhuman, barbaric treatment of women at the hands of unscrupulous husbands and relatives. Such offences are not only held as against the woman victims but also against the society and humanity.

Certain judicial responses to the offence have been disheartening to the victims resulting in high incidences of acquittal of the accused for want of evidence and strict interpretation of the provisions.<sup>144</sup> The immense scope of discretion provided to law enforcing authorities for defining 'grave injury' has further circumscribed the position of the victim. Only cases involving grievous physical injury are interpreted as grave enough to be prosecuted under the section. Patterns of systematic abuse and continual violation of her physical and mental self often precede the cruelty which is often overlooked. Difficulty to prove mental cruelty also exists. The evidentiary standards for penal laws, such as general assault and battery provisions, fail to recognize particular circumstances of domestic violence. It often takes place in seclusion over an extended period of time. More empathetic perspective towards such victims is highly felt while dealing with cases of mental cruelty.

Section 498A was introduced in response to the popular outrage and protest against the torture and killing of innocent brides for dowry, and hence there is a tendency to identify section 498A to be a dowry related legislation. The above provision meant for curbing domestic violence, having been saddled

---

<sup>144</sup> Courts has taken a view that every kind of harassment are not included under 498A and that the complainant has to conclusively establish that beating and harassment in question was with a view to compel her to commit suicide or to satisfy the dowry demand. *Sarla Prabhakar Waghmare v. State of Maharashtra*, 1990 Cri. L.J. 407 (Bom); *Shanti v. State of Haryana*, (1991) 1S.C.C. 371; *Benumadhob Padhi Mohapatra v. State*, 2004 Cri.LJ.505 Orissa at p.508.

with the dowry premise has proved to be inadequate to meet the real life situations of victims. By placing the dowry violence on a special pedestal, the routine violence faced by women is denied recognition and legitimacy. In order to access the criminal justice system, violence faced by women within homes need to be superficially and falsely attributed to dowry. The provisions of the section 498A for its applicability requires a valid and subsisting marriage between the parties and in its absence, no case could be made out. Moreover, every aspect of crime or harassment does not come under its ambit. The prosecution has to establish that the cruelty or harassment was persistent, grave and unbearable in nature and the same was with the intention to force woman to commit suicide or to fulfill illegal demand of dowry by the husband or the in-laws. The law on the problem completely de links itself from other forms of familial violence like child abuse and elder abuse. It addresses only spousal abuse and it is high time to amend and enlarge its scope to include the problems of women victims of fake marriages, divorced or widowed women, elder abuse etc.

Section 498A is vehemently criticized as being largely misused by women to seek revenge on their in- laws<sup>145</sup>. In this context, observations made by Malimath Committee in the report on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003 is significant:

“For the Indian women marriage is a sacred bond and she tries her best not to break it. As this offence is made non- bailable and non-compoundable it makes reconciliation and returning to marital home impossible...Less tolerant impulsive wife may lodge even on a trivial act. The result is that the husband and his family may be

---

<sup>145</sup> This view is also supported by Save family Organization a collective of males fighting against draconian anti cruelty legislations in India. See more details, Rukmini Sen, “Women’s Subjectivities of Suffering and Legal Rhetoric on Domestic Violence: Fissures in the Two Discourses”, 17(3) *Indian Journal of Gender Studies* 388 (2010).

immediately arrested and there may be a suspension or loss of job...The husband may realize the mistakes committed and come forward ... for a cordial relationship. The women may like to seek reconciliation. But this may not be possible due to the legal obstacles...Heartless provisions that make the offence non-bailable and non compoundable operate against reconciliation. It is therefore necessary to make this offence bailable and compoundable to give a chance to the spouses to come together.”

This view projected by the Committee brings in a conservative perspective about cruelty within marriage. In contradiction to this position, the National Commission for Women in 2005 proposed stricter punishment in cases of dowry deaths to bring in a deterrent effect. The different entities in the law making process project contradictory opinion and perspective and this shows the inherent flaws in law making by legislature. Women have been portrayed as having fabricated stories of torture and falsely implicating the entire household members. There are numerous examples and judicial trends which show this provision have been misused by registration of false cases against the husband and family members.<sup>146</sup> It is often referred to as being responsible for the break- up of families. The extremely low incidence of convictions, the high incidence of acquittals and the inability of the cases to withstand the investigation and scrutiny in a court of law is seen as signifying the frivolousness of the charges.

Though criminal law is considered to be gender-neutral, yet, there are provisions which when implemented undermine women’s interests. Family

---

<sup>146</sup>Judicial responses as to women held as abusing beneficial provision of s. 498-A are *Amisha Bhandari v State of Haryana*, 2005(2)RCR (Criminal) 429(P&H); *Harmohan Kaur v. State of Punjab*, 2006(3) R.C.R. (Criminal) 932(P&H); *Ramesh v. State of Tamilnadu*, 2005(1) Apex Criminal 537 S.C. etc.



ideology underpins the operation of law<sup>147</sup>. Operationalisation of law in a social structure driven by patriarchy is yet another factor that construes women's subordinate position in a conjugal relationship. Frequently, secondary status relegated to women in both social and legal aspects impedes the process of asserting their rights as citizens of a democratic society. This is well exemplified when one looks at the manner in which section 498-A IPC is enforced within the given socio-legal context.

In spite of the legal misconceptions and criticisms waived against 498A of the Indian Penal Code there has been a broad consensus that as a deterrent measure, the section, has realized what was expected of it namely, of preventing widespread violence against young newly married women.

All though these severe provisions embodied in sections.498-A,304-B,113-A and 113-B were enacted to deal effectively with dowry deaths as well as cruel treatment of married woman, they eventually became despite their commendable intentions, tools of harassment in the hands of unscrupulous wives to pressurize the family of the husband. This in turn aggravated the strains in family ties and made amicable settlement of issues almost impossible. This resulted in the widespread criticism that these aforesaid provisions were not only discriminatory in nature but also detrimental to the institution of marriage and the social fabric of India. However, Supreme Court of India reiterated that the mere possibility of abuse of a provision of law does not per se invalidate legislation<sup>148</sup>.By way of caution it was specified by the Apex Court that the legislature must introduce remedial measures to curb the filing of frivolous complaints, for which the provisions leave ample scope, so

---

<sup>147</sup> Family ideology construe women as loyal, self- sacrificing and dependent wives. It operates to regulate women through moral and economic regulation.

<sup>148</sup>*Sushilkumar Sharma v. Union of India*, A.I.R 2005 S.C. 3100.

as to prevent their misuse, which has the potential to unleash new legal terrorism<sup>149</sup>.

## **5.7 Specific Legislations in the Context of Domestic Violence**

The Constitutional provisions although symbolic of the then revolutionary thought process of the intelligentsia, were not indicative of the socio-economic realities of the country. Hence the need was felt to enact specific legislations on different socio-inequities perpetrated against women in the society. Some of the specific legislations that touch upon different forms of domestic violence enacted by the Indian parliament is discussed below.

### **5.7.1 The Child Marriage Restraint Act, 1929<sup>150</sup>**

Child marriages are a form of domestic violence which often takes the form of child abuse within the family. Child marriages have been made a criminal offence in India by the enactment of Child Marriage Restraint Act; 1929. It is applicable to all marriages performed in India including Hindus, Muslim, Christian and Parsi marriages. The Act does not purport to prohibit

---

<sup>149</sup> *Id.*, p.19

<sup>150</sup> Prohibition of child marriage Act, 2006 has emerged to replace the older law on Child Marriage Restraint Act of 1929. This explanation as to the earlier law is only to enlighten the readers as to what was the law at that point of time on child marriage. The Act aimed only at restraining solemnisation of child marriages in the country and not its prevention or prohibition. The procedures laid down under this law to act against solemnisation of child marriages were very cumbersome and time consuming. It did not identify authorities responsible for preventing child marriages. To overcome the shortcomings of Child Marriage Restraint Act, the Government of India enacted the Prohibition of Child Marriages Act, 2006 (PCMA), which received the assent of the President of India on 10 January, 2007. The Act came into effect from 1 November, 2007. The basic premise of the law is: To make a child go through a marriage is an offence and child or minor is a person up to 18 years in the case of girls and 21 years in the case of boys. A Preventive perspective- The solemnisation of child marriages is a cognisable and non-bailable offence. Child Marriage Prohibition Officers (CMPOs) are to be appointed in every state to prevent child marriages, ensure protection of the victims as well as prosecution of the offenders. The Courts have the power to issue injunction for prohibiting child marriages from taking place. From protective perspective- The law makes child marriages voidable by giving choice to the children in the marriage to seek annulment of marriage. It provides for maintenance and residence of the female contracting party. It gives a legal status to all children born from child marriages and makes provisions for their custody and maintenance. The law provides for all support and aid including medical aid, legal aid, counselling and rehabilitation support to children once they are rescued. For more details refer to <http://www.unicef.org/india/ChildMarriagehandbook.pdf>. Last visited on 23 rd July 2013

child marriage but it merely seeks to restrain them. The court has held that it does not purport to render child marriage as void.<sup>151</sup> Instead it prescribes penalties for persons responsible for child marriages. This Act keeps a check on the guardians of minors from exploiting them for money. The Act makes it an offence for a girl below eighteen years and a boy below twenty one years to marry. It makes the parents and if the husband is over eighteen years of age offenders. The civil court under its jurisdiction and under the above Act<sup>152</sup>, in the interest of the child, has the power to issue an injunction to prohibit a child marriage from being performed. Failure to abide by the injunction is punishable with a sentence of simple imprisonment up to three months or with a fine upto Rupees thousand or with both.

### **5.7.2 The Dowry Prohibition Act, 1961**

Dowry-related harassment, abetment to suicide and killings are components of the larger gamut of domestic violence, and are punishable under criminal law. The Dowry Prohibition Act 1961 applies to all communities and to all persons residing in India. The dominant ways in which domestic violence is manifested is society specific. Social mores impact the type of violence perpetrated on the spouse. The dowry system is a distinctive feature of the sub-continent. The Dowry Prohibition Act, 1961 marks the first attempt by the Government of India to recognize dowry as a social evil and to curb its practice. Offences under the provisions of the Act are to be investigated, tried etc. under the provisions of the Criminal Procedure Code. The Act contemplates the term dowry as a demand for property or valuable security having an inextricable nexus with marriage.<sup>153</sup> In recognition of the fact that this dowry is the genesis of domestic violence in the matrimonial home, the

---

<sup>151</sup>*V. Mallikarjunaiah v. H.C.Gowramma*, A.I.R. 1997, Kant 77.

<sup>152</sup>Child Marriage Restraint Act, 1929. s. 12

<sup>153</sup> Dowry Prohibition Act, 1961 s. 2 defines dowry as any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage or their parents or any other person to the other party to the marriage or to any other person before, at or after marriage which is given in connection with the marriage but it does not include *mahr* or dower.

Act criminalizes the giving and taking of dowry.<sup>154</sup> The Act prescribes punishment for demanding dowry<sup>155</sup> and for receiving or taking dowry or aiding or abetting the giving or receiving of dowry.<sup>156</sup> This formulation ignores the reality in which dowry transactions are made. In the specific Indian cultural set up the woman's family feels compelled to give dowry, even in the absence of overt demands, to secure the happiness and well-being of their daughter in her matrimonial home. Further, parents and other relatives may feel also compelled to give dowry due to social and cultural pressures as there is high social acceptance for this practice<sup>157</sup>. This culture specific setting of India has further aggravated the practice making the laws redundant. The Dowry Prohibition Officers have been appointed and vested with the power of implementation of the provisions of the Act, viz., to prevent the taking and giving of dowry and collect evidence for the prosecution of the offenders under the Act.<sup>158</sup>

Some of the judicial interpretations on the subject have been really welcoming in condemning the crime of dowry. Demand for dowry per se constitutes cruelty<sup>159</sup> and additional demand for dowry has also been held to be covered under the scope of the Act.<sup>160</sup> The Apex Court has made it clear that the dowry death occur not only when the husband or her in-laws put the bride to death but also when she is made to die by abetment to commit suicide.<sup>161</sup> The need for sensitization of the law and the need for connecting the object of

---

<sup>154</sup>Dowry Prohibition Act,1961 s. 3.

<sup>155</sup> *Id.*,s. 4 provides a minimum imprisonment of six months upto two years and fine upto Rs.10,000/-.

<sup>156</sup> *Id.*,s. 3 provides minimum imprisonment of five years, except for reasons to be recorded in writing the court may award less punishment along with a fine of Rs.15,000/- or the dowry amount whichever is more.

<sup>157</sup>Expert paper EGMGPLHPAsmita Basu\_.pdf. Last visited on 2<sup>nd</sup> December 2013

<sup>158</sup> Dowry Prohibition Act, 1961, s 8 B

<sup>159</sup>*Shobha Rani v. MadhukarReddy*, A.I.R 1988 S.C. 121.

<sup>160</sup>*Prem Singh v. State of Haryana*, A.I.R 1998 S.C 299: 1998 (8) S.C.C 700.

<sup>161</sup>*State of Punjab v Iqbal Singh*, A.I.R. 1991 S.C. 1532.

the Act and role of the judiciary has been stressed by the court.<sup>162</sup> The Apex Court has upheld that even in cases of lack of valid marriage, the husband could not be allowed to take shelter behind a smoke screen that there was no valid marriage. Persons who contract marriages ostensibly and co-habit with women in the purported exercise of their role and status as husband would come under the purview of the law.<sup>163</sup>

The Act has been substantially amended by the amending Acts in 1984 and 1986. Yet the amended legislation has failed to prevent harassment and torture of women for dowry due to ineffective law and law enforcing machinery. In defining dowry, the phrase 'in consideration of marriage' was replaced by 'in connection with marriage' which has widened the definition but does not cover the wide range of cruelties meted out to the women after the marriage in the name of dowry. Demands of dowry made after a couple of years after the marriage cannot be or becomes difficult to be implicated as connected with the marriage. Moreover the distinction between 'dowry' and 'voluntary gifts' remains unclear. The lack of setting a ceiling on the value of goods also has proved to be another hurdle in the effectiveness of the Act. The amendment provided that the gift should be of 'customary nature' and not of 'excessive value' with regard to the financial status of the giver. Ascertainment of 'customary and excessive value' also proved to be a difficult clause in the Act.

---

<sup>162</sup> In *State of Karnataka v. M.V. Manjunathgowda*, (2003)2 S.C.C. 188 commenting upon the objects of the Dowry Prohibition Act and the role of judiciary, the Supreme Court observed that: the practice of giving and demanding dowry is a social evil having deleterious effect on the entire civilized society and has to be condemned by the strong hands of the judiciary. Despite various Amendments providing deterrent punishments with a view to curb the increasing menace of dowry, death remains unabated. Every court must be sensitized to the enactment of the law and purpose for which it is made by the legislature. It must be given a meaningful interpretation and no leniency is warranted to the perpetrators of crime against the society.

<sup>163</sup> *Beena Agarwal v. Anupam*, A.I.R. 2004 S.C. 1418.

The newly inserted sections of the Indian Penal Code and the Indian Evidence Act<sup>164</sup> have improved but not cured the disease. This is mainly because of the fact that social conditioning is a strong restraint to legal changes. Lack of direct circumstantial evidence often results in dowry murders being passed off as voluntary suicide. The Supreme Court has lamented the manner in which the government machinery has functioned in the implementation of the Act and the Court directed the Central and State Governments to take more effective steps to implement its provisions especially sections three and four and the rules under the Act and also directed the state governments to activate the dowry prohibition officers.<sup>165</sup> The inefficiency of the law to deal with this social problem has been made manifest by the Apex Court in the above case. The fact that an increasing number of cases of homicide caused as a result of the inability of the woman's family to pay dowry were being reported, paved the way for a more stringent and comprehensive legislation.

### **5.7.3 The Commission of Sati Prevention Act, 1987**

The practice of Sati<sup>166</sup> is another manifestation of domestic violence against women practiced in our country. The above Act was enacted by the Parliament after the incident of the commission of sati in the village of Deorala in Rajasthan, its subsequent glorification and the various attempts made by the protagonists of this practice to justify its continuance on religious grounds. The offence of attempt to commit suicide is included under the Indian Penal Code<sup>167</sup> and it had been held by various High courts to include the commission

---

<sup>164</sup> Indian Penal Code ss.304 B and 498A and Indian Evidence Act 1872 s. 113 B .See for details of for dowry related case laws in the foot note and the accompanying text under the title judicial decisions on matrimonial cruelty.

<sup>165</sup> The In re Enforcement and Implementation of the Dowry Prohibition Act,1961,(2005) 4 S.C.C. 565:A.I.R 2005 S. C. 2375. The Supreme Court has also directed the government to take steps to spread anti dowry literacy among people through LokAdalats and the media.

<sup>166</sup> According to s. 2 (c) of the Commission of Sati Prevention Act,1987, 'Sati' means the burning or burying alive of widow along with the body of her deceased husband or any other relative, or with any article, object or things associated with the husband or relative.

<sup>167</sup> Indian Penal Code. s. 309.

of sati punishable under the provision. But the sentence provided in that section was not deterrent enough to prevent the commission of such practice. Further that section also did not provide for the glorification of sati subsequent to the commission of sati.<sup>168</sup>

The Act criminalizes glorification of sati which includes observance, support, justification, or propagation of sati.<sup>169</sup> Abetment of sati either directly or indirectly is made punishable with death or imprisonment for life and fine. Abetment includes obstructing the woman or police from prevention of commission of sati and being an active participant in the ceremony connected with it.<sup>170</sup> The attempt to commit sati is also punishable with one year imprisonment.<sup>171</sup> The Act also contemplates that the special courts trying an offence under the above section, shall before conviction, take into consideration the circumstances leading to the offence, the act committed, the state of mind of the person charged and all other relevant factors. The above Act has been a milestone in condemning the offence of sati in the society.

#### **5.7.4 The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994**

With the advent of the most modern scientific techniques, it is possible to ascertain the sex of the child in the womb even in the early stages of pregnancy. The technique used to diagnose the condition and sex of the foetus is medically termed as 'amniocenteses. In most of the cases, once it was determined that the foetus was female, it was miscarried deliberately as to prevent the death of a female child. These advanced medical techniques are largely being abused to serve the purpose of female foeticide. The Parliament having realized the grave implications arising out of the abuse of such

---

<sup>168</sup>Gour's, *Empowerment of Women in India*, Law Publishers (India) Private Limited; Allahabad, (2 nd edn., 2005), p.592.

<sup>169</sup>Commission of Sati Prevention Act, 1987 s. 5 makes it punishable with imprisonment between one year and seven years and also with fine.

<sup>170</sup>*Id.*, s. 4.

<sup>171</sup>*Id.*, s. 3.

techniques has recognized it as discriminatory against the female section and also adversely affecting the dignity and status of women. Thus recognizing that domestic violence is also perpetrated in the form of forced termination of female foetuses, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994 regulates the use of such pre-natal diagnosis<sup>172</sup>. The Act was amended in 2002. The Constitution of a Central Supervising Authority<sup>173</sup>, the mandatory registration stipulated for the genetic counseling centres<sup>174</sup>, the prohibition of advertisement regarding sex determination<sup>175</sup> etc provided under the Act are some of the regulatory measures adopted to do away with the social evil of female foeticide. Contravention of the provisions of the Act attracts penal provisions<sup>176</sup> to the guilty individual and the punishment depends on the nature of contravention.

### **5.7.5 Maintenance Laws**

The purpose of maintenance is to prevent destitution and provide economic security to those who are unable to maintain themselves<sup>177</sup>. Criminal law and matrimonial laws have provision for maintenance, both during a pending litigation (interim maintenance) and at the conclusion of legal proceedings (permanent maintenance / alimony). The law of maintenance in India is dealt with by the following laws / legal provisions:

---

<sup>172</sup> According to s. 4 of the Act it provides for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide.

<sup>173</sup> Ss. 7 and 16 of the Act empowers and directs the Central government to constitute an authority called Central Supervisory Board consisting of the minister for Family Welfare, the Secretary of such ministry/department and 21 other members including eminent geneticists, gynecologists, social scientists and women parliament members etc for a period of three years.

<sup>174</sup> *Id.*, ss. 18-21.

<sup>175</sup> *Id.*, s. 22 .

<sup>176</sup> *Id.*, ss. 22-28.

<sup>177</sup> The quantum will be determined by factors including financial position and status of the respondent, the reasonable wants of the claimant, the standard of life of the claimant, any source of income of the claimant.



Section 125 of the Criminal Procedure Code 1973 (available to all religious communities) Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Adoption and Maintenance Act 1956, Indian Divorce Act 1869, Parsi Marriage and Divorce Act 1936, Muslim Women (Protection of Rights on Divorce) Act 1986, Maintenance and Welfare of Parents & Senior Citizens Act 2007.

Hindu women may choose to use provisions of Hindu Marriage Act or Hindu Adoption and Maintenance Act. Section 125 of the Criminal Procedure Code is available to all religious communities. Maintenance and Welfare of Parents & Senior Citizens Act is applicable to parents and senior citizens who are neglected / abandoned. In all other cases, parties are governed by the law under which their marriage was performed.

### **5.7.6 Laws Relating to Custody of Children**

As in the case of maintenance, there are multiple laws that have provisions on permanent (at the conclusion of legal proceedings) and interim custody (pending proceedings) of children. These include: The Hindu Minority and Guardianship Act 1956, Guardians and Wards Act 1890, Family Courts Act 1984, Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Adoption and Maintenance Act 1956, Indian Divorce Act 1869, Parsi Marriage and Divorce Act 1936, Uncodified Muslim law etc.

### **5.8 Domestic Violence –The National Policy Scenario**

In India, the National Policy for the Empowerment of Women (2001)<sup>178</sup> prescribed that the legal and judicial system should be made more responsive and gender sensitive to women's needs, especially in cases of domestic violence. The policy laid down the following safeguards–

---

<sup>178</sup> Ministry of Women and Child Development, *National Policy for the Empowerment of Women, 2001*, WCD, Government of India, New Delhi.

“All forms of violence against women, physical and mental, whether at domestic or societal levels, including those arising from customs, traditions or accepted practices shall be dealt with effectively with a view to eliminate its incidence. Institutions and mechanisms/schemes for assistance will be created and strengthened for prevention of such violence, including sexual harassment at work place and customs like dowry; for the rehabilitation of the victims of violence and for taking effective action against the perpetrators of such violence.”

The Policy asserted the need for strengthening institutional mechanisms in order to promote the advancement of women as well as make available resources –financial, human and market – for the implementation of the policy. This commitment has been reaffirmed in the Eleventh Five Year Plan which proposed for the plan period a fivefold agenda for gender equity. These are economic empowerment; social empowerment; political empowerment; strengthening mechanisms for effective implementation of women-related legislations; and augmenting delivery mechanisms for mainstreaming gender.

The Eleventh Plan that rightly identified the issue when it asserted that “violence is a public health issue and its call for the “training of medical personnel at all levels of the health care system to recognize and report violence against women and children”.

The Plan recognizes that any approach towards ensuring gender equity has to be multipronged and should (amongst other things), “ensure an environment free from all forms of violence against women)—physical, economic, social, psychological etc., strengthen existing institutional

mechanisms and create new ones for gender main-streaming and effective policy implementation”<sup>179</sup>.

The need for training and sensitizing medical students has also been spelt out by the Plan given that medical and health establishments are often the first point of contact for women experiencing domestic violence. The Eleventh Five-year Plan provided for budgetary allocations for the implementation of all such acts that promote and protect the rights of women. The strategies laid down by the Planning Commission and in The National Policy for the Empowerment of Women (2001) are undoubtedly the way forward.

### **5.9 Limitations of the Pre-2005 Legal Regime**

The drawbacks and shortcomings of the laws whether be civil or criminal to deal with domestic violence in India could be summarized as follows.

Firstly, there was no definition of the term ‘domestic violence’ that comprehensively reflected a woman’s experience of violence in intimate relationships<sup>180</sup>. Secondly, most of the provisions could only be used by women who are in legally valid marriages<sup>181</sup>. Legal relief for violence could only be availed by women in matrimonial relationships. A major shortcoming of earlier laws against domestic violence was that they assumed women are abused only in their roles as wives and daughters-in-law. All the other categories of women facing violence in domestic relationships which were not in marital nature were not included under the earlier law<sup>182</sup>. This refers to daughters, sisters, widows, mothers and those who were in relationships in the

---

<sup>179</sup>WHO (2002): *World Report on violence and Health - summary*, downloaded from [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/summary\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf). Last visited on 9<sup>th</sup> October 2010

<sup>180</sup> None of the legislations in India had a specific definition on Domestic violence till 2005.

<sup>181</sup> This is in the context of S.498A specifically. See *supra* n. 144 at p.393

<sup>182</sup> Till 2005 there existed no understanding of *domestic relationships* and the different ways in which the females at their different stages of life could possibly be abused or harassed.

nature of marriages though their relationships did not meet the requirements of a legally valid marriage.

Thirdly, there reflected an inherent limitation in the criminal and civil way of approaching the problem. i.e. The criminal law which was primarily used to address violence, was geared towards prosecuting and convicting offenders<sup>183</sup> and did not offered reliefs in terms of shelter, maintenance or compensation for mental trauma suffered by the victims. The need for documentation or evidence of what happened in a conjugal space was rather difficult to be obtained<sup>184</sup>. However, given the nature of the complex social economic and personal relationships involved in this issue of domestic violence, it was felt that ordinary criminal law instruments were not sufficient to effectively curb the problem. The use of civil law (matrimonial law) on the other hand involved protracted legal proceedings of judicial separation and divorce during the course of which a woman victim has little recourse or access to reliefs.

Fourthly, the breakdown of a marriage in Indian society with its attendant discrimination means a virtual civil death for a woman<sup>185</sup>. The only two options open to a victim of domestic violence was to resort to either the civil remedy of divorce or the criminal remedy available under Section 498A. There was no via-media available to a woman who sought protection from domestic violence and that was one of the factors that contributed to the gross misuse of the provisions of 498A IPC. Most remedial measures on domestic violence were considered ‘ancillary reliefs’ in matrimonial proceedings<sup>186</sup>, and domestic violence was not treated independently as a situation warranting immediate legal intervention. Women had to approach

---

<sup>183</sup> Reference is to criminal law remedies under IPC.

<sup>184</sup> As domestic violence was private matter. Documentation or reports on the issue were negligible.

<sup>185</sup> A divorced woman from a patriarchal perspective was treated as a stigma in the social fabric.

<sup>186</sup> Maintenance and custody proceedings.

different courts for different remedies (family courts / district courts / criminal courts), leading to multiple litigations in multiple courts, causing considerable hardship to women and criminal laws do not allow space for any negotiations.

Fifthly, there was no law to recognize a woman's right to residence or her right to civil remedies. The most significant lacunae in the law were the recognition of the right to reside. The male members of the family who are in possession of the premises could easily dispossess a dependent female. This played a significant role in increasing the vulnerability of women, who constituted to remain in violent relationships for fear of dispossession and destitution. Therefore, there was an urgent need for a law, which could address this phenomenon of depriving women of their right to reside in the shared household. There was no recourse available to a woman who was rendered homeless due to violence within the family. In the context of the lack of familial support or state funded shelter or support services, such victims of domestic violence had to heed to unfair settlements or take on expensive protracted legal battles.

In the midst of alarming number of cases of domestic violence being reported even among educated classes<sup>187</sup> there was a growing concern for realization of specific legislation to curb the evil. The concept of domestic violence by then had gained international recognition as human rights violation of women by the pressure exerted by the feminist movements in the western liberal democracies.

To put in a brief manner, criminal law remedies provided in the Indian Penal Code are enforceable after the commission of the offence. So need was felt for civil law remedies in the form of preventive measures and interim relief's to check harassment of women through domestic violence. The need

---

<sup>187</sup>In 2000-2004 the total number of domestic violence cases registered were 711,778 According to Lok Sabha Debates, 23rd August 2005. In 2005 the total number of dowry deaths was 6,787 and total number of cases of cruelty was 58,319,750 cases of rape by parents/family members were registered. Sixty one percent of educated men in the highest income groups resorted to sexual violence. XIV *Lok Sabha Debates* 465, 23 rd August, 2005.

for a better understanding of domestic violence and specific legislation on the same had been extensively debated in India, much before the Act was passed. Hence, the need was felt for a more concerted legal strategy to combat domestic violence consisting of a judicious mix of both civil and criminal law remedies.

.....❧.....

## THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – AN APPRAISAL

Contents	6.1 <i>The Evolution of Protection of Women from Domestic Violence Act, 2005</i>
	6.2 <i>The Constitutional Basis of the Act</i>
	6.3 <i>Aims and Objects of the Act</i>
	6.4 <i>The Act: An Analysis of its Provisions and its Implications</i>
	6.4.1 <i>The Scope of Domestic Violence Expanded</i>
	6.4.2 <i>The Concept of Domestic Relationship</i>
	6.4.3 <i>The Concept of Shared Household</i>
	6.4.5 <i>The Concept of 'domestic Violence' Widened</i>
	6.4.6 <i>The Novel Machinery for Implementation: Role of Protection Officers and Service Providers</i>
	6.4.7 <i>The Reliefs Provided Under the Act: Protection orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders</i>
	6.4.8 <i>The Procedures of Implementation: A Mix of Civil Remedies and Criminal Procedure</i>
	6.4.9 <i>The Consequences of Breaching The Judicial Orders</i>
	6.5 <i>Analyzing the Merits of the Act</i>
	6.6 <i>The Act- A Critical Analysis</i>
6.7 <i>Indian Experience Juxtaposed with the U.S.A and U.K Experiences</i>	

The Universal Declaration of Human Rights supports the crusade against domestic violence since it favors protecting the basic right of everyone to live a dignified life. CEDAW (Convention on Elimination of Discrimination Against Women) makes it mandatory for its member nations to make laws prohibiting domestic violence.

Violence as a means to maintain unequal relationships has been resisted by the women's movement, both nationally and internationally. Particular to the context of domestic violence, the existing laws dealt with the recognition of cruelty as a ground for divorce under various personal laws and procedural laws and thereby providing maintenance to avoid destitution of women victims<sup>1</sup>. With changing societal perceptions and demands, the struggle led to amendments in the criminal law that recognized cruelty within marriage as an

<sup>1</sup>Criminal Procedure Code, s.125.

offence.<sup>2</sup> Statutes were made outlawing the practice of giving and taking of dowry<sup>3</sup>, penalized dowry related harassment and recognized “dowry deaths” as a separate offence.<sup>4</sup> Although the new amendments were enacted to deal effectively with dowry deaths as well as cruel treatment of married woman, they eventually became, despite their commendable intentions, tools of harassment in the hands of the unscrupulous women.

The laws that existed considered only married women as the subject of the concern and only legally married women could sue under these laws. The law failed to comply with the definition of ‘violence against women’ in the international treaties like Convention on Elimination of all forms of Discrimination against Women and Universal Declaration of Human Rights, which looks at it as a violation of rights and fundamental freedom of women. To eliminate these loopholes the Protection of Women against Domestic Violence Act, 2005 was enacted.

## **6.1 The Evolution of Protection of Women from Domestic Violence Act, 2005**

The context of subordinated social existence of most women, when seen through a human rights angle, depends on how best a domestic legal order responds to these expectations. Despite a proliferation of laws in this direction, there is a lack of proper law enforcement in case of domestic violence reflected by an international phenomenon cutting across different countries.

Since the popular conception of violence at home did not merit much consideration as a punishable offence, the feminist movement, aimed at attaining substantive equality for women, regarded the domestic violence as one of the chief disabilities for the promotion of women’s rights and their claims to equality. Women’s rights movement of the west struggled hard to

---

<sup>2</sup>India Penal Code, 1860, s.498A.

<sup>3</sup>Dowry Prohibition Act, 1961.

<sup>4</sup> Indian Penal Code, 1860, s.304 B.



campaign for the inclusion of various manifestations of domestic violence as a crime within the criminal justice system to get law on the side of the women in their struggle for justice. The feminist movement exerted influence in extending the reach of criminal law within the insulated world of private sphere manifested by family and the home. By 1980s and 1990s, many countries legislated for inclusion of domestic violence within the criminal law while most countries still did not legislate and were slow to respond. Most countries which did not legislate against domestic violence as a distinct crime continue to treat it under its criminal assault laws.

There was growing realisation since late 1980s that domestic violence needs special attention and is closely associated with women's rights. Due to the growing influence and impact made by the women's movement between 1970s and 1990s, the issue of domestic violence attained a primacy in at least the formal stance taken in public policy and criminal justice system of many countries. The local women's movement in many countries, inspired and energized by the international women's human rights movement greatly contributed in exerting pressure on their respective governments to change their policy stance especially in the criminal justice system to comply with the ongoing international standard setting.

The international developments in this direction gave strength to the demands from the women's rights groups in India. The recognition of domestic violence as a crime in India was brought about in the early 1980s after a sustained campaign by feminist groups and women activists all over the country. The criminalization of domestic violence in the form of sections 498A and 304B (dowry death) were considered significant developments in law in correcting historical, legal, and moral disparities in the legal protections afforded to abused women. It sought for the first time to bring the issue of domestic or family violence out of the protected private realm of the family and into the public domain in India.

Despite these legal reforms, societal responses to domestic violence still largely exclude legal intervention. The real problems encountered were with regard to access to justice and implementation of these laws. The police often exercised discretion in avoiding arrest while responding to domestic violence incidents and emphasized on mediation and conciliation. In the courts, public prosecutors failed to actively pursue cases of domestic violence under S. 498A, as often women turned hostile during the prosecution and agree to drop the charges. Sentences tend to be less serious for those convicted of domestic violence. The result of these processes led to a higher dismissal rate for domestic violence cases at the prosecution stage, compared to other violence cases, and less serious sentences. There were several attempts from women's groups to canvass the need for framing a law to deal with domestic violence comprehensively.

Finally the Ministry of Women and Child Development issued a notification to bring it into force from 26th October, 2006. The Act was passed by the Parliament in August 2005 and assented to by the President of India on 13th September, 2005. But implementation was pending as detailed consultations were required with the State and other agencies for framing the rules. The Ministry has simultaneously issued another notification laying down the rules framed for the implementation of the Act. These rules may be called "The Protection of Women from Domestic Violence Rules, 2005".

With the passing of the Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') the Indian legal system has stepped into a social space that has hitherto remained unwilling to lend itself to legislation the home and the family, and the violence faced within the same. The International and National concern over the issue reflected in India manifested itself in the form of the new Act, which for the first time addressed domestic violence as a

distinct human rights issue<sup>5</sup>; independent from any offence against women recognized under the Indian Penal Code. The Act stands in conformity with the UN Model Legislation on Domestic Violence, which provides comprehensive guidelines for states in drafting legislations on domestic violence. The enactment was passed by the Parliament with recourse to Article 253 of the Constitution<sup>6</sup>. The law draws its rationale from the rights guaranteed under Articles 14, 15 and 21 of the Part Three of the Indian Constitution.

## **6.2 The Constitutional Basis of the Act**

A constitution is central to a country's legal system because it defines the principles on which the system is based. It sets up the most important institutions of government, states their principal powers and makes broad rules about how those powers are to be exercised. To date, many laws on violence against women have focused primarily on criminalization. It is important that legal frameworks move beyond this limited approach to make effective use of a range of areas of the law, including civil, criminal, administrative and constitutional law, and address prevention of violence, and protection and support of survivors. The protective discrimination extended to women and children under Fundamental Rights of the Constitution of India supports the rationale behind the protection guaranteed to women victims of domestic violence under the Act. The Statement of Objects and Reasons declares that the Act was being passed keeping in view the fundamental rights guaranteed under Articles 14<sup>7</sup>, 15<sup>8</sup> and 21<sup>9</sup>. Article 14 prohibits class legislation, but permits

---

<sup>5</sup> The Protection of Woman From Domestic Violence Act, 2005 Statement of Objects and Reasons.

<sup>6</sup> This provision confers on the Parliament the power to make laws in pursuance of international treaties, conventions, etc.

<sup>7</sup> Right to Equality; Article 14 contains the equal protection clause. It affirms equality before the law and the equal protection of the laws.

<sup>8</sup> Article 15 disallows discrimination on the grounds of religion, caste, sex, race, etc., but permits the State to make special provisions for certain classes of persons, including women and children.

<sup>9</sup> Art. 21 states: "No person shall be deprived of his life and personal liberty except according to the procedure established by law".

classification for legislative purposes. A law does not become unconstitutional simply because it applies to one set of persons and not another<sup>10</sup>.

The Act promotes the rights of women guaranteed under Articles 14 and 15. Domestic violence is one among several factors that hinder women in their progress, and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differentia, namely, gender, and also has a rational nexus with the object of the Act.

Article 21 confers the right to life and liberty in negative terms, stating that it must not be taken away except by procedure established by law, which is required, as a result of judicial decisions, to be fair, just and reasonable<sup>11</sup>. The Supreme Court by its dynamic interpretation expanded the concept of right to life. The following decisions are relevant in this context and many new rights have been added to it.

In *Francis Coralie Mullin v. Union Territory Delhi, Administrator*<sup>12</sup>, the Supreme Court observed that that, ‘any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21’. This right is incorporated in the Act through the definition of physical abuse, which constitutes domestic violence and is hence punishable under the Act. Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impair the health or

---

<sup>10</sup>Where a law effects a classification and is challenged as being violative of this Article, the law may be declared valid if it satisfies the following two conditions. 1. The classification must be based on some intelligible differentia, 2. There must be a rational nexus between this differentia and the object sought to be achieved by the law. As a result of the ruling in cases such as *E.P Royappa v. State of Tamilnadu*, (1974) 4.S.C.C. 3, 38, any law that is arbitrary is considered violative of Article 14 as well. This provision is significant in putting a stop to arbitrariness in the exercise of State power and also in ensuring that no citizen is subjected to any discrimination. At the same time, it preserves the State’s power to legislate for a specific category of people.

<sup>11</sup>*Maneka Gandhi v. Union of India*, AIR 597, 1978 S.C.R. (2) 621

<sup>12</sup>1981 (1) S.C.C. 608; A.I.R.1981S.C.746.

development of the aggrieved person. Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. Since a victim of domestic violence is subjected to physical abuse and lives in a state of perpetual fear of violence and fear for her life, she is unable to live a life free of violence or fear of violence. By adoption of such an expansive definition, the Act protects the right of women against violence.

In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*<sup>13</sup>, the Supreme Court emphasized the fact that the right to life included in its ambit the right to live with human dignity, basing its opinion on a host of cases that had been decided in favour of this proposition. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted.

These two facets of the right to life find its manifestation under the definitions of sexual abuse and emotional abuse, respectively in the Act. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable; especially as such sexual abuse is not recognized by the IPC as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.

In *Chameli Singh v. State of U.P*<sup>14</sup> it was held that the right to life would include the right to shelter. Under S.6 of the Act, it is a duty of the Protection Officer to provide the aggrieved party accommodation where the party has no place of accommodation, on request by such party or otherwise. Under Section 17, the party's right to continue staying in the shared household is protected. These provisions thereby enable women to use the various

---

<sup>13</sup> 1997(11)S.C.C.121; A.I.R.1997S.C. 152.

<sup>14</sup> 1996(2)S.C.C. 549;A.I.R.1996 S.C.1051.

protections given to them without any fear of being left homeless. In contexts where women are dispossessed from their matrimonial / parental home due to domestic violence, their right to shelter is violated.

A woman's right to residence is protected under the Constitution of India. Women's rights are protected by the general principle of equality under Article 14 and Article 15(3) where the state has been given the special right to make provisions for women and children. The Constitution has time and again created stipulation for protective discrimination of socially and economically backward class. The right of shared household is a part of Article 21 where everyone is granted the right to live with dignity.

The Apex Court in *U.P.Avas Evam Vikas Parishad and another v. Friends Co-op Housing Society Ltd. and Another*<sup>15</sup> re-emphasized that, "Right to shelter is a fundamental right, which springs from the right to residence assured in Article 19(1) (e) and right to life under Article 21 of the Constitution."

In *Vikram Deo Singh Tomar v. State of Bihar*<sup>16</sup>, the Apex Court rightly explained the duty cast on the equality doctrine enshrined in the Constitution where it contemplated special provision for women and children. The Court thus held:

"We live in an age when this court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. And so, in the discharge of its responsibilities to the people, the state recognizes the need for maintaining establishments for the care of those unfortunates, both women and children, who are castaways of an imperfect social order and for

---

<sup>15</sup>1996 A.I.R. 114, 1995 S.C.C. Supl. (3) 456

<sup>16</sup>1988 A.I.R. 1782, 1988 S.C.R. Supl. (1) 755

whom, therefore, of necessary provision must be made for their protection and welfare.”

A woman’s right to livelihood and the fundamental freedom to practice an occupation or profession has been recognized by the courts.<sup>17</sup> In the context of domestic violence, the victim’s work is often affected as she is either unable to report to work or her performance at work is adversely affected if she sustains physical injuries or psychological distress including depression. In extreme situations, it can result in her termination / resignation from work, resulting in her loss of livelihood.

These discussions by the Apex Court reveal the recognition of peculiar nature of Indian society and the unique sociological position that women have held in its intriguing history. Since the inception of Fundamental Rights in the Constitution of India the endeavor of the legislators were to place the needs of women in the public space more justifiably. A comprehensive and multidisciplinary legislation to deal with the different aspects of problem of domestic violence is necessary with the intent of, criminalizing all forms of violence against women, and encompassing issues of prevention, protection, survivor empowerment and support(health, economic, social, psychological), as well as adequate punishment of perpetrators and availability of remedies for survivors. With the new enactment that has come forth addressing the issue of domestic violence, the invisible private space, the relationships and the violence perpetrated within the family is brought to light.

### **6.3 Aims and Objects of the Act**

The Act aims at providing protection to women who are faced with violence within a domestic relationship. In its preamble, the Act mentions the rights of women under the Constitution, and the necessity of ensuring that these rights are recognized even in the private sphere of the home and family.

---

<sup>17</sup>*Madhu Kishwar v. State of Bihar*, (1996) 5 S.C.C. 125; *Bar dancers’ case - Indian Hotels and Restaurants Association & Others v. The State of Maharashtra & Others*, 2006 (3) Bom.C.R. 705

The Act envisages comprehensive procedural tools and adequate relief measure to facilitate easy access to justice to any aggrieved party.

The Act clearly identifies the victim groups and what are the processes and reliefs to be made entitled to them in cases of different types of violence. It manifests a combination of civil reliefs backed by criminal sanctions and they are dealt with in a detailed manner. The Act has not attempted to create a new offence with respect to the issue of domestic violence but merely provides a palliative treatment to the victims of domestic violence and to prevent recurrence of the same. The only instance in which the perpetrator of violence can be punished under this Act is when he violates any order of the court, passed under the Act. The intention being clear from this that the Act protects a victim and not punishes the perpetrator.

The Act recognizes the very fact that house is not a safety zone for the women inmates therein and thereby attacks the very strong base of the holding of the traditionalists that women are born to endure all sufferings within the house. Moreover the Act envisages the participation of a wide spectrum of actors, which includes administrators created by the Act, as well as the civil society.

The broader impact that the Act aims to have is multi-fold. It has the potential to become a tool by which women are empowered to move out of circumstances detrimental to their physical and emotional wellbeing; a medium by which hitherto untouched social space can be made more gender sensitive and responsible to women's concerns. This is an important step in furthering the agenda of female emancipation in the country.

In India, the remedies under the Act have largely been adopted from similar laws in other jurisdictions. However, it has been reinvented in several ways in order to grasp the concerns and peculiarities of Indian society such as dowry deaths. For instance, the Act defines domestic violence in a wide manner so that issues like marital rape – yet to be recognized as a penal offence



under the Indian law – can be dealt with. Quasi civil-criminal remedies enable several different interest groups such as girl children and live-in couples to obtain effective remedies that circumvent societal compulsions. The following analyses of the Act will evaluate these innovative legislative tools adopted under the new Act within a theoretical and practical framework.

#### **6.4 The Act: An Analysis of its Provisions and its Implications**

The Act is the first substantial step in the direction of vanquishing the questionable public/private distinction traditionally maintained in the law. It is a comprehensive and gender sensitive legislation that introduced many new features and thereby raised various controversial issues and questions. Along with certain explanations on the new concepts in the Act, comparative provisions on the same under different jurisdictions are also compiled. The Rules that define the institutional framework for the new Act which came into force with effect from 26 th October 2006<sup>18</sup> are also examined. An analysis of the Protection of Women from Domestic Violence Act, 2005 involves six aspects:

1. What is the scope and extent of the applicability of the Act?
2. What is the definition and scope of the term ‘domestic violence’ under the Act?
3. What is the machinery for implementation of the Act?
4. What are the reliefs available to a victim of domestic violence under the Act, and its effectiveness when compared to the existing system of law?
5. What are the procedures involved under the Act? and
6. What are the consequences of breaching the judicial orders passed under the Act?

---

<sup>18</sup> The Rules specify the rights of the victim and the duties of the authorities under the Act. It specifies the procedure for exercise of powers under the Act including eligibility and appointment of authorities, manner of counseling, disposal of applications, service of summons etc.

#### **6.4.1 The Scope of Domestic Violence Expanded**

The first aspect from which the Act is to be viewed is the extent of its applicability. The Act allows institution of proceedings by an “aggrieved person”. An *aggrieved person* has been defined as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent<sup>19</sup>. A woman in her capacity as sister, widow, mother, daughter, women in relationships of co habitation, single women etc., are envisaged thereby to come under the purview of aggrieved person. The mentioning of definition of “child”<sup>20</sup> under the concept of aggrieved woman in the Act definitely extends the application of this Act to the benefit of a vulnerable child within a family. The Act thus envisages the vulnerability of woman and child whether he/she be an adopted, step or foster child equally. However under this law, children can also file a case against a parent or parents who are tormenting or torturing them physically, mentally or economically<sup>21</sup>. This provision in the Act keeps itself in tune with the concept of ‘protective discrimination’ and indicates the use of affirmative action to remedy a wrong done towards a child within the family as envisaged by the Constitution of India<sup>22</sup>. Women and children are the primary beneficiaries of this Act.

The Act is an innovation over the conventional understanding of domestic violence, in that it did not limit the protection against violence solely to marital relationships. *Respondent* under the Act is defined as any adult male person who is ,or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this

---

<sup>19</sup>Protection of Women from Domestic Violence Act,2005 s.2(a)

<sup>20</sup>*Id.*, s.2 (b) defines a “child” means any person below the age of eighteen years and includes any adopted, step or foster child.

<sup>21</sup>MadhuPurnimaKishwar, *Well –Intentioned but Over Ambitious –A Review of the New Domestic Violence Act*, Sage Publications India (Pvt.) Ltd .New Delhi (2008), p.220.

<sup>22</sup>The Constitution of India, Art.15(2).

Act<sup>23</sup>. The definitions of the aggrieved person and the perpetrator necessarily involves the context in which domestic violence takes place.

#### **6.4.2 The Concept of Domestic Relationship**

The Act has defined the concept of *domestic relationship* as a relationship between two persons who live or have at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family<sup>24</sup>. The concept of domestic relationship has been defined in wide terms<sup>25</sup> and has brought out many crucial changes. Under the Act, the domestic relationship is the basis for a woman to take action. The concept of domestic relationship has broadened the scope of who may seek remedies under this law. Previously only a woman who was able to prove her relationship with the other party by blood or marriage (such as wives and mothers) were entitled to remedies related to domestic violence, such as right to residence and maintenance. It has not been restricted to only provide protection to women against abuse by their husbands and in-laws as provided under Sections.304B and 498A of Indian Penal Code, but has also been extended to include within its ambit abuse or violence or ill treatment inflicted by a woman's father<sup>26</sup>, brother or any male relative of her own family. Until the passing of this Act, no legislation had conferred specific protection against abuse meted out by members of the family into which she was born. As envisaged by the Act, *domestic relationships* are not restricted to the marital context alone.

The most significant and commendable feature of this definition is that for the first time in India *live-in-relationships* in contrast to a valid marriage that was the sole aspect legally recognized under the existing law on the issue,

---

<sup>23</sup>Supra n. 19, s.2(q).

<sup>24</sup>*Id.*,s.2(f).

<sup>25</sup>*Azimuddin v. State of Uttar Pradesh*, MANU/UP/0238/2008.

<sup>26</sup>*Chitranganth v. Seema*, I (2008) D.M.C. 365.

have been given legal recognition. In a way it can be summarized as to the concept of *live-in-relationships*, as an inclusion of an idea which is of a western import as it is alien to Indian culture. The short term *live in relationships* are put at par with valid and legal marriages thereby extending the benefits of this beneficial legislation to women in fraudulent or bigamous marriages, or in marriages deemed invalid in law and to prevent destitution of such women at the hands of the unscrupulous men. In the pretext of providing financial assistance to women involved in such relationships the legislature cannot use it as granting legal recognition to such short term relationships characterized by flexibility in relations and the obligations involved in it. This is a concept which, on one hand, allows women whose marriages may be void or invalid in the eyes of law for various reasons to claim remedies under this law. This includes second wives of those marriages that are considered illegal because of the subsistence of the first marriage. On the other hand, it extends protection from domestic violence to women who are in 'common law marriages' or in *live-in-relationships*. This is in keeping with existing social realities, where all persons do not necessarily conform to the traditional institution of marriage, as well as earlier judgments of courts, which state that long periods of cohabitation between a man and a woman raise a presumption of marriage.

Another significant advance has been the fact that relief can also be claimed by women against men with whom they have shared a relationship in the past. The Act has not specified how long a couple has to have lived in the shared household (the period of co-habitation) in order for a woman to claim benefit under the Act. A woman who has lived with a man for two or three months without being married to him can at any point of time seek relief under this law, at par with legally wedded wife. This amounts to making mockery of laws against bigamy. The habitation rights of live-in-partners in the same household in case of already married men cannot be protected in this way without serious damage to the rights of legally married wife and her children. It

is perfectly legitimate to protect a woman from violence and punish a man for inflicting it on her, whether or not she is married to that man. However to give her right to claim maintenance and get injunctions barring her male partners entry into his own house are raising too flimsy claims with a view to promoting harassment and blackmailing the male partners. In the guise of protecting women victims of bigamous marriages the rights of legally wedded wife and her children is put at risk which can trigger criticisms and protests against the Act as a western duplication of law adopted from western culture not at all advisable for the traditional Indian culture.

The legislature while passing the Act has ignored that having sexual intercourse with any person other than his/her spouse is a ground for divorce<sup>27</sup>. The provisions which provide for maintenance pendent-lite and permanent alimony respectively<sup>28</sup> do not recognize any relationship except that of legally wedded husband and wife. The provision through which grant of maintenance to wife children, father and mother<sup>29</sup> in a broader perspective, does not recognize persons having illegitimate relationships entitled to claim maintenance except an illegitimate child. The law accordingly prohibits wife living in adultery from claiming any maintenance from the husband<sup>30</sup>. It is really contradictory to understand that while on one hand a married woman indulging in adultery is not entitled to claim maintenance from the person with whom she had or is having illegitimate relationship. The legislature has also not noticed that adultery is also an offence<sup>31</sup>. Therefore, while on one hand, a man will be prosecuted for adultery, at the same time he will be compelled to pay maintenance as well as residency rights to a woman with whom he is alleged to have maintained illegitimate relationship. This provision is likely to destroy the matrimonial relationships thereby disturbing the social fabric of the society.

---

<sup>27</sup>Hindu Marriage Act, 1955 s.13 (1) (a).

<sup>28</sup>*Id.*, ss.24 and 25.

<sup>29</sup>Criminal Procedure Code, 1973. s.125.

<sup>30</sup>*Id.*, s.125 (1).

<sup>31</sup>Indian Penal Code, 1860 s.497 .

Despite all these negative effects, this provision can positively be understood as that all these connotations on the domestic relationship from the standpoint of a beneficial social legislation shows light towards as to who all can be arrayed as respondents in a case involving domestic violence against a woman.

### **6.4.3 The Concept of Shared Household**

Another notable definition in the Act is that of the *shared household*. It refers to a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in this shared household<sup>32</sup>. Here the Act envisages the space where the woman and the perpetrator of violence have lived together in a domestic relationship irrespective of the pattern of ownership. Often, the violence is directed not only against the woman but is intended to cut off all her support structures, deny access to essential services and to withhold a woman's own property or children in an attempt to blackmail. The most obvious way of achieving this aim is to throw the woman out of the household. The idea of shared household comes to her rescue in this context.

One of the criticisms that are raised against this definition of domestic relationship is that it excludes from its purview the children, especially those who have lost their parents<sup>33</sup>, being the most vulnerable targets of domestic violence. The Act does not make any provision for the protection of domestic servants, which is a significant lacuna, given that the ill treatment of maid

---

<sup>32</sup>Supra n. 19, s.2(s)

<sup>33</sup> XIV Lok Sabha Debates 348, 23 August 2005.

servants is a common phenomenon in the Indian social set-up<sup>34</sup>. The concept of shared household has been understood to include living singly also. It can by no stretch of imagination be understood to be sharing a household.

### **Comparing the Relationships Covered under Foreign Countries**

The definition of domestic relationship as per the Act is not exhaustive when compared with similar legislations in other countries like U.K<sup>35</sup>, U.S.A and Malaysia<sup>36</sup>. In U.S.A the legislation on this issue provides that “domestic violence’ may be committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is co-habiting with or has co-habited with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction<sup>37</sup>. Moreover this Act also provides protection, against ‘dating violence’, which may be committed by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim<sup>38</sup>, and ‘sexual assault’, which may be committed by a stranger as well as any person related to the victim by blood or

---

<sup>34</sup>Tahira Karanjawala and Shivani Chugh, “The Legal Battle Against Domestic Violence In India: Evolution and Analysis”, 23 *International Journal of Law, Policy and the Family* 294 (2009).

<sup>35</sup>S. 62(3) Family Law Act, 1996, in England and Wales. The definition is similar to that of ‘aggrieved person’ under the Act, i.e. person associated with another person includes those persons who i) are or have been married to each other; ii) are co-habitants or former co-habitants; iii) live or have lived in the same household, otherwise than merely in by reason of one of them being the other’s employee, tenant, lodger, or boarder; iv) are relatives; v) have agreed to marry one another (whether or not that agreement has been terminated); vi) are in relation to any child, i.e. is a parent or has had parental responsibility for the child; and vii) are parties to the same family proceedings.

<sup>36</sup> Under ss.4 and 5 of the Domestic Violence Act 1994 of Malaysia, a protection order may be available to the complainant who may be a i) spouse, ii) former spouse, iii) child, iv) an incapacitated adult, v) any other member of the family.

<sup>37</sup> S.40002(6) of the Violence against Women Act, 1994, of the U.S.A as inserted s.3 of the Violence against Women and Department of Justice Re-authorization Act of 2005

<sup>38</sup>*Id.*, s.40002(8).

marriage<sup>39</sup>. In U.K, the Domestic Violence ,Crime and Victims Act 2004 has extended the definition of ‘co-habitants’<sup>40</sup> to include ‘same sex couples’<sup>41</sup> and has extended protection to non- co- habiting couples as well. The only criterion for claiming relief being that the complainant was in an intimate personal relationship’ with the respondent for a significant duration<sup>42</sup>. And moreover ‘child’ as a victim of domestic violence occupies a specific category under the definition of ‘aggrieved person’<sup>43</sup>.

Women’s experience of violence, and of the justice system, are further shaped by their race, colour, religion, political or other opinion, national or social origin, property, marital status, sexual orientation, HIV/AIDS status, migrant or refugee status, age, or disability. In many societies, women belonging to particular ethnic or racial groups experience gender-based violence as well as violence, based on their ethnic or racial identity. It is important that legislation, or subsidiary legislation, where necessary, make specific provision for the appropriate and sensitive treatment of women complainants/survivors of violence who suffer multiple forms of discrimination. The widest coverage is provided by the Vietnamese law, which does not include any clause defining survivors or coverage and is gender neutral. It is advisable to include all forms of domestic relationships within the ambit of the law.

#### **6.4.5 The Concept of ‘Domestic Violence’ Widened**

The second aspect of the Act that lends itself to analysis is the definition and scope of domestic violence under the Act. The Act defines “domestic violence” for the first time in Indian law. It is a comprehensive definition and captures women’s experiences of abuses within the four walls of the home. The

---

<sup>39</sup>*Id.*,s.40002(23).

<sup>40</sup>The Family Law Act.1996.s.62 (1).

<sup>41</sup> The Domestic Violence, Crime and Victims Act,2004, s.3.

<sup>42</sup>*Id.*, s.4.

<sup>43</sup> *Supra* n.20.



definition of 'domestic violence' is in consonance with the UN Model Legislation on Domestic Violence. Section.3 of the Act gives an exhaustive definition of the conduct that would amount to domestic violence. It provides that any act ,omission, commission, or conduct that harms, injures or endangers or has a tendency to harm, injure, or endanger the health, safety, life, limb, or well-being, whether mental or physical, of the aggrieved person would constitute domestic violence. It has been elaborately mentioned that such conduct might be in the nature of physical abuse, sexual abuse, verbal abuse and emotional abuse, or economic abuse<sup>44</sup>.The definition also specifically includes within its ambit any conduct that harasses, harms, injuries or endangers the aggrieved person with a view to coercing her or any other person related to her to meet any unlawful demand for any dowry, property or valuable security<sup>45</sup>.Furthermore, any such conduct that has the effect of threatening the aggrieved person or any person related to her<sup>46</sup> or otherwise injures or causes physical or mental harm to her<sup>47</sup> has been brought within the ambit of domestic violence. Even a single act of commission or omission may constitute domestic violence. Such specification which does not leave room for loopholes to the perpetrator of crime is very much essential from a victim's point of view. This is because whenever the term 'cruelty' was used prior to the enactment of this Act it specifically required a proof of subsistence of cruelty for a long period of time within the marital life .Or else single instances of violence were taken lightly and were called as 'regular wear and tear of a family life' which enabled the perpetrators to go scot free.

On a combined reading of the section and explanation given to each of the terms of abuse envisaged in the Act and also Domestic Violence Rules, 2006, the sense in which they are interpreted becomes evident. Physical abuse includes any act or conduct that causes bodily pain, harm or danger to life, limb

---

<sup>44</sup>*Id.*, s.3(a).

<sup>45</sup>*Id.*, s.3(b) .

<sup>46</sup>*Id.*, s.3(c) .

<sup>47</sup>*Id.*, s.3(d).

or health or impairs the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force<sup>48</sup>. This includes within its ambit any physical abuse meted out to the children of the aggrieved person<sup>49</sup>.

Sexual abuse has been defined to include any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of women<sup>50</sup>. It includes forced sexual intercourse, forcing the watching of pornographic material and forcing the aggrieved person to entertain others sexually<sup>51</sup>. The recognition of marital rape as a form of violence, is the other vital improvement that has been introduced by the Act. It is significant that under Indian criminal law, marital rape is not a crime unless the wife is under 15 years of age. However, by including sexual abuse as a form of domestic violence, protection is provided to a wife against sexual abuse under this law. Moreover, the law does not consider only habitual assault to be domestic violence. Even a single act may amount to domestic violence if it falls within any of the categories listed in the law.

Verbal and emotional abuse covers a wide range of conduct that includes insults, ridicule, humiliation, name calling for not bringing dowry or for not having a child or a male child<sup>52</sup>, ridicule, humiliation, accusations of unchastity, repeated threats to cause physical pain to any person in whom the aggrieved person is interested<sup>53</sup>, threatening to commit suicide, attempts to commit suicide, forcing the aggrieved person to marry any particular person, forcing her not to attend any educational institution, or preventing her from leaving the house, meeting any particular person, taking up a job of her choice, or marrying a person of her choice etc.

---

<sup>48</sup>*Id.*, s.3, Explanation I, Clause(i).

<sup>49</sup> The protection of Women from Domestic Violence Rules, 2006 Form V.

<sup>50</sup>*Supra* n. 19 s.3, Explanation I, Clause ( ii).

<sup>51</sup>*Supra* n. 49 Form I.

<sup>52</sup>*Supra* n. 19 s.3 Explanation I, Clause (iii), (a).

<sup>53</sup>*Id.*, s.3, Explanation I, Clause (iii), (b).

One of the novel concepts envisaged under the Act is the use of the term economic abuse which is not seen in any of the laws that existed prior to passing of this Act. Nor were such terms discussed because it was considered to be a concept influenced by western feminism. The term economic abuse in the Act includes a wide range of acts and omissions such as the deprivation of all or any economic or financial resources to which the aggrieved person is entitled under law or custom or which she requires out of necessity including inter alia household necessities for her and her children, her *stridhan* and property either jointly or separately owned by her, payment of rent or the shared household, maintenance etc.<sup>54</sup> It also includes the disposal of household effects, the alienation of assets, valuables, shares, securities, bonds etc., in which she has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by her or her children; and the disposal or alienation of her *stridhan* or any other property jointly or separately held by her etc.<sup>55</sup> A prohibition or restriction on her continued access to resources or facilities, which she is entitled to use or enjoy, including access to the shared household, would amount to economic abuse<sup>56</sup>.

Though the concept of claiming damages for the injuries suffered by a woman, inflicted by a husband or partner in an intimate relationship, is borrowed from Western laws, such laws to “protect women” from violence are mainly envisaged for women as productive members of a society. Hence, this ideology presumes that if women cannot function due to being affected by violence, there will be a loss in production and profit - be it in workplace or the home. Thus economic losses occur due to medical bills, abstention, or loss of employment, etc<sup>57</sup>.

---

<sup>54</sup> *Id.*, s.3, Explanation I, Clause (iv) (a).

<sup>55</sup> *Id.*, s.3, Explanation I, Clause (iv) (b).

<sup>56</sup> *Id.*, s.3, Explanation I, Clause (iv) (c).

<sup>57</sup> <http://www.hrln.org/hrln/images/stories/pdf/NC-Protection-Women-Domestic-Violence-Act-2005.pdf>. Last visited on 20th February, 2012.

The introduction of economic abuse as a human rights violation can go a long way in reaping the fruit of development of recognizing rights over property within the shared household. The inclusion of economics abuse as an act of domestic violence has raised criticisms from many quarters. It has also led to an argument that the legal rights of a women, which are enforceable through a civil court are sought to be protected by bringing it within the definition of the term domestic violence. It is not permissible to do so under a criminal law/statute as a criminal court cannot direct enforcement of civil legal rights<sup>58</sup>. Even under previous laws, a woman was entitled to seek maintenance for herself and her children from her husband though the legal procedures were cumbersome and poorly enforced.

Indian Constitution's guarantee of equal protection of the law, the right of all citizens to equality in matters relating to employment opportunities, and the duty to renounce practices derogatory to the dignity of women, all suggest that Indian domestic law entitles women to the financial resources to which men are entitled and denial of women's control over their finances amounts to a constitutional violation. Furthermore, the provisions of international covenants like the CEDAW<sup>59</sup> and the ICESCR mandate India's affirmative duty to correct inequalities that women face inside and outside of the marital home including those concerning their economic survival, to eliminate social and cultural practices oppressive to women, support women's right to work and independently choose their employment, and to advance their fundamental right of self-determination. Consequently, international law also supports the proposition that economic abuse be viewed broadly, and thus both domestic and international law, in promoting the expansion of this term in the Act, may provide a greater remedy for victims of domestic violence, granting women the right to control their economic resources will empower women and punishing

---

<sup>58</sup>Nirmal Chopra, "The Protection of Women from Domestic Violence Act, 2005-Immorality Legalised", *Cri. L.J.* 57 (2007).

<sup>59</sup>Articles 11 and 16 in particular.

men for exerting control over their spouses will contribute to changing men's attitudes concerning gender equality and domestic violence in the future.

In practice, however, definitions of domestic violence that include psychological and economic violence may be problematic. Experience has shown that violent offenders may attempt to take advantage of such provisions by applying for protection orders claiming that their partner psychologically abuses them. Further, many women may not expect a strong justice system response to so-called acts of psychological or economic violence against them. In addition, psychological violence is very difficult to prove. It is therefore essential that any definition of domestic violence that includes psychological and/or economic violence is enforced in a gender sensitive and appropriate manner. The expertise of relevant professionals, including psychologists and counselors, advocates and service providers for complainants/survivors of violence, and academics should be utilized to determine whether behaviour constitutes violence.

However the new Act leaves as much scope for misuse as the previous laws whose faults it was supposed to remedy, especially since it puts short term *live-in-relationships* at par with legal marriages. The common criticism raised in the context is as to whether the Act promotes Bigamy which is punishable under the criminal law and is promoting the western concept of *live in relationships*. If the rights of a wife and a *live-in partner* become equivalent it would promote bigamy and there would arise a conflict between the interests of the wife and the live-in-partner. The Act in effect is acknowledging the reality of violence and destitution that is common in such relationships which is unleashed against the helpless women. The legal sanction for live-in-relationships is meant to work to the advantage of women who become victims of their circumstances, even if it was a matter of choice, it is based on the assumption that the relationship is not between equals and therefore women need protection by the courts from the patriarchal definition of marriage and such relationships too.

### **Comparing the Concept of Domestic Violence Under Foreign Countries**

The definition of domestic violence is expansive as it involves the concepts of emotional, verbal and economic abuse when compared to legislations of other jurisdictions. In U.K, both the Family Law Act, 1996 and the Domestic Violence, Crime and Victims Act, 2004 have not clearly defined the term domestic violence although there are provisions for occupation orders<sup>60</sup> and non-molestation orders<sup>61</sup>. The law there has not taken note of all these novel concepts. In USA, the Violence against Women Act 1994, has defined domestic violence to include felony or misdemeanor crimes of violence<sup>62</sup> and does not extend to emotional abuse by the family. In Malaysia, Domestic Violence Act 1994 provides that domestic violence includes willfully or knowingly placing, or attempting to place, the victim in fear of physical injury, causing physical injury to the victim by an act that is known or ought to have been known would result in physical injury, compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain, confining or detaining the victim against his or her will or causing mischief, destruction or damage to property with intent to cause, or knowing that it is likely to cause distress or annoyance to the victim<sup>63</sup>. This definition of domestic violence in Malaysia is confined to physical injury, threats, force and confinement and does not include emotional, verbal or economic abuse. The Act is therefore novel in this respect.

A gender-sensitive approach to legislation on violence against women acknowledges that women's and men's experiences of violence differ and that violence against women is a manifestation of historically unequal power

---

<sup>60</sup>The Family Law Act, 1996 s.33

<sup>61</sup>*Id.*, s.42, The Family Law Act, 1996

<sup>62</sup> Violence Against Women Act, 1994, as inserted by s.3 of the Violence against Women and Department of Justice Reauthorisation Act, 2005. s.40002 (6)

<sup>63</sup>The Domestic Violence Act, 1994 s.2

relations between men and women and discrimination against women. The legislation ought to be gender sensitive<sup>64</sup> and not gender blind.

#### **6.4.6 The Novel Machinery for Implementation: Role of Protection Officers and Service Providers**

The Act is an example of interplay between NGO's and Central /State Governmental organizations. It recognizes NGOs and other private organisations and makes them equal stakeholders in the enforcement of the Act. The Act has put in place comprehensive machinery to ensure the implementation of its provisions and has contemplated the appointment of a number of functionaries to assist the victims of domestic violence in availing of the relief provided for under the Act.

##### *Role of Protection Officer*

To ensure effective implementation, the Act contains provisions creating special machinery and creates posts of the *Protection Officer*<sup>65</sup>. Preference is given to women in appointing as Protection Officers<sup>66</sup>. The Protection Officers act as a link between the judicial machinery and the society and shall perform a variety of important tasks necessary to bring the relief available under the Act to women victims of domestic violence. The role to be played by the Protection Officer is elaborately discussed in the concerned Rules<sup>67</sup>.

---

<sup>64</sup> For example, The Austrian Code of Criminal Procedure, since 2006, provides specific procedures and rights for women complainants/survivors of violence in the criminal justice process in order to avoid their secondary victimization.

<sup>65</sup> Supra n.19 s.2 (n) read with s.8 of the Act provides for the appointment of protection officers by the state government, which will appoint for any district, as many protection officers as are required for each district.

<sup>66</sup> Protection of Women from Domestic Violence Rules, 2006, r.3(1), proviso.

<sup>67</sup> S.8. Duties and functions of Protection Officers.- (1) It shall be the duty of the Protection Officer -

(i) to assist the aggrieved person in making a complaint under the Act, if the aggrieved person so desires;

(ii) to provide her information on the rights of aggrieved persons under the Act as given in Form IV which shall be in English or in a vernacular local language;

The Protection Officer may assist the Magistrate in the discharge of his functions under the Act, make a ‘domestic incident report’<sup>68</sup> to the Magistrate, make an application to the Magistrate if the aggrieved person so desires praying for issuance of a protection order<sup>69</sup>, ensure legal aid to the aggrieved person under the Legal Services Authority Act, 1987, maintain a list of ‘service providers’<sup>70</sup>, make available a shelter home if the aggrieved person so

---

(iii) to assist the person in making any application under section 12, or sub-section (2) of section 23 or any other provision of the Act or the rules made there under;

(iv) to prepare a "Safety Plan" including measures to prevent further domestic violence to the aggrieved person, in consultation with the aggrieved person in Form V, after making an assessment of the dangers involved in the situation and on an application being moved under section 12;

(v) to provide legal aid to the aggrieved person, through the State Legal Aid Services Authority;

(vi) to assist the aggrieved person and any child in obtaining medical aid at a medical facility including providing transportation to get the medical facility;

(vii) to assist in obtaining transportation for the aggrieved person and any child to the shelter;

(viii) to inform the service providers registered under the Act that their services may be required in the proceedings under the Act and to invite applications from service providers seeking particulars of their members to be appointed as Counselors in proceedings under the Act under sub-section (1) of section 14 or Welfare Experts under section 15;

(ix) to scrutinize the applications for appointment as Counselors and forward a list of available Counselors to the Magistrate;

(x) to revise once in three years the list of available Counselors by inviting fresh applications and forward a revised list of Counselors on the basis thereof to the concerned Magistrate;

(xii) to Provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incidence of domestic violence;

(xiii) to liaise between the aggrieved person or persons, police and service provider in the manner provided under the Act and these rules;

(xiv) to maintain proper records of the service providers, medical facility and shelter homes in the area of his jurisdiction.

(2) In addition to the duties and functions assigned to a Protection officer under clauses (a) to (h) of sub-section 9, it shall be the duty of every Protection Officer-

(a) to protect the aggrieved persons from domestic violence, in accordance with the provisions of the Act and these rules;

(b) to take all reasonable measures to prevent recurrence of domestic violence against the aggrieved person, in accordance with the provisions of the Act and these rules.

<sup>68</sup>*Id.*, s.9(i)b

<sup>69</sup>*Id.*, s.18

<sup>70</sup>*Id.*, s.2(r) read with s.10(1). It provides that any voluntary association registered under the Societies Registration Act, 1860, or a company registered under the Companies Act, 1956 whose objective is the protection of women and is involved in the provision of legal aid, medical or financial assistance to women and is to get registered itself with the state government as a ‘service provider’.



requires<sup>71</sup>, get the aggrieved person medically examined if she has sustained bodily injuries<sup>72</sup>, ensure that the order for monetary relief<sup>73</sup> of the Act is complied with and executed in accordance with the provisions of Code of Criminal Procedure, 1973 and perform such other duties as may be laid down by the Central Government by Rules<sup>74</sup>. The domestic incident report of the Protection Officer will be very significant in the decision making process under the Act as it will disclose the genuineness of the allegations made in the complaint. The Protection Officer in emergency cases will have to resort to prompt actions and are empowered to respond to the emergency calls of the victim in consonance with delivering justice to the victim<sup>75</sup>. The Protection Officer as per the Rules have to undertake certain enquiries for the passing of orders in interim orders under the direction of the Magistrate concerned to the effect that order passed is not prejudicial and is genuine<sup>76</sup>. In fact the Protection

---

<sup>71</sup> *Id.*, s.2(t) defines the concept of shelter home and the duties are enumerated under s.6.

<sup>72</sup> *Id.*, s.7 enumerates the duties of medical facilities.

<sup>73</sup> *Id.*, s.20.

<sup>74</sup> *Id.*, s.9.

<sup>75</sup> The Protection of Women from Domestic Violence Rules, 2006, r.9. Action to be taken in cases of emergency- If the Protection Officer or a service provider receives reliable information through e-mail or a telephone call or the like either from the aggrieved person or from any person who has reason to believe that an act of domestic violence is being or is likely to be committed and in a such an emergency situation, the Protection Officer or the service provider, as the case may be, shall seek immediate assistance of the police who shall accompany the Protection Officer or the service provider, as the case may be, to the place of occurrence and record the domestic incident report and present the same to the Magistrate without any delay for seeking appropriate orders under the Act.

<sup>76</sup> *Id.*, r.10. Certain other duties of the Protection Officers-(1) The Protection Officer, if directed to do so in writing, by the Magistrate shall-

(a) conduct a home visit of the shared household premises and make preliminary enquiry if the court requires clarification, in regard to granting ex-parte interim relief to the aggrieved person under the Act and pass an order for such home visit;

(b) after making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents as may be directed by the court;

(c) restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person;

(d) assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision as may be directed by the court.

(e) assist the court in enforcement of orders in the proceedings under the Act in the manner directed by the Magistrate, including orders under section 12, section 18, section 19, section 20, section 21 or section 23 in such manner as may be directed by the court.

Officer is envisaged to assist and aid the Magistrate in reaching effective orders for the proper enforcement of the Act.

#### *Role of Service Provider*

The law recognizes that legal remedies alone would be inadequate to help the victim of domestic violence live her life with dignity. Hence, multiple support structures have been created, to holistically address women's need for shelter, counseling and medical support. The nomenclature *Service Provider* has been used as additional machinery to aid and assist the Protection Officer<sup>77</sup> who can act as the service provider. Necessary qualifications required Service Provider them are clearly enunciated in the Rules<sup>78</sup>. They are generally NGOs working for women's rights. Service Providers are made responsible for recording and forwarding domestic incident reports to Magistrates and Protection Officers; getting the victim medically examined and forwarding the medical report to the protection officer and the police station within the local limits of which the incident occurred and also ensuring that the victim is provided shelter in a shelter home<sup>79</sup>. The role envisaged by the Service

---

(f) take the assistance of the police, if required, in confiscating any weapon involved in the alleged domestic violence.

(2) The Protection Officer shall also perform such other duties as may be assigned to him by the State Government or the Magistrate in giving effect to the provisions of the Act and these rules from time to time.

(3) The Magistrate may, in addition to the orders for effective relief in any case, also issue directions relating general practice for better handling of the cases, to the Protection Officers within his jurisdiction and the Protection Officers shall be bound to carry out the same.

<sup>77</sup>*Id.*, S.2(r) read with S.10(1)

<sup>78</sup>*Id.*, Rule.11. Registration of service providers-(1) Any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860) or a company registered under the Companies Act, 1956 (1 of 1956) or any other law for time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance and desirous of providing service as a service provider under the Act shall make an application under sub-section (1) of section 10 for registration as service provider in Form VI to the State Government.

(2) The State Government shall, after making such enquiry as it may consider necessary and after satisfying itself about the suitability of the applicant, register it as a service provider and issue a certificate of such registration:

<sup>79</sup>*Id.*, S.10

Providers as per the Rules clearly prescribe the need for the experience of such agencies or companies in the field of medical care and shelter service<sup>80</sup>.

Medical facilities and shelter homes envisaged under the Act are the support facilities to be availed off by women victims. The rules are laid down as to the facilities to be accorded to the aggrieved person to that effect. Such 'medical facilities'<sup>81</sup> and 'shelter homes'<sup>82</sup> have to be approved and notified by

---

<sup>80</sup>*Id.*, Rule 11(3) :Every association or company seeking registration under sub-section (1) of section 10 shall possess the following eligibility criteria, namely:-

(a) It should have been rendering the kind of services it is offering under the Act for at least three years before the date of application for registration under the Act and these rules as a service provider.

(b) In case an applicant for registration is running a medical facility, or a psychiatric counseling centre, or a vocational training institution, the State Government shall ensure that the applicant fulfils the requirements for running such a facility or institution laid down by the respective regulatory authorities regulating the respective professions or institutions.

(c) In case an applicant for registration is running a shelter home, the State Government shall, through an officer or any authority or agency authorized by it, inspect the shelter home, prepare a report and record its finding on the report, detailing that-

(i) the maximum capacity of such shelter home for intake of persons seeking shelter;

(ii) the place is secure for running a shelter home for women and that adequate security arrangements can be put in place for the shelter home;

(iii) the shelter home has a record of maintaining a functional telephone connection or other communication media for the use of the inmates;

(3) The State Government shall provide a list of service providers in the various localities to the concerned Protection Officers and also publish such list of newspapers or on its website.

(4) The Protection Officer shall maintain proper records by way of maintenance of registers duly indexed, containing the details of the service providers.

<sup>81</sup>*Id.*, R.17. Medical Facility to the aggrieved person-(1) The aggrieved person or the Protection Officer or the service provider may make a request under section 7 to a person in charge of a medical facility in writing, clearly stating that the application is being made under.

(2) When a Protection Officer makes such a request, it shall be accompanied by a copy of the domestic incident report

Provided that the medical facility shall not refuse medical assistance to an aggrieved person under the Act, for her not having lodged a domestic incident report, prior to making a request for medical assistance or examination to the medical facility.

(3) If no domestic incident report has been made, the person-in-charge of the medical facility shall fill in form I and forward the same to the local Protection Officer.

(4) The medical facility shall supply a copy of the medical examination report to the aggrieved person free of cost.

<sup>82</sup>*Id.*, R.16. Shelter to the aggrieved person-(1) On a request being made by the aggrieved person, the Protection Officer or a service provider may make a request under section 6 to the person in charge of a shelter home in writing, clearly stating that the application is being made under section 6.

(2) When a Protection Officer makes a request referred to in sub-rule (1), it shall be accompanied by a copy of the domestic incident report registered, under section 9 or under

the concerned state governments. If the aggrieved party of desirous of not revealing her identity the same is taken care of in the Act through the Rules<sup>83</sup>. The state government is also tasked with ensuring that the service providers meet applicable criteria under the Act and rules framed there under. These rules are to be strictly complied with so as to ensure that private participation, though wide, must be of the specialized standards to further the objectives of protecting the victims of domestic violence. The Protection Officer is subject to the control and supervision of the Magistrate<sup>84</sup>. By envisaging the duties of protection officer, the Act goes a way forward in contemplating the protection and rehabilitation of victims by providing them with shelter homes and makes it necessary for the shelter home to protect the identity of the victim if she so desires<sup>85</sup>

Any women whom has been the victim of domestic violence may initiate proceedings before a Magistrate, or such proceedings may be initiated by the Protection Officer<sup>86</sup> who may be informed of such domestic violence by any person who has reason to believe that it has occurred<sup>87</sup>. This provision makes it crystal clear that a woman victim need not necessarily set the proceedings in motion and that the locus standi of the person giving information as to the instance of domestic violence happening/happened is not restricted in any sense. Any bonafide person acting in good faith can inform the happenings to the Protection Officer or the service provider as the case may be. Section 4 therefore creates a social responsibility on members of the community at large who have knowledge of an impending or already

---

section 10: Provided that shelter home shall not refuse shelter to an aggrieved person under the Act, for her not having lodged a domestic incident report, prior to the making of request for shelter in the shelter home.

<sup>83</sup>*Id.*, R.16 (3) If the aggrieved person so desires, the shelter home shall not disclose the identity of the aggrieved person in the shelter home or communicate the same to the person complained against.

<sup>84</sup>Supra note 19S.9(2)

<sup>85</sup>The Protection of Women from Domestic Violence Rules ,2006 r. 16

<sup>86</sup>Supra n.19 s.12(1); *Milan kumarSingh v. State of Uttar Pradesh* 2007 Cri.L.J. 4742

<sup>87</sup>*Id.*, s.4(1)

committed act of domestic violence, to come forward to file complaint on behalf of the victim, this implies that even an individual has an obligation to react against violence.

On the receipt of such complaint the Protection Officer shall prepare a *Domestic incident report* which resembles the First Information Report under the Criminal proceeding and shall be forwarded to the police officer of the concerned area and the service providers in such area and a copy of it shall be sent to the Magistrate taking cognizance of the matter. The Act makes it obligatory for the Protection Officer, Service Provider, Magistrate, or Police Officer concerned to make the victim aware of the services and relief available to her under the Act<sup>88</sup>. Most important of all, the protection officer can be penalized for failing/refusing to discharge his/her duty provided that prior sanction is obtained for the purpose<sup>89</sup>. The Act also provides for the medical examination of the victim, the report of which will be forwarded by the protection officer to the Magistrate and police officer having jurisdiction<sup>90</sup>. The Act focuses on the speedy remedy for the victim and ensures a violence free environment for her in the domestic space where she is supposed to move about. In addition, Magistrates who are to hear cases under the Act are empowered to appoint counselors who are to assist the petitioner and report to the Magistrate's court<sup>91</sup>.

### *Role of NGOs*

This new law has effectively recognized the role of voluntary organizations in addressing the issue of domestic violence and enables NGOs

---

<sup>88</sup>*Id.*, s.5 vests the responsibility upon the Protection officer, Service provider, Police officer, or Magistrate to disclose to the victim as to her right to make an application for obtaining reliefs enumerated under s.17 of the Act; as to the availability of services of service providers; the availability of protection officers; right to free legal aid; right to file a complaint under s.498A of Indian Penal Code 1860.

<sup>89</sup> It invites a penalty of Rs.20,000/- and /or a prison term of upto one year for failing to do their job.

<sup>90</sup>*Supra* n. 19 s.9(g)

<sup>91</sup>*Id.*, s.14(1)

working for women's rights to register as service providers under the Act. The Act is a unique experiment in Indian legislative history as it creates an interface between the Government and the NGO sector and utilizes the experience and resources of both to provide effective machinery for its implementation<sup>92</sup>.

The protection officers and members of the service providers are deemed to be public servants and have all the rights, benefits and duties that accrue with such a status<sup>93</sup>. Enshrining their services in law grants their actions important legitimacy; according them the status of public servants protects them from frivolous persecution. The Act envisages to make it mandatory for the Magistrate to fix the date for hearing the matter within a period of three days<sup>94</sup> from the date on which an application is presented by the victim or by a protection officer or any other person on her behalf<sup>95</sup> and makes it necessary to dispose of the application within a period of sixty days from the date of first hearing<sup>96</sup>. The Act takes steps to protect the identity and privacy of the victims by providing for the proceedings before the Magistrate to be carried on in camera at his discretion or at the request of either party<sup>97</sup>. The Act also provides that Magistrates may appoint *Welfare Experts*<sup>98</sup>, preferably woman who will assist them in the discharge of their functions<sup>99</sup> and may direct the victim to undergo counseling either jointly or singly<sup>100</sup>.

Under the Act, government organizations have the role of ensuring effective co-ordination between the services provided by concerned ministries and departments dealing with law, home affairs and including law and order,

---

<sup>92</sup>Sidharth Luthra; "The Domestic Violence Act: Can We Make a Success of It?" *Halsbury's Law Monthly*, Lexis Nexis, 25 (2008).

<sup>93</sup>*Supra* n. 19 S.30. I.e. protection from suits, prosecutions and other legal proceedings for acts done in good faith, etc.

<sup>94</sup>*Id.*, s.12(4); *Neetu Singh v. Sunil Singh*, A.I.R. 2008 Chh 1.

<sup>95</sup>*Id.*, s.12(1); *Chitraganthan v. Seema*, I (2008) D.M.C. 365.

<sup>96</sup>*Id.*, s.12(5).

<sup>97</sup>*Id.*, s.16.

<sup>98</sup>*Id.*, s.15.

<sup>99</sup>*Id.*, s.15.

<sup>100</sup>*Id.*, s.14.

health and human resources to address the issues of domestic violence, giving wide publicity to the provisions of the Act and for providing periodic sensitization and awareness training to Central Government and State Government officers on issues addressed by the Act<sup>101</sup>.

The Act is an improvement over the earlier/prevaling legal mechanism as far as the role of the law-enforcing agencies is concerned. The success of any law is dependent to a large extent upon how effectively the law-enforcing agencies play their role. Earlier the enforcement of law was largely the responsibility of 'police' that itself never accepted domestic violence as a crime; rather it always perceived such violence as a part and parcel of Indian culture. But this Act creates two new offices for the purpose of implementing the law, one is Protection Officers and the second is Service Providers

Despite the lofty aspirations envisaged under the Act there exist the ground realities in India. Criticisms has pooled in enquiring about the resources and capacity of NGOs to provide such wide range of effective medical and shelter facilities. The Government-run shelter homes and medical facilities remain as dens of corruption. There is no provision envisaged under the Act to reimburse the NGOs or budgetary allocation of finance to pay for the expenses incurred for the services offered. There are loopholes by which anti-social elements will manage to get it registered as service providers much faster than the genuine NGOs.

The successful functioning of the Act depends, almost completely on the functioning of protection officer in whom tremendous responsibility is placed which would eventually make the functioning of the machinery under the Act more time consuming and more cumbersome. The qualifications prescribed for a Protection Officer is too vague<sup>102</sup>. Preference given to women candidates is appreciable. Any member of government or non-governmental

---

<sup>101</sup>*Id.*, s.11.

<sup>102</sup>*Id.*, s.3.

organization having three years' experience in a social sector is prescribed which in turn projects the fact that he/she need not be neither a trained personnel nor a judicial officer. This leaves scope for ineffectiveness and room for abuse of the machinery in case a protection officer either neglects or his/her responsibility or misuses it. Unless an exclusive body of officers is created, manned preferably by the law, social welfare and other related departments, for the purposes of discharging the functions created therein, any attempt to heap additional responsibilities on existing officers would stifle the very essence of this Act and ensure its failure. The testimony of the District Probationary officer of district of Kozhikode, Kerala who is designated as Protection Officer for the concerned district has brought out the problem of additionally burdening their system, which in turn indicates the failure of effective implementation of the Act<sup>103</sup>.

The Act does not provide for any penalty to be imposed or prosecution to be launched against a service provider for filing false complaints under the Act. Such unfettered freedom and rights are bad in law and there are chances of abuse or misuse by the service providers for purposes other than those prescribed for them to be performed under the Act.

The concept of 'any other person' making application to Magistrate under the Act<sup>104</sup> is very vaguely termed. There is no reference to any relationship between the 'aggrieved person' and such 'any other person' as a condition precedent to enable such 'any other person' to file a complaint on behalf of the aggrieved person. No specifications as to the interest of such 'any other person' have been included under the Act and it clearly gives room for abuse of the provisions in the Act.

---

<sup>103</sup>This is in reference to a Seminar related to Domestic Violence Act, 2005 held at Government Law College, Kozhikode, Kerala in the year 2012 attended by the researcher.

<sup>104</sup>*Supra* n. 19 s.12(1).



The concept of counseling envisaged in the Act is necessary in a legislation of this nature. As per the corresponding rules of the Act<sup>105</sup>, only disqualifications of a counselor is provided and it leaves room for widest chance of entry of counselors who are not at all sensitized towards the issue of domestic violence. During the course of counseling the respondent shall not be allowed to plead any counter justification for the violence inflicted<sup>106</sup> is an applaudable clause which improves the scope of counseling envisaged under the Act. But the training that is necessary for the mediators in this issue, their awareness and sensitivity to the problem, their attitude etc. plays a very leading role in reaching settlements. In a society where the culture is predominantly patriarchal and age old dogmas exist and are deep seated, it is a highly debatable issue as to the effectiveness in counseling and the fruits intended to be reaped. There exists the widest chance of a woman victim surrendering herself to the demands and interests dictated by the male victim which is happening in the Family Courts that are already in existence. Also it is very unclear as to what force a settlement reached during counseling sessions or as to any undertaking signed by the accused to refrain from domestic violence would have and what consequences a breach if such an undertaking might entail. However it is advisable to conduct counseling if required before the matter reaches the court. The problem of domestic violence is very much a social problem and it has to be viewed in that perspective.

Finally it is also ambiguous as to whether the duties imposed on the Central Government are mandatory or directory in nature and if they are mandatory, what liability would be incurred by their breach. Thus although a commendable attempt has been made to put in place a speedy and effective mechanism aimed towards protecting the victim as much as possible, there exist certain ambiguities in the provisions of the Act that might impede its successful implementation.

---

<sup>105</sup>*Id.*, s.13.

<sup>106</sup>*Id.*,s.14(5).

#### **6.4.7 The Reliefs Provided under the Act: Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders**

The Act provides a large number of avenues for an abused woman to get relief. The next aspect of the Act that needs to be analyzed is the relief it seeks to provide to the woman victim. A broad overview of the structured reliefs under the Act suggests that they are not punitive in nature. They are restorative in nature providing for protection of a woman victim from any further abuse or compensating her for the abuse already suffered and additionally restoring stability and harmony in the family unit. Applicability and establishment of tortious liability in the cases relating to domestic violence is one of the significant aspects of the Act. It provides new civil remedies for the victims of domestic violence. This law recognizes new set of rights and obligations in the nature of torts remedy, to secure women in their own families. The main thrust of the law is to provide monetary assistance in the shape of damages, compensation, maintenance, exemplary cost and penalties. In the case of domestic violence, tortious liability arises with due intention. Some conditions are required for intention which are totally employed by domestic violence, conditions are: motive, malice, recklessness.

The Act is not exhaustive and is only complimentary in nature as it supplements the existing legislations and the reliefs structured under the Act and it is meant to act as only in addition to and not in derogation to that provided under the other enactments<sup>107</sup>. The relief available under the Act may be sought in any other legal proceedings before a civil court, a family court, or a criminal court irrespective of whether such proceedings were initiated before or after the commencement of the Act<sup>108</sup>. The law complements existing

---

<sup>107</sup> *Id.*, s.36.

<sup>108</sup> *Id.*, s.26(1) There is a single window clearance under this law in supporting women's access to justice. S.26 lays down that civil relief can be claimed in any pending proceeding, which means if there is a divorce proceeding pending; if there is a partition suit pending; if there is a

matrimonial and criminal laws on domestic violence, so that women have a wider option in legal provisions that can be applied. They would exercise this option by assessing as to which law would most effectively address their specific situation and need. The Act may also be applied retrospectively and empowers the Magistrate to take cognizance of any act of domestic violence alleged to have been committed even prior to the commencement of the Act<sup>109</sup>.

The different modes of relief envisaged under the Act are: *Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders*. Each of such orders may be passed by the Magistrate while disposing of the application, depending on the reliefs sought for by the aggrieved person and taking into account the necessities of the victim at that point of time.

### **Protection Order**

The Magistrate after giving the aggrieved person and the respondent an opportunity of being heard and on *prima facie* satisfied that domestic violence has taken place or is likely to take place, may pass *Protection Order* in favour of the *aggrieved person*<sup>110</sup>. It may contain an order prohibiting the respondent from committing any act of domestic violence or aiding or abetting therein, entering the place of employment of the aggrieved person or if the person aggrieved is a child its school, or any other place frequented by the aggrieved person or attempting to communicate in any form whatsoever with the aggrieved person without the leave of the Magistrate, alienating any assets, operating bank lockers or bank accounts belonging to both the parties jointly or to the respondent singly, including her *stridhan* or any other property held jointly or separately by them, causing violence to the dependents, other relatives or any person giving the aggrieved person assistance from domestic

---

custody application pending; if there is a 498A application pending, an application under this law can be made for a protection order or for an injunction restraining dispossession

<sup>109</sup>*Id.*,s.26(1).

<sup>110</sup>*Id.*,s.18 of the Act.

violence or committing any other act as specified in the Protection Order<sup>111</sup>. The Protection Orders would be in operation till the aggrieved person applies for a discharge (removal of the order).<sup>112</sup> The court is duty-bound to study the application and ensure that there is a change in circumstances that warrants the discharge of the Protection Order<sup>113</sup>, and the *aggrieved person* has not been subjected to any sort of coercion, before issuing the necessary orders.

These Protection Orders, are in the nature of restraining orders restraining the respondent from indulging in all these activities mentioned and it can only be vacated on an application by the victim<sup>114</sup>. They are very much in consonance with the non-molestation orders which may be obtained in the U.K. The relief provided by the laws of Malaysia<sup>115</sup>, also provide for an additional discretionary power of arrest in cases where the court is satisfied that there is likelihood of physical injury being inflicted on the victim by the aggressor. Being in the nature of civil remedy, the relief provided under the Act is much milder when compared to stringent provisions under Section 498 A. The Protection Order contemplated under the Act serves the purpose of stopping violence order immediately and is likely to be a significant step towards reducing its repetitive invocation and indiscriminate abuse.

### **Residence order**

Another type of relief envisaged under the Act is the *Residence orders*<sup>116</sup>. In the Indian patriarchal society, most ownership and lease agreements are made in the names of male members of the family. Hence, women who reside in such

---

<sup>111</sup>*Id.*, s.18(a) to (g) of the Act.

<sup>112</sup>*Id.*, s. 25(1) of the Act.

<sup>113</sup>*Id.*, s. 25(2) of the Act.

<sup>114</sup>*Id.*, s.25(1) of the Act.

<sup>115</sup>s.7(1) Where the court is satisfied that the person against whom a protection order or interim protection order is made is likely to cause actual physical injury to the protected person or persons, the court may attach a power of arrest to such protection order or interim protection order, as the case may be. Available from APWLD 2003: apwld@apwld.org. Last visited on 23<sup>rd</sup> July, 2013.

<sup>116</sup>*Supra* n. 19 s.19.

premises, including wives, mothers, daughters and sisters, face the danger of being dispossessed from the same and forced to destitution. Many women are forced to tolerate domestic violence for fear of being on the streets, especially when they do not have support from their parents or government support for shelter. In situations where such women seek the court's intervention in a situation of domestic violence, women also fear that the respondent would dispossess them from the premises by way of a reprisal /revenge.

Taking into account the vulnerability of a woman victim who faces violence in a domestic relationship she is ensured the right to reside in a shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law<sup>117</sup>. To exercise this right, the Act provides for a residence order that may be obtained by the victim either restraining the respondent from dispossessing, or disturbing the possession of the aggrieved person from the shared household irrespective of whether or not he/she has a legal or equitable interest in it, directing the respondent to remove himself from the shared household, restraining the respondent or his relatives from entering into that portion of the shared household in which victim resides, restraining the respondent from alienating or disposing of or encumbering the shared household, restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate, or directing the respondent to secure alternate accommodation for the aggrieved person of the same level as enjoyed by her in the shared household or to pay rent for the same<sup>118</sup>. However the Act clearly states that no residence order against a woman may be obtained that directs her to remove herself from the shared household<sup>119</sup>. Magistrate is also empowered under the Act to impose any conditions or pass any direction that is necessary to protect the victim or any

---

<sup>117</sup>*Id.*,s.17 (1) and (2).

<sup>118</sup>*Id.*, ss.19 (a) to (f).

<sup>119</sup>*Id.*,s.19(1), proviso.

child of hers<sup>120</sup>: to require a bond to be executed from the respondent for the prevention of domestic violence<sup>121</sup>, to impose any obligations relating to the discharge of rent and other payments<sup>122</sup>; to direct the respondent to return any *stridhan*, property, or valuable security to which the victim is entitled<sup>123</sup>; and to empower any officer in charge of the nearest police station or within the jurisdiction of the Magistrate to enable the implementation of such orders<sup>124</sup>.

It is to be remembered in this context, that the right to residence is different from property rights that include right to own and dispose of a property. This law provides a right to the woman against being illegally dispossessed. She may be dispossessed through the procedure set out in law. The right to residence does not entitle the woman with the right of ownership over the premises.<sup>125</sup> These provisions of residence orders are much in tune with the relief provided under Malaysian law<sup>126</sup> and the occupation orders<sup>127</sup> available under the Family Law Act, 1996 of Britain, which goes a step further and recognizes the right of both spouses to occupy the matrimonial home<sup>128</sup>.

### **Monetary Reliefs**

The Act envisages Monetary reliefs where by the magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence including any maintenance, loss of earnings, medical expenses, or any loss caused due to destruction, damage or removal of

---

<sup>120</sup> *Id.*, s.19(2).

<sup>121</sup> *Id.*, s.19(3).

<sup>122</sup> *Id.*, s.19(6).

<sup>123</sup> *Id.*, s.19(8).

<sup>124</sup> *Id.*, ss.19(5), 19(7).

<sup>125</sup> For more details, see Address of Chandru J. of the High Court of Chennai, at 'Staying Alive: National Conference Commemorating 1 Year of the Protection of Women from Domestic Violence Act, 2005', New Delhi, 26-27 October 2007.

<sup>126</sup> Domestic Violence Act, 1994 s.6.

<sup>127</sup> Family Law Act, 1996 s.33.

<sup>128</sup> *Supra* n. 19, s.30.

any property from the control of the victim<sup>129</sup>, which is consistent with the standard of living she is accustomed to.<sup>130</sup> In case of breach of such order by the respondent, the Magistrate may direct the employer or a debtor of the aggressor to directly pay the victim or to deposit the same with the court a portion of the wages or salary or debt due to or accrued to the credit of aggressor which may be adjusted towards the towards the monetary relief payable by him<sup>131</sup>. This type of payment made to the victim out of the debts accrued from the aggressor and adjusting the same from it relates the Garnishee proceedings under the Code of Civil Procedure in India<sup>132</sup>. No specific criteria has been laid down or fixed by judicial interpretations as to the amount of compensation to be arrived at. So it can very well be deciphered that it depends on each case and its circumstances.

The laws of Malaysia provide similar relief that includes compensation to the victim for all necessary and reasonable expenses incurred in separating from the aggressor, such as lodging expenses required in setting up a separate household, which may include housing loan payments or rental payments in respect of the shared residence or alternative residence<sup>133</sup>. The Act in a way makes provision for rapid temporary reliefs for the woman pending disposal of the case.

### **Custody Orders**

The Act provides for *Custody orders* where by the magistrate may at any stage, grant temporary custody of any child or children to the victim or any person making an application on her behalf and specify the visitation rights of the aggressor, which may be refused if the Magistrate is of the opinion that it

---

<sup>129</sup>*Id.*, s.20(1).

<sup>130</sup>*Id.*, s.20(2) *Suresh Khullar v. Vijay Kumar Khullar* A.I.R. 2008 Delhi I.

<sup>131</sup>*Id.*, s.20(6).

<sup>132</sup> Civil Procedure Code, 1908, o.21, r.46.

<sup>133</sup> Domestic Violence Act, 1994. s.10.

will be harmful to the child<sup>134</sup>. Under this law, the aggrieved person cannot file an application for temporary custody alone; such an application has to be coupled with a protection order since the main aim of this law is to prevent domestic violence.<sup>135</sup> Here by envisaging such reliefs to be ordered the ‘best interest of the child’ principle is revisited. The right of the child to violence free environment thereby ensuring developmental growth of children in a conducive atmosphere is emphasized. This relief is temporary in nature. Permanent custody of children would have to be determined and settled in separate proceedings in the Family Court or other appropriate court. Custody is distinct and separate from guardianship as custody refers to the child’s physical placement, while guardianship refers to all aspects of access, custody and care of the child and his / her property.

### **Compensation orders**

The Act also provides for *Compensation orders* that may be additionally granted by the Magistrate to the victim as compensation for any injury, including mental torture and emotional distress, which may have been caused by the aggressor<sup>136</sup>. The law makes provision for positive entitlements through an interim monetary relief order related to a) maintenance for the victim or her children, b) compensation for physical injury including medical expenses, c) compensation for mental torture/emotional distress, d) compensation for loss of earning, e) compensation for loss due to destruction, damage, removal of any property from her possession or control. Thus, the Act for the first time goes beyond the framework of mere ‘punishment’ to the offenders and tries rather to protect women from violence at home.

The orders passed by the Magistrate may be of interim, final and ex-parte in nature. In addition to the primary relief and remedies granted by the Act, it also confers on the Magistrate the power to grant interim order/relief

---

<sup>134</sup>*Supra* n. 19 S.21.

<sup>135</sup>*Id.*, s. 21 deals with orders for temporary custody “at the time of granting protection orders”.

<sup>136</sup>*Id.*, s.22.



whenever he deems just, in any proceedings before him under the Act<sup>137</sup>. Since the final order in a case may take a long time, the court can pass an interim order (when the proceedings are pending) to prevent further violence and provide immediate reliefs to the affected woman, including the right of residence.

In cases where the Magistrate, on the basis of an affidavit filed by the aggrieved, is satisfied that the application before him, prima facie, discloses that the respondent is committing or has committed an act of domestic violence or that there is likelihood that the respondent may commit an act of domestic violence he may grant an *ex-parte* order against the respondent<sup>138</sup>. An *ex parte* order is one that is passed in the absence of the other party to the dispute, and without prior notice to the opposite party. Once a petition is lodged with the court, in the normal course, the court would serve a notice to the other party, so that both sides can be heard before an order is passed. This is in accordance with principles of natural justice. However, the Act makes an exception to this rule under limited circumstances, as it is intended to act swiftly in situations where the aggrieved person reasonably fears danger to her physical or mental well-being. Hence, if the court determines, on the face of the aggrieved person's application, that the respondent is committing / has committed / likely to commit domestic violence, an *ex parte* order may be passed.

The Act envisages that an appeal may be preferred within 30 days to the Court of Sessions from any order passed by a Magistrate under the Act<sup>139</sup>.

One of the pivotal purposes of the Act being restoring marital harmony, it provides that if the magistrate, on the receipt of an application from the aggrieved person or the respondent and is satisfied that there is a change in the circumstances requiring alteration, modification, or revocation of any order

---

<sup>137</sup>*Id.*, s.23(1). *Sulochana v. Kuttappan* (2007) Cri.L.J 2057; *Chithrangathan v. Seema I*(2008) D.M.C. 365.

<sup>138</sup>*Id.*,s.23(2).

<sup>139</sup>*Id.*,s.29.

previously made under this Act, he/ she may pass such orders as deemed appropriate<sup>140</sup>.

#### **6.4.8 The Procedures of Implementation: A Mix of Civil Remedies and Criminal Procedure**

A socially beneficial legislation is good if it is user- friendly from the point of view of the victims. In a nut-shell the procedure to be undergone when an application is made is enunciated as follows; As far as the procedures for obtaining the orders and relief are concerned, an aggrieved person or Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking relief under this Act. A woman herself can approach the Court directly and approaching a Protection Officer is purely optional for the woman and is voluntary. Any person who has reason to believe that such an act of domestic violence has taken place or is likely to take place can inform the Protection Officer.

On receipt of a complaint, the Protection Officer shall make a Domestic Incident Report. A copy of it is to be served upon Service Provider of the area, Police officer within the jurisdiction and the Magistrate. As per the Rules, on an application being moved<sup>141</sup> the Protection Officer shall prepare a “safety plan” which shall include measures to prevent further violence after making an assessment of damages involved. Aggrieved woman should be informed of her rights under the law. A Police Officer, Protection Officer, Service Provider or Magistrate who has received a complaint shall inform her of: her right to make an application for obtaining relief by way of protection order, an order for monetary relief, a custody order, a residence order, or a compensation order, the availability of services of the Protection officers, Service providers, including shelter homes and medical facilities; her right to free legal services under the Legal Services authorities Act,1987; and her right to file a complaint

---

<sup>140</sup>*Id.*,s.25(2).See *Shri.AmitSundra v. SheetalKhanna* 2008 Cri.L.J. 66.

<sup>141</sup> *Supra* n. 19 s.12.

under section.498A of the Indian Penal Code,1860.The Protection Officer makes a Domestic Incident Report to the Magistrate and forwards copies thereof to the Police Officer in charge. She/he must ensure that the aggrieved person gets all the benefits mentioned herein before.

The Court of Judicial Magistrate of First Class or the Metropolitan Magistrate within the local limits of which the person aggrieved permanently or temporarily resides or carries on business or is employed; or the respondent resides or carries on business or is employed or; the cause of action has arisen shall be the competent court to grant a the orders envisaged under the Act and to try the offences arising under it<sup>142</sup>. All the proceedings under the Act relating to application and orders for reliefs and offence of breach of protection order or interim protection order by the aggrieved person shall be governed by the provisions of the Code of Criminal Procedure,1973<sup>143</sup>.

Once the matter is with the Magistrate he/she shall fix the date of the hearing, which shall not ordinarily be beyond three days from the receipt of the application by the court, and shall endeavor to dispose every application within a period of sixty days from the date of first hearing. The means of serving notice and the effects thereof of non- serving etc are clearly enunciated in the Rules laid down for the purpose<sup>144</sup>.A notice of the date of hearing shall be given by the

---

<sup>142</sup>*Id.*,s.27.

<sup>143</sup>*Id.*, s.28.

<sup>144</sup> Protection of women from Domestic Violence Rules,2006 r.12 Means of service of notices.-

(1) The notice for appearance in respect of the proceedings under the Act shall contain the names of the person alleged to have committed domestic violence, the nature of domestic violence and such details which may facilitate the identification of person concerned.

(2) The service of notices shall be made in the following manner, namely:-

(a) The notices in respect of the proceedings under the Act shall be served by the Protection Officer or any other person directed by him to serve the notice, on behalf of the Protection Officer, at the address where the respondent is stated to be ordinarily residing in India by the complainant or aggrieved person or where the respondent is stated to be gainfully employed by the complainant or aggrieved person, as the case may be.

(b) The notice shall be delivered to any person in charge of such place at the moment and in case of such delivery not being possible it shall be pasted at a conspicuous place on the premises.

Magistrate to the Protection Officer who shall serve it on the respondent and on any other person as directed by the magistrate within a maximum period of two days. Counseling order can be directed only after passing an order for interim relief. As to the intricate details of appointing a counselor and as to the role to be played by a counsellor is set out in the Rules<sup>145</sup>.

Counseling plays an important role in the Act to alleviate the plight of the victim of domestic violence. The counselor is to work under the supervision of Protection Officer or the Court. The Rules bring out the procedure involved in the counseling envisaged as per the Act<sup>146</sup>. The main

---

(c) For serving the notices under section 13 or any other provision of the Act, the provisions under Order V of the Civil Procedure Code, 1908 (5 of 1908) or the provisions under Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) as far as practicable may be adopted.

(d) any order passed for such service of notices shall entail the same consequences, as an order passed under Order V of the Civil Procedure Code, 1908 or Chapter VI of the Code of Criminal Procedure, 1973, respectively, depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act and in addition to the procedure prescribed under the Order V or Chapter VI, the court may direct any other steps necessary with a view to expediting the proceedings to adhere to the time limit provided in the Act.

(3) On statement on the date fixed for appearance of the respondent, or a report of the person authorized to serve the notices under the Act, that service has been effected appropriate orders shall be passed by the court on any pending application for interim relief, after hearing the complainant or the respondent, or both.

(4) When a protection order is passed restraining the respondent from entering the shared household or the respondent is ordered to stay away or not to contact the petitioner, no action of the aggrieved person including an invitation by the aggrieved person shall be considered as waiving the restraint imposed on the respondent, by the order of the court, unless such protection order is duly modified in accordance with the provisions of sub-section (2) of section 25.

<sup>145</sup> *Id.*, R.13. Appointment of Counselors.-(1) A person from the list of available Counsellors forwarded by the Protection Officer, shall be appointed as a Counsellor, under intimation to the aggrieved person.

(2) The following persons shall not be eligible to be appointed as Counselors in any proceedings, namely:- (i) any person who is interested or connected with the subject matter of the dispute or is related to any one of the parties or to those who represent them unless such objection is waived by all the parties in writing.

(ii) any legal practitioner who has appeared for the respondent in the case or any other suit or proceedings connected therewith.

(3) The Counselors shall as far as possible be women.

<sup>146</sup> *Id.*, r.14. Procedure to be followed by Counselors.-(1) The Counselor shall work under the general supervision of the court or the Protection Officer or both.

(2) The Counselor shall convene a meeting at a place convenient to the aggrieved person or both the parties.

(3) The factors warranting counseling shall include the factor that the respondent shall furnish an undertaking that he would refrain from causing such domestic violence as complained by the complainant and in appropriate cases an undertaking that he will not try to meet, or communicate in any manner through letter or telephone, electronic mail or through any medium except in the counseling proceedings before the counselor or as permissibly by law or order of a court of competent jurisdiction.

(4) The Counselor shall conduct the counseling proceedings bearing in mind that that the counseling shall be in the nature of getting an assurance, that the incidence of domestic violence shall not get repeated.

(5) The respondent shall not be allowed to plead any counter justification for the alleged act of domestic violence in counseling the fact that and any justification for the alleged act of domestic violence in counseling the fact that and any justification for the act of domestic violence by the respondent is not allowed to be a part of the Counseling proceeding should be made known to the respondent, before the proceeding begin.

(6) The respondent shall furnish an undertaking to the Counselor that he would refrain from causing such domestic violence as complained by the aggrieved person and in appropriate cases an undertaking that he will not try to meet, or communicate in any manner through letter or telephone, e-mail, or through any other medium except in the counseling proceedings before the Counselor.

(7) If the aggrieved person so desires, the Counselor shall make efforts of arriving at a settlement of the matter.

(8) The limited scope of the efforts of the Counselor shall be to arrive at the understanding of the grievances of the aggrieved person and the best possible redressal of her grievances and the efforts shall be to focus on evolving remedies or measures for such redressal.

(9) The Counselor shall strive to arrive at a settlement of the dispute by suggesting measures for redressal of grievances of the aggrieved person by taking into account the measures or remedies suggested by the parties for counseling and reformulating the terms for the settlement, wherever required.

(10) The Counselor shall not be bound by the provisions of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973, and his action shall be guided by the principles of fairness and justice and aimed at finding way to bring an end domestic.

violence to the satisfaction of the aggrieved person and in making such an effort the Counselor shall give due regard to the wishes and sensibilities of the aggrieved person.

(11) The Counselor shall submit his report to the Magistrate as expeditiously as possible for appropriate action.

(12) In the event the Counselor arrives at a resolution of the dispute, he shall record the terms of settlement and get the same endorsed by the parties.

(13) The court may, on being satisfied about the efficacy of the solution and after making a preliminary enquiry from the parties and after, recording reasons for such satisfaction, which may include undertaking by the respondents to refrain from repeating acts of domestic violence, admitted to have been committed by the respondents, accept the terms with or without conditions.

(14) The court shall, on being so satisfied with the report of counseling, pass an order, recording the terms of the settlement or an order modifying the terms of the settlement on being so requested by the aggrieved person, with the consent of the parties.

(15) In cases, where a settlement cannot be arrived at in the counseling proceedings, the Counselor shall report the failure of such proceedings to the Court and the court shall proceed with the case in accordance with the provisions of the Act.

task of the Counselor as per the Rules is to bring out an effective remedy to the parties concerned and to prevent the violence.

Other options with the Magistrate are direct either of the parties ,singly or jointly, to undergo counseling; seek assistance of a person ,preferably a woman ,engaged in promotion of family welfare, for assisting him/her in discharging his/her functions and conduct proceedings in camera. The aggrieved person in the meantime has the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the house and shall not be evicted. In the interim period of disposal of case, the Magistrate, after giving both parties an opportunity of being heard, and satisfied that domestic violence has taken place, can pass a protection order, or a residence order, or direct the respondent to pay the aggrieved person monetary relief and in addition, can pass compensation orders, custody orders and ex-parte orders.

On receipt of an order from a Court, the protection officer can conduct home visit and can make appropriate enquiries regarding the salary assets, bank accounts and emoluments of the respondent liable to pay maintenance. The Court can also direct the Protection Officer or the police officer in charge of nearest police station to assist the aggrieved person in regaining custody of her children and assist the Court in the enforcement of the orders passed<sup>147</sup>. No order can be passed under the Act directing a woman to remove herself from the shared household. The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of hers. The Magistrate shall ensure that a copy of any such order shall be given free-of-cost

---

(16) The record of proceedings shall not be deemed to be material on record in the case on the basis of which any inference may be drawn or an order may be passed solely based on it.

(17) The Court shall pass an order s. 25, only after being satisfied that the application for such an order is not vitiated by force, fraud or coercion or any other factor and the reasons for such satisfaction shall be recorded in writing in the order, which may include any undertaking or surety given by the respondent.

<sup>147</sup>*Supra* n, 19, s. 10

to the parties. If the protection order has been breached, it shall be punished with either imprisonment or fine or both as earlier narrated.

The Central and State Government shall take measures to ensure that provisions of this Act are given wide publicity through media; Central and State government officials including Police officers, members of judicial service etc., are given periodic sensitization and awareness trainings on issues addressed by this Act; and also to ensure that there is effective coordination between the services provided by concerned Ministries and Departments dealing with law, home affairs, health and human resources, and that there is a periodic review of the same.

One of the main criticisms raised against the enforcement of the provisions of the Act is that it overburdens the Magistrates court with cases that have already been transferred to Family Court. As per the system existing prior to the enactment of this Act all proceedings of like nature relating to maintenance and other ancillary orders were taken over by the Family Courts which were mainly set up with the intention to settle the familial disputes amicably. Now after this Act has come into force, the cases of maintenance and ancillary orders of custody of child etc. is reverted back to the custody of Magistrates courts which are already overburdened. This in turn leads to delay in disposing of cases.

The whole procedures enumerated in the Act are contemplated to create an atmosphere of synergy between institutions of society, all of which are responsible for preventing violence against women. Whereas there has been a challenge to domestic violence over the years from the civil society, there has been no institutional response to that problem. The Police, performing their role under Section.498 A, are not an institution to challenge domestic violence. There were no institutions charged with liaising between different institutions

charged with the duty to combat domestic violence. Therefore the Act to an extent brings out interplay between different institutions<sup>148</sup>.

#### **6.4.9 The Consequences of Breaching the Judicial Orders**

While a range of civil remedies are provided for under the law, which an aggrieved person may choose according to her best interests, criminal sanctions are intended at providing a greater deterrent effect among the perpetrators. The Act provides that in case a protection order is breached it shall amount to a cognizable and non-bailable offence<sup>149</sup> and the aggressor shall be punishable with imprisonment, which may extend to one year or with a fine, which may extend to Rs.20,000/- or with both<sup>150</sup>. Any such breach shall be tried by the Magistrate who passed the order<sup>151</sup>. The Rules prescribe the manner in which a breach of order is to be handled by the Magistrate or by the Protection Officer as the case may be<sup>152</sup>. Moreover the Court may conclude that

---

<sup>148</sup> Annex 4; prepared by Center for World Solidarity as part of the public Awareness Campaign on the Domestic Violence Act, 2005, p.222.

<sup>149</sup> *Supra* n. 19, s.32(1).

<sup>150</sup> *Id.*, s.31(1).

<sup>151</sup> *Id.*, s.31(2).

<sup>152</sup> Protection of women from Domestic Violence Rules, 2006 r.15. Breach of Protection Orders.-(1) An aggrieved person may report a breach of protection order or an interim protection order to the Protection Officer.

(2) Every report referred to in sub-rule (1) shall be in writing by the informant and duly signed by her.

(3) The Protection Officer shall forward a copy of such complaint with a copy of the protection order of which a breach is alleged to have taken place to the concerned Magistrate for appropriate orders.

(4) The Aggrieved person may, if she so desires, make a complaint of breach of protection order or interim protection order directly to the Magistrate or the Police, if she so chooses.

(5) If, at any time after a protection order has been breached, the aggrieved person seeks his assistance, the protection officer shall immediately rescue her by seeking help from the local police station and assist the aggrieved person to lodge a report to the local police authorities in appropriate cases.

(6) When charges are framed under section 31 or in respect of offences under section 498A of the Indian Penal Code, 1860 (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of (7) Any resistance to the enforcement of the orders of the Court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.



such an offence has been committed upon the sole testimony of the aggrieved person<sup>153</sup>. This provision has been severely criticized as it would erode the presumption of innocence and it is even more stringent than the English counterpart under which, if the victim considers that the aggressor has failed to comply with an occupation order or a non-molestation order, he may apply for the issue of a warrant of the arrest against the aggressor. However the relevant judicial authority shall not issue a warrant on an application unless it is substantiated on oath and the relevant judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order<sup>154</sup>. The Act also does not make it clear what the penalty would be, in case there was any breach of a residence order, a custody order, or a compensation order by the respondent.

## **6.5 Analysing the Merits of the Act**

This is a significant advance of the Act that it shows commitment to the cause of ending violence against women. The objective articulated behind the Act is “to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental

---

(8) A breach of a protection order or an interim protection order shall immediately be reported to the local police station having territorial jurisdiction and shall be dealt with as a cognizable offence as provided under sections 31 and 32.

(9) While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the court, which may include-

(a) an order restraining the accused from threatening to commit or committing an act of domestic violence;

(b) an order preventing the accused from harassing, telephoning or making any contact with the aggrieved person;

(c) an order directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit;

(d) an order prohibiting the possession or use of firearm or any other dangerous weapon;

(e) an order prohibiting the consumption of alcohol or other drugs;

(f) any other order required for protection, safety and adequate relief to the aggrieved person.

<sup>153</sup>*Supra* n. 19, s.32(2).

<sup>154</sup>The Family Law Act, 1996 s.47.

thereto”. The stress on more effective protection brings within its gamut the need for the country to resort to more stringent measures to combat the problem of domestic violence in India. These words in the Act acknowledges the existence of existing old judicial remedies available in the context of Criminal law like the manifestations like assault, grievous hurt etc. in the India penal Code and the specific remedies provided under section 498A of the same Code. The Act intends to itself to prove itself more serious about the issue and to tackle the same. The protection of women from domestic violence is not the sole goal but a holistic view is adopted in the Preamble to show the eagerness in promoting the rights guaranteed under the Constitution to the women who are victims. The intention behind is not to take cognizance of the criminal act of domestic violence but overall promotion of rights guaranteed to the women in India. This objective legitimately takes care of the different types of acts recognized as domestic violence in the Act<sup>155</sup>. It takes into account the multifaceted violations of human rights of women victims.

The Act provides a temporary or urgent relief from a violent atmosphere at home. It gives a broad definition of domestic violence as including *physical, sexual, verbal, emotional and economic abuse*. It addressed domestic violence against all women, including wives, mothers, daughters, sisters, widows, second wives or any women in the home. The law could be used against any male person in the home, including fathers, brothers, sons, husbands, or any relative of the woman. The Act gave women the right to reside in the house, to get protection orders, and to maintenance, custody, compensation, and protection from violence. It provided women with several mechanisms to access the law, including the appointment of Judges, Protection Officers, Service Providers, and Police Officers. It also established the right to a speedy trial and disposal of cases within 60 days.

---

<sup>155</sup> Physical, mental or emotional, verbal, sexual and economic abuse.

The very inclusion of a criteria as to the ridicule resulting if a woman does not bear a male child, go on to reinforce the culturally accepted normative pattern of son preference in Indian society thereby emphasizing the patriarchal notions and cultural background of our country<sup>156</sup>. All most all the descriptions that goes on to describe emotional and verbal abuse suffered by a woman victim is indicative and reflective of patriarchal Indian culture.

Recognizing that women need state mandated infrastructure to access the law, the institution of Protection Officers is created to record all reported instances of domestic violence, to enable the woman to access the courts by assisting in drafting applications and to assist the courts in collecting evidence and in enforcing the orders<sup>157</sup>. He is the first port of call to address the concerns of women who will be stigmatized to litigating against one's own family, difficulties in getting the orders enforced etc. He/she is to assist the victim in accessing the court and other support services (such as legal aid, medical aid, shelter homes etc.) and second to assist the court during the course of the proceedings and in the enforcement of orders. It's a multiple option law in that a woman can access it herself or else can approach the following to enable her access it: Protection Officer, police, lawyer, Service Providers or can even go directly to the magistrate. A multiple channel of communication has been set up under the law and it is upto the woman to choose which is more suitable to

---

<sup>156</sup> Protection of Women from Domestic Violence Rules, 2006, gives the details of the Domestic Incident Report that needs to be filled up by, or on behalf of, the aggrieved woman. This report makes a list of the categories of verbal and emotional abuse that a woman may face: 1. Accusation/aspersion on your character/conduct, and so on.

2. Insult for not bringing dowry. 3. Insult for not having a male child. 4. Demeaning, humiliating remarks/statement.

5. Ridicule. 6. Name calling. 7. Forcing you not to attend school/college or any other educational institution. 8. Preventing you from taking up a job. 9. Preventing you from leaving the house. 10. Preventing you from meeting any particular person. 11. Forcing you to get married again against your will. 12. Preventing you from marrying a person of your choice. 13. Forcing you to marry a person of his/their choice.

<sup>157</sup> Before the Act was passed the options open to the women suffering domestic violence were unrealistic. It was difficult to imagine any marriage surviving criminal trial and imprisonment. It was a choice between tolerating the violence or ending the marriage. Now the reliefs under the Act stand in between the extreme measures relating to crime and divorce and help in preserving the matrimonial home to the extent possible.

her. Again this is in keeping with the concept that access to justice has to be democratic.

The duty to prepare a safety plan is an important responsibility vested with the Protection Officer, under Rule 8(1)(iv). The safety plan is a document prepared for the aggrieved woman that identifies ways in which the aggrieved party can protect herself during a violent incident and reduce the risk of serious harm. It must be based on the types of abuses faced by her and the remedies she has asked for in court. It is not an alternative, but in addition to the remedies she seeks through the court. The rules under the Act provide a format for a safety plan in Form V. The provision on safety plans is an example of how the Act works at the preventive level.

Counseling envisaged in the Act, can take place at the pre-litigative and post-litigative stages of proceedings. At the pre-litigative stage, counseling would aim at restoring the aggrieved woman's self-esteem, dignity, provide psychological support to her and facilitate her to decide whether or not to pursue a legal recourse. At the litigative stage, counseling would be aimed at getting the perpetrator to give an undertaking not to inflict further domestic violence. This form of counseling is important in re-establishing "basic trust and a sense of safety" for the woman facing domestic violence.<sup>158</sup> The overall objective of counseling as envisaged under this law is to prevent any further acts of violence from being perpetrated. In cases where joint counseling is ordered, the proceedings take on the complexion of a mediation process. However, Rule 14 specifies that settlements are to be attempted only at the behest of the aggrieved person.<sup>159</sup>

One of the most important remedies visualized under this law is to stop violence, particularly violence of emergency nature, and therefore we have the

---

<sup>158</sup> Keynote Address of Ms. Indira Jaising at 'Making the PWDVA Successful: Second National Women's Conference', 18<sup>th</sup> – 20<sup>th</sup> February 2007.

<sup>159</sup> See discussions on *Staying Alive: First Monitoring & Evaluation Report 2007 on the Protection of Women from Domestic Violence Act 2005*, published by the Lawyers Collective, at pp. 46-47.

‘stop violence order’ in the form of protection orders. The intention of course, is to give a woman facing domestic violence a space free from violence where she can evaluate her options and choose her future course of action<sup>160</sup>. It is meant to be an immediate and emergency law. The Act works in addition to other laws and does not make the existing pre 2005 legal regime redundant.

There is no period of limitation stated in the Act within which the aggrieved party should approach the court. This is because domestic violence is to be viewed like a continuing offence rather than a “one time offence”<sup>161</sup>. The Supreme Court has repeatedly held that in the absence of an express provision on period of limitation in the statute concerned, a beneficial legislation has no period of limitation.<sup>162</sup>

The Act is laudable for the recognition of different types of abuses that are likely to be perpetrated to woman in her natal and matrimonial family. The courts have on various occasions interpreted a wife’s right to reside as being part of her right to maintenance. But still to provide for this right through a legislative framework is a laudable leap in ensuring the very right to existence and survival in the society. The right to reside contemplated under the Act is irrespective of the pattern of ownership and is over the space where the woman and the perpetrator of violence have lived together in a domestic relationship. Through judicial interpretations several significant progressive changes are coming forth in the status of victims of domestic violence.

This new law put real power in women's hands in a court system which ought to be committed to using the laws effectively. They provide that women

---

<sup>160</sup>In contrast to existing criminal laws, (in particular S.498A) which is dependent on the state, the police and prosecution for enforcement, any civil law is victim driven. It can be put into motion by the aggrieved by direct access to court for relief. A civil law is a far more democratic form of access to justice.

<sup>161</sup> *Supra* Ch.4.

<sup>162</sup> Some examples of Supreme Court judgments which have stated this principle are as follows: *Bhagirath Kanoria v. State of Madhya Pradesh*, (1984) 2 S.C.C. 222; *Mithu Devi v. Siya Chaudhury*, MANU/BH/1083/1974 (Patna High Court) and *Golla Seetharamalu v. GollaRathanamma*, MANU/AP/0096/1990(AP HC).

can go back to court to ask the judge to find the man in contempt of court if he violates such an order. Upon finding him in contempt, the judge can fine the batterer or send him to jail to convince him there are real penalties for disobeying the law. The difference between this and a criminal law remedy is that the woman does not have to convince often recalcitrant police or prosecutors to take action; she has the right to go to court on her own behalf without the officials taking any action at all. In addition, once she has the order she can threaten the batterer, in effect, not to harass her or that she is potent to take steps to have the respondent thrown in jail.

The Act plays a stellar role in protection of women's rights in the household and in guarding them from domestic violence. In the very first instance, a recognition of domestic violence as something unacceptable, where it has become yet another social practice, is necessary and indeed, commendable in a patriarchal society. Having recognised the rights of women and the violation of these rights, the next step taken is providing innovative and efficacious remedies to enforce the same. The conceptualization of the Act thus far is admirable.

At a purely theoretical level, the Act has been a colossal leap for the women of India because it has, for the first time, recognized the fact that Indian women are not only the victims of individual acts of physical and sexual abuse, as it is prevalent in many societies, but also victims of a well-established oppressive social hierarchy that constantly and systematically stunts their economic growth and perpetuates their dependence on the male members of their family and has attempted to remedy the situation.



## **6.6 The Act- A Critical Analysis**

The Act can never be supported under Article 15(1) of the Constitution of India which talks about the policy of non-discrimination based on sex or any other kind. It doesn't discuss about the instances of domestic violence faced by men. The Act can be defended as a social welfare legislation. The Act can be only defended under the case of Article 15(3) which guarantees protective discrimination in favour of women and children. Section 3(c) of the Act defines "aggrieved person" as any person who is or has been in domestic relationship, and thus includes wives, ex-wives, live-in partners and even former girlfriends and also any person related to her. According to the provisions of the Act all the above women have a right to reside in the house of the accused. Such a provision of the Act may give rise to impractical circumstances within the family- living with a man's wife, ex-wife/wives, former girlfriends and their relatives, all at the same time. Such a situation will lead to a chaotic unwarranted situation in the Indian cultural milieu.

The issue of counseling mentioned in section 14 of the Act is a very contentious issue. It in turn brings in the alternate dispute resolution mechanism into motion without any sensitivity to the issue. This section itself states that the Magistrates may at any stage of the proceeding direct the respondent or the aggrieved person either to singly or jointly undergo counseling with a service provider who possess qualifications and experience in counseling. The practice reveals that counseling resorted to in family courts are further pressurization of women victims to adjust themselves to the hierarchical set up of the society. This could be problematic provision given that counseling is used as a tool for women to accept violent situation and get back to the marriage. Counseling ought to be for the abuser and not the victim. One must understand, to begin with, that the women and abusers are in an unequal situation and no joint counseling is possible in that situation. It can lead to further disempowerment of the unequal party.



The right of the woman to reside in the shared household was declared by law to exist as a protected right for the first time in Indian legal history. The Act has acknowledged the dangers of a patriarchal set up of matrimonial home and the consequent dangers to women victims associated with it. The fact of providing measures like providing shared residence at the cost of the husband to the women concerned is only a way of making a man moral by policing or legislation. The relationships mentioned under the Act are too sensitive and weak that it cannot withstand any coercion behind it. Law can never make a person behave morally in the society. The sanctions affixed behind the laws in the society have a deterrent effect but never has it qualified to be a preventive or restitutive justice to the victim. A victim undergoing the trauma of domestic violence is to be given a restitutive remedy but the very same remedy in its true sense is denied to the victim herein by the application of the Act.

The right to reside in a shared household and related residence order has provided a less extreme remedy than was previously available to a woman who had to suffer domestic violence and were later thrown away of their matrimonial homes. Domestic violence pertains to the violence inflicted by the family of the victim, in such a case it appears to be highly impractical to implement such residence orders and protection orders as between them. Such order between them may prove to be ineffective or worse or counterproductive, thereby further straining the family relationships in the family. Taking into account the fact that in India concepts like that of matrimonial property, shared property or concept of trust as between the spouses etc. that exist in English legal regime is alien. To implement the concept of shared household has led to many apprehensions.

The provision for a residence order is capable of being gravely misused as a sort of injunction to prevent the alienation of property ostensibly filed as a case of domestic violence. Since the definition of domestic violence is so widely worded, any emotional or verbal abuse that might have been condoned for years might be misused as leverage in what is essentially a civil dispute.

Since the definition of domestic relationship explicitly includes past relationships it is made possible for a divorced wife to be granted a continuing right to reside in the shared household, which would not have been available to her in the earlier legal set up. Moreover, orders seeking monetary compensation by one party without corresponding right to the other party based on ordinary wear and tear of family life are likely to come up on frivolous grounds. This trend is likely to disturb the equilibrium in the marital ties. Apart from the concept of ‘mental cruelty’ which has evolved over many centuries that exist in Family law there is no other test evolved to find out the extent of emotional and verbal abuse within the ‘domestic relationships’ can go a long way forward to ensure the potential misuse of the provisions under the Act.

The Act is civil in nature but criminal in procedure and offence of penalty for breach of protection order by respondent under this Act is made cognisable and non-bailable. Nowhere the Act speaks about the crime of domestic violence as non-bailable. Only when the order passed by the court is breached that offence of having committed the breach of order is made non-bailable. This in turn brings in the weakness of the Act through back door. On one side the domestic violence is acknowledged as a Human Rights issue but at the same time only emergency orders can be realized by resorting to this Act. This Act does not provide for a long term solution to the problem. The acknowledgement of the problem and its seriousness as affecting the human rights of women concerned thus becomes only a farce thereby creating a rosy impression that India has ratified and implemented legislations in consonance with the international guidelines and norms.

Another criticism raised is that some of the offences mentioned in the Act cannot be proved. To furnish evidences regarding any ‘sexual violence’ being committed by a husband, be it mental or emotional abuse perpetrated by the respondent against a woman in close relationship as mentioned in the Act is difficult to be proved before a court of law. What remains outside the ambit of the law is the sensitivity. The continuous nature of the offence makes

domestic violence intolerable to women. It cannot be expected of a woman to take note of and keep an account of it with dates, all the displeasures and illegalities meted out to her by the respondents at any point of her life with them as per the Act. This itself creates suspicion as to the genuineness of a victim's complaint. The legal system becomes an extension of the patriarchal family structure, emerging as the moral guardian, rather than a neutral arbiter, although boasting to be the latter.

The new Act seeks to cover the female live-in partner also and thus it gives, though indirectly, legitimacy to the practice of live together. Giving legitimacy to the demands made by live –in –partners akin to the legitimacy of a legal wife may create problems in the society and family being a specific unit in it. The practice of live together does not in itself reflect 'women's liberation' in the Indian context though the fact is that it exists based on the reliable sources. It may rather promote skepticism in the mind of the people of our country that a culture of free sex is being propagated and may make the position of women more vulnerable in a society. The case of famous actress Khusboo<sup>163</sup> is an example to justify the skepticism that may arise from different quarters of the society

The negative impact of the Act is that the Act is counterproductive and contradictory to the cultural ethos and norms of the Indian family and society and hence the Act is conceptually flawed. Cultural influences affect not only the content of the law, but also how the law is enforced. If members of society do not respect or understand the law-including those individuals responsible for the law's enforcement, the objectives set forth by the law will not be achieved. The sensitivities implicit in the ideology of marriage and family as an integrated unit of the society and the provisions of the Act especially in the context of the unique and peculiar form that India's social structure has acquired over the years, is making its implementation complicated and its

---

<sup>163</sup> MANU/SC/0310/2010.

success uncertain. The broad premise in which the Act is envisaged and understood clearly indicates to the patriarchal and hegemonic relationships within family relationships in India. The Act definitely speaks out for itself the protectionist paradigm of the state in any women-related legislation appears to be the ideology in this particular Act also. The Act creates a departure when it moves out of the framework of marriage and looks at domestic relationships which bring within its ambit the specific cultural protest.

The introduction of concepts of individual autonomy, freedom and integrity when induced into a woman's status and personality typical to India, is likely to damage the social fabric of the society thereby leading to disintegration of family ties. The social fabric of India which is predominantly governed by patriarchal joint family system furthering the subjugation of Indian women is the major challenge to the implementation of this Act in India. Violence is a highly stigmatized issue as society often blames women for the violence that they experience. In applying the Act, there exists a dichotomy as to the existing social spectrum the values cherished and the introduction of new concepts of autonomy and dignity rights of woman. Viewed in this perspective, the Act appears to be a western duplication. These social interpretations add to the difficulties encountered in implementing the Act effectively.

The Universal Declaration of Human Rights has proclaimed that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law." However, the Act presumes that the accused man is guilty until proven innocent, thus violating the presumption of innocence and the principles of fair trial guaranteed under Articles 20 and 21 of the Constitution of India. There can be arrest on mere complaint by the women and there is no investigation which is conducted prior to that and they do not foresee the after effects of such action like arresting and putting a person in jail, even before trial has begun, amounts to prejudging and punishing the accused without due process.

This law does not replace existing criminal, family and tort laws. Instead it works in addition to and complements other laws. The Act recognizes the need for urgent reliefs to be granted to provide women with a violence-free residence. Hence, the nature of remedies provided under this law is temporary in nature; the permanent solution still remains within the framework of matrimonial laws under which a woman would have to decide on whether or not to continue in the relationship.

At a more popular level the Act is being interpreted as a potent weapon in the hands of unscrupulous women against men and leading to disintegration of family unit in the society. The law is based on a totally wrong notion and assumes men as the sole perpetrators of domestic violence. This is altogether creates a wrong impression and only confirms the gender bias in favor of women created by this law. Giving of such sweeping legal powers to women while withholding protection to male victims is tantamount to systematic legal victimization of men. There can be arrest on mere complaint by the women and there is no investigation which is conducted prior to that and they do not foresee the after effects of such action like arresting and putting a person in jail, even before trial has begun, amounts to prejudging and punishing the accused without due process. There are no safety valves in the Act to prevent its misuse. Moreover there is no provision of penalty or punishment in case of a frivolous complaint preferred by a person under the Act. It may prove disastrous not only for an individual in case the complainant has 'malafide' intentions.

Viewed from a practical side, the Act provides for Magistrate's discretion in matters pertaining to monetary relief, monetary compensation, child custody and the contradictory reports of enquiring authorities (as the complaint may simultaneously be filed under section 498A of the IPC as well as the Act of 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 Act. There are mainly two legal approaches for women who had suffered domestic violence, one is filing for divorce through Family Court, and the other is filing application to Magistrate according to the Act which might go through criminal legal system. 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 Judge's wisdom.

The law is wholly gender specific and rules out any possibility of domestic violence against a man. The law confers rights in a woman without imposing any liability, while a man is overburdened with discriminative liabilities with total denial of rights. A counter argument could be raised at this point that it is women who are disproportionately vulnerable to violence due to their position of equality. The Constitution of India allows the state to take special affirmative measures for women and children in furtherance of the goal of substantive equality. The Act nowhere ignores violence that man face in intimate relationships. For them the general laws of the land are available for seeking legal redress. A separate law for women is to correct historical disadvantages by creating means to facilitate a woman's access to justice as a step to overcome inequalities.

The larger ambit of vulnerability of children associated with domestic violence has not been dealt effectively under the Protection of Women from Domestic Violence Act, 2005. There is no specific law on domestic violence against children in the country. However, in the year 2000 the Juvenile Justice (Care and Protection of Children) Act, recognized cruelty against children by people who have the charge of such children or control over such children as a special offence. Section 23 of this Act provides for punishment for cruelty to a child, which includes assault, abandonment, exposure or willful neglect that is likely to cause mental or physical suffering to the child. There need to be more

effective provisions of child rights and security under the Act to prevent the vulnerability of the children.

The frame work for model legislation on domestic violence<sup>164</sup> acts as the source of framework for the new Act in India .The relationships that are to be regulated within the Act to combat domestic violence includes female household workers. But the category of house maids does not find mention in the Act in India. The acts of domestic violence in the framework include marital rape which does not find mentioning in the Act in India. Instead the ambit of marital rape is confined within the sexual abuse concept included under the definition of domestic violence.

The Act ought to be activated by “vulnerable persons” of either gender that is vulnerable due to old age, mental or physical disability or for any other reason. This is a welcome recognition of the need to protect the disabled and provide remedies for the violence which they face. The same has been included within the Pakistani Law dealing with Domestic Violence that came into force recently in 2012. It explicitly states that an application can be filed against a person of any gender who has caused the violence, meaning thereby that women can also be respondents<sup>165</sup>. An interesting addition is the creation of the “Protection Committee” a multi agency body consisting of a medical doctor, a psychologist /psycho-social worker and an official appointed by the Court, a female police officer not below the rank of Sub-Inspector and two women members of civil society and the Protection Officer to respond to every case of domestic violence. The Protection officer is a full time government servant. Whereas the Indian Act visualizes a similar structure, this is being done by

---

<sup>164</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. RadhikaCoomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85-  
<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/0a7aa1c3f8de6f9a802566d700530914> Last visited on 31st May,2012

<sup>165</sup> This is also the law in India now; with the Hon’ble Supreme Court in *Sandhya ManojWankhade v. ManojBhimraoWankhade*,(2011) 3 S.C.C. 650. clarifying that woman can be respondents in an application under the PWDVA. The case is discussed in detail in the seventh chapter of the thesis.

administrative guidelines and there is no compulsion on the State to appoint full time government servants as Protection officers.

This Act should have ideally included stringent penal provisions for curtailing the instances of abuse and mishandling, but herein, instead various opportunities have been made available which can ultimately lead to its grave misuse and can thus act as a catalyst for breaking homes. Thus, this Act does not contain any provisions for creating awareness or for strengthening and preserving family as an institution or even providing chances for reconciliation or even scope for improvement to the husband. There is no mentioning in the Act as to the constitution of an agency which would essentially work to check whether the complaints are frivolous or not. At the same time creation of a new law despite the existing legal provisions on the issue of violence against women, including domestic violence reflects the gravity of the problem. Taking into account this fact the state should have given emphasis to the overall (socio-economic and political) empowerment of women to strengthen their position in society and family. However, one may see the apathy of the government towards the issue of empowerment of women. Law, though very important, is not the complete solution for such problems.

To overcome the problem of socio-economic and cultural hurdles, it is desirable to adopt a human rights approach to women's problems. Nevertheless, the passing of the new act once again reveals our dependency on the administrative and legal machinery to prevent gender crimes within the prevailing patriarchal social structure. Hence, there remains serious concern about possibility of the new law to make qualitative changes in the life of women within family. 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"<sup>166</sup>.

---

166.Rachana Kaushal- "Protection of Women from Domestic Violence Act 2005—An Appraisal," 48(11) *Mainstream Weekly* 32 (2010), New Delhi. Also see Home page>Mainstream



## **6.7 Indian Experience Juxtaposed with the U.S.A and U.K Experiences<sup>167</sup>**

The dominant family structure in the western democracies like U.K and U.S.A is the nuclear family with its gendered power structure. Indian culture is reflected in the cohesiveness of family units and familial relationships. The formal relationship between religions, theology and the State is different as well<sup>168</sup>. Feminism has taken deep roots there in a faster pace unlike the Indian counterpart. Law in the western developed countries like U.K and U.S.A is often manifested as a protective mechanism to redress the lack of citizenship and corresponding lack of power. Indian personal law formally institutionalizes Hindu, Parsi, Muslim and Christian religious doctrine in marriage and divorce law applicable to each group. In India women have equality under the Constitution of India. The two sets of law in India highlight contradictions in women's status and power<sup>169</sup>.

There have been experiments in countries like USA and UK where the ultimate decision to prosecute has been put on the law enforcement agencies regardless of the level of the co-operation of the victim, for example the no-drop prosecution policies or mandatory arrests. But such a prescription needs careful attention and consideration before being applied in India<sup>170</sup>. This could severely strain the already burdened judiciary, making infinite demand as on the human and fiscal resources of the state. The complexities of the situation surrounding the average Indian victimized woman are to be understood in this

---

Weekily>2010> “Protection of Women from Domestic Violence Act 2005-An Appraisal”. Last visited on 11th November, 2011.

<sup>167</sup>The comparison mentioned herein is with the strategic models as envisaged by U.S.A and U.K that is explained in detail in the fourth chapter of this thesis.

<sup>168</sup>Religion and family are supposed to be private/personal domains in the western countries. The relationship between state and citizens is not entirely secular.

<sup>169</sup>Diane Mitsch Bush- “Women's movements and State policy reform aimed at domestic violence against women: A Comparison of the consequences of movement mobilisation in the U.S and India”, 6(4) *Gender and Society* 592(1992).

<sup>170</sup>See Discussions by SudhirKakkar in *Intimate Relation: Exploring Indian Sexuality*, Penguin Books, NewDelhi (1989),p.29.

context. The culture specific attitudes of the country like India and the trends of family courts established in India are inclined towards the prioritization of interests of family over and above interests and security of women.

India has also resorted to alternative justice delivery systems and multi - agency co-ordination and responses in dealing with the problem of domestic violence. The State intervention has been multi-pronged and mediated through executive and judicial agencies that include the Family Courts, Legal Aid Cells<sup>171</sup>, Women Vigilance Committees, Police Counselling Cells<sup>172</sup>, Women Police Stations, besides induction of women into the police force at different levels. The experience and studies from the NGOs in India working in the field reveals that state intervention in this sphere has fallen short of expectations due to infrastructural inadequacies and lack of adequate trained staff. The family counseling cells operating within the precincts of police station produces two mutually conflicting opinions as that it invokes fear and itself is counterproductive on one hand and on the other it stresses the inherent positive feature in forcing the recalcitrant man to come to the negotiating table<sup>173</sup>.

The National Commission for Women has evolved an innovative concept of PMLA Parivarik MahilaLok Adalat (PMLA) for redressal and

---

<sup>171</sup> Legal Services Authority Act, 1987, s 12 says: The Act provides the criteria for entitlement to legal service as follows: (i) A member of schedule cast and schedule tribe. (ii) A victim of trafficking human being or beggar as referred to Article 23 of the Constitution. (iii) A woman or child. (iv) A disable person. (v) Victim of mass disaster, ethnic violence, flood, drought, industrial disaster. (vi) Industrial workman. (vii) Person in custody. (viii) person having annual income less than nine thousand or higher as prescribed by the State Govt. A person desires to get legal aid must satisfy any or all of the criteria having a prima-facie case.

<sup>172</sup> Counselling as a Police Role - Counselling is the first response of the Crimes against Women Cells in domestic matters. Many families in India still continue to live as joint families and counselling often involves other members of the family besides the immediate protagonists. The aim of counseling continues to be to remove irritants in the marriage, to prevent abuse or to ensure that there is no further abuse, and to secure the position of the woman in the marriage. The Crisis Intervention Centres have been set up and associate social workers, doctors, lawyers, psychologists and prosecutors with their functioning. A significant service started by the Crimes against Women Cell is a 24 hour helpline that responds to callers in distress. For details See. <http://www.unafei.or.jp/english/pdf/PDFrms/no69/05P77-84.pdf>. Last visited on 23 rd February, 2012.

<sup>173</sup> Nishi Mitra, *Domestic Violence As a Public Issue A Review of Responses*, Unit for Women's Studies, Tata Institute of Social Sciences, Mumbai (2000), p.85.

speedy disposal of cases under Legal Service Authority Act, 1987, which has its roots in the traditional Nyaya Panchayats. The essential features of PMLA are amicable mutual settlement and flexibility in functioning. The NGOs in association with District Legal Aid and Advisory Board, activists, advocates and others, organize Parivarik Mahila LokAdalats with the Commission's financial assistance<sup>174</sup>.

The Central Social Welfare Board serves as an apex organization at the national level for funding for welfare activities at the state level is channeled to the grass roots level voluntary agencies through a network of state welfare boards. Short stay homes and family counseling centres across the country receive support from this source. The shelter homes in India fall short of good practice due mainly to the lack of holistic treatment of women's concerns. Safety is often interpreted in manner that restricts individual's mobility. Moreover the rehabilitation programmes are not structured in a way that it would encourage the evolution of a woman from being a victim to a survivor of domestic violence. The Indian experience makes a sharp contrast of Indian victimized women to the US and UK experience of 'survivors' of the crime.

Title VI of Violence Against Women Act<sup>175</sup> that relates to public housing scheme is similar to Indian law. The specific provision of "The "right to reside in the shared household", irrespective of whether the house is owned or tenanted was drafted in the newly enacted Indian law to prevent similar instances of vulnerability and disempowerment for women facing domestic violence. The major difference between the United States policy and the "right to residence" guaranteed under Indian law is that while the former protects the tenancy rights of the survivor to emergency housing services, the latter provides protection to the de jure right of a woman (as Indian law is gender

---

<sup>174</sup>[http://ncw.nic.in/frmRes\\_PMLA.aspx](http://ncw.nic.in/frmRes_PMLA.aspx). Last visited on 13th July,2013.

<sup>175</sup>See *supra* Ch.4 for discussions on community intervention strategies in U.S.,A and U.K.

specific) to residence based on the nature of relationship that she shares with the perpetrator and/or his family<sup>176</sup>.

A one-roof system for service providers in India may enable increased monitoring and effectiveness of the Act in the lines of the Family Justice Center Initiative<sup>177</sup> which brings together NGOs, victim service providers, law enforcement officers, forensic medical professionals, lawyers, and community-based organizations under one roof.

One of the problems confronting the idea behind the Family courts established in India in 1984 has the set back of promoting the value of integration of family and the institution of marriage. Extreme case of domestic violence inflicted on the partners or individuals often leads to the notion that staying apart or disintegration of a violent family unit is desirable or favourable. Gender sensitive courts can deal with such issues more effectively. The concept of specialized domestic violence courts can be emulated in the Indian context.

Police authorities and prosecutors are of central importance to ensuring that perpetrators of violence are punished, especially with regard to investigating acts of violence against women, preserving evidence, and issuing indictments. The quality of police and prosecutor work is crucial in determining whether court proceedings are instituted or a person is convicted. Specialized units are more responsive and effective in dealing with violence against women. Experience has shown that the establishment of such units may facilitate the development of expertise in this area and may result in an increase in the number of cases investigated and a better quality and more efficient

---

<sup>176</sup>Amarsanaa Darisuren and Sarah Fortuna (Eds.) *Domestic Violence Legislation and its Implementation An analysis for ASEAN countries based on international standards and good practices*, UNIFEM and Lawyers Collective Women's Rights Initiative, India-, (2009) available at <http://cedaw-seasia.org/docs/DomesticViolenceLegislation.pdf> last visited on 18-2-2012.

<sup>177</sup>*Supra* Ch.4.

process for the complainant/survivor<sup>178</sup>. Other schemes in the United States from which the Act may benefit include the scope of protection orders themselves: in all states, protection orders can be sought by both men and women, in many states can be sought against same-sex partners, and certain states including Massachusetts and Minnesota, cover individuals who have not lived in the same household but have had a substantial intimate or dating relationship.

Public awareness-raising campaigns are critical to expose and convey the unacceptability of violence against women. It plays a significant role in naming and shaming/condemning the practice. It conveys the message of zero tolerance for violence against women, includes the promotion of women's human rights, and emphasizes societal condemnation of discriminatory attitudes which perpetuate violence against women, and address attitudes that stigmatize complainants/survivors of violence. They are also an important tool for informing women complainants/survivors about their rights and about existing laws and the remedies they contain. The Protection of Women from Domestic Violence Act, 2005<sup>179</sup> of India directs the Central Government and every State Government to take measures to ensure that the provisions of the Act are given wide publicity through public media, including television, radio and print media, at regular intervals.

As opposed to India the strategic models evolved to deal with the problem of domestic violence in the US.A and U.K revolves around the community intervention models. The funding programmes and partnership alliances are the driving factors behind the cause of prevention and suppression

---

<sup>178</sup> Examples from other jurisdictions:-Special investigation services have been organized in many police stations in Italy to respond more adequately to women who report sexual violence. In Jamaica, a sex crimes unit has been established within the police force, with the objective of creating an environment that encourages women complainants/survivors to report incidents of sexual assault and child abuse; effectively investigating complaints of abuse; and offering counseling and therapy services. The National Guidelines for Prosecutors in Sexual Offence Cases (1998) of the Department of Justice in South Africa state that "a specialist prosecutor is the ideal person for this type of case".

<sup>179</sup>Protection of Women from Domestic Violence Act,2005, s.11.

of domestic violence. Specialized domestic violence courts placing special emphasis on therapeutic jurisprudence is yet another contribution by the western model. The sanctions emphasized are both civil and criminal. Mandatory arrests and no drop prosecution policies are the trend reflected.

The culturally specific forms of family and of family state relations provide historically distinct bases for women's movement mobilization and for the outcomes of that mobilization<sup>180</sup>. The strategy of the India 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. Thus the Act fails, on various fronts, the muster of an effective piece of legislation aiming social engineering. The need for community programming and crisis intervention strategies becomes significant and the models from the west ought to be emulated in the Indian context.

.....✪✪.....

---

<sup>180</sup> *Supra* n. 168, p.592.

## JUDICIAL DECISIONS ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005–A CRITIQUE

Contents	<i>7.1 Challenges to the Constitutionality of the Act</i>
	<i>7.2 Recognition of Rights of Women in Relationships in the Nature of Marriage</i>
	<i>7.3 Right to Matrimonial Residence and Property</i>
	<i>7.4 Whether a Woman can be a Respondent under the Act.</i>
	<i>7.5 Interpretation of Procedural Requirements</i>
	<i>7.6 Procedure in invoking Appeal Provisions</i>
	<i>7.7 Retrospective Operation of the Law</i>
	<i>7.8 Effectiveness of Counseling Procedure</i>
	<i>7.9 Judicial Interpretations-An Analysis</i>

The effectiveness of any legislation can be assessed to some extent from the judicial response to it. The Protection of Women from Domestic Violence Act 2005<sup>1</sup>, provides remedy in the civil law to the victims of domestic violence. On the one hand, the Act has made significant improvements to the existing laws pertaining to violence against women, and has effectively linked all forms of domestic violence to demands for dowry. On the other hand, the development of the Act through legal interpretation appears to be marred by confusion and inconsistency. The enactment has led to a flood gate of litigations raising issues of women's rights within the precincts of the domestic domain. Very few cases have come up to the Apex Court. Each judgment passed by the High Courts has aided in clarifying, expanding and interpreting provisions of the Act. The judgments selected for examination under this chapter are those issues that have been frequently raised before the various courts and provide clarity on fundamental provisions of the Act.

The judgments from various High Courts are analysed through the lens of human rights norms in order to examine whether the objectives of Act are

---

<sup>1</sup>Hereinafter referred to as 'the Act.'

being furthered by the courts. The Chapter presents a selection of judgments evaluated and categorized under five sub themes:

1. What are the Challenges posed as to the constitutionality of the Act?
2. How are rights of women in the *relationships in the nature of marriage* recognized?
3. How are the rights of women to matrimonial home and property acknowledged?
4. What is the scope of a woman being a respondent under the proceedings?
5. How are the procedural requirements interpreted?

## **7.1 Challenges to the Constitutionality of the Act**

The Act takes into account the fact that women are disproportionately affected by domestic violence and hence falls under the category of legislation relating to protective discrimination.<sup>2</sup> The law recognizes a woman's right to a violence-free home and provides for remedies in cases of breach of this right. Therefore women alone are contemplated as per the legislative framework to avail the provisions of this Act. Article 13 of the Indian Constitution states that any law, which is in contravention of the Fundamental Rights shall, to the extent of such contravention, be void. The challenges against the Act have been filed, *inter alia* on the ground that the Act, by providing reliefs only to women, is in violation of the constitutional right to equality.

The Constitutionality of the Act was under test before the Delhi High Court in *Aruna Pramod Shah v. Union of India*<sup>3</sup>. In this case a writ petition was filed by the mother-in-law seeking to quash proceedings under the Act initiated against her in a lower court. It was argued that the Act offended Article 14 of

---

<sup>2</sup> Protection of Women from Domestic Violence Act, 2005, s.2 (a) defines an 'aggrieved person' as *any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence.*

<sup>3</sup> WP. Cr. 425/2008, Del. Judgment dated 7 th April, 2008. (Vikramajit Sen and P.K. Bhasin, JJ.)



the Constitution of India because it provided protection only to women and not to men. The petition challenged the constitutionality of the Act on two grounds. Firstly, the gender-specific nature of the Act, i.e. by excluding men, is arbitrary and, hence, violative of Article 14 of the Constitution. The Court dismissed this contention on the grounds that, there is a difference between class legislation and reasonable classification. Secondly the petitioner contended that the placing of *relationships in the nature of marriage* on par with 'married' status in section 2(f) of the Act leads to the derogation of the rights of the legally-wedded wife. The Court rejected the second contention by holding that there was no reason why equal treatment should not be accorded to a wife as well as a woman who has been living with a man as his "common law" wife or even as a mistress.

The Court by referring to the International mandates opined:

*"Domestic violence is a worldwide phenomenon and has been discussed in International fora, including the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995). The United Nations Committee Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has recommended that States should act to protect women against violence of any kind, especially that occurring within the family. There is a perception, not unfounded or unjustified, that the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against exploitation of women. The argument that the Act is ultra-vires the Constitution of India because it accords protection only to women and not to men is therefore, wholly devoid of any merit. We do not rule out the possibility of a man becoming the victim of domestic violence, but such cases would be few and far between, thus not requiring or justifying the protection of Parliament."*<sup>4</sup>

---

<sup>4</sup>*Id.*, para 4. Emphasis added.

This is the first case to address the issue of constitutionality of the law. More crucially, it serves as a model in the manner in which the object and spirit of the Act has been understood and treated by the court. In its judgment, the Delhi High Court clearly articulated the purpose and elements of formulating a law as a “special measure” under Article 15(3) of the Indian Constitution, and reaches the conclusion that the gender-specific nature of the Act is mandated in the context of the purpose of “achieving equality of status for women”.

The approach with regard to women who are in *relationship in the nature of marriage* under the Act is a progressive recognition of the fact that violence against women within the home cannot be given immunity just because the aggrieved person is not in a legally valid marriage with the perpetrator. This is a vindication of the fact that every woman, irrespective of her status and relationship, has the right to a violence-free home. *Aruna Pramod Shah's case* went a step further and acknowledged the fact that, while it is the man who, in most cases establishes a “relationship in the nature of marriage”, it is the woman who bears the social stigma of such a relationship. The Court also clarified that the intention of the provision was not to derogate from the sanctity of marriage as what the Act did was to reiterate the right of every woman to be protected from violence. Hence the judgment of the Delhi High Court sets a progressive precedent, clarifies the intent of the law, and upholds that domestic violence is a violation of the right to equality.

*Dennison Paulraj v. Union of India*<sup>5</sup>, was another case that came up before the Madras High Court wherein the constitutionality of the Act was under challenge. The petitioner in this case challenged the constitutional validity of the Act on the basis that it was a discriminatory piece of legislation because it does not permit the husband to file a complaint under the Act and hence was violative of Articles 14 and 21 of the Constitution and also affects the life and liberty of the husband and his relatives. Aggrieved by the

---

<sup>5</sup>*Dennison Paulraj v. Union of India*, A.I.R.2009 (Noc) 2540 (Mad), per Venkataraman, J.

application filed by his wife a writ petition was filed by the husband and his family members challenging constitutionality of the Act and alleging that the proceedings initiated in the lower court was a complete abuse of process of law. Sections 4, 12, 18, 19, 23 & 29 of the Act were challenged as providing preferential treatment to the wife and hence, violated the right to life and liberty of the husband and his relatives. Section 23 of the Act in particular was challenged as arbitrary and conferring unrestricted powers on the Magistrate.

The High Court of Madras rejected those arguments and held that giving certain preferential treatment to the wife and treating them as a special category could not be termed as violative of either Article 14 or Article 16 of the Constitution of India. Following the case of *Aruna Pramod Shah* the Court further held:

“Though Article 15 of the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth, however, Article 15 (3) states nothing in this Article shall prevent the State from making any special provision for women and children. Thus, the Constitution itself provides special provision for women and children. It has been widely resorted to and the Courts have upheld the validity of the special measures in legislation and executive orders favouring women. Thus, when the Constitution itself provides for making special provision for women and children, the contention on the side of the petitioners that there could be no special treatment for women is totally untenable.”<sup>6</sup>

The decision of the Madras High Court in upholding the validity of the Act is a pointer to the right direction. The approach to the issue of giving retrospective application becomes significant not only for the recognition that part of the cause of action arose after the commencement of the Act and that

---

<sup>6</sup>(2008) 2 M.L.J. 389 para 8.

the penalty provided in the law is for breach of court orders, but also because the Court went on to reiterate that it is, competent to take cognizance of the act of domestic violence committed even prior to the Act came into force and pass necessary protection orders.

The explicit support of the constitutional validity of the Act by High Courts in these cases indicates recognition of the fact that domestic violence is a manifestation of the structural inequities between men and women, which derogates a woman's ability to enjoy her fundamental and human right to equality. By upholding the constitutionality of the Act Courts have acknowledged the fact that the right to equality means not merely that men and women have exactly the same provisions under law, but that the actual realisation of the right to equality may require legal measures to redress the structural and historical roots of discrimination against women.

## **7.2 Recognition of Rights of Women in Relationships in the Nature of Marriage**

The most significant feature of the Act is that it has widened the scope of protection against violence beyond the category of women in married or consanguineous domestic relationships, to include women in informal or unmarried relationships.

The requirement of proving the validity of marriage has been a major impediment in determining the rights of women to maintenance is pertinent in a country like India where pluralistic traditions of marriage exists<sup>7</sup>. By taking away the necessity of strictly proving marriage, the Act addresses these concerns and lays down that even if a marriage is not valid or cannot be proved, the woman would still be entitled to her rights under the Act.

---

<sup>7</sup> Marriages are performed as per customary rights and there is seldom any clear-cut proof that a marriage ceremony has been performed. Furthermore, even if documentary proof of a marriage exists, once a woman initiates proceedings in court against her partner, it often becomes virtually impossible for her to return to her matrimonial household to reclaim such documentation.

The judiciary has provided a wise and tactful solution to the problem by acknowledging and upholding the right of maintenance of women victims in fake and bigamous marriages. Under the provision of this Act, any woman who claims relief such as protection orders, restraining orders or even maintenance, need not prove the validity of her marriage.

The Act seeks to define the concept *domestic relationship*<sup>8</sup> as a relationship between persons who live or have at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Under this definition live-in relationships are recognized in the phrase 'relationships in the nature of marriage'. Women in live-in relationships are supposed to receive the same protection as wives when it comes to domestic violence. Domestic relationships protect women of fraudulent or bigamous marriages or in marriages invalid in law. This marks the beginning of the legislative recognition shown to couples choosing to cohabit rather than marry under Indian law. An array of judgments has come in the way of interpreting live in relationships by Indian judiciary<sup>9</sup>.

Madras High Court in the case of *M. Palani v. Meenakshi*<sup>10</sup> had discussed at length the need for granting maintenance to an illegally married wife taking into account the beneficial objective envisaged under the Act. Petitioner had filed a suit for declaration that he and the respondent were not married to each other and for a consequential order of injunction restraining her from representing and receiving the benefits as his wife and for costs. In the said proceedings, the respondent filed an interim application for maintenance under the Protection of

---

<sup>8</sup>Protection of Women from Domestic Violence Act, 2005, ss.2,2(f).

<sup>9</sup>*A. Dinohamy v. W.L. Blahamy*, A.I.R. 1927 PC 185; *Mohabhat Ali v. Mohammad Ibrahim Khan*, A.I.R. 1929 PC 135; *Gokal Chand v. Parvin Kumari*, A.I.R. 1952 S.C. 231; *Badri Prasad v. Dy. Director of Consolidation*, A.I.R. 1978 S.C. 1557; *S. P. S. Balasybramanyam v. Suruttayan*, 1994 (1) S.C.C. 460; *Ranganath Parmeshwar Panditrao v. Eknath Gajanan Kulkarni*, 1996 (7) S.C.C. 681; *Lata Singh v. State of U.P. and Another*, A.I.R. 2006 S.C. 2522; *Tulsa and Others v. Durghatiya and Others*, AIR 2008 S.C. 1193; *S. Khushboo v. Kaniammal*, (2010)5 S.C.C. 600.

<sup>10</sup>*M. Palani v. Meenakshi*, A.I.R 2008 Mad 162, per Venkataraman, J.

Women from Domestic Violence Act. The Family Court, Chennai, granted her Rs.1,000/- per month as interim maintenance.

This was challenged by the appellant, who contended that the woman was not entitled to any maintenance under the provisions of the Act since they had not lived together at any point of time as a husband and wife. However, he admitted that they had voluntary sexual contact but alleged that the woman had voluntarily submitted to sexual contact despite knowing fully well that he did not believe in the institution of marriage and that the woman herself had not insisted on a formal marriage. The mere proximity for the sake of mutual pleasure can never be called a domestic relationship, contended the appellant. The High Court rejected those contentions and held that:

*“The provision does not say that they should have lived together for a particular period...the plaint and counter affidavit will make it clear that petitioner and respondent had a close relationship and had sex... one can infer that both of them seems to have shared household and lived together at least of the time having sex by them.”<sup>11</sup>*

The Court again emphasised that the Act applies even when there is consensual sex between a man and a woman, without promise of marriage. The Court here has taken note of the specific facts and circumstances of the case and in the process of beneficial interpretation has upheld the maintenance relief to the respondent to make sure that the interest of women victims of bigamous marriages are not at stake

*In Suresh Khullar v. Vijay Kumar Khullar*<sup>12</sup> appellant was the second wife of the respondent based on an advertisement for a proposal of marriage initiated by respondent claiming that he was a divorcee, appellant married him and lived together as husband and wife. The husband had obtained an *ex-parte*

---

<sup>11</sup>*Id.*, para.13.Emphasis added.

<sup>12</sup>A.I.R. 2008 Delhi 1. (A.K. Sikri and Aruna Suresh, JJ).

divorce from his first wife. After a few years, the parties filed separate proceedings, the husband for a divorce and the wife for maintenance under section 18 of the Hindu Adoptions and Maintenance Act, 1956. Under section 18, maintenance can only be claimed by a “Hindu wife”. During the course of the proceedings under the statute, it came to light that the *ex-parte* divorce granted to the husband for his first marriage had been set aside. The second wife’s petition for maintenance under the statute was, therefore, dismissed on the grounds that the marriage between the parties was not legally valid because the husband had an earlier subsisting marriage. The dismissal of this petition was appealed before the Delhi High Court by relying upon the provisions of the Act. The Court held that while existing case law under the statute excluded the granting of maintenance to the second wife where there was a subsisting legally valid first marriage, the trial court had, failed to recognise the fact that the decree of divorce was in operation on the day that the second marriage was solemnised, making the second marriage legally valid.

The Court went on to discuss the objective and intent behind section 18 of the Hindu Adoptions and Maintenance Act, 1956 and held:

“section 18 is a beneficial provision for the purpose of securing a decent living for a Hindu wife and to ameliorate the suffering of a deserted wife. They are to be construed in a manner which better serves the ends of fairness and justice. When such laws are made it is proper to assume that law makers enact laws which the society considers as honest, fair and reasonable and this justice and reason constitute the great general legislative intent in such a piece of legislation<sup>13</sup>.”

The Court relied on the *Mischief Rule* and observed that if a liberal interpretation was not given in the case, it would amount to giving immunity to the husband for defrauding the appellant-wife. Therefore, the appellant-wife, at

---

<sup>13</sup>*Id.*, para.15.

least for the purposes of claiming maintenance under section 18 of the statute, was to be treated as legally wedded<sup>14</sup>. In arriving at its decision, the Court also placed reliance upon sections 2(a), 18, 20 and 26 of the Act.

This judgment of the Delhi High Court marked an important step in recognizing the legitimate entitlements of a woman who had, in good faith, entered into a relationship in the nature of marriage. The court had tried to give effect to the beneficial construction of section 18 of the Hindu Adoptions and Maintenance Act, 1956 with the support of objective and provisions under the Act. And hence it becomes a judicious blend of judicial reasoning providing access to justice for the women victims. It must be emphasized that the Act, in including “relationships in the nature of marriage” within its purview, sought to ensure protection to women in similar situations. This decision reiterated the fact that no woman should be denied the protection of laws when facing domestic violence.

In the case of *Narinder Pal Kaur Chawla v. Shri. Najeet Singh Chawla*<sup>15</sup> the facts were similar to that of *Suresh Khullar’s* case. The question to be decided was the maintenance right of a second wife. The husband in the case married the appellant without disclosing the factum of first marriage to the appellant. The court came up with same ideology as was laid down in *Suresh Khullar’s* case and took support from *Savitha Ben’s* case<sup>16</sup> and observed that

“A man must not be allowed to take the advantage of his own wrongs and defeat the rights of a woman in good faith, not knowing the existence of the first marriage...The second wife must be afforded protection from violence within the home.<sup>17</sup>”

---

<sup>14</sup>*Id.*, para.16.

<sup>15</sup> A.I.R. 2008 Delhi 7, 148 (2008) D.L.T. 522, I (2008) D.M.C. 529.

<sup>16</sup>*Savitha Ben Somabhai Bhatiya v. State of Gujarat*, (2005) 3 S.C.C. 636.

<sup>17</sup>*Id.*, para 9 and 10.



In *Virendra Chanmuniya v. Chanmuniya Kumar Singh Kushwaha and Anr*<sup>18</sup>. The case was about a widow with two daughters, who had married her husband's younger brother as per the custom of the community. In such marriages generally, *Saptapadi* was not performed. As per the custom of Kushwaha community, the marriage was performed through *katha* and *sindur*. When her husband deserted her, the wife filed for maintenance. The trial court upheld her plea but the High Court held that her marriage was not valid since *Saptapadi* was not performed. A Special Leave Petition was filed by the appellant against the judgment of the High Court upholding the respondent's contention that he was not the husband of the appellant, and therefore, she was not entitled to maintenance from him, since only legally married women could claim this under the provisions of section 125 Criminal Procedure Code.

The Supreme Court examined in detail the provisions of the Act and noted that the Act had given expanded interpretation to the term *domestic relationship*. The wide coverage under the definition of domestic relationship, according to the judgment, is the most significant provision under the Act. The effect of such inclusion ensures that "women in live-in relationships are also entitled to all the reliefs given in the said Act". The judgment concluded that "if monetary relief and compensation can be awarded in cases of live in relationships under the Act of 2005, they should also be allowed in proceedings under section 125 of Cr PC". Thus the Court upheld the claim of maintenance sought on the ground that parties though not married, have lived together for a long period.

This decision is significant from the point of view of the Act as it draws directly on the relevant provisions from the Act to expand the category of relationships which could legitimately benefit from the maintenance provisions under section 125 Cr PC, by interpreting the basic social intent and purpose behind both enactments., The inclusion of relationship in the nature of

---

<sup>18</sup> MANU/SC/0807/2010. (G.S.Singhvi and Asok Kumar Ganguly, JJ.)

marriage, within the definition of domestic relationship under the Act, has generated some debate and criticism.

In *Azimuddin Abdul Aziz v. State of UP*<sup>19</sup> while interpreting the word ‘have at any point lived together’, the Allahabad High Court opined that as per the expression ‘have at any point lived together’, immediate residence of the two parties is not required. Prior acts of violence will be taken into account for filing an application under the Act.

Despite the fact that the Act recognises the rights of women in informal or unmarried relationships, the validity of marriage continues to be raised as a delay or harassment tactic by many respondents under the Act. A holding of the High Court of Kerala in the case of *Thanseel v. Sini*<sup>20</sup> is an example of the Court’s firm stance against using the issue of the validity of a marriage as a delaying tactic in the proceedings. In this case, the petitioner contended that there was no valid marriage subsisting between him and the respondent and that to be addressed as a preliminary issue in the proceedings. Rejecting his contentions, the Court ruled that, the request to decide questions as preliminary issues based on disputed facts could not obviously be entertained and the Magistrate has to consider the entire question and give decision as mandated under section 12 (5) of the Act within a period of 60 days from the date of the first hearing.”

In both the above judgments<sup>21</sup>, the Delhi High Court has clearly intended to establish the jurisprudence that women who are not considered to be ‘lawfully wedded’ or who are referred to as ‘second wife’ are entitled to the same legal protection insofar as there is fraud committed or where the nature of the relationship clearly warrants legal entitlements. These judgments strengthen the statutory protection provided to women in a “relationship in the

---

<sup>19</sup>MANU/UP/0238/2008.

<sup>20</sup>*Thanseel v. Sini* WP(C) No. 7450/ 2007, 6/3/2007, Ker.

<sup>21</sup>*Suresh Khullar’s* and *Narinder Pal Kaur Chawla’s* decisions.

nature of marriage” under the Act and offer comprehensive guidelines to courts on one of the ways in which the provision is to be interpreted.

The Bombay High Court in *Sau.Manda R. Thaore, W/o Sh. Ramaji Ghanshyam Thaore v. Sh. Ramaji Ghanshyam Thaore*<sup>22</sup> discussed the issue as to whether the petitioner, who was by the respondent’s own admission, living with him as his second wife, could be entitled to maintenance under section 125 Criminal Procedure Code in view of the fact that no divorce had been obtained from the first wife. After taking note of the husband’s own admission that the petitioner is his wife and that she was cheated by the respondent who established a sexual relationship and started living with her, the court held that she was not entitled to maintenance under section 125 Criminal Procedure Code in view of the settled legal position that a second wife could not claim maintenance under this provision. Recognizing the vulnerability of the woman and the fact that the court is unable to help in such unfortunate instances, it was suggested that this is an appropriate case for the petitioner to take recourse to the Act. The Court awarded compensatory costs to her, explicitly stating that this would help her in pursuing proceedings under the Act.

The judgment referred to the right of maintenance under the Act which is significant and it indicates an acknowledgment by the court that the Act addressed such situations where the woman was admittedly vulnerable but had no recourse to legal remedies under other existing laws.

The scope of the right of maintenance of women in “relationship in the nature of marriage” under the Act was discussed by its two Judge bench of Supreme Court in *D Veluswamy v. D. Patchaiammal*<sup>23</sup>. Respondent claimed maintenance from the appellant under Section 125 Criminal Procedure Code and it was upheld by the family court and High Court. Aggrieved by the decision appellant had filed the appeal to Supreme Court. The provisions

---

<sup>22</sup>Criminal Revision Application No. 317/2006.

<sup>23</sup> (2010)10 S.C.C. 469. (Markandey Katju and T S Thakur JJ).

relating to economic abuse<sup>24</sup>, aggrieved party<sup>25</sup>, domestic relationship<sup>26</sup> and shared household<sup>27</sup> under the Act came for discussion before the Court in this case. The court clarified that relationship of marriage and relationship in marriage and said that persons who enter into either of them is entitled to the get benefits under the Act.<sup>28</sup>The Court further held that:

“Relationship in the nature of marriage” is akin to common law marriage to the effect that:(a) The couple must hold themselves out to society as being akin to spouses, (b) They must be of legal age to marry,(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. Common Law marriage require although not being formally married must also fulfill the above requirements. In our opinion relationship in the nature of marriage under the 2005 Act must also fulfill the above requirements and in addition the parties must have lived together in a shared household as defined in s.2(s) of the Act. Merely spending weekends together or a night stand would not make it a domestic relationship<sup>29</sup>”

However, in doing so, the court sought to discuss sexual mores and the amoral nature of live-in relationships “In a feudal society, sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror...<sup>30</sup>”At the same time Court acknowledged that: “However Indian society is changing and this change has been reflected and recognized

---

<sup>24</sup> Protection of Women from Domestic Violence Act,2005, s.3(a).

<sup>25</sup>*Id.*, s.2(a).

<sup>26</sup>*Id.*, s.2(f).

<sup>27</sup>*Id.*, s.2(s).

<sup>28</sup>*Id.*, para 20.

<sup>29</sup>*Id.*, para 31.

<sup>30</sup>*Id.*, para 34.

by Parliament by enacting the Protection of Women from Domestic Violence Act, 2005.”<sup>31</sup>

Making an attempt to iron out certain ambiguous situations, in order to be eligible for ‘palimony’, a relationship must comply with certain conditions, above referred. Court in referring to the concept of palimony that existed in other jurisdiction made passing remarks as to the popular cases in U.S.A.<sup>32</sup>. As to the interpretation of object of section.125 Criminal Procedure Code the Court relied on certain Indian cases<sup>33</sup> and held that social purpose and object of the provision is to prevent vagrancy and destitution. Conscious that the judgment would exclude many women in live-in relationships from the benefit of the Domestic Violence Act, 2005, the apex court said it is not for this court to legislate or amend the law. The parliament has used the expression ‘relationship in the nature of marriage’ and not ‘live-in relationship’. The court cannot change the language of the statute, it said.

The Supreme court observed:

“Not all Live-in relationships will amount to a relationship in the nature of marriage to get the benefit of Act of 2005. To get such benefits the conditions named above must be satisfied ad this has to be proved by evidence. *If a man has a ‘keep’ whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a relationship in the nature of marriage.*”<sup>34</sup>

This decision is intended to restrict the abuse of the provision However there is an apprehension that it will leave the ground open to men to enter into bigamous relationships without any civil or criminal liability and sends out wrong signals to younger generations in India. The ruling shifts the burden on

---

<sup>31</sup> *Id.*, para 35.

<sup>32</sup> *Marvin v. Marvin*, (1976)18 Cal 3D 660(California SC); *Taylor v. Fields*,(1986)224 Cal Rptr 186(California SC); *Devaneyv.L. Esperance*,(2008 195 NJ,1247 (New Jersey SC)

<sup>33</sup> *Vimla v. Veeraswamy*, (1991) 2 S.C.C. 375 and *Savitha Ben Somabhai Bhatiya v.State of Gujarat*,(2005) 3 S.C.C. 636.

<sup>34</sup> (2010)10 S.C.C. 469 para 32.Emphasis added.

women to prove that their relationship is not bigamous, disregarding community practices.

The ruling in *Veluswamy case* is devoid of the cautious approach adopted in *Chamuniya Case*. It appears to be based on a moral high ground and western ethos that disregards Indian social reality. Such types of reckless and insensitive ruling violate the constitutional mandate of protecting the dignity of women rather than protecting women against domestic violence within homes.

A live-in relationship can neither be equated nor be substituted with marriage in India. All the trends that lean towards the interest of the people's very civil and fundamental right to live according to their wish needs to be welcomed. But the true spirit of such trends needs to be assimilated by the stakeholders or else it will lead to usurpation of ethical and moral values embedded in the rich cultural heritage of our country. If granted legal recognition to such middle way relationships, the most crucial question to be answered would be firstly whether it goes out of track from the existing social norms i.e. compatibility and secondly, whether the law has adequate provisions to deal with the peculiar arrangement that these couples exist in. There is need for greater legal clarity on some of the common disputes that arise out of these relationships, while at the same time keeping these legal provisions to a minimum, based on their indispensability in the present liberalised society.

In the USA, as in India, sufficient proof with regard to intention of parties and a certain degree of commitment is necessary to be shown in order to make a legal claim for maintenance. Family is the centre piece of Indian culture and it is adequately cherished as the basic cell of the society. Philosophically, marriage was a sacred commitment and was treated as a tie which continued not only for one life, but for other lives also after death<sup>35</sup>. Living together without the social sanction before marriage was looked upon as sin. Democratisation of moral and ethical values in the concepts of

---

<sup>35</sup> Manu 5, 160-161.

autonomy and living has led to a floodgate of debates and discussions on the liberalized alternate marital institutions within the country.

A lawfully married woman who is supported both by formal and non-formal support systems of a society needs to be differentiated and treated differently from other women who are vulnerable and have entered into such mid-way arrangements in living. To protect the interests of women and their children who have fallen prey to the abuse of male folk, such decisions are helpful and rejuvenating to lead a life of dignity in the society. Whether they are considered at par with legally wedded wives in India or is the Act giving a back door entry to the concept of live-in-relationships in Indian culture is a debatable issue. Living together without the social sanction before marriage was looked upon as sin.

*S. Khushboo v. Kaniammal* was a case wherein the concept of relationships outside the marriage came for discussion (totally unrelated to the context under the Act) in the context of freedom of speech and expression under the Constitution of India. The Court while disposing of the appeals took a bold step in recognising the new trends in the present world. The court observed “While it is true that the mainstream view in our society is that sexual contact takes place only between marital partners, *there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting with the exception of ‘adultery’ as defined under Section 497 IPC*<sup>36</sup>.”

The interpretations suggestive of contradictory outcomes had lead to inconsistency and thereby aggravate the skepticism as against the Act which is understood as mere western apism. Simultaneously a deliberate attempt has been made by the Court to introduce a culture of tolerance to our age old beliefs and values. Legislations and its interpretation unless it is in tune with the pulse of the society are likely to fail in achieving its purpose.

---

<sup>36</sup> (2010) 5 S.C.C. 600 para 31.Emphasis added

### **7.3 Right to Matrimonial Residence and Property**

The right to residence provision has been hailed as one of the most unique and important provisions of the Act. It enables a victim of domestic violence to take recourse to independent relief that provides for protective injunctions against violence, dispossession from the matrimonial home and alternate residence. While the Act does not create any new rights which were not available to women prior to this enactment through statutory or judge made laws, it provides a single window and simple procedures for claiming rights which were scattered under different statutes and legal provisions.

The Act widens the scope of protection against violence beyond the category of wives and extends it not only to mothers, daughters, and sisters, but even to women in informal relationships. An entire gamut of women like aged women, unmarried girls, widows, women whose marriages are suspect due to legal defect on the ground that essential ceremonies were not performed or that the man or the woman has an earlier subsisting marriage, are able to seek relief under this Act.

In the landmark judgment of *B. P. Achala Anand v. Appi Reddy*<sup>37</sup>, the Supreme Court had clearly upheld this right of residence in the matrimonial home. Supreme Court opined:

“A Hindu wife is entitled to be maintained by her husband, She is also entitled to separate residence if by reason of the husband’s conduct or by his refusal to maintain her in his own of residence of other just cause she is compelled to live apart from him. Right to residence is a part and parcel of wife’s right to maintenance. The right to maintenance cannot be defeated by the husband executing a will to defeat such a right. The right has come to be statutorily recognized with the enactment of the Hindu Adoption and

---

<sup>37</sup>(2005) 3 S.C.C. 313, *per* Lahoti, J.



Maintenance Act, 1956. Section 18 of the Act provides for maintenance of wife. Maintenance has been so defined in clause (b) of section 3 of the Hindu Adoption and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance the term ‘wife includes a divorced wife.’”

On clarifying the role of deserted woman occupying the tenanted premises Court has expressed the optimism of co-existence of rights .The Supreme Court has further clarified the issue and stated as follows:

“We are also of the opinion that a deserted wife in occupation of the tenanted premises cannot be placed in a position worse than that of a sub-tenant contesting a claim for eviction on the ground of sub-letting. *“Having been deserted by the tenant-husband, she cannot be deprived of the roof over her head where the tenant has conveniently left her to face the peril of eviction attributable to default or neglect of himself. We are inclined to hold and we do so that a deserted wife continuing in occupation of the premises obtained on lease by her husband, and which was their matrimonial home, occupies a position akin to that of an heir of the tenant husband if the right to residence of such wife has not come to an end. The tenant having lost interest in protecting his tenancy rights as available to him under the law, the same right would devolve upon and inhere in the wife so long as she continues in occupation of the premises.”*<sup>38</sup>

The right to residence provision under the Act had evolved in the Indian courts largely within the framework of the Supreme Court’s judgment in the case of *S.R Batra v. Taruna Batra*<sup>39</sup> in 2007. Respondent had married

---

<sup>38</sup>*Id.*, para 33. Emphasis added.

<sup>39</sup>*S.R Batra v. Taruna Batra*, 2007 3 S.C.C. 169, per Markandey Katju. J.

appellant's son and started living together at the appellant's mother's house. Appellant filed divorce petition later on. As a counterblast respondent lodged FIR under section 498A along with other provisions of Indian Penal Code. In the present case the daughter in law had sought an order to allow her to re-enter her matrimonial home. The Appellant's retaliated by contending that their son had shifted his residence to a new flat prior to the starting of proceedings. Temporary Injunction was granted in favour of the respondent by the trial court. Senior Civil Judge on appeal held that respondent had no right to the property of appellant other than that of her husband. Respondent filed petition under Article.227 and High Court gave a judgment in her favour to continue to reside at the appellant's house. Aggrieved by the decision of the High Court, appellants preferred appeal to Supreme Court.

While ruling against her, the Supreme Court based its judgment on its interpretation of the term 'shared household' in the Act<sup>40</sup> and held:

“The wife is entitled to claim right under Section 17(1) to reside in a shared household and shared household would only mean a house belonging to or taken on rent by the husband or a house belonging to a joint family in which the husband is a member”<sup>41</sup>.

Since the house in question was owned by the mother-in-law, the Supreme Court held that the aggrieved could not claim any rights to residence in this shared household. Furthermore, the Court observed that “The respondent's any claim for alternate accommodation in terms of section19(1) (f) can only be made against the husband and not against the in-laws<sup>42</sup>”.

The apex court desisted from giving an expansive interpretation to the definition of right to residence in a shared household as it apprehended that to include every single household where the victim lives or at any stage had lived

---

<sup>40</sup>Protection of Women from Domestic Violence Act,2005, s.2(s).

<sup>41</sup> *Supra* n. 37 para 29.

<sup>42</sup> *Id.*, para 28.

in a domestic relationship would ultimately imply that every property where the victim and respondent have lived in the past, including all the houses of the respondents relatives, would fall within the purview of it, effectively allowing the victim to claim right of residence in all those houses. Such a wider interpretation may lead to an absurdity not intended by the legislature and would be inequitable.

In addition, the Court clarified that there is no such law in India like the British Matrimonial Homes Act 1967, and had cautioned against equating a shared household with a 'matrimonial home' as has been interpreted by the English Courts. The Supreme Court's narrow interpretation of this otherwise expansive definition is significant has, to some degree, curbed the potential misuse of this provision.

The Court further confirmed and acknowledged the obiter dicta in *B.R.Mehta v. Atma Devi*<sup>43</sup> as to the present need in changing situation that it is high time to give wife or the spouse right of occupation in a matrimonial home in case of marriage break up or in case of strained relationship between husband and wife. Alongside Court cautioned itself that the abovementioned obiter dicta was only an expression of hope and not the law laid down and added courts do not legislate and whatever may be the personal view of a judge he cannot create or amend law and must maintain judicial restraint.

Allowing the appeal Court acknowledged the fact that definition under s.2(s) as to shared household under the Act was not happily worded and attributed the fault to the clumsy drafting of the legislation and justified their standpoint by saying that an interpretation best possible to prevent chaos in the society was resorted to by them<sup>44</sup>.

If one strictly adheres to the definition of *shared household* under the Act then aggrieved person is entitled to live within the space shared earlier by

---

<sup>43</sup> (1984) 45 S.C.C. 183 192(6).

<sup>44</sup> *Supra* n. 38 para 30.

her and her husband. The petitioner had lived in the property in question in the past; hence the said property was her shared household. But the court overlooked all of that and decided that the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint property of which the husband was a member. It was the exclusive property of the mother-in law. Hence according to the Apex Court it cannot be called a shared household as it was not fulfilling the criteria of the section. In this case<sup>45</sup> a statutory guarantee of the right to reside in the shared household was linked to the ownership of the home, rather than the fact of residence in the joint household. This judgment has curtailed the scope of right to residence envisaged under the Act.

Judicial emasculation of a law may blunt the social message which the law conveys, thereby diluting its social impact<sup>46</sup>. The Supreme Court's holding in the above case appears to be an example of this justification. Further the court by ruling that claim for alternative accommodation can only be made against the husband and not the in-laws or other relatives has proved detrimental for women residing in joint family households in which the husband himself has no legal right to reside by way of title or interest. Furthermore, it has become virtually impossible for women who had already left their households due to violence to gain orders allowing them re-entry into the household, especially in joint family scenarios. There is no guarantee as to the security in staying in such violent environment in the in-laws household.

An attempt is also made through this judgment to bring out the difference between the concept of matrimonial residence and property in the Indian and English scenario<sup>47</sup>. Section 27 of The Hindu Marriage Act makes a

---

<sup>45</sup>(2007) 3 SCC 169.

<sup>46</sup>Mohini Chatterjee, *Feminism and Women's Human Rights*, Vol.2, Avishkar Publishers and Distributors, Jaipur, (2004) p.124.

<sup>47</sup>The major struggle for women in England had been to acquire the right to own property during the subsistence of their marriage and to fight the legal provision which merged their property with that of their husbands. The attempts to enact Matrimonial Clauses Act, 1857,

vague reference to property, but contextualizes it within a limited scope of Hindu women's rights over the customary gifts, received jointly by the spouses, at the time of marriage. The Act did not even provide for claiming the Hindu woman's customary right of *stridhan* at the time of divorce. The only recognition of right of women to residence is found under the Hindu Adoptions and Maintenance Act, 1956 where maintenance is defined as inclusive of a provision of residence. On divorce women are entitled to only a meager amount of maintenance which is insufficient to procure separate residential premises for themselves and the children under their custody. This points out to the lacunae persisting in the legislations made in India. This decision continues to dominate the legal landscape. As *Batra v. Batra* is the settled law on the issue till date, researcher feels that there is a need to critically examine what this means for the right to reside as envisaged under the Act.

In *Hemaxi Atul Joshi v. Muktaben Karsandas Joshi*<sup>48</sup> the Bombay High Court, the husband had filed a petition for divorce and the wife had filed a corresponding petition to protect her right to reside in the matrimonial home and sought an injunction against her dispossession. Prior to the filing of proceedings for divorce, the parties had shifted out of the joint family household into a separate apartment. The wife staked her claim of residence in the premises owned by her mother-in-law and not against her husband. The

---

awarding limited right of divorce under stringent conditions. But women's right to separate property after divorce was not acknowledged. Married Woman's Property Rights Act, 1872 awarded rights over their separate property for women who were legally separated /divorced. Later the Married Women's property Rights Act 1882 slightly improved the position of married woman. Finally in 1935, the difference between a married and unmarried woman was abolished and married women became full owners of their own individual property, even during the subsistence of marriage. Matrimonial Homes Act in 1967 specifically empowered the courts to decide the issue of property while dealing with issues of desertion and divorce. Divorce Reform Act in 1969 introduced the "Breakdown theory" of divorce. In 1973 provisions of both the above Acts were incorporated into Matrimonial Causes Act, 1973. The Family Law Act of 1996 further altered the position laying emphasis on mediation than contested litigation. These enactments stipulated that though the courts must give effect to legal rights of the parties they must also honour the wife's right in equity to reside in the matrimonial home.

<sup>48</sup>Appeal from Order No.866 of 2007 in S.C Suit No.3072/2007 with Civil Application No.1194/2007.

Court rejected her claim on the ground that merely because the wife stayed in the house of her mother-in-law along with her husband for some time, she did not accrue a legal right of residence in the said premises. It was not the property in which the husband had a right. Relying upon the *Batra Case*, Bombay High Court held that shared household indicates the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which husband is a member. This decision signals that if the husband had no legal right over the household the wife has no other recourse but to lean back on her natal home.

In *Vandana v. T. Srikanth*<sup>49</sup>, the Madras High Court provided a broad interpretation to the notions of *shared household* and *domestic relationship* under the Act. In this case the husband had contested the right of the aggrieved wife to reside in the shared household under section 17 of the Act because the parties had not lived together in the shared household for even a single day after their marriage. The husband disputed the very fact of marriage itself. But the Court, upholding the right of the aggrieved wife to reside under section 17 held that the wife has a *de jure* right to live in the shared household because of her status as a wife in the domestic relationship. The right of a legally wedded wife to be entitled to the shared household is justified in the following dictum laid down by Madras High Court It reads:

“It is not necessary for a woman to establish her physical act of living in the shared household, either at the time of institution of the proceedings or as a thing of the past. If there is a relationship which has legal sanction, a woman in that relationship gets a right to live in the shared household. Therefore, she would be entitled to protection under section 17 of the Act, even if she did not live in the shared household at the time of institution of the proceedings or had never lived in the shared household at any point of time in the past. Her right to protection under section 17 of the Act, coexists with her right to live in the

---

<sup>49</sup>(2007) 6 M.L.J. 205 (Mad.).

shared household and it does not depend upon whether she had marked her physical presence in the shared household or not”<sup>50</sup>.

The Court pointed out that a marriage, which was valid and subsisting on the relevant date, automatically conferred a right upon the wife to live in the shared household as an equal partner in the joint venture of running a family. If she had a right to live in the shared household, on account of a valid and subsisting marriage and she was definitely in a “domestic relationship” within the meaning of section 2(f) of the Act, her bodily presence or absence from the shared household could not belittle her relationship as anything other than a domestic relationship, the court clarified.

This decision is a judicial recognition to the concept that the contract of marriage encompasses within it, a right to residence. This also brings out the developmental aspect of the provisions under the Act relating to ‘shared household’ concept in the Act.

*Abha Arora v. Angela Sharma*<sup>51</sup> was another similar case wherein the wife had claimed right of residence against her mother-in-law, relying upon the notion of shared household. The mother in law initiated proceedings to restrain the entry of daughter-in-law into the premises owned by her. The daughter-in-law failed to obtain a counter injunction for her re-entry. Later the mother-in-law sold the premises and made an application to the court for permission to withdraw the proceedings filed by her. The daughter-in-law vehemently opposed this move as her rights under the Act would be defeated in case of withdrawal of suit. The High Court rejected her plea and held that since the property is owned by the mother-in-law, the daughter-in-law cannot claim the right to residence, as the same is not a shared household under the provisions of the Act. It was also taken onto consideration by the Court that the daughter-in-law was not residing in the suit property but instead was residing and

---

<sup>50</sup>*Id.*, para 20.

<sup>51</sup>1 (2008) D.M.C. 507 Del.

working in the UK and she had substantial earnings out of it. Subsequently the proceedings filed by her were dismissed for default, as she did not follow up the suit. Hence there was no reason for preventing the mother-in-law from withdrawing her suit and compelling her to proceed with it.

In *Neetu Mittal v. Kanta Mittal*<sup>52</sup>, the wife had filed proceedings against her in-laws seeking an order of permanent injunction under Order 39, Rule 1 and 2 of Civil Procedure Code, and also invoked the relevant provisions for her right to residence under the Act. The wife admitted that she had been living separately with her husband and pleaded that that accommodation was not adequate. The relationship with in-laws was not cordial and the couple were living separately due to the settlement arrived at, at the police station, between the parties. Hence, it was held that her staying with the in-laws would be detrimental to their health and interest, and their right to live with dignity. The trial court order was affirmed by the High court. Relying upon the *Batra* case, the court held that the wife's claim of residence could only stand against her husband and not against her in-laws.

A slightly different issue came to be projected under the judgment in *M. Nirmala v. Dr. Gandla Balakotaiah*<sup>53</sup>. The wife had filed an application under Order 39 read with section.151 Civil Procedure Code seeking an injunction against her husband from dispossessing her. She also invoked section 19(f) of the Act. She contended that the property over which she claimed right to residence was purchased in 1997 out of her own and her family funds, but stood in the name of her husband. The husband denied this contention and pleaded that premises were purchased from his own funds and through a bank loan and relied upon relevant documents to prove his case. The husband was ready to pay for an alternative accommodation. The trial court dismissed the wife's petition, but directed the husband to pay a sum of Rs.3,500/- per month towards rent. The wife challenged this order in the High court on the ground

---

<sup>52</sup> 152 (2008) D.L.T. 691.

<sup>53</sup> 2008 (2) A.L.T. 241.



that she was entitled to the possession of the matrimonial house as per section.19 of the Act. The High Court upheld the order of the Family Court on the ground that she could not prove her contribution towards the purchase of the premises. This decision tends to support the patriarchal set up wherein the wife's role as an effective contributor to the family earnings goes unacknowledged. The fact that most women contribute to the matrimonial home either through their own earnings or through their unpaid labour was overlooked while ascertaining the right of residence and right to property in respect of matrimonial home in this case. A restricted scope of the provision of the shared household is visible from the above judgments which would drastically curtail the rights of women.

In *Priya v. Shibu*<sup>54</sup>, the High Court of Kerala concluded that a divorced woman was entitled to reliefs under the Act. In the case of *Bharati Naik v. Ramnath Halarnkar*<sup>55</sup>, question mooted was whether a divorced woman could have a right in the matrimonial home. In this case the woman was divorced way back in 1998. Thus, the question that arose was of the retrospective effect of the Domestic Violence Act and whether there was any present case of domestic violence where she complained about etc. The High Court of Bombay at Goa concluded that a woman who had been divorced for 12 years would be allowed to receive maintenance under the Act stating that the relationship by consanguinity, marriage, etc. would be applicable to both the existing relationship as well as the past relationship and cannot be restricted to only the existing relationship as otherwise the very intent and purpose of enacting the said Act would be lost as it then would protect only an aggrieved person who is having an existing relationship. The Court thus ruled that even a divorced woman can receive maintenance under Section 12 of the Act.

The pertinent question that arises here is the assimilation of this concept with practice in Indian society. The situation that emanates from such concepts

---

<sup>54</sup>*Priya v. Shibu*, MANU/KE/0265/2008, 6/06/2008.

<sup>55</sup>*Bharati Naik v. Ramnath Halarnkar*, Cr. W.P Nos.18/09 and 64/09, Goa 17/02/10.

is that through a residence order, a respondent including family members of the respondent could be directed to leave the household, or to secure the same level of alternate accommodation for the woman. In India, most couples, after marriage, live in a joint household, shared with the husband's parents and siblings. The question that is projected in the judicial discourse is whether such dwellings can be construed as the *matrimonial home* or *shared household* of the woman and whether she is entitled to obtain an order of injunction restraining the husband and his family members from dispossessing her. Until the Act was enacted there was no recognition of the right of residence against the husband's family members where the couple is living within a joint family unit. This Act seeks to strengthen this right and broaden its scope.

The Madhya Pradesh High Court in *Razzak Khan v. Shahnaz Khan*<sup>56</sup> stated that the aggrieved person has a right to reside in the shared household of her ex-husband. She filed for residential orders under Sections 18 to 20 of the Act. The wife contended that she lived with her husband and his two brothers in their ancestral house. The lower court granted her the protection order and maintenance for her and the minor son, the Sessions Court modified the relief and directed the Protection Officer to ensure that an alternative accommodation is given to her in the ancestral house of her husband and granted maintenance to the foster son. The husband contended that she was working as a clerk and comfortable living in her parental house and that he was a heart patient and mechanic by occupation who was not getting regular salary. And he further contended that after divorce it was not proper for her to live in the ancestral house.

The case was finally decided on the factual circumstances. The Madhya Pradesh High Court observed that:

“Thus, it is clear that every women in a domestic relationship shall have the right to reside in the shared house except in accordance

---

<sup>56</sup>*Razzak Khan v. Shahnaz Khan*, 2008 (4) MPHT 413

with the procedure established by law therefore, this argument of applicant has no force that divorcee wife Shahnaz Khan has no right to reside in an ancestral house of husband or such living will amount to 'Haram'." "...in the alternative husband Ramzan Khan is directed to secure same level of alternate accommodation for Shahnaz Khan as enjoyed by her in the shared house with the help of Protection Officer..."<sup>57</sup>

The fact situations of the case reveal the patriarchal mindset promoted by the husband's to deprive the aggrieved party of their entitlements as per the Act.

*Nidhi Kumar Gandhi v. The State*<sup>58</sup>, was a case filed in Delhi High Court by a woman with her minor daughter had been dispossessed. The husband resisted her claim by stating that the premises belonged to his father and that he was not residing in the said premises. The wife's contention was that he shifted his residence only after she had initiated proceedings against him. In view of this interim orders were passed in her favour. The husband challenged the orders, relying upon the *Batra case* and pleaded that the premises were neither owned nor rented by him, and it was not the joint family property and thus could not be construed as shared household. In view of this the Session's Court varied the residential order passed by Magistrate's court. In appeal, the Delhi High Court restored the orders of the Magistrate's court and observed that it was premature on the part of Sessions Judge to apply the ratio of *Batra case* without determining whether in fact, the husband's father owned the premises and whether the husband had no right to live there. The High Court also observed that it was inconceivable how at an interlocutory stage, in view of the mandate under the Act to provide urgent relief, a final determination on that aspect could be made. Further it was held that rights of the husband's family were not affected by the order of restoration and the wife's occupation of the premises. This judgment effectively suggests that the

---

<sup>57</sup>*Id.*, para 15.

<sup>58</sup>*Nidhi Kumar Gandhi v. The State*, MANU/DE/0077/2009;157 (2009) D.L.T. 472.

*Batra* holding should not be applied in cases where the issue is of urgent interim residence reliefs and there was no conclusive determination reached as to the ownership of the property.

A remarkable decision was taken by the Delhi High Court in *Vijay Verma v. State N.C.T. of Delhi and Anr*<sup>59</sup>, in defining the scope of “shared household” under the Act in a gender-sensitive manner. The court clarified the scope of this right by stating that where a family member leaves the house to establish his own shared household separately and establishes her own household, she could not claim a right to reside under the Act on the basis of a “domestic relationship”. The case was with regard to the issue of denial of right to reside.

The court went on to discuss that in cases where such person has a coparcenary or inheritance right in the property, such right must be claimed through a civil suit and not under the Act. Therefore, the court clearly recognized and specifically excluded instances where the aggrieved woman may have either temporarily left the household or had been forced out. In such cases, the right of residence on the basis of a domestic relationship would continue. The Court sought to distinguish between acts of violence committed even when the person is living separately and stated that in such cases, the recourse lies in the IPC and other criminal laws. The reasoning of the court is to be read in conjunction with the fact that the court categorically upheld the de- jure right of a woman to reside in the shared household. Any other interpretation can have the danger of denying the right of residence under the Act to all those women who falls under *domestic relationship* but may not be

---

<sup>59</sup>Crl. M.C. No. 3878/2009. In this case, the petitioner filed an application before the trial court seeking an immediate right to reside and police protection against her brother and his wife. She contended that being a permanent resident of US, when she came to India, she was not allowed to enter the premises of her parental house by the brother and his wife. On the other hand, the brother argued that the premises were owned by his father and himself, and upon the death of the latter, the share devolved upon the grandson under a will. Further it was argued that the petitioner had already received consideration for her share in the property.

residing in the shared household, and are subjected to domestic violence within the four walls.

The judicial approach wherein the property is in the joint name of husband and the in-laws, is that the wife has a right to reside. It was so affirmed by the Delhi High Court in *Jyotsana Shardav. Gaurav Sharda*<sup>60</sup>. On the issue of residence order, the husband argued that the wife does not have any right to stay in an accommodation, which is owned by the mother-in-law. The property in question was in the joint name of the husband and his mother, although the wife argued that the entire sale consideration was paid by the husband. The Court rejected the contention of the husband and held that since it was established that the property was jointly owned by the husband and mother-in-law and it was her matrimonial home before the dispute began, it is her shared household and she has a right to reside therein. Regarding the revision petition filed by the husband against the maintenance order in favour of the child, the court held that since it is only an interim arrangement to prevent destitution of the child, it could not be considered at par with an order affecting the rights of the parties. In spite of Batra's judgment this judgment interpreted the provisions with an open mind and has considered the plight of the aggrieved woman.

In *Ashish Bhowmick & Anr. v. Tapasi Bhowmick & Anr.*<sup>61</sup> where the dispute related to the right of a widow to claim right to residence, the Calcutta High Court laid down that where the relationship between the widow and the husband's family is acrimonious, and the parties are residing in the same house, an alternate accommodation may be the most suitable relief.

In *P. Babu Venkatesh v. Rani*<sup>62</sup>, the wife had been beaten and was disposed of her matrimonial home at midnight. She sought for urgent relief of residence order against her husband and in-laws. The trial court passed ad-

---

<sup>60</sup>Criminal Revision Petition Nos. 132 and 133/2009.

<sup>61</sup> C.R. R. No. 10 of 2009.

<sup>62</sup>2009(2) RCR(Civil) 883

interim reliefs in her favour permitting her to re-enter the matrimonial home. She was permitted to break open the locks and enter the premises as her in-laws had locked the house. The husband contended that the house was in the name of his father and relied on the *Batra* case. The wife's contention was that he had alienated the house to his father during the pendency of the case. The court took notice of the fact that if every husband started transferring his property in favour of someone else when a matrimonial dispute arises and plead that premises does not belong to him and is therefore not a shared household the women will be deprived of their right to residence. The court while upholding the order of the trial court to break open the locks observed that the wife cannot be made to wait in the street and that husbands would prevent the wives from reaping the benefits of the order by simply locking the premises and walking away.

The decision though appears to be positive from the perspective of a victim, there is an inherent limitation lying behind it. No assurance of safety to women can be guaranteed by the courts in such cases if the women are to stay in the premises in a hostile environment.

The Delhi High Court in *Master Ryan through its mother Mrs. Ridhima Juneja v. P. N. Juneja and Sons*<sup>63</sup>, restricted the scope of an interim order for notdisturbing peaceful possession passed in favour of the wife to mean constructive possession only. The facts of this case are that after marriage and the birth of their son, the parties had been residing together in the self-owned property of the in-laws. The husband was employed by the Hindu Undivided Family. As a result of alleged cruelty, the wife was forced to leave the shared household along with her son following which she filed an application under the Act seeking reliefs of residence and compensation among others. While compensation was granted, the trial court refused to grant residence order for restoring her to the shared household, based on the judgment in *Batra v. Batra*.

---

<sup>63</sup>163 (2009) D.L.T. 14.

However, an interim order directing that possession should not be disturbed was passed in her favour, which was used by her to re-enter the premises. In arriving at a conclusion against the wife, the court did not take into account the fact that the husband was employed by the Hindu Undivided Family and it was claimed that he had been disowned only after the application was filed by the wife. Further, the husband was said to be staying with a friend on a temporary basis. Hence, from the facts it may be concluded that there was an attempt to deny the wife her legitimate entitlements. The judgment clearly demonstrates the manner in which *Batra* decision could be abused to deny women their legitimate entitlements.

The right to reside in a “shared household” under the Act is not an unlimited right, therefore, if another legal provision exists that can be used to evict a petitioner from her house (e.g. under Rent Control Act, where the landlord seeks to evict a tenant), then a women cannot be protected by the orders issued under the Act. The ‘shared household’ provision in the Act can, in that circumstance, be used as a bargaining tool in order to secure alternate accommodation. Ultimately, however, the Act can only be used for temporary reliefs and does not provide women with property rights or long term residence rights.

In the case of *Mrs. Savita Bhanot v. Lt. Col. V.D. Bhanot*<sup>64</sup> where the property was a government accommodation provided to the husband, the trial Court ordered certain benefits to the wife. In this case, the husband had deserted the aggrieved woman, the reliefs that could be claimed according to the court were a.) Right of residence in the house which was her matrimonial home before the parties started residing in the government accommodation, where deemed feasible; b.) Where no such matrimonial home exists, the husband can be asked to arrange for an alternate accommodation; or c.) The husband is to provide rent for alternate accommodation.

---

<sup>64</sup>(2010) 158 P.L.R. 1

From the analysis of all these cases as to shared household and right to residence no foundational philosophy is emerging as to the exact status of right to residence. The issue of matrimonial property rights is not interpreted favourably. The economic contribution of a woman to her family or matrimonial home is least recognized. Instead, landed properties covered by the documents of title, in her name alone, will be viewed as 'her property'. In India the notion of 'marital property' is not yet recognized. There is no concept of common property and the property brought into the marriage is not subject to equitable distribution during matrimonial dissolution. Instead, even though it is most often the woman who takes on the bulk of home loans, women are invariably left empty handed after a divorce.

The model legislation on domestic violence as suggested within the United nations in 2010 clearly emphasize that such Legislation should provide for the amendment and/or removal of provisions contained in other areas of law, such as family and divorce law, property law, housing rules and regulations, social security law, and employment law that contradict the legislation adopted, so as to ensure a consistent legal framework that promotes women's human rights and gender equality, and the elimination of violence against women.

Tracking the lacuna in the right to shared household, it is often noticed that women feel insecure and scared going back in the same household where she was abused. It gets difficult for her to segregate herself entirely from the perpetrators by living in the same household. India certainly has a long way to go since women are still not protected by way of matrimonial property laws.

In order to be fully effective, the adoption of new legislation on violence against women should be accompanied by a review and amendment, where necessary, of all other relevant laws to ensure that women's human



rights and the elimination of violence against women are consistently incorporated<sup>65</sup>.

#### **7.4 Whether a Woman can be a Respondent under the Act.**

The Act clearly states that only women can petition for the remedies available under this Act, the question of whether women can be named as respondents is a contentious one. The Act defines 'respondent' as "any adult male person who is, or has been, in a domestic relationship with the aggrieved person..."<sup>66</sup>. The proviso to this Section clarifies, "provided that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner".

In *Ajay Kant v. Alka Sharma*.<sup>67</sup> the question that came up before the High Court of Madhya Pradesh was whether women can be made respondents in applications filed under the Act. An application was filed by a wife against her husband and mother-in-law after she was dispossessed from her matrimonial home, following dowry-related harassment. The quashing of the lower court proceedings was sought on two grounds. The pertinent contention was that an application can be filed only against male members of the shared household and not against female members such as the mother-in-law. To justify the contention the definition of respondent under the Act was forwarded. The High Court upheld the first contention that female relatives cannot be made respondents under the Act and stated that,

“Thus, it is provided by this definition section 2(q) that an application can be filed by an aggrieved person...claiming relief under the Act only against the adult male person. However, as per

---

<sup>65</sup> In the United States, the *Personal Responsibility and Work Opportunity Reconciliation Act* (1996) created a Family Violence Option, which permits survivors of domestic violence to be exempted from certain employment restrictions related to receiving public assistance payments. The United States Department of Health and Human Services issued regulations regarding the implementation of the Family Violence Option in April 1999.

<sup>66</sup> Protection of Women from Domestic Violence Act, 2005, s.2(q)

<sup>67</sup> *Ajay Kant v. Alka Sharma* 2008 Cri.L.J. 264, I (2008) D.M.C. 1, 2007 (4) M.P.H.T. 62

the proviso appended to this provision, a wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner. For understanding these two parts, i.e., the main part of the Section and the proviso, it is necessary to understand the scheme of the Act.”

The Court went on to distinguish between the terms “application” used in section 12 and “complaint” used in the proviso to section 2(q). The Court held that, “section 12 of the Act provides that an application (not a complaint) for seeking one or more reliefs under the Act can be filed. On perusal of sections 18 to 22 of the Act, it appears that the reliefs under these Sections as mentioned hereinabove can be passed on the application under section 12 of the Act”. The Court added “complaint” with reference to the Criminal Procedure Code, and clarified that, “this word complaint cannot be considered beyond the scope of the main provision of this Section which has been defined in first part of section 2(q)”. Based on this interpretation, the court held that a proceeding under the Act can only be initiated against an adult male person

The second contention related to the procedural aspects. As no report from the Protection Officer was sought and the Magistrate recorded the statement of the aggrieved person without first issuing notice to the respondents, procedural requirements under the Act were not met. The Court rejected the second contention on the ground that procedural irregularities were not sufficient to quash proceedings and that, as per Section 28(2) of the Act, a Magistrate has the power to set his own procedure. In so doing, the Court acknowledged the importance of ensuring speedy and efficacious access to justice, unimpeded by procedural requirements, for a woman in need. This is in accordance with the intention of the Act.

In *Smt. Saritav. Smt. Umrao*<sup>68</sup> a revision petition was filed challenging the order of the appellate and trial courts, which withdrew proceedings under the Act against the mother-in-law on the basis that women cannot be made respondents under the Act. The petitioner argued that the lower courts failed to appreciate the proviso to section 2(q) which states that a complaint can be filed against relatives of the husband or male partner. It was contended that the term “relative” is not gender-specific. The High Court clarified that the term “relative” is quite broad and includes all relatives of the husband irrespective of gender or sex.

*The decisions in Nand Kishore v. State of Rajasthan*<sup>69</sup> and *Rema Devi v. State of Kerala*<sup>70</sup> upheld the same view that a female can be a respondent. In the first case, the Court categorically held that, “the term ‘relative’ is quite broad and it includes all relations of the husband irrespective of gender or sex”. The second case, further clarified that, “section 2(q) of the Act and its proviso if read together nowhere suggest that relative of the husband or the male partner has to be a male. In proviso to section 2(q) of the Act the word is ‘relative’ and not ‘male relative’... a female relative is not excluded from the definition of respondent...” This stance was reinforced in a number of rulings in the High Courts of Madras<sup>71</sup>, Hyderabad<sup>72</sup> and Bombay.

In *U. Suvetha v. State by Inspector of Police and Anr*<sup>73</sup> Supreme Court went on to examine the meaning of “relative” under Section 498 A IPC as to decide whether a girl friend can be included in the term relative. The Supreme Court held:

---

<sup>68</sup> 2008 (1) R.Cr.D 97 (Raj) See also discussion in <http://www.endvawnow.org/en/articles/835-order-for-protection-remedies.html>. Last visited on 23rd July 2013.

<sup>69</sup> R.L.W.2008(4)Raj3432.

<sup>70</sup> I (2009) D.M.C. 297.

<sup>71</sup> *S. Meenavathu v. Senthamarai Selvi*, MANU/TN/2547/2009.

<sup>72</sup> *Afalunnisa Begum v. State of A.P.*, MANU/AP/0206/2009.

<sup>73</sup> (2009) 6 S.C.C. 757.

“Living with another woman may be an act of cruelty on the part of the husband for the purpose of judicial separation or dissolution of marriage but the same in our opinion would not attract the wrath of section 498A of the Penal Code. An offence in terms of the said provision is committed by the persons specified therein. They have to be “husband” or “his relatives”. Either the husband of the woman or his relative must have subjected her to cruelty within the aforementioned provision. If the appellant had not been instigating the husband of the first informant to torture her has been noticed by the High Court, the husband would be committing some offence punishable under the other provisions of the Penal Code and the appellant may be held guilty for abetment of the commission of such offence but not an offence under Section 498A of the Penal Code<sup>74</sup>.”

In the absence of any statutory definition, the term "relative" must be assigned a meaning, as it is commonly understood. Therefore, the court held that "respondent" under section 2(q) of the Act includes a female relative of the husband or the male partner. The Court further emphasized:

“Proof of legal marriage in the rigid sense or required under the civil law is unnecessary for establishing an offence under Section 498A IP. The expression ‘marriage’ or ‘relative’ can be given a diluted meaning which a common man or society may attribute to those concepts in common parlance for the purpose of s.498A IPC.<sup>75</sup>”

This is an important judgment in view of the right approach of the court towards the issue, sensitivity and understanding of the intent of the law.

---

<sup>74</sup>*Id.*, para 9. Emphasis added.

<sup>75</sup>*Id.*, para 23.

In *Jaydipsinh Prabhatsinh Jhala and Ors. v. State of Gujarat and Ors*<sup>76</sup>, the Gujarat High Court took note of several provisions under the Act, including the Statement of Objects and Reasons and held that female relatives can be made respondents under proviso to section 2(q) of the Act. In this case, two petitions filed against the proceedings in the lower courts was combined and heard together, in view of the fact that both related to the question of whether women can be respondents under the proviso to section 2(q) of the Act. The application under the Act, in both cases, was filed by the daughter-in-law against the husband and other in-laws, including against female relatives of the husband. In this case the court also examined the law relating to interpretation of a 'proviso' and concluded that it was well settled that the proviso ordinarily would provide for an exception to the main clause in a statutory provision. The Court then referred to the proviso under section 2 (q) and clarified that in an ordinary case, an aggrieved woman could file an application against any adult male with whom she has a domestic relationship but where she is a wife or female in a relationship in the nature of marriage, she can also file against a female relative of her husband or male partner.

The Apex Court in *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade and Others*<sup>77</sup>, considered the definition of "respondent" defined under section 2(q) of the Act of 2005, and held that "although section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint. The Apex Court further held that legislature never intended to exclude female relatives of the husband or male partner from the ambit of complaint that can be made under the provisions of 2005 Act. It is true that expression "female" has not been used in the proviso to section 2(q)

---

<sup>76</sup>(2010) 51 G.L.R. 635.

<sup>77</sup> (2011) 3 S.C.C. 650.

also, but, no restrictive meaning can be given to expression “relative” nor has said expression been defined to make it specific to males only.

Another somewhat contentious aspect of the above-mentioned section 2(q), pertaining to the definition of ‘respondent’ under the Act, is related to the rights of the aggrieved woman to claim reliefs from consanguineous domestic relationships. The definition of ‘respondent’, as any adult male person who has been in a domestic relationship with the aggrieved woman, is wide enough in its scope to implicate members of a woman’s natal family, or even her adopted family.

In *Varsha Kapoor v. Union of India & Ors*<sup>78</sup>, the interpretation of proviso to section 2(q) and its constitutional validity was challenged. A writ petition was filed by the mother-in-law of the aggrieved party before the High Court of Delhi contending that female relatives could not be impleaded under the Act. The facts of the case were that before the trial court, the daughter-in-law had sought reliefs under the Act, alleging various forms of abuse against the husband and other relatives of the husband. The trial court admitted the application and issued notice to the parties, upon which this petition was filed. In the writ petition, it was argued by the petitioner that the expression “a relative” in the proviso would only mean an “adult male person”, since the Preamble to the Act clearly provides that the law has been enacted to provide redressal to women against domestic violence, and as such cannot be used against women. It was also contended that the proviso cannot expand or limit the scope of the main provision for which reliance was placed on the judgment of the Supreme Court in *Dwarka Prasad v. Dwarka Das Saraf*<sup>79</sup>. In the alternate, it was further argued, if relative is interpreted to include female relatives, the same would not pass the test of reasonable classification under Articles 14 and 15 of the Constitution.

---

<sup>78</sup> Writ Petition (Crl.) No. 638 of 2010.

<sup>79</sup>(1976) 11 S.C.C. 128.

To begin with, the court noted the purpose and intent of the law. Reference was also made to the judgment of the Delhi High Court in *Aruna Pramod Shah v. UOI*<sup>80</sup> in which the court upheld the constitutionality of the Act and dismissed the contention that the gender-specific nature of the law was arbitrary. In view of the above, the court sought to segregate the definition of “respondent” under section 2(q) into two independent and mutually exclusive parts: It was held that where the aggrieved party is in a domestic relationship with the other person, such person has to be an adult male person, as per the main provision. Using this provision, any woman, irrespective of her marital status, may seek reliefs under the Act against an adult male person. The applicability of the proviso, however, is limited in nature as it applied only to cases where the aggrieved party is married or in a relationship in the nature of marriage. Only with regard to such a limited and specific class of persons, the definition of “respondent” has been widened to include a relative of husband or male partner. The court reasoned that it is common knowledge that family members of the husband may also join in treating the wife with cruelty, and such family members would invariably include women. Further, it was pointed out that leaving female relatives out of the scope of the Act would mean that the husband or male relatives would ensure that the violence is perpetrated by the female relatives thereby frustrating the object of the law. The court also referred to the provisions of the Act such as sections 19, 21 and 31, from which a clear inference in this regard can be drawn.

The Court dismissed the argument relating to the constitutional validity of the interpretation and observed that the wider scope of rights given to married women to claim reliefs under the Act against both male and female relatives must be understood in view of the fact that the Act was enacted to provide a civil remedy in addition to the criminal provision of section 498 A of Indian Penal Code.

---

<sup>80</sup> *Supra* n. 3.

This judgment of the Delhi High Court is a landmark as to the manner in which it defined the scope of the rights of a married woman as well as for clearly upholding the constitutional validity of section 2(q). It is hoped that the legal position upheld in this judgment would aid in developing a uniform and gender sensitive understanding of the law.

The decisions in the abovementioned case suggest that the courts have begun to develop a more nuanced understanding of domestic violence, recognising that women are not only abused in their roles as wives and daughters-in-law, but can also face domestic abuse as daughters, sisters, mothers, grandmothers, etc. This is, however, an aspect of the law that has not as yet been adequately developed or implemented for the diverse manifestations of violence faced by women within the domestic sphere.

## **7.5 Interpretation of Procedural Requirements**

Procedures prescribed under the law are meant to facilitate a woman's access to speedy and efficacious remedies by giving effect to the substantive right recognized by this statute. The Act is supposed to provide a single window clearance system to the issue of domestic violence. With a view to providing speedy access to justice for women in such circumstances, the Act combines the remedies previously available under a number of civil and criminal laws under a single statute, making it easier for women to access reliefs in single court, through a single legal proceeding. Thus, although the Act is a civil law, it simultaneously allows women to approach criminal courts since they are often more accessible and provide the possibility of quicker justice.

The Act prescribes simple procedures by dispensing with the complex technicalities of civil law to make room for aggrieved women themselves to approach the courts, without the aid of a representative or in cases deserving assistance to be guided by Protection Officers. The Act also mandates that Magistrates should dispose of every application within 60 days from the date of



the first hearing<sup>81</sup> and that courts must grant interim/ urgent orders<sup>82</sup> to help ensure that women facing violence at least have immediate access to shelter, food, protection, and some financial resources even when the case is pending in the court. These ‘fast-track’ procedures have often been challenged on the basis that the case has not followed the requisite legal and technical procedures.

In *Milan Kumar Singh & Anr. v. State of U.P. & Anr*<sup>83</sup>, the husband challenged the application filed by his wife under the Act on the ground that such an application ought not be filed directly before a Magistrate without first approaching the Protection Officer and recording a Domestic Incident Report as per the stipulations of the Act. He also argued that the application was not in the prescribed format as provided in Form II as per the Rules.

The Court dismissed both contentions on the grounds that the provisions of the Act were not accurately interpreted by the husband. The Court held that as the Act was a social legislation, its purpose was to help the aggrieved person and not impose strict procedural requirements. The Court held:

“A plain reading of section 12(1) shows that the aggrieved person can file complaint directly to the Magistrate concerned. This is the choice of the aggrieved person that instead of directly approaching the Magistrate, he or she can approach the Protection Officer and, in case of emergency, the service provider and with their help to the Magistrate concerned.. There is no illegality in directly approaching the Magistrate for taking cognizance in the matter. This is for the Magistrate concerned to take help of Protection Officer and service provider after receiving the complaint provided, if he feels it necessary for final disposal of the dispute between the parties”<sup>84</sup>.

---

<sup>81</sup>Protection of Women from Domestic Violence Act,2005, s. 12(5).

<sup>82</sup>*Id.*, s. 23.

<sup>83</sup>2007 Cri. L.J. 4742, *per* R.N.Mishra,J.

<sup>84</sup>*Id.*,para 7.

The Court further clarified that the Domestic Incident Report therefore, is to be recorded only if the Magistrate or the parties require the assistance of the Protection Officer. An affidavit properly verified attached to the complaint is sufficient enough and the complaint cannot be dismissed solely for the reason of non- attachment of verification note. In its clarification of the proviso to section 12(1), the Court had set a precedent by reiterating that, in view of the purpose of the legislation, procedural rules must not be allowed to defeat substantive rights.

In *Jyotsana Sharda v. Gaurav Sharda*<sup>85</sup>, the Delhi High Court reiterated that an approach, which defeats the substantive rights of the party, must not be adopted. Considering the question of rejection of the wife's appeal by the Sessions Court on the ground that it was time barred, it was stated that courts must not ignore the merits of an appeal on flimsy technicalities. The only consideration that needs to be taken note of in such cases is whether the reason given for such delay is genuine.

In *Amar Kumar Mahadevan v. Karthiyayini*<sup>86</sup> a petition before the High Court of Madras was instituted to quash ongoing proceedings on an application under the Act in a lower court. The following issues were raised regarding the necessity of complying with procedures prescribed under the Act: The service of notice was not in accordance with the procedure prescribed under section 13(1) of the Act namely, that notice was not served by the protection officer and private service was permitted. Further, there was no declaration of service by the protection officer. That the Magistrate had admitted the application without calling for the report of the protection officer as required by the proviso to section 12(1). The Court dismissed both contentions at the threshold. It held that the lower court had made every effort at serving the notice to the petitioner and that directing the private service of notice was in consonance with the procedural mandate under section 28 of the Act and that,

---

<sup>85</sup>Crl. Rev. P. No. 132/2009, Delhi High Court.

<sup>86</sup>MANU/TN/9632/2007.

therefore, a declaration of service by the protection officer is not required. The Court also held that receipt of the protection officer's report was not a condition precedent for taking cognizance of an application under Section 12 of the Act.

This judgment reiterates the fact that, in light of the objective and spirit of the Act, procedural technicalities must not be allowed to act as barriers to a woman's access to justice. In fact, the significance of the judgment lies in the fact that before reaching its conclusion and interpreting the procedural provisions of the Act, the Court examined the intention of the legislature and observed that, as a social legislation, the Act cannot be fettered by the technicalities of procedure and path at the cost of justice, safety and security of the aggrieved woman. The Court held that the purpose of service of notice is to put the respondent on notice and to ensure compliance with the rules of natural justice, which had been fulfilled by the lower court.

Interim orders are routinely challenged on the grounds that a woman has not filed a *separate* application for interim reliefs. For example, in the cases of *P. Chamdrasekhara Pillai v. Vasala Chandran*<sup>87</sup> and *Vishal Damodar Patil v. Vishakha Vishal Patil*<sup>88</sup>, filed before the High Courts of Kerala and Bombay respectively, the husbands approached Courts for quashing the ex-parte interim orders passed in favor of the aggrieved, on the grounds that the orders were illegal since the wife had filed no separate interim application. Rejecting these arguments in both cases, the Courts ruled that there was no need for a separate application for interim reliefs, reiterating that the technicalities of paperwork and applications should not impede the quick delivery of justice to women facing domestic violence.

---

<sup>87</sup>CrI. MC No. 53/2007.

<sup>88</sup>CrI. W.P. No. 1552/2008, 20/08/2008, Bom.

Another common contention has been that an order passed by a Court is invalid if the Protection Officer's<sup>89</sup> report is not submitted before the order was passed. This argument rests on the basis that in the absence of the Protection Officer's report, the court has not followed proper technical procedure and therefore the order is not legal and binding. Once again, this technical contention has been rejected by a number of High Courts across the country, including the High Courts of Madhya Pradesh and Madras<sup>90</sup>In the case of *Nandkishor Vinchurkar v. Kavita Vinchurkar*<sup>91</sup> the Court acknowledged the fact of procedural delays happening when the trial court, who is required to pass an interim order, keeps on waiting to get the report of the Protection Officer or Service Provider, and that the idea of considering the case of a needy person at the interim stage gets actually defeated.

In all of the abovementioned cases, therefore, the Courts suggest that complaints should not be rejected on the basis of technical issues, as the purpose of the Act is to provide a simple procedure, without any formal legal drafting, for women to access justice quickly and effectively.

Despite these rulings, however, technical concerns and procedural issues continue to be the greatest impediment in allowing a woman to access the reliefs prescribed by the Act. Although the Act envisages that an aggrieved person can approach the court directly, without the aid of a representative, in reality women still find it virtually impossible to negotiate the law and its provisions without the aid of a lawyer. Furthermore, although the Act stipulates that an application must be dispensed with within 60 days from the first hearing, in reality this has rarely been possible and cases routinely take over a year to dispose. Since there is no time frame stipulated for appellate

---

<sup>89</sup> Under the Act, a 'Protection Officer' (PO) is appointed by the state government to help an aggrieved woman register her complaint and seek protection. The first step in these proceedings is for the PO to write out a Domestic Incident Report, detailing the instances of domestic violence. The PO also assists Magistrates to implement many of the Act's provisions and to ensure the orders passed by the Courts are properly implemented.

<sup>90</sup>E.g., decisions in *Ajay Kant v. Alka Sharma*, 2008 Cri. L.J. 264 and *M.Palani v. Meenakshi*, A.I.R 2008 Mad.162

<sup>91</sup> Cr. Ap.No. 2970/2008, 5/8/2009, Bom.

proceedings, cases that go into appeal are often dragged out for even longer. Finally, even though many courts have ruled that complaints do not necessarily have to subscribe to a given format and that a Protection Officer's report is not necessary while granting interim reliefs, inconsistent practices are followed in different courts.

Although there have been a number of cases in India, where the petitioner was later abused and even killed by the respondent after a Protection Order was passed, the courts have failed to set any landmark precedents in terms of holding the various functionaries under the Act accountable for *inaction* or a *failure* to provide protection to women. For example, a number of International Courts have held the state directly responsible for a failure to provide protection to women facing domestic violence. This was reaffirmed by the landmark case of *Opuz v. Turkey*<sup>92</sup>, where the European Court of Human Rights held that the Turkish authorities' failure to react to the problem of domestic violence was tantamount to a form of discrimination against women and ordered the state to pay the victim non-pecuniary damages and called for the Turkish government to modify its tolerant attitude towards domestic violence. In the light of an increasing number of women facing continued violence despite the issuance of Protection Orders, the Indian Courts need to keep in mind the state's national and international legal obligations to protect women from violence and hold the state accountable in cases where it fails to protect women from violence.

The Act stipulates that a woman, her minor children, or her major children suffering from physical or mental abnormalities are entitled to monetary reliefs in cases of domestic violence. Although The Act specifically stipulates that the monetary relief granted to a woman should be, "adequate, fair, and consistent with the standard of living to which the aggrieved person is accustomed"<sup>93</sup>, women routinely find themselves having to wage prolonged

---

<sup>92</sup>*Opuz v. Turkey* (European Court of Human Rights, Application no. 33401/02), See Ch.3.

<sup>93</sup> Protection of Women from Domestic Violence Act, 2005, s.20 (2).

legal battles for paltry amounts of maintenance, which aren't even adequate to cover their basic living expenses. This is evidenced in the case of *Madhu Bala v. Pritam Kumar Rao*<sup>94</sup>, where the aggrieved was shuttled from the Trial Court to the Sessions Court and finally to the High Court, when her husband challenged the sum of Rs 3000 that she had been awarded for monthly rent and maintenance by the Trial Court. Although the High Court finally ruled in favor of the wife, it halved the sum awarded to her to Rs 1500 per month.

One of the objections that is sometimes raised in maintenance cases under the Act is that one or more children of the aggrieved person may be 'illegitimate' and it is therefore not the responsibility of the respondent to maintain them. This was one of the objections raised in the case of *Suresh v. Jaibir*<sup>95</sup>. The High Court of Rajasthan stated that the Magistrate might direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief might include, but was not limited to the maintenance for the aggrieved person as well as her children.

Another point of confusion with regards to maintenance applications is whether in awarding any maintenance under section 20 of the Act, the court must also ensure it is in accordance with Section 125 Criminal Procedure Code. The High Court of Chattisgarh ruled decisively against this objection in the case of *Rajesh Kurre v. Safuraba*<sup>96</sup> and clarified that the provisions of the Act are independent and are in addition to any other remedy available to the aggrieved. It was held that competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of section 20 of the Act and the aggrieved person was not required to establish his case in terms of section 125 of the Code. Therefore, it was clarified that a

---

<sup>94</sup>, RLW2009(1)Raj 827.

<sup>95</sup> MANU/PH/1180/2008, 9/9/2008, Pun.

<sup>96</sup> MANU/CG/0119/2008, 11/11/2008, CG.

maintenance claim under the Act does not need to be established in terms of the Criminal Procedure Code.

In *Neetu Singh v. Sunil Singh*<sup>97</sup> in an appeal before the High Court of Chhattisgarh, the aggrieved woman challenged the order of a Family Court dismissing her application filed under section 12 of the Act in a pending proceeding. The question that arose for determination was whether the family court was correct in dismissing her application, given the statutory mandate provided under section 26(1) of the Act whereby, “any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act”. The Court upheld the right of an aggrieved person to file an application under the Act in any pending proceeding, with the caveat that such an application must be filed under Section 26 of the Act, rather than under Section 12 of the Act as was done in the instant case.

This judgment provided clarification with regard to the procedure to be followed in using the law. While addressing an almost routine procedural issue, the Court reiterated the fact that filing an application under Section 26 of the Act had been provided as an option that may be exercised by the woman in order to facilitate her access to the justice system.

## **7.6 Procedure in Invoking Appeal Provisions**

In *Smt. Maya Devi v. State of NCT of Delhi*<sup>98</sup> the judgment by the High Court of Delhi held that procedure for appeal under the Act must first be used before approaching higher courts through writ or appellate jurisdictions. An application seeking a residence order was filed under the Act before a Magistrate’s Court. The Magistrate passed an interim order directing the

---

<sup>97</sup>A.I.R 2008 S.C. 360, *per* L.C. Bhadoo, J.

<sup>98</sup> MANU/DE/8716/2007

aggrieved person not to be dispossessed from the shared household pending final disposal of the application. This writ petition for quashing the interim order was filed before the Court under Article 227 of the Constitution. The Court dismissed the writ petition and held that, “an order passed by the Magistrate under this Act has an alternate relief under the Act itself which has not been availed of by the petitioner in the instant case.” The court stated that where a right or liability is created by a statute which gives a specific remedy for enforcing it, the remedy provided by that statute only must be used. A person may approach the higher court under any other provision only after the specific statutory remedy has been exhausted.

This decision comprehensively laid down the procedure with regard to appeals against any order passed under the Act. The High Court had laid down a ‘good practice’, which ought to be followed by other courts in order to avoid undue hardship to the aggrieved person. If the other party is allowed to approach higher courts without first exhausting the statutory remedies, it will lead to the negation of the rights of the aggrieved person. Thus, this judgment is an indicator as to gender-sensitive attitude of the Court in addressing the issue of domestic violence.

### **7.7 Retrospective Operation of the Law**

*In Sarvanakumar v. Thenmozhi*<sup>99</sup> High Court of Madras was confronted as to the determination on the question of maintainability of petition under the Act on the grounds that the acts alleged in the petition took place before the commencement of the Act. In this case, the wife had filed a petition under the Act alleging continuous dowry harassment and that she had been thrown out of the shared household with her child in 2006. The Court held that acts committed prior to the commencement of the Act can be the basis for filing an application under the Act. The Court categorically held that although the alleged acts took place before the Act came into force, since the wife and child

---

<sup>99</sup>MANU/TN/9828/2007



continue to remain dispossessed from the shared household; the act of domestic and economic abuse is still continuing and shall, therefore, attract liability under the Act. It was affirmed that being a beneficial legislation, technicalities could not stand in the way of the Court entertaining such applications. Through this notable decision the Court recognized the reality that domestic violence is an ongoing, recurrent phenomenon and that, while the cause of action may have arisen prior to the enforcement of the Act, the abuse is deemed to continue until the aggrieved person is restored to a position of safety from where she can enjoy her legal entitlements.

The court addressed this issue in *Shyamlal and Ors. v. Kantabai*<sup>100</sup> by pointing out that section 23 of the Act does not provide for punishment to the respondent for commission of domestic violence but merely allows the court to pass an interim order in favour of the petitioner. In the instant case, the Court held that since the criminal penalty under the Act was passed only on violation of an interim order, which was only possible once the Act came into force, the question of retrospective operation of the law could not arise. Hence, it was decided that a petition under the Act is maintainable irrespective of whether the acts of domestic violence were committed before the Act came into force or the aggrieved person was not living with the respondent at the time of its coming into force.

What is particularly significant about this decision is that the Court sought to undertake a constitutional analysis of the issue of retrospective operation based on the principle of equality enshrined therein. Using the framework of reasonable classification, the Court observed that there could be no reasonable classification based upon an intelligible differentia between the women who are living with the respondent on the date of coming into force of the Act or who are subjected to domestic violence after coming into force of the Act. A similar principle was applied in case of a woman who was living

---

<sup>100</sup>II (2009) D.M.C. 787.

with the respondent in the same shared household on the date of its coming into force and those who have been forced to leave the shared household but were still in a domestic relationship. Demonstrating sensitivity to the vulnerabilities faced by women, it was held that not only would denial of the right to claim under the Act would be a violation of the constitutional guarantee of equality but would also allow the respondent to take advantage of his own wrong, and deny such women the benefit of the provisions of the Act.

The question of whether the Act has retrospective operation is squarely situated within the understanding of nature of domestic violence, which is not an isolated act of violence but forms part of a pattern of abuse that may, at the same time, be physical, emotional, economic and sexual. It must be noted that the debate regarding retrospectivity of the law arises because of its quasi-criminal nature. In determining this issue therefore, courts have very often relied upon the intent of the law, the definition of domestic violence therein and the general legal principles relating to retrospectivity.

Another case which raised the issue of continuing violence and retrospectivity is that of *Kishor, S/o Shrirampant Kale v. Sou. Shalini, W/o Kishor Kale, Master Shantnu S/o Kishor Kale and State of Maharashtra, through P.S.O. Rajapeth Police Station*<sup>101</sup> The issue before the Bombay High Court was whether an application under the Act, which was filed 15 years after the parties started living separately and where they had very little communication, could be considered to be maintainable. On examination of the contentions of both parties and provisions of the Act, the High Court held that since there had been no contact or communication between the parties for 15 years and no proximity of an act of domestic violence to the date of filing application under the Act could be shown, the case against the husband was not maintainable and would constitute an abuse of the process of law. The court relied on the fact that since the husband was already paying the amount of

---

<sup>101</sup>2010 (112) Bom LR 1398.

maintenance granted under section 125 Criminal Procedure Code, the aggrieved person could make a demand for enhancement and on any deprivation, prohibition or restriction upon such demand under section 125 Criminal Procedure Code and not under this Act.

This judgment of the Bombay High Court was clearly based on the particular facts of the case and cannot be taken as laying down a principle of law or adjudicating upon a specific provision of the Act. However, in so far as the court based its conclusion on the fact that because there was no communication or contact between the parties, no proximate act of domestic violence could be alleged, it must be mentioned that the fact of desertion continued. As was rightly contended by the aggrieved person desertion itself is a form of economic abuse under the Act. Hence, irrespective of any communication or contact, the fact of continued desertion is sufficient to invoke the provisions of this Act.

In *Mrs. Savita Bhanot v. Lt. Col Bhanot*<sup>102</sup>, the Delhi High Court considered whether an application under the Act was maintainable where the allegation was with regard to domestic violence, including being forced out of the shared household, which took place before the Act came into force. In the proceedings filed by the petitioner against her husband before the trial court, it was alleged that she was forced to leave her shared household in 2005. The wife sought a residence order to allow her to live in her permanent matrimonial home since the shared household was a government accommodation. The wife appealed against the order passed by the Magistrate, which was dismissed on the ground that the cause of action arose before the Act came into force.

On the issue of retrospective operation of the law, the Court made a clear distinction between a criminal law and a law such as the Act where the issue of criminal penalty arises only on violation of the court orders. Based on this, it was concluded that the dates on which the acts of domestic violence

---

<sup>102</sup>(2010) 158 P.L.R 1.

were committed has absolutely no bearing on the matter. Similarly, it is absolutely immaterial whether the 'aggrieved person' was living with the respondent, on the date of the commission of the offence, or not. The use of the words 'is or has been in a domestic relationship' in the definition of aggrieved person under the Act was cited as further substantiation of the fact that the parties need not have lived together on the date of coming into force of the Act in order to seek reliefs. The Court further held that this does not amount to breach of Article 20(1) of the Constitution. While raising assumptions & presumptions, the Court further went on to say:

“There is no difference between the women who were subjected to domestic violence before 2005 and those who were later, as any differentiation would tantamount to denying the right of equality before law guaranteed to all citizens by the Constitution. Any discriminatory treatment to women in either category would be violative of their constitutional right guaranteed under Article 14 of the Constitution”.

Marking a distinct departure from other rulings of district courts in this behalf, that if the alleged acts of domestic violence have occurred before the Act was notified, they would not be entertained by the protection officers, this decision of the Delhi High Court adopts a beneficial construction/interpretation, and held that legislative intent of providing succor to women who are harassed at the hands of their husbands and their in-laws, should be taken into consideration whenever construing/interpreting the Act. But criticism was raised against the decision that this kind of interpretation runs contrary to all established norms of fairness and no justification/rationale could justify a concept as legally unsound as this.

In India without using the expression 'ex post facto law' the underlying principle has been adopted in the Article 20 (1) of the Indian Constitution in the following words: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as

an offence, nor be subjected to a penalty greater than that which have been inflicted under the law in force at the time of commission of the offence.”

Hence it is the settled position that any law that has penal repercussions, is to be applied prospectively and the departure only be allowed in rarest of the rare cases, in instances morally repugnant or involving grave moral turpitude. The right to protection from retroactive criminal law is well recognised throughout the international community<sup>103</sup>. The Court in the instant case has adopted a retributive approach of punishment and to punish retrospectively. It reflects how a rule as basic as this, relating to retrospectivity, can be circumvented in the garb of protection to women, and runs contrary to various international instruments and Article 20(1) of the Constitution of India.

## **7.8 Effectiveness of Counseling Procedure**

*In T. Vineed v. Manju S. Nair*<sup>104</sup> the appeal that came up before the High Court of Kerala deals with the issue of counseling as stipulated under the Act. The facts in brief are that the parties, who had a child from their marriage, were estranged. The wife initiated proceedings under the Act, while the husband sought enhanced visitation hours with the child, who was in its mother's custody. The parties had multiple litigations pending between them and the wife had also initiated divorce proceedings on the ground of cruelty. In view of the worsening relations between the parties and their dispute over child custody, the Court appointed a conciliator on the very first day of proceedings to see whether an amicable settlement could be reached. Subsequently, the parties agreed on a settlement with regard to child custody and other matters

---

<sup>103</sup> As early as 1651, Hobbes wrote: No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law. This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it: ... shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

<sup>104</sup> 2008 (1)K.L.J. 525.

and a mutual consent divorce were decreed as part of the judgment. Following these successful negotiations between the parties, the Court held that the attempt in matrimonial cases must be first to exhaust the option of court-mediated settlement before beginning legal proceedings.

The intentions of the Court to ensure an amicable parting of ways where the matrimonial relationship has completely broken down, to discourage multiplicity of litigation and to protect the interests of children is to be appreciated. At the same time, however, caution must be exercised in taking the view that conciliation is the first and most viable approach that the Court should take before initiating legal proceedings. On the facts of this case, a mutually agreeable settlement through conciliation was an appropriate strategy, but in another case where the issue at hand is domestic violence, an approach prioritizing conciliation could adversely affect the safety and security of the woman facing violence. As no ground playing level can be ensured and a fool proof mechanism cannot be resorted to it appears that too much reliance on conciliation can become counter-productive. It must be emphasized that the provision on counseling under the Act has been specifically drafted to ensure that if the aggrieved woman so desires, the Court can refer the parties to counseling for a mediated settlement. However, the Act specifically provides for civil reliefs in the form of protection orders to ensure that the woman's safety is not compromised and that she approaches such negotiations from a position of equality. Hence, where there are allegations of domestic violence, there is a need to exercise some caution before recommending that settlements through conciliation ought to be the standard practice in all matrimonial disputes.

## **7.9 Judicial Interpretations-An Analysis**

The Act recognises the right of a woman to be free from all forms of violence by providing a comprehensive definition of domestic violence, which includes physical, sexual, verbal, emotional, and economic abuse. Section 3 of

the Act defines ‘domestic violence’ as any act, omission, or commission that harms or injures or has the potential to harm or injure a woman or child. In theory, the law treats verbal, emotional, economic, sexual and physical abuse as equally serious offences. In reality, an analysis of case law on domestic violence demonstrates that the courts have rarely taken generally action in cases of verbal or emotional abuse, unless it is accompanied by some form of physical abuse.

The judiciary’s response in cases of economic abuse (deprivation of resources, alienation of assets, restricting access to facilities, etc.) has been positive to some extent. The deprivation of financial resources is a form of violence against women. However, there have been few noteworthy attempts to provide any real *redress* in instances of economic violence. With paltry amounts awarded as maintenance and in the absence of a clear-cut law on a woman’s matrimonial property rights, in effect the domestic violence act does little more than provide statutory recognition to economic violence as a form of domestic violence.

The following discussions on cases dealt under the Act aims to analyse judicial pronouncements regarding domestic violence and related women’s rights issues. While many judges have not hesitated to give full effect to the provisions of the Act, there have been decisions which have conservatively interpreted what are prima facie liberal provisions. There have been a significant number of judicial decisions which have challenged existing notions of patriarchy while looking at “the woman question” and have delivered judgments which granted relief to women at a time when there were no legislations which provided any remedy. Further, the judiciary has often chosen a policy of non-interference while dealing with cases relating to violence against women since they perceive such matters to be in the private domain. Given this background, the best argument along with the Act in place, is that what is needed is a radical change in the judicial mindset and recognition of the fact that ‘personal is political’.

Although the Act is still a nascent legislation, Courts are interpreting this law. The constitutional validity of the Act, which was challenged on the ground that it is gender-specific, has been upheld, and is perhaps conclusively decided, through the 2009 judgment of High Court of Chennai in *Dennison Paulraj's case*. An analysis of judgments indicates, however, that on the issue of whether or not the term 'respondent' includes female relatives of the husband / male partner, the judicial verdict is divided. The Supreme Court judgment in *Batra v. Batra*, which narrowly interpreted the term 'shared household' to deny a woman a right to residence in her in-laws' house which was her matrimonial home, has unfortunately failed to interpret the Act in accordance with its objective of preventing the dispossession of a woman challenging domestic violence. This has impacted subsequent High Court judgments in varied ways. While some High Courts have followed the judgment to restrict the right to residence, others have distinguished on the basis of facts of the case before them, to grant residence rights in favour of the aggrieved woman. Courts have also been proactive in ensuring implementation of the Act.

A peripheral reading of the above judgments gives an impression that the Act has received much appreciation and it has effectively protected the rights of the woman victims but the contrast remains glaring. The cases analyzed leads to a conclusion that most of the rulings are within the context of matrimonial relationships and woman is seen only through the lens of being a wife alone. Cases are decided based on the specific factual circumstances. Very rarely cases have come up dealing with the domestic violence perpetrated to woman within her natal family. So the Act is mainly construed and understood by the public as being a legislation intended to promote matrimonial discords. A majority of rulings remain either against the woman, or grant insufficient reliefs with no broad ideological conception of real life experiences and women's rights as human rights. Although the preamble of the Act recognizes



that domestic violence is undoubtedly a human rights issue, the Act has not yet succeeded in building a solid foundation.

.....✿.....

## THE EMERGING ISSUES AND CHALLENGES

Contents	8.1 <i>Conceptual Dichotomies and Disarrays in the Act</i>
	8.1.1 <i>The Concept of Sexual Abuse Versus Marital Rape Immunity in India</i>
	8.1.2 <i>The Concept of Right to Residence Versus Status of Matrimonial Property to Women in India</i>
	8.1.3 <i>The concept of Relationship in the Nature of Marriage Versus Rule of Monogamy</i>
	8.1.4 <i>The Complaint System Versus Restorative Justice to the Victims</i>
	8.1.5 <i>Libertarian Ideals Versus Utilitarian Goals</i>
	8.1.6 <i>Reliefs Envisaged Versus Restorative Justice to Victims</i>
	8.2 <i>Procedural Dichotomies and Deficiencies in the Act</i>
	8.3 <i>The Act- A Western Apism</i>
	8.4 <i>An Attempt to Make Man Moral by Legislation</i>
	8.5 <i>Apathy of the Society at Large</i>
	8.6 <i>Abuse of the Act</i>
	<i>Conclusion</i>

Domestic violence erodes confidence in the rule of law, the very foundation of civil society. The law essentially performs a normative function, where it indicates what behavior is unacceptable. The Protection of Women from Domestic Violence Act, 2005 has put in place the norm that violence against women is unacceptable and the norm is backed by state sanctions. Violence within the home is a phenomenon that has achieved recognition as socially unacceptable behavior, whether as crime, pathology or violation of human rights. The international developments that led to the passing of the Act in India are quite applaudable. But the fact remains that the international human rights law fails to guarantee and enforce rights of women as family members because its procedural focus is on the rights of individuals. Coming to India our approach towards gender and sexuality is circled around the family and cohesiveness of familial relationships. Even the best of laws become infructuous if they go against popularly held beliefs of right and wrong. A law that addresses violence in the home raises a number of questions, implicitly or explicitly challenging received ideas about the family as social structure and ideological system in India.

After analyzing the pros and cons of the Act and the judicial interpretations three important questions are posed in this chapter. An attempt is made to answer these specific questions.

1. Does the Indian society tolerate the legal intervention into the so called sacrosanct “familial space”?
2. Does the Act integrate or does it disintegrate the family relationships?
3. Does the Act provide restorative justice to the women victims?

An ideal law on domestic violence, according to the International mandates, ought to be based on three principles of intervention: victim safety, offender accountability, and changing community attitudes to achieve zero tolerance. Laws reflecting this principle identify the system - not the victim - as the problem and the focus of change. A country like India that prioritizes the preservation of the culture and the values within the familial relationships ought to look up at the issue of domestic violence in a totally different manner. Any legal system can survive only in a social, political and economic context, and not in a vacuum, which brings a perplexing range of cultural and ideological factors to bear on the analysis of and exposition of legal concepts. In India we give priority to the sanctity and permanence of marriage as a social institution. Preservation of family is the core content of cultural ethos in India. At the same time domestic violence is acknowledged as a social evil and stems from the idea that women in India have been historically subjugated and are victims of violence. The challenge therefore sets in as to how to harmoniously reconcile the idea of family preservation and the zero tolerance to violence within familial relationships in the Indian cultural scenario.

### **8.1 Conceptual Dichotomies and Disarrays in the Act**

The reconciliation process is to address the conceptual dichotomies in the legislation. The main dichotomies analysed are mainly in five areas.

### **8.1.1 The Concept of Sexual Abuse Versus Marital Rape Immunity in India**

Marriage as a social institution in India is best conceptualized and understood as union of husband and wife which lasts long. The institution implies to have consented sexual intercourse between the persons contracting a lawful marriage and hence there is no traditional concept of rape in marriage. The doctrine of marital rape was incorporated into the Indian legal system by virtue of the exception to section.375 of the Indian Penal Code which says that ‘sexual intercourse by a man with his wife (the wife not being under fifteen years of age) is not rape’. Section 376(1) of IPC provides a nominal punishment if the wife is between twelve to fifteen years of age or is living under a decree of judicial separation. The only two categories of married woman covered by the legislation is firstly those being under 15 years of age and secondly those living separately from their husbands under a decree of judicial separation. Other than these two categories, all other married woman are denied protection under section 375 of IPC<sup>1</sup>. Offences relating to the above crimes are non-cognizable and bailable sending out the message that they are lighter offences. The problem of marital rape goes much beyond the issue of domestic violence and the Act does not deal with this. By providing civil remedies to a woman subject to domestic violence, the Act undermines the serious nature of the problem of marital rape. The concept of ‘sexual abuse’ in the Act perpetrated within the marital ties relates to the concept of bodily privacy, which is an alien concept to Indian marital culture. A woman hardly takes a stand against the sexual desire or aggressive characters of her husband. A sensitization on this issue can lead to criticisms from different quarters as trying to destroy the marital relationship/unit in India.

---

<sup>1</sup> Sudhanshu Roy and Iti Jain, “Criminalizing Marital Rape in India: A Constitutional Perspective” Cri,L.J 83 (2008).

A bare reading of the Act gives the impression that when a woman is sexually abused against her will, the offence of sexual abuse is committed. To raise an argument against the husband or to do a job independently against the wishes of the husband in Indian family are uncomfortable discussions and are socially construed as offences. To counter argue this criticism one need to have a strong culture of tolerance and respect for the status of women which is completely lacking in India. But how far an Indian woman who doesn't want to sever her marital bond for the sake of her children will come forward with the complaint of sexual abuse perpetrated by her husband is perplexing. The way in which the concepts of autonomy and privacy are construed by the west cannot be made applicable to Indian context. Indian cultural traditions attach an extremely high value to decisional autonomy for males. As Robin West has rightly remarked- 'the marital rape exemption creates, fosters and encourages not marital intimacy, harmony, or reconciliation, but a separate state of sovereignty ungoverned by law and insulated from state interference'<sup>2</sup>. The Act rightly leaves that space of bodily privacy of the married woman vacant.

### **8.1.2 The Concept of Right to Residence Versus Status of Matrimonial Property to Women in India**

Marriage in India has never been conceived as an economic partnership. There exists no concept of joint property or ownership over the properties acquired after the ceremony of marriage unlike to that what it exists in the western liberal democracies. Indian patriarchal culture has always been reluctant to recognize the economic contributions of the woman within a familial set up<sup>3</sup>. The idea of woman surviving under the strength of temporary civil protection orders as envisaged in the Act in the atmosphere of hostility perpetrated by the man and his relatives with no recourse to safety and security

---

<sup>2</sup>Robin L. West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment", 42 F.La.Rev. 40,71 (1990).

<sup>3</sup> See for discussions on the topic. Flavia Agnes, "Matrimonial Rights and Obligations" in *Marriage, Divorce and Matrimonial Litigation*, Vol. II Oxford University Press, New Delhi 263 (2011).

is unimaginable and seems to be impossible in the Indian cultural context. The civil protection order to be granted by Magistrate's court in India which is already pre-occupied with petty criminal offences appears to be a paradox. The utmost care and sensitivity required in dealing with delicate familial issues having long term implications in the familial relationships are casually disposed through the court that is ill-equipped and least sensitized on the matter. The existing realities and the ideals conceived by the Indian society acts as a stark contradiction for the easy assimilation of the concept of right to residence to a woman who is a victim of domestic violence<sup>4</sup>. The need of the hour is the thorough review and amendment, where necessary, of all other relevant laws to ensure that women's human rights and the elimination of violence against women are consistently incorporated.

### **8.1.3 The Concept of Relationship in the Nature of Marriage Versus Rule of Monogamy**

The Indian Penal Code makes bigamy punishable<sup>5</sup> and the over-enthusiasm shown in the legislation to imbibe the concept of relationships in the nature of marriage seems to be contradictory. The invalidity of marriage can no longer be used as defence by the man to dispossess or deny maintenance to the vulnerable women. The argument posed by the promoters of the Act that the law takes care of the limited remedies of women who have fallen prey to unscrupulous males by entering into bigamous marriages does not appear to be reasonable. The western concept of live-in-relationships/civil partnerships are often equated and understood as the basis of the provision of *relationships in the nature of marriage* under the Act. The law can never play the role of

---

<sup>44</sup> Amartya Sen's Capability enhancement and approach as to women's economic status supports this view. Ownership of property by women or promotion of employment opportunities can reduce her tolerance to violence. Researcher is referring to the discussions in Bina Agarwal and Pradeep Panda, "Toward Freedom from Domestic Violence :The Neglected Obvious", 8(3) *Journal of Human Development* 364-378 (2007).

<sup>5</sup>Indian Penal Code, s.494

cultural conscience in the Indian context and the same idea is conveyed when Elizabeth Schneider remarked that:

“Law is made, and operates, in many sites and in many different ways; it does not exist outside culture but is reflected in popular consciousness, where it takes on a wide range of cultural forms and produces cultural meanings.”<sup>6</sup>

The western concept appears to be completely incongruous to the Indian cultural setting. The lack of clarity in judicial interpretations also supports this point<sup>7</sup>. The debate over the topic pertains to the effect that whether the Act will open up flood gates of ‘sexual promiscuity’ or redeem the Hindu marriages from the yoke of monogamy<sup>8</sup>. Another emerging challenge is how to reconcile the conflict between the interests of the legally married woman and the woman claiming under the relationships in the nature of marriage in the Indian cultural setting. In this context, the Indian social and cultural notions of sexual morality raise much uncomfortable questions.

#### **8.1.4 The Complaint System *Versus* Restorative Justice to the Victims**

The complaint system envisaged by the Act<sup>9</sup> defeats the very purpose of the Act. Easy accessibility to law or making the law against domestic violence ‘user friendly’ through the complaint procedure becomes antithesis and a threat to her peaceful survival in the matrimonial home and her marital relationship. A woman who sets the process in motion as envisaged by the Act is likely to suffer the consequent evil of rupture in marital ties. The rights guaranteed

---

<sup>6</sup> Debora Tuerkheimer, “Recognising and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence”, 94(4) *Journal of Criminal Law and Criminology* 3 (2004)

<sup>7</sup> *Supra*, Ch.7.

<sup>8</sup> Flavia Agnes, “Domestic Violence Act-A Portal of Hope”, 4(4) *Combat Law –A Nation on Dialysis* 8 (2005).

<sup>9</sup> Protection of Women from Domestic Violence Act, 2005, ss.9,14.

under the Act thus become inimical to the safest survival of woman in the family.

The field of matrimonial discord or familial disputes are areas covered under the so-called 'decision making by the individuals'. It is an aspect of right to privacy or the 'right to be let alone'. But when violence surpasses a threshold limit affecting the developmental process of the country the State claims its authority to intervene in such familial space. The threshold limit of violence is a construct of the societal attitudes to the issue concerned. This again raises the debate as to the level of threshold limit in violence in a familial space. The level of threshold limit gets interpreted by the judicial decisions. A woman claiming reliefs under the Act such as protection order, restraining orders etc., will be discouraged and dominant relationships within the familial space makes the decisions in such an environment leading to the ostracisation of the victim from her matrimonial home.

### **8.1.5 Libertarian Ideals Versus Utilitarian Goals**

One of the key challenges in the area relating to legislation on domestic violence is reconciliation between the human need and the social need. An optimum balance is to be struck between individual autonomy within the familial relationships and on the other side preserving accountability to the 'rule of law'. Libertarianism<sup>10</sup>(often viewed as a progressive view)and utilitarianism<sup>11</sup> have emerged as two dominant schools of thought in response to this dilemma.

---

<sup>10</sup> It propagates the theory of live and let live and advocates maximizing individual rights and minimizing the role of the state. The key assumption behind libertarian thought is that formal institutions such as governments, formal religions and social organizations are not only poor managers of resources, but are also fundamentally inimical to the autonomy of the individual, the most fundamental libertarian value. The best-known economic, literary, and philosophical exponents of American libertarianism are Murray Rothbard, Ayn Rand and Robert Nozick.

<sup>11</sup>Utilitarianism propagates the theory that an action is right in so far as it promotes happiness, and that the greatest happiness of the greatest number should be the guiding principle of conduct. The most famous exponents of utilitarianism were Jeremy Bentham and J. S. Mill. In *An Introduction to the Principles of Morals and Legislation* (1789), Bentham introduced his "utilitarian" doctrine: mankind has two masters, pleasure and pain; nothing is good except



Keeping in tune with the traditional concept of undisturbed privacy and sanctity of family life, the induction of law into family relationships has been opined by the judiciary thus:

“Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art.21 nor Art.14 have any place. In a sensitive sphere which is at once intimate and delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond<sup>12</sup>.”

According to the libertarian philosophy, personal autonomy cannot be restricted by the State i.e., the state control or action over the extent of freedom of the individuals are to be kept at a minimum level except to the extent that an exercise thereof limits the liberty of other individuals. The legal intervention into the private territory of family is viewed with skepticism. On the other hand, Utilitarianism is founded on the principle that any State action ought to be for the “greatest good of the greatest number” and therefore gives primacy to the interests of the society/community at large. It justifies the legal intervention in the familial space to an extent. The conflict between these two theories forms one of the basis of the debate surrounding domestic violence.

Mere enactment of a law in the nature of Protection of Women from Domestic Violence Act, 2005 cannot or is not likely to change the mindset and attitudes of the people in a country. How the law has been acknowledged and assimilated into the national social fabric of the society is the root concern. The domestic violence debates in the developed countries like United States and

---

pleasure, or bad except pain. To advance pleasure is the aim of human nature, and therefore the goal of every person; by extension, it should be the goal of society as well. But since individual interests clash within every society, the aim of legislation and government should be to harmonize these clashing interests for the good of the whole.

<sup>12</sup>*Harvinder Kaur v. Harmander Singh Choudhary*, A.I.R. 1984 Delhi 66.

United Kingdom for instance has reflected in the community co-ordinated crisis intervention and safety nets strategies to help the survivors from the menace. The egalitarian ideas of personal autonomy and freedoms rule the legal regime in such jurisdictions. The limits imposed by the state are viewed as violation of the right to personal autonomy. The criminal mandatory arrests and 'no-drop' prosecution policies are the methods relied by such developed countries to tackle the problem of domestic violence. These methods stand as stark contradictions to the specific cultural set up in our country.

Indian society is hierarchically organized. According to Amartya Sen<sup>13</sup>, the India born Nobel Laureate in Economics, in his book *The Argumentative Indian: Writings on Indian History, Culture and Identity* has described the culture of modern India as a complex blend of its historical traditions, influences from the effects of colonialism over centuries and current Western culture---both collaterally and dialectically. Community gender norms tacitly sanctioning domestic violence creates a culture of silence. It is a strongly held belief in India that the family honour and marriage as a social institution should be preserved at any cost. This in turn compels women to remain silent on the issue and live tolerating abuse. Indians lean towards the relational world view and harmony and balance within the system. Sanctity attached to marriage and family as inviolable institutions of Indian society appears to be contradictory when stay away orders are guaranteed through the Act. The restraining orders passed by the court in the eventuality of violence, leads to counterproductive results. The perpetrator/abuser is removed from intimate settings and thereby the victim is emotionally displaced and is deprived of important linkage to herself. In short the Indian society does not accept/tolerate the legal intervention into the familial space as it deviates from its culture and ideology of family as an integral unit of society. There exists a wide gap between the

---

<sup>13</sup>Allen Lane Publishers, Penguin Books. June (2005).  
<http://en.wikipedia.org/wiki/CultureofIndia>. Last visited on 12 th June.2012.

disease to be treated and the remedy forwarded by the legislation. Instead of integration of family units, disintegration is the outcome.

### **8.1.6 Reliefs Envisaged *Versus* Restorative Justice to Victims**

Domestic violence is one of the most difficult types of crimes to investigate and prosecute due to its peculiar nature<sup>14</sup>. A strict adherence to criminal strategies are harmful in dealing with the issue. Criminalization of domestic violence was an important step in changing societal views towards violence in relationships. The special bondage and dependency she shares with the perpetrator is a unique feature. These facts are not fully incorporated into a criminal justice policy. Minor children of the couple may present significant issues with regard to their protection and often the victim's desire for an intact family structure. Financial ties that make some victims critically dependent on abuser's financial support for minor children, a factor at odds with strict punishment models<sup>15</sup>. The civil protection orders also play a limited role due to the specific nature of violence unleashed between the once loved ones. They could neither guarantee any reduction in the extent of such violence, nor could they expedite the justice delivery system in India. The existing criminal and civil remedies cater to the physical and economic harm to victims but fails to account for psychological harm from intimate members which may last long after physical injuries have healed<sup>16</sup>.

Counseling, under the Act, continues to be a grey area. Counseling, as approached by the Act again takes the cases back to the fate of what is being reiterated in the form of counseling in family courts earlier constituted. The whole objective of counseling as envisaged in the Act is to get the abusive partner to give an undertaking/assurance that there will be no further domestic violence being perpetrated from his/her side. The need for this form of counseling would involve the re-establishment of the basic trust and the sense

---

<sup>14</sup> *Supra* Ch.1.

<sup>15</sup> [www.ncjrs.gov/pdffiles1/nij/grants/181427.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/181427.pdf). Last visited on 31 st January 2013.

<sup>16</sup> *Supra* n.6, p.969.

of safety to be given to the women who faces violence. A victim cannot be assured safety within the domestic space after the restraining or protective order is passed by the courts. Most victims in Indian context, face further traumatization both through the system of restitution and justice as also from family members and society at large. The qualifications required of a counselor to deal with such delicate issue are not prescribed by the Rules. The Rules talk about certain persons who are not eligible to be appointed as counselors<sup>17</sup>. Such a negative connotation cannot serve the purpose here in this context.

Patrilineal and patrilocal nature of marriages that is prevalent in Indian society make the position of women more vulnerable. Hence the option to come out of a violent relationship is threatening as the victim with no marketable skill has no way to earn a living. It is in this context the injustice of quick-fix compromises negotiated by gender insensitive mediators has to be taken into consideration<sup>18</sup>.

The lack of trained counselors to deal with such types of delicate familial issues ought to be ensured or else there is likelihood of women victims falling prey to the pressure and disempowerment process. The counselors require a multi-faceted approach/skills to deal with the issue. A total absence of set qualifications in the Rules required of a counselor clearly brings out the hollowness of the purpose of the Act. The counseling provision as envisaged in the Act provides skepticism as to whether it is provided for integration or for disintegration of a family unit. Hence to decide as to endure with abusive familial relationship or proceed to break up from an abusive relationship again falls into the field of right to privacy or individual autonomy. Both situations

---

<sup>17</sup> Protection of Women From Domestic Violence Rules , 2006,R.13 (2): The following persons shall not be eligible to be appointed as Counselors in any proceedings, namely:-

(i) any person who is interested or connected with the subject matter of the dispute or is related to any one of the parties or to those who represent them unless such objection is waived by all the parties in writing.

(ii) any legal practitioner who has appeared for the respondent in the case or any other suit or proceedings connected therewith.

<sup>18</sup>[http://www.napsipag.org/PDF/NEENA\\_JOSEPH.pdf](http://www.napsipag.org/PDF/NEENA_JOSEPH.pdf). Last visited on 9th February 2010.

appear to be traumatic to a woman living in remote villages of Indian society when compared to a woman who is accustomed to the *metro-living*. The woman survivor in both the situations stands devoid of restorative/restitutive justice. Then the challenge comes in as to who is the one that the Act is trying to assist and in what way?

The methods of dialogues, conferencing and mediation which are a component of the restorative justice paradigm, fail to address the nuances of the offence of domestic violence and therefore, stand impotent to impart the infinitive benefit which they do so while dealing with other categories of crimes. Resorting to alternate dispute resolution in cases of domestic violence in a way is accepting the failure of justice delivery system. Compromises arrived are negotiated solutions and it can never mean propagation of human rights culture.

The adversarial system that relates to notion of justice and understandings of power fails in this front and counseling as a form of alternate resolution mechanism that promise equal participation never provides a level playing ground between the players in the Indian context. The major focus of counseling or mediation on future rather than past behavior and tendency to avoid blame denies the victim's experiences of violence and de-legitimizes her right to talk about it. The nature of remedies provided under this law is temporary in nature. The permanent solution still remains within the framework of matrimonial laws under which a woman would have to decide on whether or not to continue in the relationship. Re-focusing legal policy away from mediation and towards strategies that truly promote victim empowerment would assist in returning to domestic violence victims what is rightfully theirs, control over their activities, their bodies and their ability to count in the familial set up in India.

## **8.2 Procedural Dichotomies and Deficiencies in the Act**

One of the major deficiencies apparent within the legislation is the conflict of jurisdictions between different courts. The new Act seeks to bring domestic

violence within the ambit of civil law with objectives markedly different from those of a family court. The purpose and significance of a civil law on domestic violence, the first of its kind in the country, lies in its attempted circumvention of personal law regime. Personal laws most closely regulate women's status and entitlements within the family and since they are dictated by religious law, they have been extremely resistant to reform<sup>19</sup>. The new law is envisaged as a way to conceptualize how restraint and restitution can be achieved. The objective of the Act specifically projects the need for more effective protection to Indian women from domestic violence. This very objective of the Act differentiates itself from the predominant concept of the Family Courts Act, 1984 which is meant for the preservation of the family. Taking cue from the 'Model legislation' as envisaged by the UN Rapporteur on Violence Against Women, the ideal legislation globally acceptable to combat the issue of domestic violence projected is the legislation that combines both criminal and civil remedies. Reflecting the international consensus about the nature of legal intervention into domestic violence, the Government of India has also incorporated the new Act on domestic violence that provides for a blend of civil and criminal remedies. The cases on domestic violence under the Act are reverted to the Magistrate's court thereby overburdening the criminal court proceedings and in a way it implicitly acknowledges failure of the Family Court's working.

The reliefs provided under sections 18, 19, 20, 21 and 22 of the Act can also be simultaneously be sought in any pending legal proceedings before a civil, family or criminal court<sup>20</sup>. A High Court judge may be called upon to adjudicate proceedings for maintenance under the Hindu Maintenance and Adoption Act. A Family Court is presided over by a District Judge. The only provision of appeal provided in the statute is under section 29 of the Act which says that an appeal will lie in the Court of Sessions only with the orders of the

---

<sup>19</sup> The proposal for a Uniform Civil Code, as advocated in the Indian Constitution's Directive Principles of State Policy has therefore had to be almost indefinitely deferred.

<sup>20</sup> *Supra* n.6, s.26.

Magistrate. The Act is totally silent as to where an appeal will lie against orders passed by any other court, under the Hindu Maintenance and Adoption Act or a District Judge under the Guardian and Wards Act or under the Hindu Marriage Act wherein such an application is made in a pending case.

The Act has non-obstante provision in several sections. The section 21 contains a non-obstante clause which enables the magistrate to exercise jurisdiction and pass orders which could result in conflict with the orders passed by any other court. So far as procedure is concerned, it is a civil legislation but at the same time the Code of Civil Procedure is not applicable to proceedings under this Statue. It says that procedure under criminal procedure will apply at several places. Therefore there is grave possibility of conflict of jurisdiction and judgment in the event that a Civil Court is seized of the matter or has decided a matter relating to issues which are also raised in parallel proceedings before a Magistrate under the Act.<sup>21</sup>

Offences under the Act are cognizable. The Act contains no provisions for compounding. This was the prime argument against section 498A that it should be made cognizable and compoundable<sup>22</sup>. This issue went up to the Supreme Court repeatedly and courts have devised the methods whereby 498A offences are being compounded. It is extreme injustice if the woman is willing and wants to go back despite her making a complaint and her-in laws are

---

<sup>21</sup>For instance a case of custody under the Guardianship Act and a similar petition filed before the magistrate, there is no provision as to which proceedings the litigants is required to adopt, whether she will proceed with the application under this Act or she has a right to continue in the earlier proceedings. This Act has a non-obstante clause that says not withstanding any Act in force, the provision of the Act will take force.

<sup>22</sup> In this context, the observation made by Malimath Committee in the Report on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003 is significant: It reads: "For the Indian women marriage is a sacred bond and she tries her best not to break it. As this offence is made non-bailable and non-compoundable it makes reconciliation and returning to marital home impossible...Less tolerant impulsive wife may lodge even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job...The husband may realize the mistakes committed and come forward ... for a cordial relationship. The women may like to seek reconciliation. But this may not be possible due to the legal obstacles...*Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliation. It is therefore necessary to make this offence bailable and compoundable to give a chance to the spouses to come together.*" Emphasis added.

willing to take her back. Women are deprived of a very important statutory benefit. Rapprochement and compromise which is the need of matter, is not permitted by this legislation. This very aspect disrupts the restorative justice to a woman inclined to a matrimonial set up. All these aspects are pertinent in a patriarchal set up where marriage and family is viewed as inviolable institutions. Mere enactment is not enough to deal with the issue of domestic violence but conceptual and procedural clarity and enforceability becomes crucial for its success.

Protection Officer is the first point of contact for the aggrieved person. The protection of Women from Domestic Violence, Rules, 2006 provides for the qualifications and experience of Protection Officers<sup>23</sup>. Another ground of legal debate is that there is no statutory provision or rule which provides the procedure which is to be followed by the Protection Officer or the Welfare Officers. The Protection Officers appointed by the State Government may be of the Government or members of non-governmental organizations, provided that preference shall be given to women. Every person appointed as Protection Officer under the Act shall have at least three years' experience in social sector. No stipulation as to the legal knowledge or background for a protection officer is provided under the Rules. The work of a Protection Officer needs more legal knowledge to understand the court procedures. In India, Women and Child Development Department appoints the Protection Officer who is already handling another important duty as a programme officer. Therefore discharging duties as a protection officer becomes less important to them. In practice, District Probation officer is the person who is appointed as Protection Officer in the states. One Protection Officer for entire district is not enough and is unrealistic to attend to victims from different corners. The overburdening of

---

<sup>23</sup>The protection of Women from Domestic Violence, Rules, 2006, r. 3(1)&(2)



Protection Officers with little infrastructural facilities creates hurdles for effective implementation of the Act<sup>24</sup>.

Service Providers refer to organizations and institutions working for women's rights. They must be registered with the state government to record the Domestic Incident Report and to help the aggrieved person in medical examination. The intention behind this is to save distressed women from legal complicity, vagrancy and health hazards. There is a huge delay in notifying the service providers. Similarly there is a wide gap between black and white lines of the Act and reality. Shortage of medical supplies and women doctors is another reason for victims not seeking recourse to medical facilities. Shelter homes, are in deplorable conditions so much so that the victims refused to go there.

The Act suggests a new role of police as the 'savior' of victim. Yet, the perceived notion of police as the 'power to punish' clashes with this new role. Moreover the stakeholders seem to be confused about their duty and obligation in 'protecting' a victim of domestic violence. This in turn creates hurdles for the effective implementation of the Act.

The statute is also silent as to the evidentiary value which is to be attached to the reports given by such officer or the mode of their proof. The evidentiary value of the report of the Protection Officer is important when the judge has to access the material at the end of the trial and give an order of final relief. This issue may not be important for interim orders when the judge is only arriving at a prima facie view. Lack of clarity in rules creates difficulties in the effective implementation of the Act.

### **8.3 The Act - A Western Apism**

The *one-size-fits-all* approach to the problem of domestic violence does not keep in tune with the preservation of cultural values in India. No law which

---

<sup>24</sup> This argument by the researcher is based on her own interactions with the Protection officers Attended and participated in a workshop conducted at Govt. Law College, Kozhikode, Kerala, on The Protection of Women from Domestic Violence Act, 2005.

is unrelated or unconnected with the cultural and social ethos/realities of the country is bound to be successful. The Act appears problematic with its apparently uncritical subscription to and reliance on international norms of gendered justice. They conflict with the local cultural standards and perspectives of indigenous system of patriarchy prevailing in India. The Act becomes a mere western duplication unrelated to cultural specificities of the country<sup>25</sup>.

Victims of domestic violence, unlike other victims of crime, share a special relationship with the perpetrator. For these and other reasons, domestic violence cases present complex legal, psychological, and sociological challenges to our communities. Therapeutic jurisprudence and the problem-solving approach in the U.S.A and U.K envisages and treat victims and survivors as people (not 'cases') given the background of complex realities of their daily lives. Here lies the difficulty in following the western model. This may mean acknowledging the potential of the legal system to address domestic violence, while equally acknowledging (from the victim's perspective) the problems which beset its operation in practice. We need to recognize the limits of criminal justice initiatives as it fail to provide to victims of domestic violence the protection, safety and 'justice' they need. The law is just one element of a necessarily wider social response to domestic violence. It must necessarily include community-based and preventative strategies.

Specialized arrangements to deal with domestic violence cases in the form of specialized domestic violence courts<sup>26</sup> taking cue from the western countries alone cannot achieve enhanced satisfaction and sense of 'justice' for victims of domestic violence— this requires a range of allied community-based support initiatives. While specialized courts like the family courts in India provide a very positive focus for these activities, their long term success

---

<sup>25</sup> The critics of this view advocate that respect for a largely imagined and idealized version of the Indian family system is likely to hamper the feminist initiatives in the Indian context.

<sup>26</sup> See Ch. 4 of the thesis for more discussion on specialized domestic violence courts.

depends on the effective coordination and delivery of a range of policies which are likely to lie outside the scope of the criminal justice system.

#### **8.4 An Attempt to Make Man Moral by Legislation**

The Act plays the role of moral policing. State acts as omnipotent savior bringing in canned solutions to the victims of domestic violence. The situation reflects the tragedy that abused is pitted against the state driven legal mechanism. The victim feels emotionally displaced from her cultural and social settings and is deprived of her linkage to herself. The legal option to punish an offender for repeating domestic violence following ‘protection order’ is limited because victims mostly abandon their matrimonial home before filing a case as it happens so in the Indian matrimonial set up. Persuading the victim to reach a compromise and start conjugal relation even though her husband did not comply with the protection order fully appears to be contradictory with the restorative reliefs envisaged by the Act. This vindicates the position that the Act attempts to settle domestic violence within the existing familial structure and may not help those who lost all hope of reunion. The instances of court trying to moralise the litigants through the judgment are also not rare in the present scenario<sup>27</sup>. The legislation is simple an attempt to make man moral by legislation.

---

<sup>27</sup> *T. Vineed v. Manju S. Nair*, 2008 (1) K.L.J., 525 para.3. The parties were involved in eleven litigations against each other before different for a, in view of the worsening relations between the parties, the court appointed a conciliator to enable the parties to settle the disputes between them. Upon arriving at a settlement, the court said: “In the light of the discussions the court and the conciliator had between the parties and thanks to the cooperation extended by the learned counsel appearing on both sides, it is heartening to note that peace could be purchased not only between the parties to the marriage, but also between the families of both parties. True, they have agreed to disagree. But we could convince them that on disagreement also, the parties to the marriage can still be friends. For the only reason that the matrimonial bond is terminated and the marriage is dissolved, the parties to the marriage need not be strangers and enemies; they can still continue to be friends, and they have to continue as good friends in this case for the additional reason that they have a child. In cases of domestic violence in grave forms, prioritizing conciliation could have the effect of compromising the safety, security and dignity of the aggrieved woman and forcing her back into the violent home. The good intention of the court in this judgment was to prevent further hostilities between the parties, avoiding multiplicity of litigations and arriving at an amicable settlement of all pending issues between the parties. It appears to be a good ideal. While this is desirable, conciliation may not be the

## **8.5 Apathy of the Society at Large**

Domestic violence which is the so called personal matters of the neighborhood attracts little intervention and care from the society at large. The apathy of the society at large to stand by the sufferings of a victim of domestic violence is a major hurdle for resolving any dispute<sup>28</sup>. In the absence of NGOs providing the needed support to the victims, the role of neighbors and other secondary groups becomes pertinent. This forces the victims, in the Indian scenario to leave matrimonial home and take shelter in parental home. In the Indian condition, if a victim fails to garner such support in view of the poor economic conditions of the parents or other relatives, she is left to the mercy of the abusive husband to continue a painful life. It is in this context that the Act has failed to rescue the victims by implementing court orders or providing quick justice to the victim. Lack of civil society actions should also be seen in the wider context of prevailing social structure in India.

## **8.6 Abuse of the Act**

Filing of false cases out of vested interests thereby belittling the status of the legislation is another menace to the effective implementation of law in the country. No proper screening methods to filter out vexatious claims are envisaged under the Act to make the system fool proof. The Act is found to target male relatives even though the offender is female. Yet, they are a testimony to the fact that provisions of the Act may be potent weapon in the hands of unscrupulous female partners/members of the family.

---

viable and standard practice in all cases under the Act. To advise a man to be friendly towards the ex-partner and be friends appear awkward in a situation of domestic violence where a victim has suffered a torturous life.

<sup>28</sup>Likewise the judicial officers with whom I had the opportunity to talk and elicit opinion on the issue, contended that the law as such is a *draconian* law disintegrating family relationships and domestic violence can be categorised as the usual *wear and tear* of marital life. Very few academicians suggested the significance of the Act in acknowledging a familial issue. From a feminist perspective, the suggestions reflected a pro-western type of criminal approach/strategy to be resorted in the issue.

Articulating the language of rights for women (and children and the elderly i.e., the dependents) within the home and thereby seeking to alter the power relations of the patriarchal house-hold through the mantra of constitutional rights is a major and radical intervention<sup>29</sup>. This law is envisaged to create division within the family, counters violence by a legal protection order<sup>30</sup> and checks patriarchal privilege by imposing the law as limit.

## **Conclusion**

The questions raised in the first part of this chapter stands analysed in the context of the Act's new emerging issues and challenges. Although this issue has been deliberated for long whether law should succeed a change or should prove to be as one of its principal cause, the latter seems to have a beneficial and concerned approach to the issue. Consciousness of rights should per se be asserted first in a socio-political construct, much before a law or a policy comes into existence so that the concerned law or policy proves to be meaningful in the associated context. As to the practical value and the wider educational function of legislation, Jawaharlal Nehru has rightly said:

“Legislation cannot by itself normally solve deep-rooted, social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it”.

The Act is meant to operate in a patriarchal set up which is very much clear from the definition of domestic violence adopted as per the Act. But the problem of effective implementation lies in difficulty in reconciling the familial values in India with the rights culture propagated by the Act. To be useful in an Indian context, they need to be adapted to a world view and idea of

---

<sup>29</sup>Rajeswari Sunder Rajan, “Rethinking Law and Violence: the Domestic Violence (Prevention) Bill in India”, 16 (3) *Gender and History* 35 (2002), Blackwell Publishing Ltd.USA, (2004), p.785

<sup>30</sup> A threat of arrest ,a form of surveillance

self that is based on the integration of the individual with the family group. These constructs need to be modified to take into account the multiple, complex and hierarchically ordered boundaries, the centrality of the intergenerational dyad and the lifelong independence between generations. Without modification, the use of these constructs as per the Act in the treatment of problem of domestic violence within familial space may cause disintegration or dysfunctional result in the family relationships and thereby strain the social fabric ties. In such a context, to draw experiences from the West and emulate them in the Indian cultural set up appears to be incongruous.

The whole of the Act is structured for the purpose of effective protection to women from violence within familial relationships. The patriarchal family is much more demanding on human nature. It requires chastity and self-sacrifice on the part of the wife and obedience and discipline on the part of the children, while even the father himself has to assume a heavy burden of responsibility and submit his personal feelings to the interests of the family tradition. But for these very reasons the patriarchal family is a much more efficient organ of cultural life. It is no longer limited to its primary sexual and reproductive functions. It becomes the dynamic principle of society and the source of social continuity<sup>31</sup>. To this cultural tradition law is to be moulded to suit the idea of violence free society. The adversarial procedure adopted by the Act purportedly to protect the women in familial relations from violence does more harm than good, when viewed practically. The very complaint procedure envisaged leads to disintegration of the long cherished familial bonds in the Indian family. Once the women adopt the remedial procedure envisaged by the Act she is out of the matrimonial house. No restorative or preventive remedy is ensured by the whole process of empowerment as guaranteed by the Act. It appears like posting a policeman inside the family to check the behaviours of the inmates, which is rather impossible. It is both dangerous and futile to emulate western models with a single colour and brush. Concepts like right to

---

<sup>31</sup> [www.catholiceducation.org/articles/marriage/mf0060.html](http://www.catholiceducation.org/articles/marriage/mf0060.html). Last visited on 20th February 2013.

residence in matrimonial home, rights of live in partners on par with legally wedded wife etc., though adopted in the legislation, are yet to be indigenized in terms of cultural determinants, location and history. So the need exists to find out other alternative methods that are culturally and socially feasible in the Indian context.

The magnitude and severity of the problem requires the laws to be viewed in a fresher sociological perspective. The legislators need to assimilate the gravity of the problem while enacting laws. Laws are the expressions of social needs and aspirations. Only a change in the mindset could bring about gender sensitivity in the administration of justice. Infusing gender sensitivity in the society, laws and functionaries of law enforcement machinery in this globalised world is one of the biggest challenges before us.

What remains outside the ambit of law is the sensitivity over handling the issue and the subjectivities of suffering of the victim. Law in its attempt to correct something immoral or something wrong intends to end disorder within the familial space. Legal system tries to assert its presence like any other institutionalized hierarchical structure, emerging as a moral guardian, rather than a neutral arbiter. Creative approaches are needed in order to move a private matter into the sphere of public concern and to translate that public concern into a widespread social consensus for action. A one size fits all approach is dangerous and self-destructive in emulating western models. The Act demonstrates a half-baked solution without any understanding of the cultural fabric of the Indian society. People's conceptions of moral rights and wrongs is shaped not by the present law, but by their assumption about what one is socially and (may be morally) entitled to do<sup>32</sup>. Based on the above discussions the questions raised in the first portion stands answered in the negative.

---

<sup>32</sup> Mohini Chatterjee, *Feminism and Women's Human Rights*, Vol.2, Avishkar Publishers and Distributors, Jaipur (2004), p.124. See for discussions on ideological and social culture, Frances Raday, *Culture Religion, and Gender*, Oxford University Press and New York University School of Law (2003), p.1.

The big challenge before us is to figure out ways to strengthen and reinvigorate civil society and family as an institution in a way that individual rights remain inviolable and also contribute to the protection of vulnerable individuals through communitarian efforts and vigilance.

1. How can we make people respect the rights of others not simply out of fear of being locked up in jail but because they do not feel good hurting the interests of others?
2. How do we make laws that are taken seriously by the people and have the capacity to protect the legitimate rights and claims of women?

The future of democracy in India is dependent on whether we can evolve a legal framework that creates egalitarian and workable norms for the rights of men and women in the family and commands universal respect for its ability to maintain a healthy balance between allowing a good deal of autonomy to the individuals relying upon the sanctity of family and marriage.

Acknowledging the costs of domestic violence in a society is positively performed by the Act. The complexities inherent in protecting the rights and responsibilities of women as a family member and home maker require sensitive decision making and monitoring mechanisms within the system. The Act in itself effects major theoretical shifts in thinking about gendered violence in relation to a women's space of privacy or safety. To introduce the politics of *rights within the home* is itself a major challenge to deal with. But the Act fails to take into account the socio- cultural set up in which the domestic violence is to be acknowledged. This creates a wide gap between the black letters of law and its effective implementation.

According to Yehezkel Dror, "basic institutions rooted in tradition and values, such as the family, seem to be extremely resistant to change, imposed by the law"<sup>33</sup>. There is danger in over-stressing the social importance of law,

---

33. *Id.*, p.125



particularly when a country is concerned with institutions with a special place in our culture, such as family, popular moral evaluations as patriarchy etc. are unlikely to be altered by the mere existence of a law. It conveys the idea that a *sui generis model* is to be carved out to deal with the problem of domestic violence in India.



## CONCLUSIONS AND SUGGESTIONS

The extent to which domestic violence threat inhibits women from playing a decisive role in her own life and how it eventually impact adversely on her human rights are a matters of deep concern in a democratic society. Recognizing the importance of social costs of gendered directed violence, the international human rights instruments had taken up the cause as reflected through different Conventions and Treaties. The major challenge lies in the assimilation of those principles into the national/domestic context.

Historically, the violence against women or practices of gender inequality was in existence both in the western and Indian cultural background. The western philosophical thinking starting from the Greek philosophy to the feminist thinking reflected the development from the disadvantaged position to a highly empowered rights holder. The Indian philosophical underpinnings traced its origin from the western counterparts and woman's role within the family was highly curtailed. The cause identified as to the perpetuation of gender inequality across the countries is one and the same i.e., the patriarchal hegemony within the household. The culture and gender constructs of female sexuality is predominant in the thoughts that emerged from the west and taking cues from the west, the east imitated the same practice. The behavioural problems of the individuals, behavioural changes ensued as a result of continuous consumption of prescribed medications, drug addiction, neuro-biological sub traits of human beings, mutual incompatibility occurring within man woman relationships driven by economic self- sufficiency etc. has not been effectively considered or addressed as sources of perpetuation of domestic

violence. Analysing domestic violence solely as a form of patriarchy leads to half-baked solutions as it is apparent in the Act. The problem lies within the concern that the stability of family as a cohesive unit is not addressed in any of the thinking's. As Lord Moulton rightly puts it, law is the crystallized common sense of the society, these gender discriminative practices led to the awakening of ideas related to feminism in the west.

The International Human Rights Instruments exhorted the ideas of equality, liberty and fraternity among human beings. Right to marriage and form family was emphasized throughout the Conventions and Treaties. A great impetus was unleashed by CEDAW, but yet it remained silent as to the issue of domestic violence. General Recommendation No.19 of the CEDAW speaks explicitly about the issue of discrimination and violence and was taken note of by the world. However, the international human rights jurisprudence lays down no foundational philosophy as to the maintenance of family stability and the need to address the rights of women within a familial framework.

The efforts of feminist movement in U.S.A and U.K enabled a quick reformation in their policies and strategies to concentrate attention to the issue of domestic violence. There exists a mixed application of civil and criminal remedies to the issue. They emphasized the mandatory arrest policies and no-drop prosecution policies in the criminal side and simultaneously they have civil remedies to deal with the issue. Community co-ordination in dealing with the issue in both the jurisdictions and the concept of specialized domestic violence courts are the predominant features that are highlighted in the western culture. The main aim envisaged is the survivor's safety and at the same time accountability of perpetrators of violence.

The pre-2005 legal scenario in India was inadequate to deal with the issue. Emphasis on culture specific dowry deaths and matrimonial cruelty, non-coverage of relations other than matrimonial relations within the household by laws, ineffectiveness of civil injunction orders etc., were marred the situation.

The UN Model Code emphasizing on enacting legislations in the domestic set up to deal more comprehensively on the issue was taken up by the feminist movements in India.

The year 2005 witnessed the emergence of a new legislation that boldly stepped into the private familial domain. The Act widened the horizons of concept domestic violence to encompass all forms of abuse that remained dormant throughout the history like, physical, emotional, verbal, and economic abuse, shared household concept, relationships in the nature of marriage etc. The remedies were also made exhaustive by the Act.

The judicial decisions that came up mainly related to the issues like challenging the constitutionality of the new Act, interpretation of relationship in the nature of marriage, shared household concept, right to residence in the matrimonial home etc. All the cases that came up were decided by the courts based on their specific facts and circumstance in each case. The decisions rendered in *Batra* case and *Veluswamy* case are the major decisions that invoked criticism against the culture specific aspects of the Indian setting. Courts have not delved deep into the conceptual disarray emerged out of the Act in the course of its implementation. The decisions, thus lacked the conceptual clarity of real life experiences of Indian woman. This in turn resulted in dilution of legal protection.

Hence the new issues that emerged in the familial domain raised big challenges to the existing foundation of the family cohesiveness in India. The concepts like sexual abuse, relationships in the nature of marriage, right to residence in matrimonial home for a woman are contentious issues to be decided with clarity in the specific Indian cultural scenario. It clashes with the established cultural ethos and ideology of India. There is a wide gap between the black letters of law and the existing real life experiences of an average Indian woman. To detail out the total effect of transition of impact of law in ordering peace within families is that from a policy of non-intervention into

familial issues as private/personal (victim's requests were not remedied), the law has made over to the policy of intervention in such a manner that it virtually requires ending the relationships. The specific nature of domestic violence calls for special treatment and approach. The need of the survivor is not to end the relationship but to end the violence within the relationship. Any domestic relationship must bring out growth and harmony at the individual, family, and society levels, and the growth should involve physical or material, mental or intellectual and spiritual. No attempt to harness the law's power to affect relationships in constructive ways has been made out by the legislation in India.

Though the Act has clearly sent out the message that domestic violence against women within familial space is a socially unacceptable behavior, the Act fails in its attempt by bringing in the 'one size fits all approach' of the law in India and by bringing in the canned solutions of remedies provided under the Act. The outcome is disintegration of familial ties and relationships. The Act adopts a total alien ideology of rights based culture and language within the familial set up contrary to the Indian ideology of relational worldview<sup>1</sup>. Thus the Act fails in understanding that family is the foundation of a successful society and that the promotion of healthy and stable family relationships renders fatherhood, motherhood and childhood stronger and stable. Maintaining familial stability is crucial to the welfare of children and acts as the cornerstone of a healthy civilization. This situation warrants the need for evolving a sui generis model adaptable to Indian situations.

---

<sup>1</sup> The relational world view finds its roots in tribal cultures. It denotes a collectivity of factors to be studied and balanced to reach a solution. A Healthy balancing of context, mind ,body and spirit leads to health. Here it is working with traditional models of helping and healing. In contrast to this view the linear worldview finds its roots in Western European and American thought .It tries to find out the cause effect relationship between events. Interventions are targeted at the cause and it is a narrower view. It treats the individual. See <http://www.nicwa.org/relationalworldview>. Last visited on 12 th February 2013

## **9.1 Findings of the Study**

The findings of thesis that answer the hypothesis formulated in the first chapter are as follows:

1. Domestic Violence adversely affects human rights of women and as a result their dignity and participation in developmental process are also badly affected.
2. The Act is conceptually flawed in Indian patriarchal cultural context.
3. The Act disintegrates the cohesiveness of family system as the wife is pitted against husband in a matrimonial set up.
4. The implementation of the Act finds no answer to the current understandings of domestic violence holistically due to insensitivity of the state driven legal machinery in handling delicate issues of man-woman relationship.
5. The Act is a mere western duplication incapable of understanding the Indian cultural ethos and the characteristics of family cohesiveness due to deficiency in drafting and importation of western ideologies.

## **9.2 Suggestions**

The laws has inherent limitations to tackle familial matters in a man-woman relationship within a familial set up in India. Law alone cannot change human nature. It is the cultural thinking awakening from education that are necessary for societal transformation. The normative and symbolic power of the law should not be wielded to gain acceptance for new lifestyles or to disintegrate family ties, but to reinforce the time- honoured values and customs of civilization related to family life. Respecting others, protection of vulnerable, acknowledging the integrity and dignity of others, following the lines of experiences of the aged, etc. within the family form the basic norms on which the higher versions of the same gets reflected in the macro level

application in a society. All these foster the development of capacities such as perspective taking, negotiation, reflective and flexible thinking. This in turn promotes a culture of peace in the society.

Need of the hour is a holistic approach /treatment to the problem of domestic violence against women. The problem encompasses within itself personal/individual dimensions, psychological dimensions, clinical dimensions, human rights dimensions, social and cultural dimensions leading to a developmental dimension for the country. Man, woman and child within a familial relationships is to be viewed in a triangular perspective; each contributing and taking from each other, that makes life meaningful.

The approach envisaged under the Act is to vest the entire burden of the problem on men and his relatives. An anti-discriminating and protectively discriminating legislation favourable to women cannot be conceived in a vacuum in the Indian familial cultural setting. The remedies offered is more dangerous than the disease itself in the Indian cultural scenario. A need based approach (need of the woman to end violence without ending relationships;) rather than rights based approach (right of a woman as an individual) is suitable in this context. Woman in the Indian context is to be viewed along with the familial framework. The role she plays the status she occupies and the need of a human being for belongingness are all pertinent when viewed through the lens of socio cultural ideologies .Finding a solution within the familial structure rather than disintegrating the familial relations can take forward the cause of ending domestic violence against women. In short there should be an attempt to merge and apply the relational world view into the domestic violence prevention process in the Indian cultural setting<sup>2</sup>.

Healthy interdependence is the core of the extended family life in India. The context within which the families in India is filled with strength-producing/ harmonizing resources. Community provides additional balancing.

---

<sup>2</sup> *Ibid.*

Support from the elder generations adds to the balancing concept. The family structure and roles, the kinship systems etc., reflects as to how one relates to others, sustain each other and how one act in a system. There is a natural tendency within the system to seek harmony. Services need not be targeted to a specific set of symptoms but rather targeted towards restoration of balance. This type of restoration of balance within a unique system is not envisaged in the legislation. Aggravation of individualistic tendencies within families leads to counter-productive results.

Tocqueville believed that family stability and loyalty were among the permanent needs of mankind that make social responsibility possible. According to him family stability produces social responsibility and order whereas family instability fosters social misbehavior<sup>3</sup>. This ideology reflects a commitment of State to promote virtue over vice ie., to promote good quality of life in conformity with Aristotelian thoughts. Abraham Maslow's hierarchy of needs<sup>4</sup> justifies the need for satisfaction of physiological needs, safety and need for belongingness(deficiency needs) to be satisfied in the first instance before aspiring for self-esteem and self-actualization(upper needs) of an individual driven by rights based approaches<sup>5</sup>.

Victims of domestic violence face the challenges that keep them struck in the safety needs of the stages of human development. The need of the hour is to work with her to develop her capacity to decide her own future. Victims of domestic violence are considered to be 'experts in their own lives' and are supported to make informed choices about how they would prefer to be. This part of making informed choices over one's own survival is considered to be a

---

<sup>3</sup> J Sean E. Brotherson and Jeffrey B. Teichert, "Value of Law in Shaping Social Perspectives on Marriage", 3 J.L. & Fam. Stud. 28 (2001).

<sup>4</sup>In social psychology, the need to belong is an intrinsic motivation to affiliate with others and be socially accepted.

<sup>5</sup> Nayef R.F Al-Rodhan, *Emotional amoral Egoism-A Neuro-philosophical Theory of Human Nature and its Universal Security Implications*, Transaction Publishers, Rutgers University, U.K. (2008). p.52; See A. Maslow, *Motivation and Personality*, Harper & Row (1970).p.18. See [http://psychology.about.com/od/theories\\_of\\_personality/ss/maslows-needs-heirarchy.htm](http://psychology.about.com/od/theories_of_personality/ss/maslows-needs-heirarchy.htm). Last visited on 12<sup>th</sup> February 2012.



part of feminist counselling in the western practices. The human urge for belongingness and cultural compulsions of group living rather than individualistic style of living is to emphasised in the Indian context. . The need for preservation of indigenous culture and family is reflected in the views of Malinowski when he says that family is the universal human institution to be preserved. Malinowski's views on collectivity of familial relationships, the need for a shared physical space and the love that comes out of such relations cannot be deprived by the eventuality of domestic violence within the family<sup>6</sup>. Adhering to tribal philosophy of collectivity, family partnerships/ mentoring programmes are the suggestions proposed in this context.

A comprehensive institutional and environmental change is required to empower individuals to be adaptable to such way of thinking. Schools can be strategic entry points for the purpose. Creating sensitivity to roles of family members and the need to sustain family stability can be included in the course curriculum. Collaborative effort from Law faculty in each universities with Women Study Centres and Ministry of HRD, Ministry of Women and Children, Government of India can evolve a curriculum grounded on gender sensitivity to these issues. It is significant to ensure that those mandated to implement legislation regarding violence against women, including police, prosecutors and judges, should have an in-depth understanding of such legislation and are able to implement it in an appropriate and gender-sensitive manner. When public officials involved in the implementation of the law are not comprehensively trained regarding its content, there is a risk that the law will not be implemented effectively or uniformly. There have been many and varied efforts to train public officials, and/or to include capacity-building on violence against women in the official curricula for these professions. Such trainings and capacity-building efforts have been found to be most effective, and

---

<sup>6</sup>[http://malinowski'sviews.about.family/od/theories/malinowski-preservation of family.htm](http://malinowski'sviews.about.family/od/theories/malinowski-preservation%20of%20family.htm). Last visited on 12 th February 2013

implemented rigorously, when they are mandated in law and developed in close collaboration with non-governmental organizations<sup>7</sup>.

A need for para legal training course for law students and lawyers including clinical education as to sensitization on the traumatic stages of victims of domestic violence is the need of the hour<sup>8</sup>. Understanding and addressing the subjectivities of the victim in her own space, giving her time to assess the meaning of experience of violence and leading her to self-guided resolutions can uphold and justify the theory of women's best interests which is very much akin to the child's theory of best interest. Clinical supervisions, working with psychologists, need for psychological counseling etc. helps her to decide between multitudes of conflicting loyalties in her own life. To reach out to the victim is the crux of the programme envisaged here. This programme is much adaptable to the Indian context where women victims are interested in stopping violence without severing relationships.

Social corporate responsibility tuned in the lines of western jurisdictions can be promoted to prevent violence within homes. The affirmative pro-active role of the State in the lines of *Durbalasya Baloh Rajah* is worth mentioning in this context. Governmental efforts to change societal norms refer to the top-down approach (as in the case of enactment of legislation creating a deterrent or restitutive effect) whereas targeting individual families represents the

---

<sup>7</sup> S.42of the Philippine Anti-Violence against Women and their Children Act, 2004 requires all agencies responding to violence against women and their children to undergo education and training on (a) the nature and causes of violence against women and their children; (b) legal rights and remedies of complainants/survivors; (c) services available;(d) legal duties of police officers to make arrests and offer protection and assistance; and (e) techniques for handling incidents of violence against women and their children.

<sup>8</sup> The main emphasis of *affective lawyering* by Professor. Linda G. Mills is significant in this context. The work of the team is mainly oriented towards the cause of domestic violence against women. They are involved in a process of empowerment of women in such crisis situation by empowering them which reflects a need based strategy their strategy is to cure the whole system than concentrate on the abuser alone. The family of both the abused and abuser is targeted in the process. For details, see Linda G. Mills, "On the Other Side of Silence: Affective Lawyering For Intimate Abuse" in Michael D. Freeman (Ed.), *Family, State and Law- Part VII Disputing Violence* ,Vol II, Ashgate/Dartmouth (1999), pp. 539-619.

bottom-up approach. These two interventions have the potential to reduce conflict, increase co-operation, negotiation and tolerance.

Thus the need of the hour is co-operation instead of competition, respect instead of degrading, equality instead of dominance, dialogue instead of monologue, communication instead of control, love instead of fear, hate and contempt. These traits can lead to preservation of human rights with humanitarian face within the families. Eleanor Roosevelt has aptly observed<sup>9</sup> :

“Where, after all, do universal human rights begin? In small places, close to home--so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunities, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world”.

The crux of the quote by Eleanor Roosevelt is the necessity for local origins of lofty global ideals i.e., the attitudinal change cannot come abruptly. The human rights culture is to begin from the home itself.



---

<sup>9</sup> “In Our Hands,” a 1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights, as cited in OHCHR (2003), p.4

## BIBLIOGRAPHY

---

### Books

- A.S. Altekar, *The Position of Women in Hindu Civilization From Pre-Historic Times to the Present Day*, Motilal Banarsidass Publishers Private Limited, Delhi (1959).
- Agnes, Flavia, *A Toothless Tiger: A Critique of Family Court*, Manushi, (1991).
- Amartya Sen, *The Argumentative Indian' Writings on Indian History, Culture and Identity*, Allen Lane Publishers, Penguin Books (2005).
- Amnesty International Publications, *It's in Our Hands--Stop Violence against Women*, Amnesty International Publications, UK (2004).
- Anjani Kant, *Women and the Law*, A.P.H. Publishing Corporation, New Delhi (1997).
- B.D. Chattopadhyaya (Ed.), *Readings in Early Indian History--Women in Early Indian Societies*, Manohar Publishers (1999).
- Bhargavi V. Davar, *Mental Health From A Gender Perspective*, Sage Publications, New Delhi (2001).
- Bina Agarwal and Pradeep Panda, *Toward Freedom from Domestic Violence: The Neglected Obvious*, *Journal of Human Development and Capabilities*, Routledge Publishing Ltd. (2007).
- Bonita Meyersfeld, *Domestic Violence and International Law*, Hart Publishing Ltd. UK (2010).
- Clire M. Renzetti, Jeffrey L. Edleson and Raquel Kennedy Bergen (Eds.), *Source Book on Violence Against Women: International Educational and Professional Publishers*, Thousand Oaks London; Sage Publications, New Delhi (2001).

- D. Askin and Dorean M. Koenig (Eds.), *Women and International Human Rights Law*, Transnational Publishers, Inc, Ardsley, New York (1999).
- Eve Buzawa & Carl G. Buzawa (Eds.), *Do Arrest and Restraining Orders Work?* (1996).
- Frederick Engels, *The Origin of Family, Private Property and the State* (1884).
- Hatzidimitriadou Matczak, A., and J. Lindsay, (Eds.), *Review of Domestic Violence policies in England and Wales*, Kingston University and St George, University of London, London (2011).
- Hilaire Barnett (Ed.), *Introduction to Feminist Jurisprudence*, Cavendish publishing Ltd., London (1998).
- Holborn, *Sociology Themes and Perspectives*, Harper Collins Publishers Limited, London (2000).
- Janaki Nair, *Women and Law in Colonial India: A Social History*, Published in collaboration with National Law School of India University, Bangalore, Kali for Women, New Delhi (1996).
- Janice Richardson, *Selves, Persons and Individuals: Philosophical Perspectives on Women and Legal Obligations*, Ashgate Publishing Co. (2004).
- K. Uma Devi, *Women's Equality in India: A Myth or Reality?* Discovery Publishing House, New Delhi (2000).
- K.D.Gour *Empowerment of Women in India*, Law Publishers India Private Limited, Allahabad (2005).
- L. Waldorf, C. Arab, and M. Guruswamy, *CEDAW and the Human Rights-Based Approach to Programming*, United Nations Development Fund for Women (2007).
- Madhu Purnima Kishwar, *Zealous Reformers, Deadly Laws, Battling Stereotypes*, Sage Publications India (Pvt.) Ltd., New Delhi (2008).
- Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company Lucknow (2005).

- Maya Majumdar, *Social Status of Women in India*, Dominant Publishers and Distributors, New Delhi (2004).
- Merry E. Wiesner, *New Approaches to European History: Women and Gender in Early Modern Europe*, Cambridge University Press (2008).
- Michael D. Freeman (Ed.), *Family, State and Law- Part VII. Disputing Violence*, Vol II ,Ashgate /Dartmouth (1999).
- Mohini Chatterjee, *Feminism and Women's Human Rights*, Avishkar Publishers and Distributors, Jaipur (2004).
- N.M.Tripathi *Bentham's Theory of Legislation*, N.M.Tripathi, Bombay(1979).
- Nishi Mitra, *Domestic Violence As a Public Issue: A Review of Responses*, Unit for Women's Studies, Tata Institute of Social Sciences, Mumbai(2000).
- Nomita Aggarwal, *Women And Law in India*; Women's Studies and Development Centre, University of Delhi, New Century Publications, Delhi (2002).
- P. Madhava Soma Sundaram, K. Jaishankar and S. Ramdass (Eds.), *Crime Victims and Justice-An Introduction to Restorative Principles*, Serials Publication, New Delhi (2008).
- Paul Bowen (Ed.), *Themes and Issues in Hinduism*, Cassell, London and Washington (1998).
- Pradeep Kumar Panda, *Rights-Based Strategies in The Prevention of Domestic Violence*, Working Paper Series 344, (March 2003).
- R.S. Verma (Ed.), *Human Rights-Burning Issue of the World*, Indian Publishers & Distributors, Delhi (2000).
- Rama Mehta, *Socio-Legal Status of Women in India*, Mittal Publications, Delhi(1987).
- Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagement with Law in India*, Sage Publications, New Delhi (1996).

- Richard Collier, *Masculinity, Law and the Family*, Routledge, London and New York (1995).
- S.R.Shastri, *Women in the Vedic Age*, Bharatiya Vidya Bhavan, Bombay (1954).
- Saroj Iyer, *The Struggle to be Human : Women's Human Rights*, Books for Change, Bangalore.(1999).
- Shimon Scetret (Ed.), *Women in Law*, Hebrew University of Jerusalem Kluwer Law International. (1998).
- Shirin Kudchedkar and Sabiha Al-Issa, (Eds.), *Violence Against Women: Women Against Violence*, Pencraft International, Delhi (1998).
- Sudhir Kakkar , *Intimate Relation: Exploring Indian Sexuality*, Penguin Books, New Delhi (1989).
- Suranjita Ray, *Understanding Patriarchy, BA Programme II; Foundation Course, Human Rights, Gender & Environment*, University of Delhi (2009).

#### Articles

- “Scream Silently or Neighbours Will Hear”. The Crying Need for a Law against Domestic Violence”, 6(4) *The Lawyers Collective* 5 (1991)
- Amita Sahaya, “Religion and the Patriarchal Lens,” 13(3) *Women's Link* (2007)
- Amy Musgrove and Nicola Groves, “The Domestic Violence, Crime and Victim's Act 2004: Relevant or 'Removed' Legislation?” 29(3) *Journal of Social Welfare and Family Law* 233 (2007).
- Caroline Bettinger, “Lopez, Jessica Gonzales V. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States”, 21 *Harvard Human Rights Journal* 183 (2008)
- Cheryl Thomas, “Women in International Human Rights Law” in D. Askin, Dorean M. Koenig (Eds.), *Women and International Human Rights Law*, Transnational Publishers, Inc, Ardsley, New York (1999).
- Diane Mitsch Bush, “Women's Movements and State Policy Reform Aimed at Domestic Violence Against Women: A Comparison of the Consequences

- of Movement Mobilisation in the U.S and India”, 6(4) *Gender and Society* 587 (1992)
- Douglas E. Beloof & Joel Shapiro, “Let the Truth Be Told: Proposed Hearsay Exceptions to admit Domestic violence Victims Out of Court Statements as Substantive Evidence”.11 *Colum. J. Gender &L*.1 (2002).
- Frances Raday, “Culture Religion, and Gender”, Oxford University Press and New York University School of Law (2003)
- Gill Hague and Ellen Malos, “Inter-agency Approaches to Domestic Violence and the Role of Social Services” *Br. J. of Social Wk.*(1998)
- Gill Hague, Claudia Wilson, “The Silenced Pain: Domestic Violence 1945-1970” 34 *Journal of Gender Studies* 258 (2000)
- Jeebanlata Salam, “Women and Domestic Violence: Human Rights Perspective,” 10(1) *Women’s Link* 7 (2004)
- Julie Goldscheid, “Elusive Equality in Domestic and Sexual Violence Law Reform”, 18 *Florida State University Law Review* 238 (2007)
- Lauren L. Tichy& Judith V. Becker & Melissa M. Sisco, “The Downside of Patriarchal Benevolence: Ambivalence in Addressing Domestic Violence and Socio-Economic Considerations for Women of Tamil Nadu, India”.24 *Journal of Family Violence* 547 (2009)
- Lee Hasselbacher, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection”, 8(2) *Northwestern University Journal of International Human Rights* 34 (Spring 2010)
- Leigh Goodmark. “Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases”, 37(1) *Florida State University Law Review* 84(2006).
- Linda .G. Mills, “On the Other Side of Silence: Affective Lawyering For Intimate Abuse”, in Michael D. Freeman (Ed.), *Family, State and Law-Part VII: Disputing Violence* Vol.II, Ashgate /Dartmouth (1999).



- Marjory D.Fields, "Rape and Domestic Violence Legislation: Following or Leading Public Opinion, in Shimon Scetreet (Ed.), *Women in Law*, Hebrew University of Jerusalem, Kluwer Law International (1998).
- Nirmal Chopra, "The Protection of Women from Domestic Violence Act, 2005-Immorality Legalised," 8 Cri. L.J. 38 (2007)
- Note, "Developments in the Law: Legal Responses to Domestic Violence", 106 Harv.L.R 1499 (1993)
- Rachana Kaushal, "Protection of Women from Domestic Violence Act 2005—An Appraisal", 48(11) *Mainstream* 28 March (2010)
- Rajeswari Sunder Rajan, "Rethinking Law and Violence: the Domestic Violence (Prevention) Bill in India, 2002"; 16(3) *Gender and History* 138 (2004)
- Roberta L. Valente, Barbara J. Hart, Seema Zeya and Mary Malefyt, "The Violence Against Women Act of 1994: The Federal Commitment to Ending Domestic Violence and Sexual Assault", in Clire M. Renzetti Jeffrey L. Edleson, Raquel Kennedy Bergen (Eds.), *Source Book on Violence Against Women: International Educational and Professional Publishers* Thousand Oaks London, Sage Publications New Delhi (2001).
- Robin L. West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment", 42 Fla.L.Rev 412 (1990)
- Rukmini Sen, "Women's Subjectivities of Suffering and Legal Rhetoric on Domestic Violence: Fissures in the Two Discourses", 17(3) *Indian Journal of Gender Studies* 53 (2010)
- Shahid M Shahidullah, and Nana Derby, "Criminalisation, Modernisation, and Globalisation: The US and International Perspectives on Domestic Violence" 28 *Global Crime* 212 (2009)
- Sidharth Luthra, "The Domestic Violence Act: Can We Make a Success of It?" 12 *Halsbury's Law Monthly* 38 (2008)
- Stanley B Yeldell, "Battered Women's Syndrome: Civil Remedies for the Victims of United States of America" in P. Madhava Soma Sundaram, K.

Jaishankar and S. Ramdass (Eds.), *Crime Victims and Justice-An Introduction to Restorative Principles*, Serials Publication, New Delhi (2008), p. 96.

Sudhanshu Roy and Iti Jain, "Criminalizing Marital Rape in India: A Constitutional Perspective" 2008 Cri. L.J.21.

Suman Saha, "Sleeping with Enemy?-Recognizing Marital Rape", 10(2) *Women's Link* 14 (2004)

Susan Elley, "Changing Practices: The Specialised Domestic Violence Court Process", 9 *The Howard Journal* 35 (2005).

Tahira Karanjawala and Shivani Chugh, "The Legal Battle Against Domestic Violence In India: Evolution and Analysis", 124 *International Journal of Law, Policy and the Family* 23, (2009)

Ursula Smartt and Helmut Kury, "Domestic Violence:Comparitive Analysis of German and UK. Research Findings". 88(5) *Social Science Quarterly*, 438 (2007)

V.A .Mohamad Ashrof, "Is Male a Degree above Females in Status?" 7(4) *Al-Harmony: A Journal on Islamic Thought and Ethics* 14 (2007)

### Reports

---

A Framework for Model Legislation on Domestic Violence, (1996)

International Center for Research on Women and The Centre for Development and Population Activities, *Domestic Violence in India-A Summary Report of a Multi- Site Household*, Washington, DC, (May, 2000)

International Centre for Ethnic Studies Report Ameena Hussein, *Some Times There Is No Blood: Domestic Violence and Rape in Rural Srilanka*, (2000)

Lawyers Collective, *Staying Alive: First Monitoring & Evaluation Report on the Protection of Women from Domestic Violence Act 2005*, (2007)

Ms. Radhika Coomaraswamy *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, submitted in accordance with Commission on Human Rights Resolution 1995/85

Office of Violence against Women, *The Fact Sheets About the Office on Violence against Women Focus Areas* (1986).

Preliminary Report of the Special Rapporteur on Violence against Women to the Commission on Human Rights E/CN.4/1995/42 (1994).

Report of Ministry of Women and Child Development, 2001, *National Policy for the Empowerment of Women*, WCD, New Delhi: Government of India.

Report of the World Conference of the United Nations Decade for Women; *Equality, Development and Peace*, Copenhagen, July (1980)

Report of United Nations Commission on the Status of Women (CSW) and the Economic and Social Council (ECOSOC).

Reports of The Special Rapporteur on Violence against Women, its Causes and Consequences 1994-2009

World Health Organization, *World Report on Violence and Health*, Geneva (2002)

#### **International Conventions and Declarations**

African Charter on Human and Peoples' Rights, 1981

American Convention on Human Rights, 1969

ARAB Charter on Human Rights, 2004

Beijing Declaration And Platform For Action, adopted at the Fourth World Conference on Women: Action for Equality, Development and Peace, 1995

CEDAW Optional Protocol, 2000

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

Convention on the Rights of the Child, 1989

Declaration on the Elimination of Violence against Women, 1993

European Convention of Human Rights, 1953

European Union Charter of Fundamental Rights, 2000

General Assembly Resolution on the Elimination of Domestic Violence against Women, 2004

General Recommendation No.19 of the UN Committee on Elimination of Discrimination against Women, 1992

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994

International Covenant on Civil and Political Rights, 1966

International Covenant on Social Economic and Cultural Rights, 1966

International Covenant on the Elimination of All Forms of Racial Discrimination, 1965

Rome Statute of the International Criminal Court, 2002

UN General Comment No.28, 2000

UN Resolution 40/36, 1985

Universal Declaration of Human Rights, 1948

### **Legislations**

Adoption and Children Act, 2002, UK.

Anti-Violence against Women and their Children Act 2004, Philippine.

Civil Procedure Code, 1908.

Code of Criminal Procedure Code, 1973.

Dissolution of Muslim Marriage Act, 1939.

Domestic Proceedings and Magistrate's Court Act 1978, UK.

Domestic Violence Act 1994, Malaysia.

English Matrimonial Causes Act, 1950

Family Courts Act, 1984.

Family Law Act, 1996, UK.

Hindu Adoptions and Maintenance Act, 1956.

Indian Evidence Act, 1872.

Indian Penal Code, 1860.

- Juvenile Justice (Care and Protection of Children) Act, 2000.
- Legal Services Authority Act, 1987.
- Medical Termination of Pregnancy Act, 1971.
- Parsi Marriage and Divorce Act, 1936.
- Personal Responsibility and Work Opportunity Reconciliation Act, 1996, USA.
- Prohibition of Child Marriages Act, 2006.
- Protection from Harassment Act 1997, UK
- Special Marriage Act 1954.
- The Child Marriage Restraint Act, 1929.
- The Commission of Sati (Prevention) Act, 1987.
- The Constitution of India, 1950.
- The Criminal Law Amendment Act of 1983.
- The Divorce Act 1869.
- The Domestic Violence and Matrimonial Proceedings Act 1976, UK.
- The Domestic Violence, Crime and Victims Act 2004, UK.
- The Dowry Prohibition Act, 1961.
- The Dowry Prohibition Act, 1961.
- The Equal Remuneration Act, 1976.
- The Guardians and Wards Act 1890.
- The Hindu Marriage Act 1955.
- The Hindu Minority and Guardianship Act 1956.
- The Homelessness Act, 2002, UK.
- The Housing Act, 1996, UK.
- The Indecent Representation of women (Prohibition) Act, 1986.
- The Maternity Benefit Act, 1961.
- The National Commission for Women Act, 1990.
- The Pre-conception and Pre- natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994.

The Protection of Women from Domestic Violence Act, 2005.

The protection of Women from Domestic violence Rules, 2006.

The Specific Relief Act, 1963.

Violence Against Women and Department of Justice Reauthorization Act of  
2005, USA.

.....❧.....

## TABLE OF CASES

A v. The United Kingdom, App NO100/1997/884/1096)1998 27 EHRR 611 .....	65
Abha Arora v. Angela Sharma 1 (2008) D.M.C. 507 Del .....	306
A.Dinohamy v.W.L. Blahamy A.I.R.1927 PC 185 .....	288
Ahmedabad Municipal Corporation v. Nawab Khan GulabKhan, 1997(11) S.C.C.121: A.I.R.1997 S.C. 152.....	216
AIR v. Nergesh Mirza, A.I.R. 1987 S.C. 1829 .....	157
Airey v. Ireland, (European Court of Human Rights, Application no. 6289/73) .....	100
Ajay Kant v. Alka Sharma. 2008 Cri.L. J 264, I (2008) D.M.C 1, 2007 (4) MPHT 62.....	316
Amar Kumar Mahadevan v. Karthiyayani MANU/TN/9632/2007 .....	325
Amisha Bhandari v. State of Haryana, 2005(2) R.C.R. (Criminal 429(P&H).....	195
Ammini E.J v. Union of India, A.I.R. 1995 Ker. 252,268.....	157
Appasaheb v. State of Maharashtra,(2007) 9S.C.C. 721 .....	189
Aruna Pramod Shah v. Union of India WP. Cr. 425/2008, Del.....	283,286,322
Ashok Kumar v. State of Punjab,1987, Cri.L.J 412.....	191
Azimuddin v. State of Uttar Pradesh, MANU/UP/0238/2008.....	293,222
B. P. Achala Anand v. Appi Reddy, A.I.R. 2005 SC 986 .....	299
B.S. Lokhande v. State of Maharashtra, (1965) 2 S.C.R. 837 .....	181
Badri Prasad v. Dy. Director of Consolidation, A.I.R. 1978 S.C. 1557.....	288
Balkrishna Ramachandra Kadam v. Sangeeta Balkrishna Kadam, (1997) 7 S.C.C. 500.....	179

Balwant Singh and another v. State of Punjab, A.I.R 2005 S.C. 1504.....	188
Bapu Subhdeo v. State of Maharashtra, (1992) 2 Bom C.R. 450 .....	191
Beena Agarwal v. Anupam, A.I.R. 2004 S.C.141 .....	189,200
Benumadhob Padhi Mohapatra v. State, 2004 Cri.LJ.505 Ori.....	193
Bhagirath Kanoria v. State of Madhya Pradesh (1984) 2 S.C.C. 222 .....	264
Bhagwan Das v. State of Haryana, A.I.R. 1987 S.C. 2049 .....	160
Bhagwant v. Bhagwant, A.I.R. 1967 Bom. 90 .....	168
Bharati Naik v. Ramnath Halarnkar, Cri.W.PnO.S 18/09,64/09,Goa .....	308
Birch v. Birch,1873)28 L.T.R.540 .....	166
Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SC.C. 490 .....	159,184
Bradley v. State, 1 Miss. 156 (1824) (U.S. Commission on Civil Rights, 1982 .....	116
Britt v. Britt, (1953) 3 All E.R. 769 .....	166
B.R. Mehta v. Atma Devi, (1984)45 S.C.C. 183 .....	302
C.B. Muthamma v. Union of India, A.I.R. 1979 S.C. 1868.....	157
C.M. Mudaliyar v. Idol of Sri S. Swaminathaswami Thirukoil, (1996) 8 S.C.C. 525 .....	160
Chameli Singh v. State of U.P, A.I.R.1996 S.C.1051 .....	216
Chetan Dass v.Kamla Devi (2001) 4 S.C.C.250 .....	170
Chitraganthan v. Seema, I (2008) D.M.C. 365 .....	222
Church v. Church, 1983 N.L.J. 317 .....	162
Cracknell v. State of U.P, A.I.R. 1953, All. 746.....	158
D Veluswamy v. D. Patchaiammal,(2010)10 S.C.C. 469 .....	294,297
Dastane v. Dastane, A.I.R. 1975 S.C. 1534 .....	167,176
Dattatraya Motiram v. State of Bombay, A.I.R. 1953 Bom.842 .....	158



Delhi Domestic Working Women’s Forum v Union of India, (1995)1 S.C.C. 14 .....	159
Dennison Paulraj v. Union of India MANU/TN0525/08, Mad .....	285,339
Devaney v.L.Esperance,(2008195NJ,1247(New Jersey)).....	296
Dinohamy v. W.L. Blahamy, A.I.R. 1927 P.C. 185 .....	288
Dwarka Prasad v. Dwarka Das Saraf,(1976) 11 S.C.C. 128.....	321
E.P Royappa v. State of Tamilnadu, (1974) 4 S.C.C. 3, 38.....	215
Edwards v. Attorney General of Canada, (1930) A.C.124 .....	38
Estate of Maria Teresa Macias v. Mark Ihde, 219 F.3d 1018 (9th Cir. 2000) .....	107
Francis Corailie Mullin v. The Administrator of Delhi &Ors.,A.I.R. 1981 746, 1981 S.C.R. (2) 516 .....	215
Giani Ram v. Ramjilal, A.I.R. 1969 S.C. 1144 .....	157
Gita Hariharan and another v. Reserve Bank of India &Another,(1999), 2 S.C.C. 228: 1999 (1) CTC 481 .....	110,158
Gokal Chand v. Parvin Kumari, A.I.R. 1952 S.C. 231 .....	288
Golla Seetharamalu v. Golla Rathanamma, MANU/AP/0096/1990(AP HC).....	264
Government of A.P v. P.B. VijayaKumar, A.I.R. 1995 S.C. 1648 .....	158
Handa v. Handa, A.I.R. 1985 Del. 76 .....	176
Harmohan Kaur v. State of Punjab, 2006(3) R.C.R. (Criminal) 932(P&H).....	195
Harvinder Kaur v.Harmander Singh Choudhary, A.I.R. 1984 Delhi 66.....	348
Hem Chand v. State of Haryana India, (1994) 6 S.C.C. 727 .....	182
Indian Hotels and Restaurants Association & Others v. The State of Maharashtra & Others, 2006 (3) Bom C.R. 705.....	218
Indraj Malik v. Sunita Malik, 1986 Cri. L.J. 1510 Delhi.....	192

Jaydipsinh Prabhatsinh Jhala and Ors. v. State of Gujarat and Ors,(2010) 51 G.L.R. 635 .....	320
Jessica Gonzales v. United States, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07,OEA/Ser.L./V/II.128, doc. 19 (2007).....	103,105
Jyotish v. Meera , A.I.R. 1970 Cal. 266.....	168
Jyotsna Sharda v. Gaurav Sharda, Cri.R.P No.s132&133/2009 .....	312,325
KaliyaPerumal v. State of Tamilnadu, (2004) 9 S.C.C. 157 .....	188
Kalpana v. Swendra, A.I.R. 1985 All. 253 .....	168
KameshPanjiyar @ KamleshPanjiyar v. State of Bihar,(2005)2 S.C.C. 388 .....	188
Kalyani v. Union of India, (1995) 3 S.C.C.635 .....	181
Kashinath Sahu v. Smt.Devi, A.I.R 1971 Ori 296.....	167
Keshaorao v. Nisha, A.I.R. 1984 Bom. 413 .....	169
Keshavananda Bharati v.Ssatte of Kerala (1973) 4 S.C.C.225.....	110
Khullar v. Khullar, A.I.R. 2002 Delhi 373, 98 (2002) DLT 41, II (2002) DMC.....	131
Kishor, S/o Shrirampant Kale v. Sou. Shalini, 2010 (112) Bom LR 1398.....	333
Lal Mohan v. State, (1993) 1 Crimes 298 .....	191
Lata Singh v. State of U.P. and Another, A.I.R. 2006 S.C. 2522 .....	288
Lily Thomas v. Union of India, (2000) 6 S.C.C. 224 .....	160,181
M. Nirmala v Dr. Gandla Balakotaiah, 2008 (2) A.L.T 241	
M. Palani v. Meenakshi, A.I.R. 2008 Mad.162 .....	288,327
Madhu Bala v. Pritam Kumar Rao, RLW2009(1)Raj.827.....	329
MadhuKishwar v. State of Bihar, (1996) 5 S.C.C. 125 .....	158,218
Madhuri Mukund Chitniss v. M.M. Chitniss, 1992 Cri.LJ. 111, Bom.....	169.
Maneka Gandhi v. Union of India, A.I.R. 1978 597, 1978 (2)S.C.R. 621 .....	159,215

Manshan Ram v. Taj Ram, 1980 S.C. 558 .....	157
Maria da Penha v Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000). .....	99
Maria MameritaMestanza Chávez v. Peru, Petition 12.191, Report No. 71/03, 2003.....	99
Marvin v. Marvin,(1976)18Cal 3D 660.....	296
MC v. Bulgaria, European Court of Human Rights 39272/98, 4 Dec. 2003. ....	101
Milan Kumar Singh & Anr. v. State of U.P. &Anr, 2007 Cri. L.J. 4742.....	324
Mithu Devi v. Siya Chaudhury, MANU/BH/1083/1974 .....	264
Mohabhat Ali v. Mohammad Ibrahim Khan, A.I.R. 1929 PC 135 .....	288
Mohd. Hoshan v. State of Andhra Pradesh, (2002) 7 S.C.C.....	414
Moonshee Buzloor Ruheem v. Shumsoonissa Begum, (1867)11M.I.A 551 .....	166
M. Nirmala v. Dr. Gandla Balakotiah.....	307
Mrs. RidhimaJuneja v. P. N. Juneja and Sons, 163 (2009) DLT 14.....	313
Mrs. Savita Bhanot v. Lt. Col. V.D. Bhanot, (2010) 158 P.L.R. 1 .....	314,334
Muller v. Oregon, 52 L.ed. 551.....	158
Murugan v. State, 1991 Cri.L.J.1680 (Mad) .....	181
N. Sripadchandra v. Vasanta, AIR 1970 Mys. 232 .....	166
NaliniRanjan v. State of Bihar, A.I.R. 1977 Pat 171 .....	157
Nand Kishore v. State of Rajasthan,RLW2008(4)Raj3432 .....	318
Narinder Pal KaurChawla v. ShriManjeet Singh Chawla A.I.R. 2008 Delhi 7, .....	291
Neeraja Chowdhary v.State of M.P, A.I.R. 1984 S.C. 57 .....	159
Neetu Mittal v Kanta Mittal, 1 52 (2008) D.L.T., 691 .....	307
Neetu Singh v. Sunil Singh, A.I.R. 2008 Chh. 1.....	30

Nidhi Kumar Gandhi v. The State, MANU/DE/0077/2009; 157 (2009) DLT 472 .....	310
Noor Mohammed v. Mohammed Jijaudin, A.I.R. 1992 M.P.244.....	160
Opuz v. Turkey,(App No.33401/02)ECHR 9 June2009 .....	101,102 ,328
P. BabuVenkatesh v. Rani, 2009 (2) RCR(Civil) 883 .....	312
P. Chandrasekhara Pillai v. Vasala Chandran, Crl. MC No. 53/2007.....	326
Padmavati v. State of M.P,1987 Cri.L.J 1573 .....	192
Pannalal Bansilal Pitti v. State of Andhra Pradesh, (1996) 2 S.C.C. 498 .....	160
Parveen Mehta v. Inderjit Mehta, A.I.R. 2002 S.C. 2582 .....	172
Pawan Kumar v. State of Haryana,(1998) 3 S.C.C. 309 .....	189
P.Babu Venkatesh v.Rani (2009) (2)R.C.R. (Civil) 883 .....	312
Pratibha Rani v. Suraj Kumar, A.I.R. 1985 S.C. 628 .....	178
Prem Singh v. State of Haryana, A.I.R. 1998SC299:(1998) 8 SCC 700 .....	199
<i>Priya v. Shibu</i> , MANU/KE/0265/2008, 6/06/2008.....	308
P.S.Balasubramanyam v. Suruttayan(1994)(1)S.C.C. 460 .....	288
R v. R, (1991)4 All E. R. 481 .....	38
R. Balasubramaniam v. Vijayalakshmi Balasubramaniam, (1999) 7 S.C.C. 311 .....	173
R. v. Godoy, [1999] 1 S.C.R. 311Canada, Supreme Court, 1999.....	106
R.Prakash v. Sneha Lata, A.I.R. 2001 Raj. 269 .....	171
Raghuban v. State of Punjab, A.I.R. 1972 P&H 117 .....	157
Rajani v. Subramaniam, A.I.R. 1990 Ker. 57 .....	169
Rajesh Kurre v. Safuraba, MANU/CG/0119/2008, 11/11/2008, CG .....	329

Ramesh v. State of Tamilnadu, 2005(1) Apex Criminal 537 S.C. ....	195
Rameshchand Daga v. Rameshwari Daga, (2005) 4 S.C.C. 772 .....	179
Randhir Singh v. Union of India, A.I.R. 1982 S.C. 877 .....	160
Ranganath Parmeshwar Panditrao v. Eknath Gajanan Kulkarni, 1996 (7) S.C.C. 681 .....	288
Rashmi Kumar v. Mahesh Kumar Bhada, (1997) 2 S.C.C. 397, 1996.....	178
Razzak Khan v. Shahnaz Khan, 2008 (4) M.P.H.T. 413 .....	309
Revathi v. Union of India, AIR 1988 S.C. 835 .....	182
Rosy Jacob v. Jacob a. Chandranakkal, A.I.R. 973 S.C. 2090	
Russel v. Russel, L.R (1897) A.C.395 .....	166
S. Khushboo v. Kanniammal and Anr., MANU/SC/0310/2010.....	298
S. Meenavathu v. SenthamaraiSelvi, MANU/TN/2547/2009	
S. v. Bayoli and Ors, (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) (3 December 1999.....	108
S.R.Batra v. Smt.TarunBatra,136(2007) D.L.T. 1(SC):1(2007) D.M.C. 1(SC): .....	300,339
Samar Ghosh v. Jaya Ghosh, 2007 (5) SCALE 1 .....	174
Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade, (2011) 3 SCC 650 .....	320
Sarala Mudgal v Union of India, A.I.R 1995 S.C. 1531 ;( 1995)3S.C.C. 635 .....	160,181
Sarla Prabhakar Waghmare v. State of Maharashtra, 1990 Cri L.J. 407 (Bom) .....	193
Saro Ram v. State, (2005) Cri. L.J 457 (A.P) .....	189
Sarvanakumar v. Thenmozhi, MANU/TN/9828/2007 .....	331
SavithabenSomabhai Bhatiya v.State of Gujarat,(2005)3 S.C.C.375 .....	296
Shahbad v. Abdullah, A.I.R. 1967, J&K 120.....	157,168

Shanti v State of Haryana, (1991) 1 S.C.C. 371 .....	193
Sheela Barse v. The Secretary, Children's Aid Society A.I.R. 1987 S.C.656.....	110
Shobha Rani v Madhukar Reddi, A.I.R. 1988 SC 121 .....	168,199
Shri.Amit Sundra v.Sheetal Khanna, 2008 Cri. L.J. 66	
Shrikant v. Anuradha, A.I.R. 1980 Kant. 8 .....	168
Shyamlal and Ors. v. Kantabai, II (2009) D.M.C. 787 .....	332
S.Khusbhoo v.Kaniammal, (2010) 5 S.C.C.600 .....	288,270
Smt Shanti and another v. State of Haryana, A.I.R 1991 S.C. 1226.....	189
Smt. Maya Devi v. State of NCT of Delhi, MANU/DE/8716/2007 .....	330
Smt. Sarita v. Smt. Umrao, 2008 (1) R.Cr.D 97 (Raj .....	318
Soumitri Vishnu v. Union of India, 1985, Supp S.C.C 137.....	157,182
Srikanth v. Anuradha, A.I.R. 1980 Kant. 8	
State of A.P v. Gangula Satya Murty, (1997) 1 S.C.C. 272 .....	184
State v. Black, 60 N.C.262 .....	116
State of Karnataka v. M.V. Manjunathgowda, (2003)2SCC 188 .....	200
State of Madras v. ChampakomDorairajan , A.I.R. 1951 S.C. 226 .....	157
State of Maharashtra v. Madhukar N.Mardikar,(1991) 1 S.C.C. 5. ....	159,185
State of Punjab v. Gurmit Singh ,(1996) 1 S.C.C.485 .....	184
State of Punjab v. Iqbal Singh, A.I.R 1991 SC 1532.....	190,199
State of West Bengal v. Orilal and another, (1994) 1S.C.C. 73 .....	189
Subbegowda v. Honnamma, A.I.R 1984 Kant. 41 .....	164
Sucha Singh v. State of Punjab, A.I.R. 1974P&H 162 .....	157
Sukumar Mukherjee v. Tripti Mukherjee, A.I.R. 1992 Pat 32.....	169
Sulochana v. Kuttappan, (2007) Cri.L.J 2057 .....	252
Suresh Khullar v.Vijay Kumar Khullar A.I.R. 2008 Delhi I .....	289

Suresh v. Jaibir, MANU/PH/1180/2008, 9/9/2008, Pun.....	329
Surinder Kumar v. State, (Delhi Administration), (1980) 1S.C.C. 467.....	188
Sushil Kumar Sharma v. Union of India, A.I.R. 2005 S.C. 3100: 2005(3) R.C.R. (Criminal)745 S.C .....	192,196
Taylor v. Fields, (1986)224Cal Rptr 186(California SC) .....	296
T. Vineed v. Manju S. Nair, 2008 (1) K.L.J 525 .....	336
Thanseel v. Sini, WP(C) No. 7450/ 2007, 6/3/2007, Ker .....	293
Thurman v. City of Torrington, (595 F. Supp. 1521 D. Conn. 1984) United States, Connecticut District Court, 1984.....	106
Tulsa and Others v. Durghatiya and Others, A.I.R. 2008 S.C. 1193.....	288
U. Suvetha v. State by Inspector of Police and Anr, (2009) 6 S.C.C. 757 .....	318
U.P.AvasEvamVikasParishad and another v. Friends Co-op Housing Society Ltd. And another, 1996 A.I.R.114, 1995 S.C.C. Supl. (3) 456 .....	217
United States v. Yazell, 382U.S.341, 361 (1966) .....	37
V. Mallikarjunaiah v. H.C. Gowramma, A.I.R. 1997, Kant. 77 .....	198
Vandana v. T. Srikanth, (2007) 6 M.L.J 205 Mad.....	305
Varsha Kapoor v. Union of India & Ors, WP(Crl.) No. 638 of 2010.....	321
V.Bhagat v. V.Bhagat, A.I.R 1994 (1) S.C.C.337 .....	170
Velásquez Rodríguez v. Honduras, 4,Inter- Am.C.H.R.,OAS/ser.C (1988) .....	98
Vidhya Devi v. State of Haryana, (2004) 9 S.C.C. 476 .....	188
Vijay Kumar Bhate v. Neela Bhate, A.I.R. 2003 S.C. 2462 .....	173
VijayVerma v. State N.C.T. of Delhi and Anr.,Crl. M.C. No. 3878/2009.....	311

---

VikramDeo Singh Tomar v. State of Bihar, A.I.R.1988 S.C. 1782: 1988 S.C..R Supl. (1) 755 .....	217
Vimala v.Veerawamy, (1991)2 S.C.C.375 .....	296
Vineeth Saxena v.Pankaj Pandit, (2006)3 S.C.C.778 .....	174.
Vineeth v. Vaishali, A.I.R. 1998 Bom. 73 .....	168
VirendraChanmuniya v. Chanmuniya Kumar Singh Kushwaha and Anr , MANU/SC/0807/2010 .....	292,297
Vishaka& Others v. State of Rajasthan, A.I.R. 1997 S.C. 3011 .....	57
Vishal Damodhar Patil v. Vishakha Vishal Patil, Cri .W.P No.1552/2008.....	326
Vishal Jeet v. Union of India, A.I.R. 1990 S.C. 1412.....	159
Yusuf Abdul Aziz v. State of Bombay, A.I.R. 1954, S.C. 321.....	157,182

.....❧.....



### **I. Research Articles Published by the Scholar**

1. **“Philosophical Underpinnings as to the Subjugated Role of Women in Family”**, [2011] *Cochin University Law Review* 137-161.
2. **“Domestic violence against women - Limitations and Implications under the Criminal Justice System in India”**, [2008] *Cochin University Law Review* 458-482.

### **II. Resume of the Scholar**

## Domestic Violence Against Women: Implications and Limitations

The status and position enjoyed by the women in a society is considered as a yardstick in assessing the development of a nation. Gender based violence has been defined as 'violence that reflects the existing asymmetry in power relations between men and women and that perpetuates the subordination of a female as opposed to male and exists within the framework of patriarchy as a symbolic system that denies women their rights and reproduce the existing imbalance and inequality between the sexes'.<sup>1</sup>

In spite of the medley of laws, passed after getting independence of our country, relating to the elevated status of women in marriage, succession, inheritance, divorce, maintenance etc., it is an undeniable fact that the women in India still continue to live under the stress and strain of male domination that manifests itself in the form of various kinds of cruelties meted out to them. At this juncture it is necessary to review the specific offences addressed by the substantive criminal law system in our country.

The Indian Penal Code, 1860 has recognized certain specific offences against women such as offences affecting human body consisting of dowry death, causing miscarriage, outraging the modesty of a woman, kidnapping and abduction, sexual offences against woman, offences relating to marriage consisting of cohabitation by deceitful means, bigamy, adultery, enticing or taking away a married woman, cruelty by husbands or his relatives for dowry, insulting the modesty of women etc. This paper confines itself to the problem of familial violence perpetrated against women, the penal legislative mandates in the field, its implication and limitations and overall the need to look up at the problem from a human rights perspective of the victim.

---

1. Hilaire Barnett, *Source Book on Feminist Jurisprudence*, Cavendish Publishing Ltd., London (1997), p.558.

The specific socio-cultural traditions and beliefs as to the roles and behaviour of women in a society were not well assimilated into the substantive criminal legislations and hence categorically retained a blind eye as to the violence perpetrated against women within the family. The notion behind was that women as the makers of home need to have no rights or dignity of their own free from the male members of the family.

Violence in general is a coercive mechanism to assert one's will over another, in order to prove or feel a sense of power. It can be perpetuated by those in power against the powerless, or by the powerless in retaliation against coercion by others, to deny their powerlessness. The power exerted by the state is accepted as legitimate means of resolving a problematic situation. One of the core elements of violence is that the coercion involved is neither legitimately nor socially acceptable. Any hierarchical system of social organization, where there are categories of dominant groups and subordinate groups, is inevitably accompanied by the victimization of the latter through various means-subtle pressure, through the power ideology, through mechanism of socialization that reward compliance and punish non-compliance and also through open force. Any individual or group facing the threat of coercion or being disciplined to act in a manner required by another individual or group is subject to violence.

Women's subordinate position in the home, makes their experience different from men's. The image of the family as a protective retreat has been created largely through male eyes, disregarding women's oppression and the extensive discrimination against them which is inherent to the patriarchal structure and functioning of the family.<sup>2</sup> The significance of family for women is also more vital than that of men, because while a man is allowed an

---

2. Saroj Iyer, *The Struggle to be Human : Women's Human Rights*, Books for Change, Bangalore (1999), p.3.

independent existence, woman's identity and survival is not socially conceivable without family. In behavioural terms, violence against women ranges from simple oppression to abuse, aggression, exploitation and severe oppression. Human Rights violations from female foeticide, infanticide, marital cruelty, dowry murders, child abuse, incest to women, battering and murder are committed within the safe confines of the home making women highly vulnerable in families. They remain largely invisible, being considered family matter.

Domestic violence or violence within the family is a universal phenomenon, though its manifestation varies depending on the social, economic and cultural background. It is one of the most insidious forms of violence against women, and is an issue which is often shrouded in silence and cloaked with societal shame. Domestic violence is all about power relations and the abuse of power in a household. It is perpetrated by one member or members collectively on another to gain control.<sup>3</sup> It includes all types of violence against women. i.e., physical, psychological, sexual, economic, emotional and verbal. The different form in which it gets reflected in the society includes foeticide, infanticide, marital cruelty, dowry murders, child abuse, battering, harassment, torture etc. The major premise of the problem is that it happens within the family, the crime is perpetrated by the family members and she is compelled to endure it for the sake of her children's future and lack of economic independence.

### **Human Rights Standards on Family and Domestic violence**

The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. It is asserted throughout the National and International Human Rights documents as the 'basic and fundamental

---

3. Ranbir Singh and Ghanshyam Singh, *Human Rights Education, Law and Society*, NALSAR University, Hyderabad, p.96.

unit of the society.’<sup>4</sup> The significance of ‘family’ in a society as a provider of natural environment for the growth and well being of all its members,<sup>5</sup> the need for giving social, legal and economic protection to the basic unit of the society,<sup>6</sup> the inter relationship between the family, the child and the woman<sup>7</sup> have all been affirmed throughout the standards set by the United Nations Organisation. Family is upheld as the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized.

The International Bill of Human Rights<sup>8</sup> and the other Core U.N. Human Rights Treaties<sup>9</sup> forms the basic guideline to the fundamental rights and freedoms of human beings in the international arena. These documents do not explicitly address the issue of domestic violence. Yet its principles articulate the concepts of fundamental

- 
4. UDHR, Art. 16(3); The International Covenant on Civil and Political Rights, 1966, Art.23; The International Covenant on Economic, Social and Cultural Rights, 1966, Art.10; American Convention on Human Rights,1969, Art. 17; African Charter on Human and Peoples’ Rights, 1981, Art. 18; ARAB Charter on Human Rights, 2004, Art. 33.
  5. Preamble of International Covenant on Economic, Social and Cultural Rights, 1966; of Declaration on Social Progress And Development, 1969 Art 4; adopted by General Assembly Resolution 2542 (xxiv) on 11 th December, 1969.
  6. European Union Charter of Fundamental Rights, 2000, Art. 33.
  7. *Global Framework of Beijing Declaration and Platform For Action*, Chapter II adopted at the Fourth World Conference on Women: “Action for Equality, Development and Peace, 1995” held at Beijing on 15 th September 1995.
  8. It consists of The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), which entered in force in 1976.
  9. It consists of the International Covenant on the Elimination of All Forms of Racial Discrimination, 1965; The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and The Convention on the Rights of the Child, 1989.

rights and freedoms that are commonly violated in domestic violence cases. Those rights include the right to equality, right to equal protection of the laws, right to life, liberty and security of the person, right to physical and mental integrity, and right to be free from discrimination, torture, degrading and inhuman treatment. The mandates set up under the International Bill of Rights and the efforts of the United Nations Organisation, through international conventions, declarations, and conferences has brought to light the issue of domestic violence and the need to evolve laws to combat it both in the international and regional forums.

The preamble of the United Nations Charter, 1945 begins by referring to faith in fundamental human rights, in the dignity and worth of the human persons, and in the equal rights of men and women. The Universal Declaration of Human Rights<sup>10</sup> proclaimed in 1948 by the General Assembly is considered as the cornerstone of UN's human rights system. It upholds and protects the dignity and integrity of human beings. The golden thread of fundamental human rights and freedom is embedded in its provisions when it exhorts that all human beings are born free and equal in dignity and rights.<sup>11</sup> All the rights and freedoms set forth therein are held entitled to all human beings without distinctions of race, colour, sex, language, religion, national origin, property, political opinion etc.<sup>12</sup>

Right to life,<sup>13</sup> liberty and security of person<sup>14</sup> and the right to be recognized as a person before the law<sup>15</sup> are conferred by the Declaration.

---

10. The Declaration consisting of 30 articles was written by Eleanor Roosevelt, Chair of the UN Commission on Human Rights, and 17 other international delegates. It is held to be the primary international articulation of the fundamental and inalienable rights of all human beings.

11. Universal Declaration of Human Rights, Art. 1.

12. *Id.*, Art. 1.

13. International Covenant on Civil and Political Rights, Art. 6(1).

14. Universal Declaration of Human Rights; Article 9(1), International Covenant on Civil and Political Rights, Art. 3.

15. Universal Declaration of Human Rights, Art. 6.

Freedom from torture is fundamental to allowing an individual to live a life of dignity and security. The Declaration provides freedom from torture or cruelty, in human or degrading treatment or punishment.<sup>16</sup>

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in the year 1984 defines torture<sup>17</sup> as “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a purpose such as obtaining or a confession, punishment, intimidation, or coercion “or for any reason based on discrimination of any kind”. Domestic violence is a violation of a woman’s rights to bodily integrity, to liberty, and often right to life itself. This approach equates domestic violence to a form of torture.

The Declaration further ensures the right to marry, to found a family and equal rights as to marriage and at its dissolution<sup>18</sup>. It exhorts free and full consent in entering into marriage.<sup>19</sup> Moreover the family is upheld as the natural and fundamental group unit of society and emphasizes on its protection by both society and the state.<sup>20</sup> The family, as being acknowledged as the basic unit of the society, the violence perpetrated against women within the family and their right to personal dignity, life and security within the family receives recognition in the international and national platform.

Thus it can be inferred that any form of violence against women which is seen as a threat to their life, liberty or security of person or which is torture or cruel, inhuman or degrading treatment is a violation of the international human rights obligations of the member states,

---

16. *Id.*, Article 7, International Covenant on Civil and Political Rights Art. 5.

17. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

18. Universal Declaration of Human Rights, Art. 16(1).

19. *Id.*, Art. 16(2).

20. *Id.*, Art. 16(3).

and thus contrary to the principles of the Universal Declaration. The International Bill of Rights resorts to a gender neutral terminology while pronouncing the rights of individuals. The provisions contained therein begins with terms like 'no one', 'every one', all etc which means that they are equally applicable to women and implicitly refers to the protection to be accorded to them in cases of domestic violence.

### **Domestic Violence as a Human Right Issue**

Universal Declaration of Human Rights, The Magna Carta of the Mankind exhorts that, "all human beings are born free and equal in dignity and rights". Human right to dignity, worth of human person and freedom from discrimination and recognition of violence as a form of discrimination are the pre requisites to protect and preserve the human rights of women placed under special circumstances. The Constitution of India running along in the same spirit upholds the right to live with human dignity under Article 21. The evolutionary motive force for human rights is the mankind's demand for decent civilized life in which the inherent dignity of each human being is well respected and protected.

Domestic violence against a woman leads to a series of violation of her human rights as an individual. It is a violation of the right to live with human dignity and identity, as it reinforces and reproduces the subordination of women and thus obstructs the developmental process. It is the denial of the right to equal protection before law to which every human being is entitled. Denial of the state to recognize such offence committed against women also denies her right to simple and prompt recourse to a competent court for protection against acts that violates her rights. The right to personal liberty and security is endangered where victims are deprived of their liberty of free existence and their right to security. Her mobility is restricted, her self- expression is monitored and her thoughts influenced by others in her milieu.

The threat of dis-possession from family aggravates the situation making her vulnerable to incompatible adjustments within the household. Domestic violence is a denial of right to social and political participation,



by subjecting the victim to home confinement. Thus the right to equal access to the public service of the country and to take part in the conduct of public affairs, including decision-making is restricted. It suppresses her right to associate freely and the most fundamental attribute of the human beings i.e., the right to freedom of expression. Thereby, the right to have a woman's physical, mental and moral integrity respected is denied. The right not to be subjected to torture is also denied.

There is the denial of the right to optimum standard of physical and mental health as the victim undergoes prolonged physical and mental trauma. The right to affection and enriching personal relations required for the basic human existence suffers a set back. The denial of personal development restricts a woman's right to participate in various activities, curtails her prosperity in career or working field, academic field etc. Viewed from a human rights perspective it is the general denial of women's human rights as an individual.

All these rights have been guaranteed to woman by virtue of international and national human rights standards. Such a situation is a return to the law of jungle, where might is right. The reconciliation with the subjugation and hopelessness harms the woman more than the violence itself, as it erodes her personality and also that of the children. This brings us to the crux of the whole problem of familial violence. It is the sense of inadequacy, of vulnerability, of helplessness, of weakness and fear of violence that often destroys the women's sense of self.

### **The Individual and Social Cost of the Problem**

Domestic violence leads to serious repercussions to the victim and other members of the family. The abuser is likely to suffer the consequences of his behaviour. Insecurity on the part of the victim leads to isolation and social withdrawal. Marital violence accounts for serious health implications in the victim. According to the World Report on Violence and Health by the World Health Organisation, Geneva, 2002, domestic violence accounts for a substantial but largely unrecognized proportion of maternal mortality. Children witnessing domestic violence

in the families are often the worst hit who run the risk of being injured or may lead to serious behavioural disorders later leaving long scars that may be carried on to adulthood resulting in either neurotic conditions, personality disorders, or repetition of the violence cycle. For example a high proportion of street children report marital violence in their family life. Such long term consequences on the children reduce the productivity of future generations as well. The adolescent in violent family situation undergo a period of identity crisis where he or she is unable to arrive at a defined self understanding and left unable to choose and invest energy into the right careers.<sup>21</sup> And often some of them might end up at suicide.

The social cost incurred on the society as a whole needs to be discussed in a wider perspective. It leads to an increased level of violence in the society. Family forms the basic unit of social organization. It is an inevitable part of human society. It is the primary institution of any society and is formed by the ceremonial marriage of males and females, resulting later in the birth of offspring. All the societal forces are used for its support and protection, for through it, societies perpetuate themselves both culturally and biologically. The family, therefore, is a socially recognized unit of people related to each other by kinship, marital, and legal ties. Every society implies its ultimate control over this unit by its institutionalization of marriage and the definition of rights and obligations that arise as a result of marriage and consequent reproduction. Another aftermath of the problem is the family disintegration. The most devastating aftermath of familial violence is the break up of the social institution of the family leading to an increased number of single parent families. Another disintegrative effect of the domestic violence need to be understood on the basis of Greater demand on health care systems, temporary or chronic economic and psychological dependence of victims on the welfare system. It leads to adverse economic burden on the society's welfare system. Gradually the oppression of women in the family results

---

21. Bhargavi V. Davar, *Mental Health From : A Gender Perspective*, Sage Publications, New Delhi, p.236.

in the maintenance of women as second-class citizens thus depriving the country of women's full potential for taking part in the developmental process. This is a serious developmental problem for the country. It is in this wider framework, that the violation of human rights of women occurring at the basic cell of the society i.e. the family needs to be viewed from a larger sociological framework.

### **Domestic Violence Under the Indian Criminal Justice System**

It was only as late as 1983, following the public outrage against 'dowry deaths' coupled with a strong advocacy for legal reform by various women's organisation that domestic violence came to be recognized as a criminal act. Prior to it only the general provisions of the Indian Penal Code could be invoked to book and penalise the offenders. A limited recognition of the criminal nature of domestic violence is reflected in Sections 498A<sup>22</sup> and 304B<sup>23</sup> of the Indian Penal Code which were introduced by the Criminal Law Amendment Act of 1983 and Dowry Prohibition (Amendment) Act, 1986 respectively. This was followed up by a spate of other amendments all of which reflected certain recognition of the seriousness of the problem of domestic violence in India. Under the Criminal Law (Second Amendment) Act, 1983, a new Section namely 113A<sup>24</sup> was inserted in the Indian Evidence Act. Under the Criminal Law (Second Amendment) Act, 1983, Section 174 Criminal Procedure Code was suitably amended to provide for investigation by the police, of cases of suicide committed by women within seven years of marriage. By criminalizing domestic violence, Section 498 A had the effect of

- 
22. This new provision for the first time criminalized domestic violence. Physical or mental violence inflicted on a woman by her husband and relatives was recognized as a cognizable and punishable act.
  23. It introduced 'dowry death' as a new offence.
  24. Under this section when a woman commits suicide within a period of seven years from the date of her marriage, due to 'cruelty' by her husband or his relatives, the court may presume that such suicide had been abetted by her husband or by his relatives.

creating the much-needed space for a distressed woman facing violence in her marital home.<sup>25</sup> As the two vital arms of the state, the Police and the Judiciary are responsible for the successful implementation of these laws.

### **Judicial Responses to Human Rights Protection within the Marital Ties**

Under the backdrop of the changing scenario of the world certain notable judicial interpretations has upheld the right of women to human dignity within the marital relationship. The concept of cruelty under the section has undergone various interpretations as to inculcate its impact in the deprivation of identity in women's life. 'Cruelty', no matter whether perpetrated by the husband or the wife seems to be recognized by the judicial responses.<sup>26</sup> And thereby men alone have not been stigmatized as the perpetrator of violence within the marital bond. The Karnataka High Court took a practical and broad view in conformity with the recent trend and development of matrimonial law as it observed that the failure to comply with one of the essential obligations of marital life or any conduct of either spouse which causes disgrace to the other or subjects him or her to annoyance and indignity, amounts to legal cruelty.<sup>27</sup>

In *Keshaorao v. Nisha*,<sup>28</sup> it was held by the Court that the broad test to determine cruelty is whether the conduct of the respondent is of such type that the petitioner cannot be reasonably be expected to live with the respondent or living together of the spouses has become incompatible. The acts of violence against wife, however minimal, will, therefore amount to cruelty in case the acts cause distress, humiliation

---

25. Nishi Mitra, *Domestic Violence as a Public Issue - A Review of Responses*, Unit For Women's Studies, Tata Institute of Social Sciences, Mumbai (2000), p.8.

26. Leading case on wife's cruelty towards husband is *Dastane v. Dastane*, (1975) 2 S.C.C. 326 : A.I.R. 1975 S.C. 1534 and *Handa v. Handa*, A.I.R. 1985 Del. 76 is a case of husband's cruelty towards wife.

27. *Shrikant v. Anuradha*, A.I.R. 1980 Kant. 8.

28. A.I.R. 1984 Bom. 413.

or indignity to wife or the acts affect her mental or bodily health. This decision holds well as to the concern over the right to human dignity and identity of a woman within the marital ties.

In *Shobha Rani v. Madhukar Reddi*,<sup>29</sup> the Supreme Court dealt with the issue of dowry demand qua its impact on matrimonial relations. It was held that dowry demand per se constitutes cruelty, giving to the wife a ground for divorce.

In *Rajani v. Subramaniam*<sup>30</sup> the Kerala High Court remarked that judged by the standards of modern civilization wives are not expected to endure harassment in domestic life whether mental or physical like women in older days. The Court held :

“Her sentiments have to be respected and her aspirations and ambitions are to be taken into account in making adjustments according to the life the wife is accustomed to lead.” The acts and behaviour of human beings are diverse and infinite and so it was held by the court that the interpretation and definition of the concept of cruelty depends upon the character, way of life of the parties, their social and economic conditions, their status, customs and traditions.<sup>31</sup> The non limitation of the definition of ‘cruelty’ within a straight jacket formula holds good in the present globalised world where human values and culture are getting eroded”.<sup>32</sup>

In *R.Prakash v. Sneh Lata*<sup>33</sup> the Rajasthan High Court emphasized the concept of complete equality of the spouses. The remarks of the Court are pertinent as to uphold the rights of woman to equality, and to live with human dignity. The Court thus held :

---

29. A.I.R. 1988 S.C. 121.

30. A.I.R. 1990 Ker. 57.

31. *Id.*, at p. 61.

32. *Sukumar Mukherjee v. Tripti Mukherjee*, A.I.R. 1992 Pat. 32.

33. *Id.*, at p. 35. A.I.R. 2001 Raj. 269.

“The orthodox concept of wife and expectations from her to subject herself to husband’s wishes has undergone a revolutionary change with education and high literacy in women and with recognition of equal rights to women in the Constitution and abolition of sex distinction in all walks of life. She is a partner in marriage with equal status and equal rights with the husband.”<sup>34</sup>

Here in this case, the wife’s insistence on her continuing with her employment and refusal to leave the job was held not to constitute cruelty.

To a certain extent, right to live with human dignity and integrity of women has been accepted through the above judicial pronouncements. While dealing with dowry death cases courts have resorted to mixed interpretations of the provisions resulting in both negative<sup>35</sup> and positive judgments<sup>36</sup>. The cumulative effect of sections 498A and 304B of the

34. *Id.*, at p. 275.

35. In *Appasaheb v. State of Maharashtra*, (2007) 9 S.C.C. 721, the Supreme Court overruled the conviction of the appellants (husband and in-law) under Sec 304 B of the Indian Penal Code combined with s. 34 of the Code, and held that demand for money by the husband and his family was on account of some financial stringency or for meeting some urgent domestic expenses and that it cannot be termed as a demand for dowry as the word is normally understood. The Court observed that a strict interpretation must be given to the word “dowry” as defined in the Dowry Prohibition Act, 1961 and be necessarily be connected with the marriage. This judgment fails to take into account the reality of the way in which demand for dowry takes various forms even after the actual marriage ceremonies are completed, and how women continue to be harassed for dowry long after the initial demand at the time of marriage. In *Saro Ram v. State*, (2005) Cri. L.J. 457 A.P., where the demand of money for house construction was not held to be a dowry demand for the applicability of S.304 B of the Indian Penal Code.

36. *State of West Bengal v. Orilal and another*, (1994) 1 S.C.C. 73; *Pawan Kumar v. State of Haryana*, (1998) 3 S.C.C. 309; *Beena Agarwal v. Anupam*, A.I.R. 2004 S.C.141. In *Smt Shanti and another v. State of Haryana*, A.I.R. 1991 S.C. 1226, the Supreme Court held that even a case of suicide would be within the expression ‘death occurred otherwise than in normal circumstances’

(f.n. contd. on next page)

Code is that the offences under these sections have discriminatory protective clauses against the inhuman, barbaric treatment of women at the hands of unscrupulous husbands and relatives. Such offences are not only held as against the woman victims but also against the society and humanity.

Certain judicial responses to the offence have been disheartening to the victims resulting in high incidences of acquittal of the accused for want of evidence and strict interpretation of the provisions.<sup>37</sup> The immense scope of discretion provided to law enforcing authorities for defining 'grave injury' has further circumscribed the position of the victim. Only cases involving grievous physical injury are interpreted as grave enough to be prosecuted under the section. Patterns of systematic abuse and continual violation of her physical and mental self often precede the cruelty which is often overlooked. Difficulty to prove mental cruelty also exists. The evidentiary standards for penal laws, such as general assault and battery provisions, fail to recognize particular circumstances of domestic violence. It often takes place in seclusion over an extended period of time. More empathetic perspective towards such victims is highly felt while dealing with cases of mental cruelty.

### Legislative and Institutional Repugnancy

The ingredient of the lofty and much applauded offence of dowry death (section 304B) has made it impossible to prove the offence. Earlier

---

and would attract the provision of S. 304 B of the Indian Penal Code if other ingredients of the section are proved.

37. Courts has taken a view that every kind of harassment are not included under 498A and that the complainant has to conclusively establish that beating and harassment in question was with a view to compel her to commit suicide or to satisfy the dowry demand. *Sarla Prabhakar Waghmare v. State of Maharashtra* 1990 Cri. L.J. 407 (Bom.); *Shanti v. State of Haryana* (1991) 1 S.C.C. 371; *Benumadhob Padhi Mohapatra v. State*, 2004 Cri. L.J. 505 Orissa at p.508.

a case of wife murder would be registered under section 302-murder. The prosecution needed to prove the accused in terms of his proximity to the scene of offence and motive for the murder. But after the amendment, a wife murder ceased to be a murder and was relegated to 'dowry death'. To meet the stipulations of the section, the married woman had to die within seven years of marriage. And that prior to her death she had to be subjected to dowry harassment by her husband and his relatives. Only once these ingredients were proved the onus would shift on to the husband to prove that he did not commit the offence. But in reality, most of the cases never reach such a stage.

The provisions of abetment to suicide, with its positive rules of evidence, have failed to bring redressal as the court interprets the newer provisions in the most technical manner. Some important judgments would substantiate the above premise.

In the case of abetment to suicide under section 306 of the Indian Penal Code, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abetment to suicide is available only if husband is proved guilty of cruelty towards the wife.<sup>38</sup> In certain cases of cruelty in which the death of the wife was suicidal or homicidal, the prosecution has been launched only under section 498 A of the Indian Penal Code and the husband had escaped prosecution under section 304 B.<sup>39</sup>

Madhya Pradesh High Court set aside the conviction of three years and acquitted the mother in law. The Court held that since the deceased ended her life by self immolation when none of the in-laws were present in the house at the time of suicide it was committed in all probability out of frustration and pessimism due to her own sensitiveness.<sup>40</sup>

---

38. *Ashok Kumar v. State of Punjab* 1987, Cri. L.J 412.

39. *Bapu Subhdeo v. State of Maharashtra*, (1992) 2 Bom. C.R. 450; *Lal Mohan v. State*, (1993) 1 Crimes 298.

40. *Padmavati v. State of M.P.*, 1987 Cri. L.J. 1573; *Ramesh v. State of Tamilnadu*, 2005 (1) Apex Criminal 537 S.C. etc.



The timing of the enactment of section 498A has led to legal misconceptions as to its precise scope. Since it was introduced in response to the popular outrage and protest against the torture and killing of innocent brides for dowry, there is a tendency to identify section 498A to be a dowry related legislation. The above provision meant for curbing domestic violence, having been saddled with the dowry premise has proved to be inadequate to meet the real life situations of victims. By placing the dowry violence on a special pedestal, the routine violence faced by women is denied recognition and legitimacy. In order to access the Criminal Justice system, violence faced by women within homes need to be superficially and falsely attributed to dowry. In fact the difficulty starts with the very process of translating and interpreting the woman's complaints into that of a particular institutional framework. The officials entrusted with the task of carrying out the counseling are not gender sensitive and those institutional records offers only a partial understanding of woman's plight, let alone in the family.

The provisions of the section 498A for its applicability requires a valid and subsisting marriage between the parties and in its absence, no case could be made out. Moreover, every aspect of crime or harassment does not come under its ambit. The prosecution has to establish that the cruelty or harassment was persistent, grave and unbearable in nature and the same was with the intention to force woman to commit suicide or to fulfill illegal demand of dowry by the husband or the in-laws. The law on the problem completely de links itself from other forms of familial violence like child abuse and elder abuse. It addresses only spousal abuse and it is high time to amend and enlarge its scope to include the problems of women victims of fake marriages, divorced or widowed women, elder abuse etc.

The procedural hurdles poses a great threat in recognizing , investigating and imparting justice to the victims ,namely insufficient evidence, tampering of evidence, flawed investigations by the police, the problem of witness turning hostile, protracted legal process, and the state institutions permeated by patriarchal ideology. All these procedural hurdles play an upper hand in cases of domestic violence thus making

the criminal justice system inaccessible for woman victims. The high incidence of conciliation needs to be seen in the larger context of the overall vulnerability of woman in India. The incompatibility of adjustments prescribed by the counseling officials again compels the victim to reconcile with the criminal situations.

### Misuse of the Law

Ever since its enactment, section 498A has come in for strident criticism that it is being largely misused by women to seek revenge on their in-laws. Women have been portrayed as having fabricated stories of torture and falsely implicating the entire household members. There are numerous examples and judicial trends which show this provision have been misused by registration of false cases against the husband and family members.<sup>41</sup>

It is often referred to as being responsible for the break up of families. The extremely low incidence of convictions, the high incidence of acquittals and the inability of the cases to withstand the investigation and scrutiny in a court of law is seen as signifying the frivolousness of the charges.

Keeping in view the misuse of this particular provision its constitutional validity was challenged as violative of Articles 14 and 20(2) of the Constitution of India in *Indraj Malik v. Sunita Malik*<sup>42</sup> and ultimately it was decided positively and constitutionality was upheld.<sup>43</sup>

41. Judicial responses as to women held as abusing beneficial provision of section 498-A are : *Amisha Bhandari v. State of Haryana*, 2005(2) R.C.R. (Criminal) 429 (P&H); *Harmohan Kaur v. State of Punjab*, 2006 (3) R.C.R. (Criminal) 932 (P&H); *Ramesh v. State of Tamil Nadu*, 2005 (1) Apex Criminal 537 S.C. etc.

42. 1986 Cri. L.J. 1510 (Delhi).

43. The contention was that the provision was violative of Art.14 in as much as it gave an arbitrary power to the police as well as to the courts, that the word 'harassment' used in part (b) of the explanation was vague and thus any person can be arbitrarily arrested for harassment and this section violates

(f.n. contd. on next page)

In *Sushil Kumar Sharma v. Union of India*,<sup>44</sup> it was held by the Supreme Court that section 498-A is constitutionally valid and the object of this Section is to combat the menace of dowry deaths and cruelty.

While the efficacy of section 498A in criminalizing acts of domestic violence and in meting out justice to women victims is being questioned, its strong deterrent value needs to be recognized. It has been successfully used for negotiating reconciliation, maintenance, separation, child custody and divorce. Cruelty meted out to other women members of the family has been overlooked and as a result the criminal justice enforcement in our country as to the issue is one sided. Thus relative rather than absolute justice has been the outcome of these arbitrated cases of domestic violence.

#### **Protection of Women From Domestic Violence Act, 2005**

The Act was enacted with a view to providing more effective protection to the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The Act in its statement of objects and reasons has clearly acknowledged the conceptual framework for the law as including the Vienna Accord, the Beijing Declaration, the CEDAW and Recommendation No.19 of the CEDAW Committee where violence against women including violence within intimate relationships were first articulated in the international arena. The Act stands in conformity with the UN Model Legislation on Domestic Violence, which provides comprehensive guidelines for states in drafting legislations on domestic violence. The enactment was passed by the

---

the principles against double jeopardy guaranteed by Art.20(2) of the Constitution in view of the fact that the demand of dowry or any property was punishable under this section as well as section 4 of the Dowry Prohibition Act, 1961.

44. 2005(3) R.C.R. (Criminal)745 S.C.

Parliament with recourse to Article 253<sup>45</sup> of the Constitution. The rights guaranteed under Articles 14, 15 and 21 of the part three of the Indian Constitution have also been kept in view by the framers of the Act. The Act in theory goes a long way towards protection of women in the domestic setup. It is the first substantial step in the direction of vanquishing the questionable public/private distinction traditionally maintained in the law.

The Act is a civil law directed towards providing compensation and support to the woman and not intended to penalize the perpetrator in the first instance. The wide definition of domestic violence envisaged by the Act as including all types of physical, mental and emotional, verbal, sexual and economical abuse-brings under its purview the invisible violence suffered by a large section of women and entitles them to claim protection from the court<sup>46</sup>. It is significant because for the first time the term 'domestic violence' has been widened in meaning and scope from the culture specific restriction of 'dowry deaths' and penal provisions to positive civil rights of protection and injunction<sup>47</sup>.

A major shortcoming of earlier laws against domestic violence was that they assumed women are abused only in their roles as wives and daughters-in-law. The new Act takes a more balanced and nuanced view of domestic abuse by including daughters, sisters, mothers, mother in-law, sisters-in-law and even grandmothers in its purview. Recognizing that women's rights are violated not only as wives, but also as mothers,

---

45. This provision confers on the Parliament the power to make laws in pursuance of international treaties conventions etc.

46. Protection of Women from Domestic Violence Act, 2005, s. 3.

47. In each case of cruelty, suicide or murder, the prosecution had to prove not only a link but a close proximity to the dowry demand and the incident of violence as the offences under the Indian Penal Code were framed in the language of dowry i.e. dowry death (s. 304 B),cruelty to wives and dowry harassment (s.498A ) etc.

sisters, daughters, live in partners, it covers all such relationships under the definition of “domestic relationship”. 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 Act provides protection to women, who live or have at any point of time lived together in a shared household whether related by consanguinity, marriage, or relationship in the nature of marriage, adoption or are family members living together as joint family<sup>48</sup>. The present Act only requires 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 women’s access to justice is a major impediment to effective implementation of any gender-specific law. It is in this context that the law has in-built mechanisms in place to ensure that a woman can have access to the justice system as well as access to support systems<sup>49</sup>. The relief system in the Act clearly shows the attempt on part of the legislature to allow the accused to have access to a variety of relief measures, to be adapted to differing circumstances. The Act provides scope for protective injunctions against violence, dispossession from

---

48. Protection of Women from Domestic Violence Act, 2005, s. 29(f).

49. *Id.*, s.8. The Act has envisaged the Protection Officer and the Service Provider (s.10) to women in using the provisions of the law. While the Protection Officer is to serve as the link between the woman and the court as well as enable her to access the support services provided under the Act, the Service Provider (NGO’s working for women who choose to register under the Act) continues providing her with the necessary support that she might require.

the matrimonial home and alternate residence.<sup>50</sup> The Act provides the woman with the right to residence in her shared household<sup>51</sup>. This is all the more relevant when one keeps in mind the importance of the matrimonial home in the lives of women in India. Women are often discouraged from filing complaints about domestic violence because they will be left homeless and destitute once turned out of the house of their husband. The idea of residence orders therefore has a dual purpose in that it prevents the destitution of women, and empowers them to utilize the legal system available by providing security.

The Act also provides the scope for claiming economic protection, including maintenance. Apart from other reliefs, the Magistrate can grant monetary relief to meet the expenses incurred and losses suffered<sup>52</sup> and compensation to the victim for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent<sup>53</sup>. The Magistrate can also direct the respondent or the aggrieved person either singly or jointly to go for counselling<sup>54</sup>.

There has been an effort in this Act to simplify and make more effective issues of procedure in the method of filing a complaint of domestic violence and of obtaining relief under this Act. 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, who has witnessed a case of domestic violence to file a complaint in that regard to the Protection Officer<sup>55</sup>.

---

50. 4(4) *Combat Law*, 7 (2005).

51. The Act does not create any title in the property but prohibits a woman from being rendered shelterless. *Domestic Violence Act*, 2005, s. 17(1).

52. *Protection of Women from Domestic Violence Act*, 2005, s. 20.

53. *Id.*, s. 22.

54. *Id.*, s. 14.

55. *Id.*, s. 14(1).

The Act combines features of both civil and criminal laws. It is governed by the Code of Criminal Procedure and the Magistrate passes the orders, but it provides remedies in the nature of civil law. The combination of a civil and criminal approach to address the problem of domestic violence has been used in other jurisdictions as well. Notably, the English domestic violence act incorporates the idea of a 'non-molestation order' which is conceptually similar to the Indian protection order. A non-molestation order can be issued by the courts without an application for the same, if the courts feel it is necessary for the protection of an individual the breach of a non-molestation is also a criminal offence. The criminal approach to domestic violence is also given a space in this Act, which criminalizes the breach of any of the above orders, and punishes it by a criminal sentence of imprisonment up to one year, a fine up to Rs. 20,000 or both<sup>56</sup>.

For the first time the Act holds the state responsible for the care of victims of domestic violence. Under the Act, the Central government and every State government should take all measures to ensure that the provisions of this Act are given wide publicity through public media including the television, radio and the print media at regular intervals; the Central and State government officers including the police officers and the members of Judicial Services are to be given periodic sensitization and awareness training on the issues addressed by this Act.<sup>57</sup> The Domestic Violence Act is a unique experiment in Indian legislative history as it creates an interface between the government and the NGO sector and utilizes the experiences and resources of both to provide effective machinery for its implementation.<sup>58</sup>

---

56. *Id.*, s. 31.

57. *Id.*, s. 11.

58. *Lexis Nexis Halsbury's Law Monthly*, April, 2008, p.24.

### Evaluation of the Act

The Act could play a stellar role in protection of women's rights in the household and in guarding them from domestic violence. In the very first instance, a recognition of domestic violence as something unacceptable, where it has become yet another social practice, is necessary and indeed, commendable in a patriarchal society. Having recognised the rights of women and the violation of these rights, the next step taken is providing innovative and efficacious remedies to enforce the same. The conceptualization of the Act thus far is admirable.

While reading in between the lines the of the Act, it clearly point towards certain mis matches existing in the society. In the garb of providing protection, this legislation in fact, strikes at the very foundation of marriage by promoting intolerance and encouraging unnecessary litigation even for petty domestic disputes. The law is based on a totally wrong notion and assumes men as the sole perpetrators of domestic violence. This is altogether a wrong impression and only confirms the gender bias in favor of women created by this law. Giving of such sweeping legal powers to women while withholding protection to male victims tantamount to systematic legal victimization of men. The law is wholly gender specific and rules out any possibility of domestic violence against a man. The law confers rights in a woman without imposing any liability, while a man is overburdened with discriminative liabilities with total denial of rights. This Act should have ideally included stringent penal provisions for curtailing the instances of abuse and mishandling, but herein, instead various opportunities have been made available which can ultimately lead to its grave misuse and can thus act as a catalyst for breaking homes. Thus, this Act does not contain any provisions for creating awareness or for strengthening and preserving family as an institution or even providing chances for reconciliation or even scope for improvement to "the husband". The main beneficiaries of this Act will obviously be women of propertied upper class.

The reliefs provided under the Act are not new or path breaking. They were available to women under the civil law regime. Another



difficulty is revealed as to the jurisdiction. Earlier with the intention to club together divorce and maintenance proceedings family courts had a larger framework duty to be exercised. Under the new Act the jurisdiction gets reverted to the magistrates' court. Now the question arises as to the efficacy, honesty, and gender sensitivity of family courts. A law is only as good as its implementability, despite lofty aspirations. The responses to the Act are polarized fearing its futility and misuse.

### Conclusion

Jawaharlal Nehru has rightly said :

“Legislation cannot by itself normally solve deep-rooted, social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape.”

The magnitude and severity of the problem requires the laws to be viewed in a fresher sociological perspective. The legislators need to assimilate the gravity of the problem while enacting laws. Laws are the expressions of social needs and aspirations. Only a change in the mindset could bring about gender sensitivity in the administration of justice. Infusing gender sensitivity in the society, laws and functionaries of law enforcement machinery in this globalised world is one of the biggest challenges before us.

Domestic violence erodes confidence in the rule of law, the foundation of civil society. The vital issue is to recognize domestic violence as a human rights problem. The victim is to be reached ‘behind the closed doors’. Inability of the victim to reach out from behind the ‘closed door’ of the family and the incapacity of the society and the law to reach the victim sustain a vicious circle which is difficult to disentangle.<sup>59</sup> Whenever crimes are committed against women the same

---

59. *Supra* n.6, p.20.

should be viewed in the context of violation of her human right to live with human dignity under Article 21 of the Indian Constitution.

It is suggested that for a more holistic approach to the problem, the definition of domestic violence from spousal abuse needs to be broadened. The need is to explicitly recognize domestic violence against women as a serious developmental issue. Services that integrate preventive and rehabilitative strategies with supportive strategies can go a long way in providing long term solutions to the problem. It requires active involvement from lawmakers, the media, non-state actors, private individuals etc. Educational strategies are to be initiated directing at changing attitudes and biases of the people in general and functionaries of law enforcement machinery specifically. Powerlessness of women as the root cause of violence needs to be specifically addressed. Existing services of counseling, crisis intervention and legal aid requires improvement in quality and accessibility. Existing laws on minimum age at marriage, inheritance of parental property and maintenance rights of women are to be strictly enforced.

Both the national and international community need to emphasize on the issue to achieve its goals in the area of women's human rights. A social response to help victim to open the doors is required to raise the veil that hides the violence and legal response to knock the doors is needed to bring justice to the doorsteps of the victim.

**S. Anuja\***

---

\* LL.M. (S.I.L.T., Kottayam); Research Scholar, School of Legal Studies, Cochin University of Science & Technology, Kochi - 22.

# Philosophical Underpinnings as to the Subjugated Role of Women in Family

S. Anuja \*

Despite the very vital and undeniable roles which women play in human beings life and its continuity within families and communities, they did not enjoy an appropriate and suitable social status, and were deprived and discriminated by different ways through history, around the world. The subjugated role of women in society is a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women. Different social mechanisms such as violence and cruelty existed in the family by which women are forced into a subordinate position compared with men. The patriarchal culture inevitably validates these evil social mechanism as an acceptable, even desirable, attribute of masculinity and tends to devalue women and all attributes considered feminine and thereby intervening into relationships. The age old philosophical perceptions on the role of women permeates in all man-woman relationships within the four walls of the home which is considered as the repository of love, warmth and affection. This paper is an attempt to examine the various theories on the subjugated role of women in domestic relations. The Western as well as the Indian perceptions are analysed in this context.

## Familial Ideology and Oppression of Women in Family

The family is exalted as the very foundation of human existence, a haven for love, care and loyalty. Family is a concept which is often taken for granted as representing a group of people related by blood and marriage. It is asserted throughout the national and international Human Rights documents as the basic and fundamental unit of the society<sup>1</sup>. Family is the dominant ideology, through which a particular set of household and gender relationships are universalized and naturalized.

Fletcher defines 'family' as a small, relatively permanent group of

---

\* LL.M. (SILT-M.G.); Teaching Associate, National Law School of India University, Bangalore.

1 International Covenant on Civil and Political Rights, Art.23 states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

people, related to each other in the most intimate way, bound together by the most personal aspects of life, who experience among themselves the whole range of human emotions, continual responsibilities and obligations towards each other and the sense of 'belonging' to each other in the most intimately felt sense of that word.<sup>2</sup> This definition maintains and projects the warmth and heat of the emotions through which the man-woman relationship in the domestic relations is often portrayed. These 'most intimate' and, 'most personal' dynamics of family life are the unstated core of Fletcher's idea of the 'family'.

Murdock defines the family as a social group characterized by common residence, economic co-operation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults. He termed four basic functions of a family in all societies i.e., sexual, reproductive, economic and educational<sup>3</sup>.

The concept of family and household needs to be distinguished in this context. Household can be considered as co-resident units in which the distribution and exchange of commodities and services such as wages and domestic work are organized primarily through relations of kinship. Family on the other hand, can be defined as those kinship based relations that are located within co-residential groups and to the particular ideological forms taken by kinship structures. By the ideological discourse in the concept of family, we refer to a representative process whereby beliefs, norms and explanations are constructed historically in conjunction with and in relation, to material and cultural conditions and power relations, but are presented as natural, inevitably and necessary<sup>4</sup>. Thus the concept of familial ideology forms an important focus in exploring the role of family in the oppression of women.

Through this ideology, women are constructed as wives and mothers, having vested with the duty of child rearing and domestic labour. Men on the other hand are constructed as husbands and fathers, responsible for the financial welfare of the family. The sexual division of labour was closely associated with the emergence of the family wages.

---

2 Richard Collier, *Masculinity, Law and the Family*, Routledge, London and New York (1995), p.51.

3 Holborn, *Sociology : Themes and Perspectives*, Harper Collins Limited, London (2000), p.504.

4 Ratna Kapur & Brenda Cossman, *Subversive Sites : Feminist Engagement with Law in India*, Sage Publications, New Delhi (1996), p.89.

In the process it led to women's economic dependency on their husbands. Therefore the emergence of the private i.e., the domestic sphere and the public sphere was a natural outcome of familial ideology. Women's role within the domestic realm as wives and mothers was regarded as a natural self-evident product as to their biological role in reproduction. These ideas nurtured and reinforced the public/private distinction, and the construction of family and domestic relations as something private. Family as been understood as beyond the reach of State intervention operated to immunize the oppression of women within this domestic sphere. Thereby the authority structure came to be considered as patriarchal; succession to be patrilineal and living arrangements, to be patrilocal, marked by unequal gender relations of power running along the gender lines in which man's powerful position and woman's subordination is accepted as a social norm to be confirmed.

Women's subordinate position in the home makes their experience different from men. The image of the family as a protective retreat has been created largely through male eyes, disregarding women's oppression and the extensive discrimination against them which is inherent to the patriarchal structure and the functioning of the family<sup>5</sup>. The significance of family for women is also more vital than that of men, because while a man is allowed an independent existence, woman's identity and survival is not socially conceivable without family. Human Rights violations from foeticide, incest to women, battering and murder are committed within the safe confines of the home, making woman highly vulnerable in families. They remain largely invisible, being considered family matter. The emphasis is always on preservation of the family at all costs even, if it compromises women's safety and security.<sup>6</sup>

As relationships are universal, so is the form of co-residence, intimacy, sexuality and emotional bonds. But the forms they take can be infinitely variable. So the rights and freedoms guaranteed to women in the family depends on how the familial ideology reacts to it.

### **Theories on Subjugation of Women in Domestic Relations -The Western Perspective**

Woman is defined and differentiated with reference to man and not he with reference to her. She is the incidental, the inessential as

---

5 Saroj Iyer, *The Struggle to be Human : Women's Human Rights*, Books for Change, Bangalore (1999), p.3.

6 *Id.*, p.4.

opposed to the essential, he is the Subject, he is the Absolute-she is the other. The core running through the Simone de Beauvoir's work *The Second Sex*, 1949 is that of woman being the 'other' (sex). Accordingly women are socially constructed rather than biologically determined. i.e., the construction of society, language, thought, and religion and the family all rests on the assumption that the world is male.

The historical and traditional position of women in domestic relations has its own ramifications when viewed from a broad sociological and philosophical perspective. Law does not exist in a vacuum. It is rather intimately connected with the society. The biological fact of being female and all the associated implications and consequences of it got translated itself early into cultural norms which distinguished between men and women. Men, having superior physical strength, took control of the public sphere of life i.e., law and government. Having asserted dominance in the public sphere women became relegated to the private domain of home and family. The refusal of society and law to recognize the realities of patriarchy have far too long rendered women, vulnerable to abuse, manipulation and violence.

Domestic violence inflicted by a family member on a woman whether she be a wife, daughter or elderly woman represents the perpetuation of formerly socially accepted norm of controlling women and is the manifestation of the abuse of power relations over women. Being perpetuated in the private sphere of family it is a prime manifestation of patriarchal authority. Use of violence against women silences her and it thereby reinforces male authority. Thus it becomes important to have an overall view of the position of women in philosophical angles, both Western and Indian, which ultimately reflects as to what extent it, influences the very bed rock of existence-the man-woman relationship and the manner in which it shapes women's lives.

### **The Greek Philosophy**

Throughout the centuries, from ancient Greece, to the current time, women have been portrayed as in some sense different from men and generally in an inferior social and legal position to men. i.e., women are either invisible, or excluded or relegated to a position of social and political inferiority. Family organization being the core of a given society's norms and values, often contributes to her subordinated role in a system of rights, duties, privileges of the members and control over resources. Throughout the civilizations, man was allowed an independent existence, but woman's survival was not socially conceivable without family.

Plato<sup>7</sup> and Aristotle<sup>8</sup> sought to analyse the actual and appropriate role of women in society. In the Republic, Plato sets out his vision of an *Ideal State*. Woman's position freed from the demands of domesticity, Plato tells us through Socrates, it is one of equality in which she is fitted to do all the tasks in society.<sup>9</sup> According to him, private family presents an obstacle to the best services of the State, as it was antithetical to civic harmony, encouraging selfishness and greed. In such an *Ideal State*, women and children are to be owned in common. The appropriate role of women is determined, not by biological characteristics, but by abilities. The best women are to be treated as guardians, the ruling class. With the abolition of private family among guardian class, women and men were to mate in order to produce children of highest quality, whom would be fit to rule. The traditional domestic role was preserved for the women of lower class. She was not in any sense equal to her husband, but a mere subordinate. The husband had all the powers that her father had, plus the right to sexual inter course on demand. After the death of her husband, she returned to the custody of her father, whose power over her was absolute. Here women were most clearly identified as property, a thing to be kept or given away. Women were not eligible to own property, being regarded by law as lacking legal capacity in the same manner as children.

In 300BC, Aristotle formulated his central concept of justice, namely equal case should be treated alike and that unequal cases should be treated differently. The effect of this doctrine was that not only women were treated differently but also as second class citizens. Aristotle disassociated himself from Plato's concept of abolition of the private family and the communalization of women and children. According to him the private family is the natural and best unit for the preservation of the State. But within that family unit, it is the husband who is the master of the household, as he is by nature more fitted to rule than the female. Thus his approach to women was also functional. He declared the Greek City State (*Polis*) to be natural and Greek family with the subordination of wife, children and slaves as the best form of family structure. Slavery was a natural state for him. It could be either male or

---

7 427-347 BC.

8 384-322 BC.

9 Hilaire Barnett (Ed.), *Introduction to Feminist Jurisprudence*, Cavendish Publishing Ltd., London (1998), p.85.

female. He prescribes the role and status of a female and a slave. Neither women nor slaves participate in *Polis*<sup>10</sup> but in the private sphere of life, each has a different role to play.<sup>11</sup> Thus a female was characterized as having a female body and deliberative capacity without authority; a female slave has a female body but no deliberative capacity. The slave's primary function was to serve his or her master while the female's primary natural function was reproduction and the maintenance of the family. The functions ascribed to females depend on the extent of their rationality, which was conclusive to be inferior with men. To Aristotle, women were imperfect men.<sup>12</sup>

For both Plato and Aristotle, the issue of gender difference was one of justification i.e., how was the unequal treatment of women to be justified? And to both, the question received the same answer. The inferior treatment of women was to be by women's inferior nature. According to Confucius, the subordination of woman to man was one of the supreme principles of government.<sup>13</sup>

### The Natural Law Thinking

An early and famous formulation of the dictates of Natural law was offered by Cicero<sup>14</sup>. St. Paul, citing *Genesis 2*, states that "while man is the image and glory of God, the woman is the glory of man... the man was not created for the woman's sake, but the woman for the sake of the man,"<sup>15</sup> The first and the most obvious inequality lies in the gendered identity of God.<sup>16</sup> According to St. Thomas Aquinas, while there

10 The public/private distinction derives from ancient Greek thought which drew a distinction between the *Polis*, the public sphere and the '*Oikis*', the private. The public world was meant for male governance, the private is that of the home occupied by women and children.

11 *Supra* n. 5 at p.88.

12 The result of something wrong with the conception that created them-either their parents were too young or too old or too diverse in age or one of them was not healthy. Nature always aimed at perfection, and Aristotle termed woman as a deformity but one which occurs in the ordinary course of nature. Merry E. Wiesner, *New Approaches to European History: Women and Gender in Early Modern Europe*, Cambridge University Press, p.18.

13 Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company Lucknow (2005), p.1.

14 True law is right reason in agreement with nature, it is of universal application and is everlasting. The appeal to a higher divine law as a control over the naked power has been apparent throughout the history.

15 I C or 11:7-9

16 According to Elaine Pangels, "... while it is true that Catholics revere Mary as the mother of Jesus, she cannot be identified as divine in her own right., she is 'mother of God', she is not 'God the Mother' on an equal footing with 'God the Father'". *Supra* n. 3 at p.91.



was no distinction between men and women in the primary sense, women were placed in a secondary sense in a position of inferiority. In his *Summa Theologica*, it is quoted: "...for the man is the beginning and end of woman; as God is the beginning and end of every creature."

Despite Augustine's declared position that men and women are spiritually equal he perpetuated the alignment of maleness with superiority and femaleness with inferiority. Augustine in his *Confessions* remarks that "women are cast in the role of 'helpmate' to the man. Woman is equal to man in so far as she has been made in the God's image but in respect of her helpmate role she is not in God's image."

### The Positivistic Thinking

Positivism brought with it the age of modernity. The autonomy and freedom of the person was the central focus of liberal thought. As reason and rationality replaced superstition and irrational belief, the mind took priority over nature. The Social Contractualists had their own version as to the women's role. Thomas Hobbes deviated from the patriarchy<sup>17</sup> of the seventeenth century. To him, sharing of power was impossible as one cannot serve two masters and supreme power is indivisible. Reading the version of Hobbes reveals that the subordination of women was due to conventions and human conduct.

John Locke assumed that familial authority belonged to the mother as much as to the father. Parents have a joint dominion over their children. According to him the paternal power of the society ought to be called the parental power. Locke was clear as to women's natural equality on the one hand and on the other hand, the ultimate decision making power over matters of common interest was to be vested with the husband.

Jean Jacques Rousseau's explanation to the position of women with their differing physical attributes in the light of rationality and equality being universal components was very clear i.e. women's role was determined by biology. In his '*Emile*' he has written as:

The male is male only at certain moments; the female is female her whole life... everything constantly recalls her sex to her, and to fulfill its functions, an appropriate physical constitution is necessary to her...she needs a soft sedentary life to suckle her babies. How much care and tenderness does she

---

17 Patriarchy is a form of social organization in which a male is the head of the family and descent. Kinship and title are traced through the male line; any society governed by such a system. *Harper Collins English Dictionary* (3rd edn.,1991), p.143.

need to hold her family together!... the rigid strictness of the duties owed by the sexes is not and cannot be the same.

The general implication of his work consider woman as the source of evil. Modesty is the only virtue of a woman according to him and man has the absolute rule over his wife attributed by reasons like single authority, women's incapacity at times and certainty of paternity. He bases his thoughts upon the view that nature intended women for domestic functions only.<sup>18</sup> He tried to sanctify marriage as a training ground for a good son, husband or father. The family he thought must have a sentimental foundation which demands chastity which can be ensured by the husband's rule.<sup>19</sup>

According to Hegel, when women held the helm of government, the state is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions. He stressed on the 'status of manhood', which was acquired by the stress of thought and technical exertion. And so that male selfhood or manhood needs to be delineated from women.

### **The Enlightenment Thinking**

A dichotomic view was taken by the enlightened thinkers such as Voltaire and Montesquieu. They held that women were capable of equality with men and should not be regarded as being under the authority of the husband and represented as capable only of maternal functions. Justification for women's confinement to domesticity can again be noticed in the writings of Freud. He wrote:

For women the level of what is ethically normal is different from what it is in men. Their super ego is never so inexorable, so impersonal, so independent of its emotional origins as we require it to be in men... They show less sense of justice than men, they are more influenced in their judgments by feelings of affection and of hostility.<sup>20</sup>

### **The Utilitarian Thinking**

To Jeremy Bentham, sensibility of women is greater than men; they are inferior in physical strength and are more sympathetic by nature. On the whole, she is fit for a family life and man for the outward

---

18 Rama Mehta, *Socio Legal Status of Women in India*, Mittal Publications, Delhi (1987), p.16

19 *Supra* n. 7 at p.7.

20 Maya Majumdar, *Social Status of Women in India*, Dominant Publishers and Distributors, New Delhi (2004), p.43.

life.<sup>21</sup> He never advocated exclusion of women from public sphere.

John S. Mill in his book, *The Subjection of Women* has considered the relationship between the sexes as one characterized by the 'legal subordination of one sex to the other'. According to him it was not the result of any conscious thought or experimentation with differing forms of social organization. Based on the physical inferiority women were subjugated by men in the earliest twilight of human society and it later on got concretized into rules of law. He propounded that the emancipation of women to a level of equality with men was not solely for the happiness of women themselves, but was a prerequisite for the improvement of mankind. Liberty, individuality, democracy and justice run like a golden thread cherishing equal rights to women except when some recognized social expediency required otherwise. He considered family as a "school of sympathy in equality, of living together in love, without power on one side and obedience on the other."<sup>22</sup> Slavery having being abolished, Mill considered marriage as the last vestige of slavery in the society.

### **The Marxist Thinking**

In the *Origins of the Family, Private Property and the State*, Friedrich Engels argues that the position of women in society has been determined by the changing structures of marriage which itself is determined by economic forces. In the early society, women determined the line of succession. This 'mother right' needed to be destroyed if male supremacy was to be secured. With the successful destruction of 'mother right', women's subordinate status in society was ensured. The introduction of machinery which facilitated more efficient agriculture enabled man to enslave other men and to exclude women from their traditional economic role. Thus women were confined to the 'domestic sphere' - to the hearth, home and children. The introduction of private property and the destruction of 'mother right' represented the greatest historical defeat of the feminine sex.<sup>23</sup> Bacon in his book *Abridgement of the Law* in 1736 has quoted that the husband hath by law the power and dominion over the wife, and may beat her, but not in violent or cruel manner.

---

21 *Bentham's Theory of Legislation*, N.M.Tripathi, Bombay (1979), p.24.

22 *Supra* n. 7 at p.8.

23 *Supra* n. 5 at p.137.

### The Teachings of Christianity

Patriarchy and patriarchal theory originating in ancient Greek thought may be traced in English political theory at least to the seventeenth century which represented its high watermark. Christianity, encompassed with ideas from Judaism was the most important source of ideas about women for early modern Europeans. Jewish tradition and commentaries contained in Hebrew Scripture viewed women in a largely negative light. The authors of Hebrew Scripture had a clear idea of the ideal woman. She was the mother of many children, up working before sunrise to provide food and clothing for her household, making no objections when her husband brought home concubine or a second wife totally obedient and deferential<sup>24</sup>. Jesus preached that men and women were equally capable of achieving life after death and that women as well as men should not let their domestic responsibilities come before spiritual wellbeing. Church on becoming hierarchical excluded women from church offices and priestly functions.

Legal scholars like Jean Bodin defended for the list of female vices to prove that women were naturally inferior and so should men be allowed to hold public offices. Protestant reformers did not break sharply with medieval scholastic theologians and cited three purposes of marriage i.e. procreation of children, the avoidance of sin and mutual help and companionship. The mutuality in marriage pronounced in the marriage sermons all stressed the importance of husbandly authority and wifely obedience. Men were also given specific advice as to how to enforce their authority and often it included physical coercion, in both Continental and English marriage manuals. Marriage was a woman's highest calling, even though it brought physical dangers and restraints in her freedom. Thus opinions of learned catholic authors about women as well as marriage, tended to reaffirm traditional negative ideas.

### The Common Law Thinking

Ideas about women on the backdrop of religion, biology or tradition influenced the legal systems and law codes in early modern Europe. Laws thus reflected male notions. The traditional medieval law codes had set up limitations on women's legal rights because of feudal obligations<sup>25</sup>. Marriage was also held out as a reason for restricting

---

24 *Supra* n. 13 at p.15.

25 It had accorded a secondary legal status based on the inability to perform feudal military (f.n.contd. on next page)

woman's legal role. Women were not considered as independent persons as their duty to obey their husbands prevented them from acting so. Women in the nineteenth century were governed by the doctrine of 'one flesh'. Under the *one flesh doctrine* enshrined in law, wife impliedly consented to sexual intercourse 'on demand'.<sup>26</sup> Women's confinement to the 'private' - to the domestic world, traditionally unregulated by law ensured that women were largely invisible to the law. Thus the invisibility of women marked the absence of women's rights.<sup>27</sup>

Pateman had brought out the legal ambiguity of women's position within the marriage contract by comparing it with the slave contract and the employment contract. According to her, the problem within the marriage contract was that the contracting parties enter into relationship of subordination because the weaker party purported to contract something which cannot be separated from his /her body.<sup>28</sup>

Historical justifications as to the acceptance and development of marital rape exemptions are rooted in three important common law fictions: the theory of "*women as chattel*", "*unities theory*" and "*implied consent*" theory.<sup>29</sup> "*Women as chattel*" theory stated that a woman as a property was first with her father and on marriage she became the property of her husband. The "*unities theory*" was a derivative of the feudal '*covertures*' doctrine. Sir William Blackstone articulated in his *Commentaries* in the following words:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband]." Although the

---

service; so any unmarried woman was to have a legal guardian to undergo such procedures or a trial by ordeal for her. This gender based guardianship gradually died out in the later Middle Ages as court proceedings replaced physical trials and unmarried women and widows gained the right to hold land on their own and appear in court on their own behalf. But they could not serve as witnesses to a will.

- 26 Until 1884, a wife refusing her husband's sexual demands could be imprisoned for such refusal and the husband could apply for an order of restitution of conjugal rights against his wife. Moreover until 1891, to enforce his rights, husband was entitled to imprison his wife in the matrimonial home.
- 27 The law only became alert to the problem of domestic violence in the 1970s attests to that invisibility. See e.g., Domestic Violence and Matrimonial Proceedings Act, 1975, s.1., Domestic Proceedings and Magistrate's Courts Act, 1978, s.16.
- 28 Janice Richardson, *Slaves, Persons and Individuals: Philosophical Perspectives on Women and Legal Obligations*, Ashgate Publishing Co. (2004), p.104. The case of *R.v.R.* (1991), 4 All E.R. 481, can be used as an illustration of the way in which marriage has been discussed in terms of contract.
- 29 Suman Saha, *Sleeping with Enemy?-Recognizing Marital Rape*, 10(2) *Women's Link* 3 (2004).

“unities doctrine” posited that the husband and wife became one upon marriage, in reality “the one” [was] the husband<sup>30</sup>.

The position of wives under English law with regard to marital sexual intercourse i.e., “implied consent theory” was determined by Lord Mathew Hale in *The History of the Pleas of the Crown* in the following words:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.<sup>31</sup>

The exemption of marital rape from the purview of the criminal law sustained the dominant familial ideology that the wife was the exclusive property of the husband. The same concept was applied in *Popkin v. Popkin* (1794). Lord Stowell opined that, The husband has a right to the person of his wife but not if her health is endangered<sup>32</sup>. It was a noteworthy use of the term ‘person’ given that women were not viewed as ‘persons’ until the courts declared that they had achieved personhood in the *Person’s Case*.<sup>33</sup> Blackstone in his *Commentaries on the Laws of England* (1775) stated that the husband was empowered to correct his wife ‘in the same moderation that a man is allowed to correct his apprentice or children’. Blackstone’s codification “limited” a man’s right to chastise his wife with stick no thicker in circumference than his thumb, and this right came to be known in popular parlance as the “rule of the thumb”.<sup>34</sup>

Early modern jurists were selective in what they took from Roman law in regard to women projecting them as depended or neglected. The concept of *Patria Potestas*<sup>35</sup> was cited frequently and women lost the right

30 See *United States v. Yazell*, 382 U.S. 341, 361 (1966). (Black, J., dissenting)

31 M. Hale, *Hale’s History of the Pleas of the Crown* (1736), vol.1,ch.58,p.629. According to him, a woman surrenders her right to consent to sexual relations at the time of entering into a marriage and the husband is given an unconditional,unqualified right of sexual access to her. Every act of sexual intercourse is deemed to be consensual as such consent is considered to be given at the time of marriage.

32 As cited in *R.v.R.*, (1991) 4 All E.R. 481, at p.604.

33 *Edwards v. Attorney General of Canada*, (1930) A.C.124). The meaning of the term ‘person’ has a legal, as well as philosophical history in the U.K. Women were not classified as ‘persons’ until the Persons Case. Women challenged their position as non persons that prevented them from voting, taking part in government or the profession or receiving education. Women were denied rights ,because the courts failed to classify them as ‘persons’ and, at the same time companies began to be viewed as legal persons. *Supra* n. 28 at p.104

34 Note, “Scream Silently or Neighbours Will Hear: The Crying Need for a Law Against Domestic Violence”, 6 (4) *The Lawyers Collective* 5 (1991).

35 The concept, ‘*Patria potestas*’ refers to absolute rights of the father.

of guardianship over their children if they remarried. Honor was considered as highly gender specific and in case of men class-specific.<sup>36</sup> For women honor was a sexual matter. Because of the ideas of female sinfulness, irrationality and weakness drawn from tradition, religion and science women were never regarded as able to defend their own honor completely without male assistance. Thus the concepts of feudal obligation, wifely obedience, Roman law and the honor resulted in shaping women's legal rights in early modern Europe.<sup>37</sup>

### The Feminist Theories

Feminist analyses exposing domestic and sexual violence as a form of sex discrimination figured centrally in the wave of reform that began in the 1960's. Feminists argue that the biological difference might lead to some difference in their roles, but the former should not become the basis of a sexual hierarchy in which men are dominant. They address the problem of gender discrimination through various angles. The traditionalist view<sup>38</sup> accepts patriarchy as biologically determined and as the biological functions of men and women are different, the social roles and tasks assigned for women are also different. The concept of domestic violence revolved in terms of psychological pathologies and individual personality disorders<sup>39</sup>. This attitude or theory justifies the public-private divide.

Since the origin of patriarchy and establishment of male supremacy can be traced to different factors and forces feminists differ in their approach to understand patriarchy and adopt different strategies to abolish it. One way to understand the various dimensions of feminist theories and their theoretical approaches to understand patriarchy is to locate them within the broader philosophical and political perspectives that have been broadly classified as Liberal, Marxist, Socialist and Radical.<sup>40</sup>

36 For upper class men, it revolved around notions of physical bravery and loyalty ,for bourgeoisie it was primarily related to honesty, good craftsmanship and integrity.

37 *Supra* n. 12 at p.40.

38 According to the traditional view in feminist thinking sexual or domestic violence is privatized, pathologised and de-politicised.

39 Julie Goldscheid, "Elusive Equality in Domestic and Sexual Violence : Law Reform", *Florida State University Law Review* 731-34 (2007).

40 Suranjita Ray, *Understanding Patriarchy*, BA Programme II; Foundation Course, Human Rights, Gender & Environment, University of Delhi, p.4.

Liberal feminists have championed equal legal and political rights for women to enable them to compete with men in the public realm on equal terms. The philosophical basis of liberal feminism lies in the principle of individualism and they campaigned for all individuals to participate in public and political life<sup>41</sup>.

Marxist feminist believed that both subordination of women and division of classes developed historically with the development of private property.<sup>42</sup>

Socialist feminism aims at transforming basic structural arrangements of society so that categories of class, gender, sexuality and race no longer act as barriers to share equal resources<sup>43</sup> Women's subordination within capitalism results from their economic exploitation as wage labourers and their patriarchal oppression as mothers, consumers and domestic labourers.

Radical feminists aims at the need to redefine individual identity, free language and culture from the clutches of masculinity, re-establish political power, re-evaluate human nature/ behaviour and challenge the traditional values<sup>44</sup>.

---

41 Several women's movement demanded female suffrage during the 1840s and 1850s in United States and United Kingdom. The famous Seneca Falls Convention in 1848 marked the birth of women's rights movement which among other things called for female suffrage. Women were granted the right to vote in the US Constitution in 1920.

42 Frederick Engels in *The Origin of Family, Private Property and the State* (1884) stated that with the emergence of private property, women's housework sank into insignificance in comparison to man's productive labour. Thus maternal authority gave place to paternal authority and property was to be inherited from father to son and not from woman to her clan. The bourgeois families which owned private property emerged as patriarchal families where women were subjugated. Such patriarchal families became oppressive as men ensured that their property passed on only to their sons. Therefore bourgeois family and private property as a byproduct of capitalism subordinated and oppressed women.

43 Socialist feminists deny the necessary and logical link between sex and gender differences. They argue that the link between child bearing and child rearing is cultural rather than biological and have challenged that biology is destiny by drawing a sharp distinction between 'sex and gender'. The relationship between sexes is rooted in the social and economic structure itself. Therefore women can only be emancipated after social revolution brings about structural change.

44 For radical feminists sexual relations are political acts, emblematic of male/female power relationships. The traditional political theory which divide personal and political spheres and believe that family is nonpolitical and personal has been questioned by radical feminists who argue that family is that space where maximum exploitation of women takes place. It is this 'public-private divide' which legitimizes exploitation of women. In fact, it is essential that the private sphere must be mapped in terms of the same values of justice, equality and freedom which are necessary in the public sphere.



The new feminist traditions such as psychoanalytical feminism, eco feminism, postmodern feminism, black feminism, lesbian feminism have emerged since the 1980s. Psychoanalytical feminists analyse the psychological process through which men and women are engendered. They do not hold biological factors as responsible for the construction of sexual difference. Eco-feminists accept women's attitudes and values as different from men. They believe that in certain respects women are superior to men and possess the qualities of creativity, sensitivity and caring which men can never develop. Postmodern feminists claim that there is no fixed female identity. The socially constructed identities can be reconstructed or deconstructed.

Lesbian feminism and cultural feminism are two types of feminist separations advocating the creation of women identified world through the attachments women have to each other. They believe that since patriarchy is organized through men's relations with other men, unity among women is the only effective means for liberating women<sup>45</sup>. The prioritization of safety and accountability over autonomy is consistent with the school of feminist thought that has coloured a great deal of domestic violence theory and policy making. Dominance feminism focuses on women's subordinated and victimized status and argues that the legal system can best serve those victims of violence by enforcing policies that ensure safety, regardless of what individual women's preferences might be<sup>46</sup>.

All these western perceptions on domesticity of women defended the fact that women had been denied recognition in male jurisprudence. Law being the crystallized common sense of the community adopted such social constructions of gender and translated it into legal norms. Humanity developed gender and sexual identity and dominion arose out of the inability to recognize, appreciate and nurture differences, not simply out of the failure to see all as the same.

---

45 Therefore while earlier feminists struggled for a legally equal position for women and demanded democratic rights, which included right to education and employment, right to own property, right to vote, right to birth control, right to divorce, today feminists have gone beyond demanding mere legal reforms to end discrimination between men and women. They have raised issues of violence against women, rape, unequal wages, discriminatory personal laws, the sexual division of labour, distribution of power within the family, use of religion to oppress women

46 Leigh Goodmark, "Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases", 37(1) *Florida State University Law Review* 72 (2009).

### Perceptions on Women in Domestic Relations-The Indian Scenario

The status of woman is the yardstick for assessing the standard of culture of any age of any nation; the term 'status' refers to the position of an individual in a social system. It encompasses within itself the notions, rights and obligations of superiority and inferiority in terms of power, authority and grading. Her rights, privileges and their determination, her access to power and authority, the state of her position when compared to that of man, manifests her status in the society so when compared to man's position, Indian woman always occupied a status inferior to man<sup>47</sup>

Diversity has been India's most prominent feature which is a common thread running through the social structure of the country. This diversity factor is prevalent in the form of marked differences in the customs, social traditions and beliefs of people separated by mere political boundaries of states. One such feature which is analogous to our society is the dominance of males in our social system. Since time immemorial, the power of decision making is single handedly bestowed on the physically stronger sex in almost all realms of life whether it is economic, family related, political etc. Such prejudice had weakened the status of women in India who were reduced to mere child bearing tools. India being an abode to many civilizations has been influenced by multifarious religions, their traditions, and socio-cultural settings and in turn had adopted a mixed approach as to the granting of rights to women in domestic relations.

### The Hindu Texts on Woman's Dharma

Hinduism originated in India and is thus the most common and seemingly most representative of Indian culture. The entirety of Hinduism focuses on the balance between the masculine and feminine. India exemplifies the patriarchal system in which women and men are expected to fulfill distinctly different roles from birth. Women are trained, from a young age, to submit and acquiesce to the desires of their valued male counterparts while men are trained to dominate and guide their female counterparts.<sup>48</sup>

---

47 K. Uma Devi, *Women's Equality in India: A Myth or Reality?* Discovery Publishing House, New Delhi (2000), p.15.

48 Lauren L. Tichy, Judith V. Becker & Melissa M. Sisco, "The Downside of Patriarchal Benevolence: Ambivalence in Addressing Domestic Violence and Socio-Economic Considerations for Women of Tamil Nadu, India". 24 *Journal of Family Violence* 547 (2009).

Patriarchy is all about the power equation between women and men, and when seen through the prism of history, it has been a complex array of strictures and strategies often wearing the legitimacy of religion. It lays down the ground rules for what women should do; what is enjoined upon them i.e., what is their *dharma*?<sup>49</sup> This idea of *dharma*, forms the bedrock of women's various roles-both within the larger construct of society and the smaller, the private domain of family i.e the relationship to the other-the man in her life.

The reference to *Sastras*, Brahmanical normative texts accompanied by its various interpretations produced the first in a series of pronouncements about the scriptural understanding of woman in early Indian society. It was taken for granted that woman as such can have no rights and privileges. The code and conduct of a woman and her duties towards the husband were prescribed and reinforced on the basis of woman characters of the epics. And accordingly marriage was held at the highest helm in the society and since the marriage takes place in the presence of fire, the husband was to be the wife's highest deity. And if husband was gratified with her, all the deities will also be gratified with her<sup>50</sup>.

In Halhed's book, the chapter on 'what concerns women' began with a prefatory statement on the relations between the sexes. A man, both day and night, must keep his wife in so much subjection that she by no means be mistress of her own actions, if the wife has her own free will notwithstanding she be sprung from a superior caste.<sup>51</sup> It clearly marked women as a category of people who had few rights and attempted to homogenize the category of women as who deserved only to be subordinated and controlled. Women's natural urges or wrongs i.e., lust for sex, jewels, fine furniture, handsome clothes etc were compared to evil as a fire not satisfied with the burning fuel. It was in this context Manu's famous injunction was understood i.e., 'her father protects her in childhood, her husband protects her in youth, her sons

49 Amita Sahaya, "Religion and the Patriachal Lens," 13 (3) *Women's Link* 28 (2007).

50 Referring to verses in the Mahabharata's Anusasana Parvaand Santi Parva. *Ibid*.

51 Halhed, *A Code of Gentoo Laws*, ixv. A Code of Gentoo Laws is an English rendering of *Vivadarnavasetu*, compiled under the direction of Warren Hastings by a team of Brahmana legal experts, done by N.B.Halhed and published in the year 1776. B.D.Chattopadhyaya (Ed.), *Readings in Early Indian History-Women in Early Indian Societies*, Manohar Publishers (1999), p.113.

protect her in old age: a woman does not deserve independence.<sup>52</sup> The woman was regarded as a species of property which passed on into the husband's family on her marriage.

Despite the family being patriarchal and patrilineal, women were accorded a significant place within the family and society. Role of wife and mother were of supreme importance. The term referred was *Dampathi*, meaning married pair. Her varied roles were indicated by terms such as 'Jaya, *Jani* and *Patni*. *Jaya* has the special sense of a sharer of the husband's affection, *Jani*, the mother of children; and *patni*, the partner in the performances of sacrifices.<sup>53</sup> Marriage being the ideal upheld in the vedic religion, and home being the centre of religious practice, the woman was indispensable from both the domestic and religious point of view.

The aim of the Hindu marriage was to help full growth and development of the husband and the wife and to promote the preservation and progress of society and its culture by enjoining upon the couple the procreation of children and their proper education.<sup>54</sup> Marriage was regarded as a religious necessity to both the man and the woman; neither could reach heaven without being accompanied by his duly married consort. Landed property could be owned only by one who had the power to defend it against actual or potential enemies. As women were unable for it they could hold no property. Patriarch was its sole owner and guardian. It was well recognized that the wife was the ornament of the house;<sup>55</sup> nay, the wife herself was the home.<sup>56</sup> The normal relations between the husband and the wife were determined by the principle that there should be an absolute identity in their aesthetic, material and moral interests. It was recognized in the Vedic age and is approved by later Dharmasastra writers like Manu and Apasthamba.<sup>57</sup> The absolute identity of interests of couple was a natural corollary from the recognition of the fact that the husband and the wife are the compliments of each

---

52 Janaki Nair, *Women and Law in Colonial India: A Social History* (Published in collaboration with National Law School of India University, Bangalore), Kali for Women, New Delhi (1996), p.32.

53 S.R.Shastri, *Women in the Vedic Age*, Bharatiya Vidya Bhavan, Bombay (1954), pp.17,18

54 A.S.Altekar, *The Position of Women in Hindu Civilization From Pre-Historic Times to the Present Day*, Motilal Banarsidass Publishers Private Limited, Delhi (1959), p.100

55 R.V.I, 66.3.

56 R.V.III, 53.4.

57 *Supra* n. 40, p.95.

other. Buddhist thinkers had also accepted this view. Husband was to be true to his vow of conjugal fidelity, its violation being the greatest sin he can commit.<sup>58</sup> The position of woman in the Vedic age was held to be one of honourable subordination. The general freedom and better status which women enjoyed in the Vedic age were largely due to men being engrossed in the work of conquest and consolidation.<sup>59</sup>

During the age of later *Samhitas*, *Brahmanas* and *Upanishads*, there took place a continual and gradual deterioration in the position of women as a whole. There was a gradual decline in female education, their proprietary rights continued to be unrecognized, the only exception being in favour of marriage gifts of movable property. Divorce was permitted to the wife though the permission was not extensively availed of.

At the outset of Aryan conquest, the neglect of education and lowering of the marriage age produced disastrous consequences upon the position and status of women. Marriage became an irrevocable union, however only so far as the wife was concerned. The husband could discard his wife for the grave offence of not being sufficiently submissive. The differential treatment was due to the simple fact that women were no longer able to effectively oppose these absurd theories and claims as they were uneducated and ignorant about it.<sup>60</sup>

The general adoption of the Purdah system by the ruling and aristocratic families of Hindu community was subsequent to the advent of the Muslim rule. It was seen as a mark of high status and prestige. Naturally husbands began to claim and exercise a greater control over them which proved detrimental to their participation in the social and public life activities. This created a favourable atmosphere for the spread of the theory that woman should lead a life of seclusion. Despite the prevalence of monogamy in the Hindu society polygamy was rampantly common in the Vedic literature. The main reason for the perpetration of the same was the great anxiety that was felt for the preservation and continuance of the family.

For offering the prescribed oblations to ancestors so as to secure their continuance in heaven, a son was absolutely necessary, and so society permitted the husband to take a second wife, if the first was barren. A son's birth supposedly elevates the family status, ensures

---

58 Manu, ix,101.

59 *Supra* n. 13, p.54.

60 *Id.*, p.59.

happiness in the afterlife and continuity of name in the present; conserves family wealth, with the opportunity of adding to it as well as by accepting dowry. While in the case of girls, all the opposites of this idyllic scenario weigh heavily on the minds of family elders.<sup>61</sup>

The authors of legal texts reflect a profound sense of ambivalence in their attitude to women. On the one hand, she is elevated to the status of a goddess, but on the other, she is seen as a temptress and seducer, Christianity also upheld similar views on women. Women's love and devotion to her husband are exalted but at the same time she is seen as incapable of these virtues.<sup>62</sup> As mother she is most revered, but as sexual partner she is seen as an obstacle to man's spiritual quest.<sup>63</sup> The ideal conduct of a housewife i.e. *Pativrata*, devotion to the husband, came to be seen as the only *Stridharma* or duty of the wife. Her individuality was merged and she had no separate existence apart from him. Accordingly she was to be open hearted to her husband, respectful to his brothers and sisters, devoted to his mother, affectional towards his relations, considerate towards the servants, smiling even to her co wives, courteous towards her husband's friends and hateful to his enemies. A wife who discharged all these duties was held to be a true *Pativrata*. The sanctity of gods, sages and holy places were all centered in her. The ideal love and harmony between the husband and wife is described by Bhavabhuti.<sup>64</sup> To maintain and support his wife was the most sacred duty of the husband, which must be discharged at all cost; otherwise would have no right at all to be called a husband.<sup>65</sup>

An ideal notion of womanhood and preservation of a patriarchal household was prescribed for. According to Manu, the wife's marital tie and duty do not come to an end even if the husband were to sell or abandon her.<sup>66</sup> This ideal later transformed itself into the practice of *Sati*.<sup>67</sup> The reason attributed to such inhuman practice was that total

---

61 *Supra* n. 52, p.29.

62 Manu 2.213-214.

63 Paul Bowen (Ed.), *Themes and Issues in Hinduism*, Cassell, London and Washington (1998), p.67.

64 *Uttararamacharit*, Act, vi, 39: Their love is uniform both in prosperity and adversity, and adjusts itself to surrounding circumstances; it affords the best solace to each others' hearts; old age does not diminish its flavour; when the veil of reserve drops down in course of time, it develops into an ever-abiding affection.

65 Manu, ix, 101.

66 Manu, ix, 46.

67 'Sati'-A virtuous woman practice of immolation on the funeral pyre of one's husband.

fideli ty to their husband was expected of women and this could be established by becoming *Sati*. Women's salvation was weighed in terms of being reunited with their husband and hence was re- birth oriented. Men's salvation was in terms of release from the cycle of births and deaths.<sup>68</sup>

The custom of *Niyoga*, had religious sanctity. In case of death of husband or incapacity to procreate children, the husband's brother or any of his relations would take her as wife, or raise children on her. Often it occurred when a person died without leaving any male issue behind. As it was a great spiritual calamity to die without a son, it was held to be the sacred duty of the brother to see that a son was raised on his sister-in-law to perpetuate his brother's memory and to ensure him a seat in heaven. Moreover a son by *Niyoga* was always preferred to a son by adoption in early Hindu societies. Women under the pressure of in-laws often had to surrender to their wishes of progeny and her reproductive rights and freedom in decision making was totally denied to her.

According to the Hindu law no portion of the parental property was allowed to be shared by female children and therefore a part of compensation-gifts and presents were given to daughters at the time of their marriage. These gifts over a period of time became institutionalized as dowry.<sup>69</sup> This practice gradually became imbedded and the bridegroom and his family started insisting for dowry as matter of right. The institution of dowry has negatively impacted the status of women leading to rampant rise in female infanticide, female foeticide and abuse of girl child cutting across various social groups. Dowry even today remains one of the most important reasons why the birth of a girl child is lamented.

### **The Christian Teachings and its Reflections**

Christianity, brought within it to India the negative ideological perceptions as to women's role in the family. Inspired by the teachings and interpretations as to the religious texts women in India was relegated to the realm of occupying secondary status. The inextricable bond between religion and family, with women at its helm, was most visible in the interpretations from the west. A cursory reading of some of the

68 *Supra* n. 49, pp. 74, 75.

69 Jeebanlata Salam, "Women and Domestic Violence :Human Rights Perspective," 10(4) *Women's Link* 7 (2004).

passages in the Bible, clearly reveals the fact that God by creating Adam first<sup>70</sup> and also by creating woman for man,<sup>71</sup> has set the gender based role and responsibility of males in the most basic unit of society (the family) to be that of leader, provider and self-sacrificial protector,<sup>72</sup> and likewise has set the gender based role and responsibility of females to be that of help and nurture<sup>73</sup> and life-giving<sup>74</sup> under male leadership and protection.<sup>75</sup>

### The Teachings of *Qur'an*

Muslim believers cannot conceive nor accept a system of rights which excludes religion. Religion for them suffuses every facet of life.<sup>76</sup> The Islamic tradition can be inferred from sources like the '*Qur'an*'<sup>77</sup>. The book of Revelations which Muslims believe to be God's words transmitted through the agency of Angel Gabriel to the Prophet Mohammed. It is regarded as the Magna Carta of Human Rights as it concerns itself to free human beings from the bondage of traditionalism, authoritarianism ;political, economic or other; tribalism, racism, sexism, slavery or any thing that prohibits or inhibits human beings from actualizing the Qur'anic vision of human destiny embodied in the classic proclamation the *Sunnah*,<sup>78</sup> the *Hadith*,<sup>79</sup> the *Fiqh*<sup>80</sup> and the *Sharia* or code of law which regulates the diverse aspects of a Muslim life. The Qur'an point out that, in essence the life of each individual is comparable to that of an entire community and needs to be treated with utmost care.<sup>81</sup> Human beings

70 Gen.2:18; Cor.11:8.

71 Gen.2:18,20,22;1 Cor.11:9.

72 Eph.5:25; 1 Peter 3:7.

73 Gen. 2:18.

74 Gen. 3:20.

75 1 Peter 3:7. See *supra* n. 49 at p.29.

76 R.S. Verma (Ed.), *Human Rights-Burning Issue of the World*, Vol. III, Indian Publishers & Distributors, Delhi (2000), p.647.

77 The book of Revelations which Muslims believe to be God's words transmitted through the agency of Angel Gabriel to the Prophet Mohammed. It is regarded as the Magna Carta of Human Rights as it concerns itself to free human beings from the bondage of traditionalism, authoritarianism ;political, economic or other; tribalism, racism, sexism, slavery or any thing that prohibits or inhibits human beings from actualizing the Qur'anic vision of human destiny embodied in the classic proclamation.

78 The practical traditions of the Prophet Mohammed.

79 The oral Revelations attributed to the Prophet Mohammed.

80 Jurisprudence (schools of law).

81 Surah 5:Ma'idah:32.



are deemed worth of esteem because of all creations they alone chose to accept the 'trust' of freedom of the will.<sup>82</sup>

The idea of ideal society or community (*ummah*) envisaged by the Qur'an comes from the root (*umm*) or mother. The symbols of a mother and motherly love and compassion are also linked with two attributes of God named Rahim and Rahman both of which devolved from the root *rahm*, meaning womb. The Qur'an recognizes the need for privacy as a human right and lays down rules for protecting an individual's life in the home from undue intrusion from within or without.<sup>83</sup> The fruits of labour belong to the one who has worked for them-regardless of whether it is a man or a woman.<sup>84</sup>

Underlying much of the Qur'an's legislations on women related issues is the recognition that women have been disadvantaged persons in history to whom justice needs to be done by the Muslim *ummah*. For Muslims, family is the central institution; it is at the center both of theology and sociology. The family is considered as a divinely inspired institution that came into existence with the creation of man. The proper behaviour of all the family members is constantly emphasized in the Qur'an and Hadith. Ideal behaviour encourages dignity and modesty in the family. The father, the mother, the children and the elders have a positive and defined role to play. The Prophet was both the ideal son and later the ideal husband and father. The women of his household-like Khadija and Fatimah-provides the ideal Muslim women.

Marriage is considered a sacred contract. This was a sharp contrast to the principles of Christianity and Hinduism where marriage was traditionally viewed as an indissoluble sacrament. The Qur'an is very clear that the basis of a marital relationship is love and affection between the spouses, not power or capital. Marital rape is unacceptable in such a relationship.<sup>85</sup> The household affairs should be conducted based on consultative process between the spouses, and not autocratically.<sup>86</sup> Superiority is determined by righteousness of character and not by gender, race, colour, lineage, wealth etc.<sup>87</sup> Equal human dignity by birth was proclaimed as a Divine

82 Surah 17:Al-Isra': 70.

83 *Supra* n. 62, p.659.

84 Surah 4:An-Nisa.

85 Qur'an 2:223,30:21,2:187,4:19.

86 Qur'an 2:233.

87 Qur'an 49:13.

Decree.<sup>88</sup> Gender equity is a basic theme of the scripture.<sup>89</sup> Thus, patriarchy is not inherent in the Qur'an but rather has been read into it throughout the centuries of patriarchal dominance of Muslim societies.

The continuing popularity of *Ahadith* amongst Muslims articulated the deeply embedded belief that women are derivative and secondary in the context of human creation. The motherly role of women is essential for the continuation of human existence and this function becomes the primary only with regard to women since they are the only ones capable of doing so<sup>90</sup>. The Muslim societies regarded son as a gift and a daughter as a trial, from god. In a married life women cannot claim equality with their husband. The husband in fact came to be regarded as his wife's gateway to heaven or hell and the decider of her final destiny. Muslim societies have made divorce extremely difficult for women, both legally and through social penalties. Practices like seclusion (Purdah), child marriage, poverty, and illiteracy contributed to the vulnerability of Muslim women. Polygamy which was intended by the Qur'an to be for the protection of orphans and widows, got transformed into a sword of Damocles which kept women under constant threat. To give wealth to a woman in preference to a man was highly looked down upon and hence disapproved by the society. One of the distinctive characteristics of Muslim sexuality is its territoriality, which reflects a specific division of labour, and a specific conception of society and of power. The territoriality of Muslim sexuality sets ranks, tasks and authority patterns. Thus women came to be taken care of materially by the man who possessed her in return for her total obedience and her sexual and reproductive services. This Muslim practice of treating a woman in home appears to be both a profound irony and a great tragedy, as when Qur'an regarded the home as a microcosm of the *ummah* and emphasized the importance of making it the 'abode of peace' through just living.

The idea of religion and all that entails is perhaps more central to human kind, its quest and reinforcement of identity, than other forces. It is the point of reference that dictates and influences our socio cultural norms and the sub- texts of our existence, in a variety of ways more insidious and encompassing than even the identification through nation or nationhood. The organic relationship between religion and society is too obvious to deny and is not problematic except when it results in

---

88 Qur'an 17:70, 95:4.

89 Qur'an 4:32, 33:35, 3:195,4:124, 16:97,40:40,6:139-140,2:232.

90 V.A. Mohamad Ashrof, "Is Male a Degree above Female in Status?", 7(4) *Al-Harmony : A Journal on Islamic Thought and Ethics* 14,17 (April-June 2007).

restrictions on the legal and human rights of citizens particularly women in the context, on the ground of faith or belief. To repudiate the underlying core of the human existence i.e., the right to live with human dignity for a woman, clearly delineates her from the path of human development.

### **Conclusion**

The question often mooted while discussing woman's rights against violence and ill treatment is whether the concept and desire for women's self-determination is merely a western construction? It is a fact that women have resisted oppression throughout the ages in every society. In the course of man's journey from feudalism to industrialism, patriarchy overtook divinity and women became subordinate to men. Conceiving and giving birth are thought to be her weakness rather than the divine strength and even become the means of subjugation. Subjugation, in its extreme form, is enforced through violence. Rigid dogmas and doctrines are not product of religion, as one often believes, but of human mind which itself is the product, not of divine teachings but of existing social ethos. The need of the hour is total replacement of culture of violence and subjugation to a culture of peace and tolerance towards womenfolk taking into consideration that laws alone cannot be a panacea for all the evils perpetrated against women in the society.

Female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as politically constructed reality maintained by patriarchal interests, ideology and institutions. Recognition of the complex ways in which culture, religion and systems of oppression interact, creating qualitatively different abuse experiences creates overwhelming impact on feminine identity formation. A woman's sense of self is greatly dependent on how the society or fellow beings behave to her and how she is treated by them. The fundamental difference in identity formation between the sexes has deep roots in the socialization processes. The self-identity roles and obligations are worked out fairly early in a woman's life and leaves no stage without change and questioning. Thus feminine identity and a woman's position within the family continue to be open for assessment and modifications, depending on her situation in the life cycle. The natural outcome being the suppression of individual self-expression. This understanding is the springboard from which more effective assessment and intervention strategies with vulnerable abused women of diverse backgrounds can emerge.

## Resume

**ANUJA S.**                      **Present Address:**  
Sukrutham                      Faculty Quarters,  
First Mile Stone              Block No.3,  
Thottakkara P.O              National Law School of India University  
Ottappalam                      Nagarbhavi,  
Palakkad District              Bangalore  
Kerala - 679102  
Email: anujas@nls.ac.in  
Mob: 9632744940

### ***Educational Qualifications***

<b>LLM</b> (Human Rights Law)	2003	Mahatma Gandhi University	714/1100 First class - (65%)
<b>LLB</b>	2000	Mahatma Gandhi University	502/800 First Class - (72%)
<b>Pre Degree</b>	1995	Mahatma Gandhi University	648/900
<b>S.S.L.C</b>	1993	Board of Public Examination	518/600 Distinction – (86%)

### ***Professional Experience***

Enrolled as advocate on 17-12-200. Practised as an advocate for five years at various courts in Kerala.

### ***Teaching Experience in Law***

1. Guest Lecturer, Government Law College, Thrissur, Kerala.  
(2005, July – 2006 February)  
Subjects taught - Consumer Protection Law, Administrative law, Intellectual Property law.
2. Guest Lecturer, Sree Narayana Gurukulam College of Engineering, Kadayiruppu, Kolenchery, Kerala, MBA Department.(2006-2008).  
Subjects taught- Buisness laws.
3. Guest Lecturer, School of Legal Studies CUSAT,  
(2009December –March, 2010) Kochi.  
Subjects taught – Criminal Procedure Code, Administrative Law.

### ***Present Designation***

*Assistant Professor (Ad-hoc) at National Law School of India University, Nagarbhavi, Bangalore since September, 2010*

*{Subjects Taught- Civil Procedure Code, Law of Evidence, Administrative Law and Labour Laws}*

### ***Project/Assignment Accomplished***

*Work assignment for LL.M – Human Rights and Human Development.*

*(Highlights the role of human rights in the course of human development in the new age of globalization and liberalization.)*

*Work assignment for LL.B – Sexual Harassment of women at work place, A case study.*

### ***Research Topic***

*Rights of Women Against Domestic Violence – The Law and Emerging Challenges.*

*Supervising Guide – Prof. (Dr.) D. Rajeev, Former Director, School of Legal Studies, Cochin University of Science and Technology.*

### ***Publications***

- 1. Notes and Comments - Domestic violence against women- Limitations and Implications under the Criminal Justice system in India Cochin University Law Review, Volume XXXII September-December, 2008*
- 2. Article - Live-in relationships and its feasibility in the Indian Context- 2010 (2) KLD*
- 3. Article - Philosophical Underpinnings as to the Subjugated Role of Women in Family- Cochin University Law Review, Volume XXXV March –June, 2011*
- 4. Article -Domestic Violence Against Women –Deprivation of Right to Life-in Gurdip Singh and V.K.Ahuja (Eds.), Human Rights in 21st Century-*

*Dimensions. Gurdip Singh and V.K.Ahuja (Eds.), Universal Law Publishing Co.Delhi,2012*

***Paper presentations. [National/State Level Conference & Seminars]***

***Domestic Violence against Women – Deprivation of Right to life.***

*(DYUTI – National Conference on Right to life sponsored by UNICEF, Chennai held on 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> of December 2009 at Rajagiri College of Social Sciences, Kalamassery, Kerala.*

***Domestic Violence against Women – A Human Rights Violation. –***

*(Two day National Seminar on Human Rights sponsored by UGC scheduled at School of Legal Studies, CUSAT, on 29<sup>th</sup> February & 1<sup>st</sup> March)*

***The Protection of Women From Domestic Violence Act,2005 – A Critical Evaluation.****(UGC sponsored National Seminar on “Gender Equality- A Human Rights Perspective” organized by the Centre for Women’s Studies, University of Calicut on 6<sup>th</sup> & 7<sup>th</sup>, March,2007).*

***Right to Health as Constitutional Right- Existing Realities- An Indian Perspective.****(National Seminar on “Right to Health Care”, held at School of Legal Studies, CUSAT, on 26<sup>th</sup> and 27<sup>th</sup> March,2010).*

***Access to Justice Project on “ Law School Based Legal Services Clinics”*** *organized by V.M. Salgaocar College of Law and Forum of South Asian Clinical Law Teachers held on 4<sup>th</sup> and 5<sup>th</sup>, July,2011*

***Human Rights of Persons with disability*** *(National Seminar on Human “Rights of the socially excluded” held at Govt. Law College, Thrissur on the 11<sup>th</sup> and 12<sup>th</sup> October, 2011)*

***The Deemed Homeless in India-A Human Rights Discourse*** *(National Conference on “Place of Deemed Homeless in Good Governance and Inclusive Growth” organized by Legal Aid Society & Centre for Human Rights and Citizenship Studies*

held at West Bengal National University of Juridical Sciences from 27- 29<sup>th</sup> January, 2012.)

***The UN Convention on Persons with Disabilities-A Human Rights Discourse*** (National Seminar on “Human Rights of persons with Disabilities” organized by Department of Human Rights and Social Development held at Sri. Venkateswara University: Tirupati on 24<sup>th</sup> and 25<sup>th</sup> December, 2012)

***Live- in –Relationships in India-A Socio-legal Perspective*** (National Conference on “Socio Legal Dimensions of live- in relationship” organized by N.S. Soti Law College, Sangli on 14<sup>th</sup> and 15<sup>th</sup> January, 2012.)

***Right to safe and healthy childhood-Human Rights of Street Children Juxtaposed*** (National Seminar on Right to health vis-a vis The Vulnerable Population from 18- 20<sup>th</sup> March, 2012 held at Govt. Law College Ernakulam, Kerala.

***Rights of Women Against Domestic Violence- CEDAW Its Letters and Practice***(National Seminar on “International Human Rights Treaties and Their Enforcement in India” organized by K.L.E. Society’s Law College, Rajaji Nagar, Bangalore on 8<sup>th</sup> December, 2012)

***Revisiting the Role of Law in Ordering Violence in Family- Challenges and Possibilities*** (National Seminar on “Family as an Institution : Modern realities and trends in Law held during 28<sup>th</sup> February-2<sup>nd</sup> March 2013 at School of Indian Legal Thought, Mahatma Gandhi University, S.H. Mount, Kottayam, Kerala)

#### ***Other Academic Activities undertaken***

Guest lecture on Moot Court Sensitization at K.L.E. Society’s Law College, Rajaji Nagar, Bangalore

Guest Lecture on Protection of Women from Domestic Violence Act, 2005 in connection with legal literacy programme at St. Joseph’s College, Bengaluru.

Guest lecture on the topic Negligence under Tort Law at Christ College, Law Department, Bangalore

*Judge for Inter Class Moot Court Competition held at K.L.E. Society's Law College, Rajaji Nagar, Bangalore on 18 th April 2013*

*Participated in the CLEA Biennial Conference 2011 held at 'The Leela Palace Kempinski', Bengaluru ,on 29 th and 30 th January,2011.*

*Participated in the Public Law Lectures 2009 on **Right to Life and Capital Punishment** delivered by Hon'ble Mr. Justice K.T. Thomas at School of Legal Studies, CUSAT on 16<sup>th</sup> and 17<sup>th</sup> March 2010.*

*Attended and participated **Asia Women Lawyer's Conference** on 22<sup>nd</sup> & 23<sup>rd</sup> of September 2007, at Bangalore.*

*Attended and participated **workshop** conducted at Govt. Law College, Kozhikode, Kerala, on **The Protection of Women from Domestic Violence Act, 2005.***

#### **Social Activities Undertaken**

*Active member of KELSA. ( Kerala Legal Service Authority).Conducted legal literacy campaigns and classes on different legal issues and topics relating to Human Rights Kudumba Sree and CDS ventures and at Block Panchayat Level, various schools and colleges in and around Ottappalam.*

#### **References**

1. **Dr. (Prof.) V.D Sebastian,**  
*Ad-Junct Professor,  
Kalinga Institute of Technology, Orissa  
Ex-dean, CUSAT, School of Legal Studies, Kochi  
Founder Director, School of Indian Legal Thought, Kottayam.  
Mobile. No.09437565646*
2. **Dr. (Prof.) K. Vikraman Nair**  
*Director, Dean- Faculty of Law,  
School of Indian Legal Thought  
Mahatma Gandhi University,  
Kottayam.  
Mobile No.09447391093*

#### **Declaration**

*I affirm that the above information is true to the best of my knowledge.*

**Anuja S.**