

**PROTECTION OF WOMEN FROM DOMESTIC  
VIOLENCE ACT, 2005: LAW AND IT'S  
IMPLEMENTATION**

**A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTERS OF  
LAWS**

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## **CERTIFICATE**

This is to certify that the dissertation titled “PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: LAW AND IT’S IMPLEMENTATION” is the work done by Km. Charchika, under my guidance and supervision for the partial fulfillment of the requirement for the Degree of Master of Laws in School of Legal Studies Babu Banarsi Das University, Lucknow, Uttar Pradesh.

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51. S.R. Batra v. Smt. Taruna Batra, AIR 2007 SC 1118
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53. State v. Narayan A.I.R 1952 Bom. 84
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## **LIST OF ABBREVIATIONS**

1. A.I.R	All India Reporter
2. All.	Indian Law Report, Allahabad
3. Art.	Article
4. Bom	Indian Law Reports, Bombay series
5. CJI	Chief Justice of India
6. Cr. LJ.	Criminal Law Journal
7. CR. Lr.	Criminal Law reporter
8. e.g.	for example
9. H.C	High Court
10. ILR	India law reports
11. UDHR	Universal Declaration of Human Rights
12. IPC	Indian Penal Code
13. ICCPR	International Covenant on Civil and Political Rights
14. Ibid.	repetition of footnote on the same page
15. Id	repetition of footnote on different page
16. i.e.	that is
17. Infra	quoted in later pages
18. J.	Hon'ble Justice
19. Sec.	Section
20. SC	Supreme Court of India
21. SCC	Supreme Court Cases
22. Supra	Quoted in earlier pages
23. UOI	Union of India

24. Q.E	Queen Empress
25. V.	Versus
26. Vol.	Volume

## **CHAPTER 1**

### **INTRODUCTION**

In the ancient Vedic Age, women used to enjoy equal status and a place of pride in the Indian society. One important measure of an advanced society is in the way it treats its women. As an ancient Sanskrit proverb goes- 'Where Women are worshiped the Gods Delight.' After the foreign invasion, began the concept of inequality between the males and their female counterparts. The blind adhering of the western culture resulted in the dominance of the male while the females were deprived of their place of pride in the society. Sadly, in a male dominated set up, women have been relegated as means of entertainment for the male - a mere play thing. The Indian Constitution has conferred equal lights on both<sup>1</sup>, but the application thereof has more or less remained a fairytale. This has not been only at the request of the male for many of the customs and traditions are also responsible for their present plight. It is important to safeguard and protect the rights of women, and this should be given due priority.

Domestic violence has been documented throughout history and has been reported in every community. Discrimination and oppression leading to physical, mental, or emotional violence have long been condoned in patriarchal societies. Some significant events, laws, and norms offer historical context within which concept of domestic violence emerge. Domestic violence known with different name like domestic abuse, spousal abuse or Intimate Partner Violence (IPV) and can be defined as violence which is of physical, psychological, emotional, economic or sexual abuse directed towards one's spouse, partner or other family member with in the household. Domestic violence occurs when any family member, partner or ex-partner attempts to physically,

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<sup>1</sup> By Fundamental Rights: Constitution of India

economically or psychologically dominate or harm the other party. It occurs in all cultures, people of all races ethnicities and religions can be committers of domestic violence. Domestic violence inclined and still tends to be a 'crime of silence'. Violence against women is particularly intimate partner violence and sexual violence against women is a major problem and also a violations of women's human right.

In simple words we can say that domestic violence is violent victimization of women within the boundaries of family, usually by men. It can be the husband, his parents, or siblings or any other resident who has the overt or covert latitude for actions that can cause physical or mental agonies to women...it happens behind closed doors and is most often denied by the very women who has been victim of violence.<sup>2</sup> Though some laws were formulated to prevent violence like for dowry<sup>3</sup> and rape<sup>4</sup> etc but there was no Act to deal with the violence against women in the domestic sphere till the Protection of Women from Domestic Violence Act was passed in 2005.

Today domestic violence against women is a worldwide problem. It is a great social and legal problem in India as well. Almost every day we hear news of burnt alive, beaten to death and forced to commit suicide. The cases of domestic violence found across all cultural, socio-economic, educational, religious and ethnic boundaries in India. We find this type of violence not only in rural area but also in urban area also among educated and uneducated women, in all sectors of the society. Family which is the basic unit of society and considered as the safest place for women has now become the most insecure and uncomfortable place for women due to domestic violence. Thus, the domestic violence against women is a heinous crime in the society, that is operating

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<sup>2</sup> Jaising Indira, law of Domestic Violence, 9-10, (Universal Law Pub. Co. Pvt. Ltd. Delhi, 2001).

<sup>3</sup> Dowry Prohibition Act. 1961

<sup>4</sup> Indian Penal Code, 1860: Section 375

in a severe form of oppression against women and which has been increasing at alarming proportion in India.

Violence against women within four walls is the worst form of violation of the Constitutional mandate, perpetrated in present day society. The nature of violence varies from physical assault, forced sexual gratification to psychological torture for reasons varying from non-payment of dowry, reinforcement of masculine fervour to mere disobedience of authoritative dictates. Such continual subjugation and harassment of women has proved to be an anathema for the physical and mental wellbeing of women, and society, at large.<sup>5</sup>

Justice, liberty, equality and dignity are the Four-folded elements of free living stipulated in the Indian Constitution.<sup>6</sup> They are the ways to the attainment of the goals of welfare State and all efforts of the Government are directed towards this end in view. But, unfortunately even after so many years of Indian independence, people continue to grope in the dark and all dreams of ensuring liberty, equality and dignity of women continue to be mere farce as they have been systematically denied to women. Family system, vulnerability, inhibitions, subordination, cultural, religious and socio-economic reasons are inter alia giving scope for violence against women. Of all violence of men against women 'domestic violence' is a serious type but caused silently.

Domestic violence thus contravenes the Universal Declaration of Human Rights, Article 3<sup>7</sup> "Everyone has a right to life, liberty and security of person" and the Section 2(d) of the Protection of Human Rights Act 1993 says Human rights is nothing but the rights relating to life, liberty, equality and dignity of the individual i.e., guaranteed by

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<sup>5</sup> Dipa Dube, "Domestic Violence Bill: A Critique", (2003) Vol XXX (2&3) Ind. Bar. Rev, pp 441- 442.

<sup>6</sup> See Preamble of the Indian Constitution.

<sup>7</sup> Universal Declaration of Human Rights, G.A. Res 217 A (III) U.N. GAOR, 3d Sess. U.N. Doc. A/810, (1948), p.71; available at <http://www1.umn.edu/humanrts/instrree/blvdhr.litm> visited on 10 April 2021



the Constitution of India or embodied in International Covenant and also enforceable by the Courts in India”<sup>8</sup>. Immune from law, domestic violence perpetuates beyond legal boundaries, constantly challenging the universality of human rights i.e., their applicability in all places and domains.

In India previous to 1983; the issue of domestic violence was external the domain of law. It was only recognized in various different matrimonial laws where cruelty towards women was valid on the ground for divorce but there was no immediate way or provision to stop the violence in the family. In 1983, Domestic Violence was documented as a specific criminal offence by the introduction of Section 498-A in the Indian Penal Code which deals with the cruelty by a husband or his family towards his wife. Section 498A of the Indian Penal Code (IPC), was inserted by an amendment of 1983. Article 498A was passed by Indian Parliament in 1983. In Indian Penal Code, 498A is a criminal law (not a civil law) which is defined as follows, “Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be penalised with imprisonment for a term which may extend to three years and shall also be liable to fine.<sup>9</sup> The offence is non-bailable (you have to appear in court and get bail from the judge), non-compoundable (complaint cannot be withdrawn) and cognizable (arrests without investigation or warrants).

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<sup>8</sup> Sec 2(d) of Protection of Human Right Act, 1993.

<sup>9</sup> Section 498A of Indian Penal Code.

Husband or relative of husband of a woman subjecting her to cruelty —

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation—For the purpose of this section, “cruelty” means—

(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.

Passing of Domestic Violence Act 2005 was an important marker in the history of the women's movement in India. Prior to this Act, Domestic violence survivors were hampered by unwillingness to enforce domestic violence as a criminal offence. Although criminal proceedings and injunctions were available under the Indian Penal Code and existing legislation, Domestic Violence was registered as private family matter and police and courts were generally unwilling to take action against the offenders. In the absence of a universally accepted definition of Domestic Violence, its definition changes from country to country, region to region whereas the nature and the extent of its prevalence are more or less similar globally.

The Domestic Violence Act of 2005 has played a vital role in safeguarding the rights of women and put them on their deserving place. This would mean conversing on them equal human rights and promising them a social status at par with their male counterparts.

### **1.1 THE PROBLEM**

In India none of the provisions of penal statutes or the matrimonial statutes define the concept of domestic violence. Some provisions are available under the Indian Penal Code, 1860 (IPC) that can be used to address the problem of domestic violence. The introduction of section 498A in 1983 was significant in bringing domestic violence out of the closet, but this section with its specificity to dowry demands ignores other factors of violence. Other offences of assault, hurt, grievous hurt, dowry death, murder, rape etc are also used against the perpetrators of violence.

It is felt that these criminal offences, however, are not enough to deal with the complexities of domestic violence because the violence inflicted is not by a stranger but by an intimate partner of the victim. More importantly, a criminal remedy will only serve to punish the abuser and is not adequate to address the requirements of the victims

of violence. A man can quite simply throw his wife out from the home and wait for her to make her long- winding way through the courts for whatever little relief she can get, or he can instil in her the fear of losing custody of her children. Therefore, one of the most important consequences of domestic violence is the homelessness of the abused women, and the criminal law remedies do not succeed in providing immediate emergency protection that the victims need.

A closer perusal of the available civil remedies discloses that the various personal law provisions that are existent deal only with marriage and breakdown of marriage, such as divorce or judicial separation. Other civil remedies include those providing maintenance for the women seeking divorce. However, it is important to note that in many situations women do not opt for a divorce, and often wish to remain in the marital relationship. Therefore, when it comes to issues 'within' marriage such as marital violence, there is a huge gap as these issues are not addressed by the legal system.

The devastating effects of domestic violence in India, and the Government's indifference towards the growth of domestic violence compelled the women activists to prepare a model bill on Prevention of Domestic Violence. They submitted the same to the Government of India in 1999. This proposed bill was drafted by Supreme Court Advocate, Indira Jai Singh and the Lawyers' Collective, along with a wide range of women groups who had been dealing with cases of domestic violence for over two decades. The main purpose of this model bill was to provide civil remedies to the victims of domestic violence. This Bill was an attempt to introduce, into the existing law, the following concepts:

- The civil wrong of domestic violence
- The right to protection against domestic violence by attaining protection orders, residence orders and monetary relief orders.

- The right to be well-versed of the accessibility of such orders and the service providers; and
- The right to live in a shared household.

The Bill was tabled in the Lok Sabha on 8th March 2002. However, this Bill was opined by the women's organisations that the Government's version of the Bill was a far cry from what they had proposed. Looking at the provisions, as incorporated by the Government in the Bill, the women's organisations maintained that the Bill could turn out to be dangerous in its implications for women, who are victims of domestic violence. The Lawyers collective went a step ahead and termed the Bill as 'an exercise in tokenism'.

And finally in August 2005, The Protection of Women from Domestic Violence Bill 2005 was passed by the Parliament, which brings substantial improvement upon the 2002 Bill. The 2005 Bill received the assent of the President on September 13, 2005 and is published in the Gazette of India. This Bill has now officially become The Protection of Women from Domestic Violence Act, 2005. For the first time, the Domestic Violence Act holds the state responsible for the care of victims of domestic violence. This Act has been described as a major milestone in the journey of women's movement and has sparked new interest among the women activists. It is expected that this Act will set a new precedent for abused women to seek a means out of a harmful and demeaning relationship.

Domestic violence presents a situation akin to the "chicken and egg" paradox. The laws are needed to protect victims against crimes rooted in social circumstances and social reforms are necessary for effectiveness of law. The legal institutions and implementation of law have lagged. And, the social conditions that germinate domestic violence have

proved to be too stubborn to change. The situation thus requires reforms both in legal and social spheres.

Thus, there is a need to survey the existing law and the Protection of Women from Domestic Violence Act, 2005 to make an objective assessment whether the laws and legal systems etc are adequate to protect women from domestic violence.

## **1.2 OBJECTIVES OF THE STUDY**

The primary objective of this study is to investigate as to how far the laws and legal systems are adequate to protect women against domestic violence.

Secondly to trace the historical roots of domestic violence with a view to determine its underlying cause and to trace the emergence of domestic violence as a problem.

The third objective is to analyse the problem of domestic violence with a view to ascertain the various aspects such as definition and nature, its magnitude, causes and consequences.

The fourth objective is to ascertain the efforts of International Community towards protecting women against domestic violence

Fifthly to make an analysis as to how far the existing law and the Protection of Women from Domestic Violence Act, 2005 are adequate in protecting women against domestic violence.

Sixthly objective is to ascertain is there any alternative strategy to contain the domestic violence and to outline the strategy for combating the problem of domestic violence.

### **1.3 HYPOTHESIS**

Hypothesis' is derived from two words: 'hypo' which means 'under', and 'thesis' means an 'idea' or 'thought'. Hence, hypothesis means 'idea' underlying a statement or proposition.

1. Women get social security under the provisions of this Act.
2. The provisions of the Act are against men.
3. There are no separate courts in India to ensure the implementation of this Act.

### **1.4 REVIEW OF LITERATURE**

Domestic violence against women forms the primary sources for present study. In spite of the efforts of Women's Organisations in pursuing individual instances of domestic violence, in awakening consciousness about the issue, and in shaping amendments to the existing laws, academic research in our country has not been equally forthcoming in conducting a systematic empirical analysis of such violence. The absence of such studies in urban, semi-urban and rural areas is a clear indicator of the lack of information on the vital issue pertaining to women.

Overt violence as part of a general trampling on the rights of girls and women, as part a spectrum denying them the right to life, liberty and security of the person, to health and education, to their earnings at work, to the choice of a career or a partner in marriage<sup>10</sup>. Abuse is a way of maintaining control, approved by societal norms, while other members of the community see it as connected with individual circumstances, resulting from alcoholism or from financial and other personal problems of the

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<sup>10</sup> Kalmki Muzumdar, Violence Against Women & Law, p 128

perpetrator.<sup>11</sup> The pretext offered by perpetrators to justify their violence, again demonstrating that violence for them is a way of maintaining control.<sup>12</sup>

No place is safe, not the home, the campus, the workplace or the street. No age is safe, infants, old women, paraplegics can all be victims of rape.<sup>13</sup>

There are some works dealing with social or legal aspect of the problem of dowry in India. Though they are not wholly devoted to the problem they have touched the theme and some of them devoted a chapter of two to discuss the problem of dowry. Among them mention must be made of 'Violence Against Women', J K Pathak & B K Sharma's<sup>14</sup>, 'Crimes Against Women and Protective Laws', Dr Paras Diwan's<sup>15</sup>, 'Law Relating to Dowry, Dowry-Deaths, Bride Burning' V K Diwan's<sup>16</sup> 'Law Relating to Offences Against Women', Jaisingh Indira, Law of Domestic Violence, and Article by Sinha, Archana , 'Gender Concerns and Domestic Violence'.

A point discussed by several Indian authors pertains to the reluctance of victims of domestic violence in their dying declarations to implicate their husbands Kalindi Mazumdar elaborates on some of the reasons. The woman often fears retaliation against her husband or m-laws She also pathetically clings to the notion of a family honour that must be protected. In the absence of such clear evidence, it is often difficult to establish that a death by burning is a case of homicide and not a suicide or accident as claimed by the culprits.<sup>17</sup>

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<sup>11</sup> An Interview by Jacqueline Burkell to the abused survivors.

<sup>12</sup> Bakula Ghaswala, Crime Against Women, p 68

<sup>13</sup> Women and Violence, Vikas Publishing House, (New Delhi, 1989), p 68

<sup>14</sup> JK Pathak & BK Sharma, Law of Stridhan, Allahabad, The Law Book Company (P) Ltd, (1992)

<sup>15</sup> Dr Paras Diwan, Law Relating to Dowry, Dowry-Deaths, Bride, Rape and Related Offences, Delhi, Universal Law Publishing Co Pvt Ltd (1997)

<sup>16</sup> VK Diwan, Law Relating to Offences Against Women, New Delhi, Orient Law House (2000)

<sup>17</sup> Kalindi Mazumdar, Races and cultures of India, Asia Publishing House, (Bombay, 1961), p 251

With these issues relating to sexual and domestic violence unfolding in the review of literature in the form of books, articles, seminar papers, the present study seeks to examine the under mentioned objectives.

### **1.5 RESEARCH METHODOLOGY**

The methodology adopted for the study is completely doctoral, involving content analysis. The documents analysed include International Human Rights Documents, International Conventions and Declarations, treatises, statutes and judicial decisions, for which original sources were consulted and for critical appraisal secondary sources such as juristic writings were consulted. Relevant books, articles, empirical studies, reports, etc have been studied to get the true picture of the problem of domestic violence and to outline the remedial measures for it. The standard forms of quotations and references are used in the work.

### **1.6 IMPORTANCE OF THE STUDY**

The importance of the study lies primarily, in the fact that it analyses the problem of domestic violence and evaluates the existing relevant law and the Protection of Women from Domestic Violence Act, 2005, to find out the infirmities prevailing in them and to evolve certain concrete measures to protect women against domestic violence. The study examines the various international efforts and also law in India. The study contributes towards the serious implementation of a progressive legislation against domestic violence. Lastly, the importance of the study lies in its purpose, namely, to make an original contribution to the discipline of law.



## **1.7 OUTLINE OF THE CHAPTERS**

The investigation into the problem pertaining to the 'Protection of Women from Domestic Violence in India' is planned in seven chapters:

### **Chapter-1: Introduction**

This chapter is concerned with an elucidation of the problem, the objectives of the study, its importance and the methodology adopted for the study.

### **Chapter-II: Historical Roots of Domestic Violence and its Emergence as a Problem**

It is difficult to understand the source of present-day domestic violence without looking at the history that has shaped current law regarding, and perceptions about, women's rights in society. Domestic violence in our society is one outcome of laws that historically have discriminated against women and of societal views of women as a lesser class. Gender-based violence is the ultimate extension of gender discrimination and the belief that women are innately subordinate to men. It is, after all, the primitive way to 'keep a woman in her place'.

The problem of domestic violence has only come into the limelight in the past few years. Its progression towards public awareness is parallel to the growth of the women's movement and the sustained efforts by the grassroots battered women's movements over the past three decades.

The analysis in this chapter has traced the historical roots of domestic violence in Hindu society, in Arabic and Islamic societies. The analysis has also dealt with the rise of the women's movement of the late 1960s and 1970's, in both Britain and United States and also the battered women's movement, which was the direct product of the women's movement in both the countries.

### **Chapter-III: Domestic Violence - An Analysis**

Domestic violence is considered as one of the most pervasive of human rights violations, denying women equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms. To understand why it is so, this chapter analyses the definition and nature of domestic violence. Further, the magnitude of the problem around the world and also in India is discussed. The several complex and interconnected social and cultural causes that have kept women particularly vulnerable to domestic violence are also analysed. Lastly, the chapter analyses the consequences of domestic violation, which are far reaching with fatal outcomes.

### **Chapter- IV: Other Legislative Provision for the Protection of Women Against Domestic Violence in India**

The principle of gender equality is preserved in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. International Conventions and norms have been used by Courts in India in cases where there is a lacuna in domestic legislation. As to Criminal Law that deals with domestic violence, some limited recognition was given by passing the Criminal Law (Second Amendment) Act 1983, and the Dowry Prohibition (Amendment) Act 1986, which inserted new sections 498A and 304B respectively in the Indian Penal Code, 1860, and also made consequential amendments in the Criminal Procedure Code 1973 and the Indian Evidence Act 1872. Also, several lacunae exist in criminal justice system, some of which lie in inherent shortfalls in the law and others deal with the practice and implementation rather than the content of law. And further there is also the offence of marital rape dealt under the Indian Penal Code. As to the Civil Law on domestic violence, the remedies available are under the laws of marriage and divorce on the ground of cruelty, and during the pendency of those proceedings' victims can ask for maintenance and alimony and also injunctions restraining them from dispossession

from matrimonial home. Further remedies are available under the Family Courts Act 1984, the Specific Relief Act 1963, the Civil Procedure Code 1908 and the Law of Torts. In addition, the Protection of Women from Domestic Violence Act 2005 was passed by the Parliament in August 2005, which comes as a ray of hope to millions of women who suffer abuse. In this chapter, all the above provisions are analysed, to find out the extent to which they provide protection to women subjected to domestic violence.

### **Chapter-V: Conclusion and Suggestions**

The study has led the researcher to conclude that the Criminal Law relating to domestic violence is of a very limited character, several lacunae exist in the criminal justice system, and the women in distress is reluctant to approach the police. The Civil Law relating to domestic violence is recognised only in the context of dissolution of marriage and the remedies available under the general Civil Law are also not adequate enough to serve the purpose. Civil actions available at present are lengthy and cumbersome and have not proved to be efficacious remedies. Thus, it was necessary that an appropriate separate legislation by which domestic violence could be effectively controlled and restrained be passed to alleviate the suffering of women subjected to domestic violence and also to create a single forum, which would grant civil and criminal remedies. This has been very much taken care by the Protection of Women from Domestic Violence Act 2005. Except for the provisions as to shelter homes the Act is drafted in accordance with international standards and also suits Indian conditions. Now what requires to be done is the implementation of the Act with the seriousness it deserves. The study further concluded that legal remedies alone are insufficient to deal with domestic violence as it is the outcome of the inferior status of women in society and thus it is necessary to take concrete steps to guarantee women equality in all spheres of life. On the basis of the analysis of the study the suggestions are made.

## **CHAPTER II**

# **HISTORICAL ROOT OF DOMESTIC VIOLENCE**

# **AND IT'S EMERGENCE AS A PROBLEM**

### **2.1 Introduction**

It is difficult to understand the source of present-day domestic violence without looking at the history that has shaped current law regarding, and perceptions about, women's rights in society.<sup>18</sup> Domestic violence in our society is one outcome of laws that historically have discriminated against women and of societal views of women as a lesser class. Gender-based violence is nothing but the ultimate extension of gender discrimination and the belief that women are innately subordinate to men. It is, after all, the primitive way to 'keep a woman in her place'.

The problem of domestic violence has only come into the limelight in the past few years. Its progression towards public awareness is parallel to the growth of the women's movement and the sustained efforts by the grassroots battered women's movements over the past three decades.

### **2.2 Status of Women within the Family**

In Indian society the problem of violence against women in the family is not new. Women in our society have been the victims of humiliation, torture and exploitation from the time immemorial irrespective of the fact that they were also worshipped.

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<sup>18</sup>Sherri L. Schornstein: Domestic Violence and Health Care (SAGE Publication) 1997 or <https://books.google.com/booksid=VE-efdchYtEC> visited on 10<sup>th</sup> April, 2021

Family is considered as the first agency, which provides not only emotional and material support to its members but also serves as basic source of personal satisfaction, socialization and social control. It works as a connection between continuity and change and as an important source of constancy and support. Human development can only be improved by inspiring family life. On the other side actual practice, due to patriarchy in our family system, the family does not give equal importance to all members as role, power and status are strictly determined by age and gender. Moreover, family being considered as a private domain, even, abuse, exploitation, injustice, discrimination and violence are allowed in our patriarchal structure. Gelles (1983) in his writings gave a clear picture of the family role. He not only considered family as the source of love, compassion and sustenance, but also the source of inequality, exploitation and violence.<sup>19</sup>

The family is the first and the leading agencies of socialization and social control. In India, domestic violence has been directly related to status and role of the individuals in the family. Family, separately from providing security and emotional support, fulfills certain important and non-important functions. It provides the harmless and the most protected atmosphere to an individual to grow. But due to the fact family contains of the candied and legitimized, socially and culturally constructed firm gender-based roles and in a patriarchal set up there are fundamental inequalities between men and women. These differences have been a share and parcel of the Indian families for year. From Vedic eras, the civilizations and practices showed women enjoying equal status but future on in the Smritis, the status of women began to weakening. The women's freedom and rights were shortened. The exercise such as child marriage, denial of education to women and polyandry etc. became quite predominant during those times.

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<sup>19</sup> [https://www.ijmra.us/project%20doc/2018/IJRSS\\_FEBRUARY2018/IJMRA-13263.pdf](https://www.ijmra.us/project%20doc/2018/IJRSS_FEBRUARY2018/IJMRA-13263.pdf) visited on 12th May 2021

In the medieval period, the worsening in the status of women brought even more abuse such as the purdah and devadasi system. In the later period the illegitimate sexual manipulation of the devadasis became a norm in some parts of India.

### **2.3 Women Condition in Ancient Day:**

Domestic violence is a prevalent problem throughout the developed and developing world and makes serious impact on quality of human life and broader progress. Violence against women is the appearance of a factually unequal power relationship between men and women. It is an accustomed response and is unnatural or born of biological determinism. In the olden days, violence against women was a result of the predominant atmosphere of ignorance and feudalism. Today violence against women is an uncontrollable phenomenon, which is a direct result of the rapid urbanization, industrialization and structural adjustment programs which are changing the socio-economic situation of our nation. In this land where non-violence has been spoke as a way of life for thousands of years and where women have been worshipped in the image of Durga, Saraswathi and Lakshmi, it is shocked to observe the brutal reality of women.<sup>20</sup>

Women in India through the ages have been victimized, humiliated, tortured and exploited. There have been occurrences of murder rape, abduction and torture from time centuries old. In unkindness of such a dark past violence against women has not been given much attention. More, so, no attempts were made on the subject of why such a socially relevant theme has been left neglected and ignored. Violence touches the lives of millions of women universal in all socio-economic and educational classes. It cuts

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<sup>20</sup>(Sharma2000), [http://www.academia.edu/32953008/A\\_Study\\_on\\_Domestic\\_Violence\\_Coping\\_strategies\\_between\\_Rural\\_Married\\_Women\\_visited\\_on\\_12\\_May\\_2021](http://www.academia.edu/32953008/A_Study_on_Domestic_Violence_Coping_strategies_between_Rural_Married_Women_visited_on_12_May_2021)

across cultural and religious walls, obstructing the rights of women to participate fully in society.

The post-industrial era, with the advancement in technology brought significant structured and role changes in the family. The women now had two roles to perform one in the family and the other at the work place. The burden of this additional role called for not only redefinition of the rigid gender-based roles but also required a shift in the mindset of the people, which did not take place till today. There is uncertainty and instability in the relationships of the most spouses. The weights thus, created have made family a store house of the most willful kinds of violence one of them being domestic violence.

Domestic violence in India came in to sharp focus in 1980s<sup>21</sup> when there was a widespread coverage by the mass media of the growing incidence of torture of brides, dowry deaths and objections against some monstrous incidents of domestic violence. India's commitment to eliminate violence against women becomes more obvious when India became a signatory to convention on elimination of all forms of discrimination after the amendment of social laws and when the women's liberation movement identified and responded to the issue of women violence documented by the eleven dangerous areas of concern after being a part of the 4th world conference on women at Beijing in 1995.

Strauss (1977) has highlighted this culture of violence through traditional verse:

*"A woman, a horse, and a hickory tree,*

*The more you beat them, the better they be".<sup>22</sup>*

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<sup>21</sup> Convention on elimination of all form of discrimination.

<sup>22</sup> Strauss (1977)

Women are the victims in the hands of men all over the world maybe women were free and equivalent in quite very old times. Progressively, the women were preserved as lesser and moreover, they treated themselves lesser. The lack of bodily muscle leads to broad timidity in women throughout the Middle Ages, cruel and unfeeling treatment was imposed out to them. They trailed the holy scriptures in which they were told to get happiness by obedience. The women sacrificed everything as well as their lives. The higher the expense, the higher the redemption become a slogan for women, in reality, women rarely had an identity apart from the given to them as wives, mothers and daughters. through, they were worshipped as gods at home, they were treated as second class members of the family. What was the reason for this? Some historiographers felt that it was Since of the fire which tied the women to kitchen, while other think that it was due to requirement of safety on foreign invasions. Another reason supported is the patriarchal system where girl is to leave her parents place and go to her husband's place. The girls being alone in the new family, it became easy to subject her with various atrocities. The ancient custom of 'swayamvaram– choosing the husband was replaced by arranged marriages. Then the custom of dowry became the steel frame of marriage, the parents wished to have sons, who may fetch cash and dowry. On the other hand, the daughters were never welcomed and the mother wished themselves dead and cursed on the birth of a female child. Infanticide was practiced and a law had to be passed to stop it. The women were tortured physically as well as mentally in their own homes. The women were treated as salves and idiots.

The women were made to put on 'Purdah'. They could not own any property. She had no personality of her own. In India, it was worse. She was told to serve her husband and in laws. She was to call her husband as 'Swami' (owner) and she the 'Dasi' (slave). In literature, the woman was appreciated to cherish sex. In India, the miserable disorder continued during Mughal and early British period. The cruelties were so much like



infanticide, child marriage bigamy, sati, abduction and various other physical and mental cruelties that the atmosphere forced for some reforms. Social campaigner like Raja-Ram Mohan Roy<sup>23</sup>, Swami Dayanand Saraswati<sup>24</sup> and Swami Vivekanand<sup>25</sup> and other took up cause of women and several laws were enacted to recover the position of women.

Domestic violence victimization of women, within the boundaries; usually by men (or his family) to whom they are married or with whom they have marriage like relationship. Violence can be both physical and psychological. It indicates the art or aggressive behaviors towards her not only to her physical being but towards her self-respect and self-confidence. Psychological violence is carried out with psychological weaponries (threats/insults/humiliating treatment/ denial of human existence) rather than physical outbreak. Physical violence includes all types of aggressive physical behavior by husband or his family towards the women's body (victim). Sexual violence could include both passive (denial) or active violence. Domestic violence could include infrequently be seen in other relation also (i.e., by parents; brothers or others in parents' family).

## **2.4 Conclusion**

In conclusion we can say that the argument of domestic violence is not new to us. And our knowledge shows that the weeds of violence can never make for a field of Promise and Plenty. It is a matter of regret that in this land of the Buddha, Akbar and Mahatma Gandhi, there should be domestic violence. Domestic violence knows no age, socio-economic, religious, gender or educational and barriers. It is a myth that only the poor

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<sup>23</sup> Founder of Brahma Samaj and also abolished Sati Pratha

<sup>24</sup> Founder of Arya Samaj and he opposed idol worship, child marriage and caste system. He was the first to give the call for Swaraj as "India for Indians" in 1876, a call later taken up by Lokmanya Tilak.

<sup>25</sup> He observed education is most powerful instrument of social change.

and uneducated are victims of domestic abuse. Most studies designated that there is also a high occurrence of bridal abuse in the more affluent neighborhoods. Although a poor victim faces the awful problem of not having resources available.

## **CHAPTER III**

### **DOMESTIC VIOLENCE – AN ANALYSIS**

#### **3.1 Introduction**

Abuse of women are of numerous forms and of different natures. It comprises not only crimes involving sexual abuse for economic gains like trafficking & prostitution, adultery, abduction, rape, wrongful confinement, and murder etc. but also crimes related to women's property like dishonest misappropriation, criminal breach of trust, domestic violence, dowry extortion and outraging the modesty of women etc., on the other. These crimes are not only harmful for the women but also for the civilization as an entire. Some of them has explained as follows:

**Female Infanticide and Feticide:** This is playing an important role in lop sided sex ratio in India. Deprived families in certain areas of the country sometimes resort to killing baby girls at birth, to avoid an unwelcome burden on family resources. gender selective abortion has also been communal in the country. It's unsafe to abort the fetus after 18 weeks of pregnancy and quite injurious for mother too at such a late stage.<sup>26</sup>

**Dowry:** The Dowry Prohibition Act of 1961 was the first attempt by the Government of India to identify dowry as a social evil and to limit its practice. The act was improved with the Dowry Prohibition Amendment Act of 1984, which has again been improved with Dowry Prohibition Bill 1986. Women's organization have played significant role in this process of change. The 1961 Act define dowry and makes the practice of dowry transaction, a punishable offence. Dowry is one of those social evils that no educated

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<sup>26</sup> The Female Infanticide Prevention Act, 1870

woman will own up with pride; still, many are adhering to it. Practices of dowry incline to outranked women in the society.

**Domestic Violence:** In Indian family the man is the master and women are the inferior and subordinate partner and societal pressure force women to maintain this status quo. Wife beating is the most predominant form of violence against women in the Indian society and it is viewed as a general problem of domestic discord.

### 3.2 Domestic Violence Act

Since the early eighties, women's groups have been campaigning to bring about effective legislation to counter domestic violence. In 1999, the Lawyers Collective formulated the "Domestic Violence Against Women (Prevention) Bill". It took into consideration several prevalent forms of violence against women within the family and proposed a mechanism for women to approach the Court for a protection order to prevent further violence and to ensure that they do not have to leave their home.<sup>27</sup> The Bill was given to the Government for consideration. The Government of India drafted another Bill titled "The Protection from Domestic Violence Bill, 2002" also providing for protection orders and protection offices and introduced in Lok Sabha on March 8, 2002. But die communal crisis in Gujarat precluded discussion on the Bill during the last session of Parliament.

The Bill, since its inception, had been in the eye of a storm with sharp differences emerging on the definition of domestic violence itself. Women involved in the struggle against domestic violence vehemently opposed to what they saw as the Governments half-hearted and fundamentally flawed attempt to provide a legal remedy for a social epidemic.<sup>28</sup> Women's groups opposed to the 2002 Bill accused the Government of

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<sup>27</sup> Domestic Violence Against Women (Prevention) Bill,2002

<sup>28</sup> Ammu Joseph, "Intimate Enemy', The Hindu, August 4,2002, p.4.

blunting its main purpose — to protect the woman. After having actively lobbied for a Bill to check domestic violence its proponents felt cheated by the Government, which they alleged had made a mockery of the issue of domestic violence. It was felt, it will be better not to have a Bill on domestic violence rather than have something which goes against the very spirit of the Bill.<sup>29</sup> Women activist cited many reasons for their resistance to the 2002 Bill, asserting that it would do more harm than good.

### **3.2.1 The Protection from Domestic Violence Act, 2002: A Critique**

A closer look and comparison with the earlier draft Bill proposed by Lawyers Collective showed that the 2002 Bill was detrimental and damaging to the interest of women and demanded a complete overhaul of the Bill. It suffered from a number of intrinsic defects as follows:

- a. It was conceptually flawed, neither recognizing domestic violence as a grave violation of the human rights of women nor including an explicit statement on women's right to live a life free of violence. As a result, it failed to uphold a number of United Nations agreements on violence against women, to which India is a signatory.
- b. It had questionable goals. The function of any law on domestic violence should be to prevent it to the extent possible, to provide relief to victims /survivors and to/punish perpetrators. Yet the stated aim of the official Bill<sup>30</sup> was “to preserve the family and regulate and improve matters for the future, rather than to make judgments upon or punish past behavior”, according to a briefing note prepared by the Central Government's Department of Women and Child Development in December 2001, when the draft was first published and circulated.

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<sup>29</sup> Preeti Mishra, “The Protection from Domestic Violence Bill 2002 An Appraisal (2004) Cri.L.J. p.317.

<sup>30</sup> Domestic Violence Against Women (Prevention) Bill,2002

- c.** It's vague wording left too much to the discretion of individual judges. For instance, it did not provide a clear and comprehensive definition of domestic violence even though internationally accepted definitions are readily available in the United Nations framework for legislation on domestic violence. Similarly, by including the phrase "habitually assaults" in the definition<sup>31</sup> outlining what constitutes domestic violence, the drafters of the Bill<sup>32</sup> suggested that occasional assaults are unacceptable and left individual magistrates to decide what "habitual" means. The Bill was also seriously weakened by the inclusion of a clause that in effect condones violence committed in "self-defense" or "in order to protect property". This exemption enabled the perpetrator of domestic violence to use the plea of self-defense, providing violent men with a convenient excuse that would have allowed many to get away with their crimes. Another problem with the 2002 Bill was that it failed to specify the nature of the relief or compensation monetary or material to be granted to a victim of domestic violence. This crucial decision was again left to the discretion of individual judges.
- d.** It did not recognize women's right to reside in the "matrimonial home" or shared household. Neither did it protect them against any denial of that right.
- e.** Although it brought into its ambit women who are related by blood, marriage or adoption to the alleged abuser, it failed to protect the right of women who live with 'and/or are in intimate relationships with violent men but are not technically "relatives" as defined under the law.
- f.** It did not address the common problem of non-compliance with the Court order.
- g.** It did not provide for a transparent system for appointment of the proposed "protection officers"<sup>33</sup> who are meant to assist victims of domestic violence. Nor

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<sup>31</sup> Chapter II of Domestic Violence Against Women (Prevention) Bill,2002

<sup>32</sup> Ibid

<sup>33</sup> Ibid, Chapter III

did it contain any provision to ensure that they had requisite qualifications, experience, knowledge and /or sensitivity for the post. To make matters worse, it did not commit funds for the appointment of protection officers or for the implementation of the law.

- h.** It did not require the Government to publicize the law so that women know that it exists or to be put in place any system where by the implementation of the law can be ensured and monitored.<sup>34</sup>

In view of the multiple deformities of the 2002 Bill it was not surprising that women's organizations were emphatic in their opposition to it. Many responded to the public notice issued by the Parliamentary Committee on Human Resource Development, despite the short time that was provided. The Karnataka State Commission for Women, for instance, hastily convened a meeting with lawyers, academicians, and activists and submitted a detailed note outlining its objections to and suggestions regarding the 2002 Bill, stating that 'while a law to redress domestic violence is certainly very necessary', ... the Bill in its present form is totally unacceptable.<sup>35</sup>

### **3.2.2 The Protection of Women from Domestic Violence Act, 2005**

The Protection of Women from Domestic Violence Bill 2005, passed by the Parliament in August, 2005, received the assent of the President on September 13, 2005, has now officially become the Protection of Women from Domestic Violence Act, 2005. It has been described as a major milestone in the journey of women's movement in the country by Indira Jaisingh, a prominent women activist and Supreme Court Lawyer.<sup>36</sup> The Domestic Violence Act, 2005 brings substantial improvement upon the earlier Bill

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<sup>34</sup> Joseph, supra note 28.

<sup>35</sup> Ibid.

<sup>36</sup> Deccan Herald, October 8,2005.

of 2002. The Act on domestic violence<sup>37</sup> even though cannot erase the scars that millions of women of the country carry, but what it can do is provide that essential support system that abused wives, mothers, sisters and even live-in partners need to pick up the threads of their lives. It comes as a ray of hope to millions of women who have for ages suffered abuse with nowhere to go due to lack of legal, emotional, social and other forms of support, which did not provide women any alternatives to lead violence free lives.

### **3.2.2.1 Objectives of the Act**

In its statement of objects and reasons the Act makes it clear that domestic violence is undoubtedly a human rights issue and states that the Vienna Accord of 1994 and the Beijing Declaration and the Platform of Action (1995) have acknowledged this. It also recognizes the recommendations of the United Nations Committee on Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) that State Parties should act to protect women against violence of any kind mainly that happening within the family. The problem of domestic violence is broadly prevalent but has remained invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives is an offence under section 498A of the Indian Penal Code; the civil law does not address this phenomenon in its entirety. It is, therefore, proposed to enact a law providing for a remedy under the civil law, which is intended to protect women from being victims of domestic violence in the society.<sup>38</sup>

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<sup>37</sup> Protection of Women from Domestic Violence Act, 2005

<sup>38</sup> The Protection of Women from Domestic Violence Act, 2005 (hereinafter Domestic Violence Act 2005), Statement of Objects and Reasons.



**The Act is aimed at providing the following things as these are considered as the main requirements to protect women from the menace of domestic violence:**

- This Act seeks to cover those women who are or have been in a relationship with the abuser where they have lived together in a shared household and are related by consanguinity, marriage or adoption. In addition, relationship with family members living together as a joint family is also included. This Act also cover those women who are sisters, widows, mothers, single women, or living with the abuser and provide legal protection to them.
- It defines the expression “domestic violence” which not only includes actual abuse but also threat of abuse that is physical, sexual, verbal, emotional or emotional or economic.<sup>39</sup> Harassment by way of illegal dowry demands to the women or her relatives would also be protected under this definition.
- It seeks to protect the rights of women to secure housing. It also provides for the right of a woman to live or reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right of woman is protected by a residence order, which is passed by the Magistrate.<sup>40</sup>
- This Act by incorporating Section 18 authorizes the Magistrate to pass protection orders in favor of the aggrieved person to prevent the respondent from assisting or committing an act of domestic violence or any other specified act, arriving a work place.<sup>41</sup>
- Any other place visited by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to

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<sup>39</sup> Protection of Women from Domestic Violence Act, 2005, Section 3.

<sup>40</sup> Ibid, Section 17 and 19

<sup>41</sup> Ibid, Section 18: Protection Order

the aggrieved person, her relatives or others who provide her aid from the domestic violence.

- It delivers for appointment of protection officers and registration of non-governmental organizations as facility providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.<sup>42</sup>
- The Act provides the remedies for women's multi needs which can be addressed through single litigation in one court therefore strongly reducing the time and money spent by aggrieved women on legal interventions.
- This Act recognizes that legal remedies would not be adequate to help the victim live her life with dignity, thus multiple support structures have been created to holistically address women's needs for counseling, shelter and medical support.<sup>43</sup>
- The Act complements existing matrimonial and criminal laws on domestic violence which provides wider option in legal provisions to effectively address the specific situations and needs.

### **3.2.2.2 Scope of the Act**

'Domestic relationship' has been defined to include the relationship between two persons:

- Living or have, lived together in a shared household.
- Related by consanguinity.
- Related by marriage.

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<sup>42</sup> Ibid

<sup>43</sup> Ibid, Section 20

- Related by adoption.
- Who are family fellows living together as a joint family.<sup>44</sup>

Women in any of these relationships are covered by the Act.<sup>45</sup> As the Act covers all those who live in a shared household — whether related by consanguinity, marriage, a relationship in the nature of marriage or adoption, it is a step in the right direction. Till now, those in a live-in relationship had no protection because there was no legal marriage. With this Act, the fact of living together in a shared household is important and not legalities. Furthermore, it's a whole life cycle of violence — in the parent's home, in the matrimonial home and then in old age, when the woman is living with her son. And this Act recognizes that home is no sweet home.<sup>46</sup> It recognizes the reality that often it is not just the wife who faces abuse but also other members of the family which is a welcome step.

### **3.2.2.3 Definition of Domestic Violence**

**Section 3 of Protection of Women from Domestic Violence Act, 2005** defines Domestic Violence as any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms, injures or endangers the health, safety, life, limb or well-being, of aggrieved person whether physical or mental or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and also economic abuse; or

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<sup>44</sup> Ibid., sec.2 (f).

<sup>45</sup> Ibid., sec.2 (a).

<sup>46</sup> Neelam Raj, 'Heart Break', Times of India, July 3,2005, p.13.

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or the person related to her to meet any unlawful demand of any dowry or other property or valuable security; or

(c) threatening the aggrieved person or person related to her by any of the conduct as mentioned in above clause.

(d) injures or causes harm, to the aggrieved person whether physical or mental.<sup>47</sup>

In simple words, this expanded definition includes physical, sexual, verbal, emotional and economic abuse. Intimidation and harassment, damage or destruction of property, demands for dowry and taking or attempting to appropriate property belong to the woman are also defined as domestic violence. Thus, the definition includes all types of violence against women by intimates. Even those who are not beaten up but are subjected to insults and ridicule especially when they are unable to bear a child or a male child can get redress. It also includes the established understanding of ‘cruelty’ in matrimonial law, and covers offences under the IPC and Dowry Prohibition Act. It is based on guidelines in the United Nations model legislation on Domestic Violence and concepts from the laws in other countries and also includes forms of violence specific to India. Women’s organizations, who had slammed the 2002 Bill, which recognized the crime only if the abuser “habitually” assaulted the abused. have welcomed this definition. The attempt of the Act has thus been to provide as exhaustive a definition as possible.

The Protection of Women from Domestic Violence Act, 2005 has **five Chapters and 37 Sections**. According to this Act the Section 2 enumerates the definitions to be used in the Act, some of them are as follow:

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<sup>47</sup> Protection of Women from Domestic Violence Act 2005, Sec.3

**“Aggrieved person”** means any woman who is, or has been on domestic relationship with the respondent and who alleges to have been subjected to any type of domestic violence by the respondent.<sup>48</sup>

**“Respondent”** means any adult male person who is, or has been in domestic relationship with the aggrieved person and against whom the victim of domestic violence has sort any relief under this act.<sup>49</sup>

**“Domestic relationship”** means relationship between two persons who lived or have lived together in a shared household. Such person may be related by consanguinity/ blood; Marriage; through a relationship in nature of marriage (live in-relationship); Adoption; Members of the joint family.<sup>50</sup>

**“Shared Household”** includes those places where the aggrieved person lives or at any point of time has lived together in domestic relationship. It is not essential for either of the parties to own the house. It could be owned or tenanted household.<sup>51</sup>

### **3.2.2.4 Types of Domestic Violence:**

Domestic violence can occur to anyone, irrespective of size, gender, or strength, yet the problem is often overlooked, excused, or denied. This is principally true when the abuse is emotional, rather than physical. Emotional abuse is often diminished, yet it can leave deep and lasting scars. Observing and recognizing the warning signs and symptoms of domestic violence and abuse is the first step to ending it. There is a provision of Domestic Violence Act 2005, in India to have backing at the time, when one becomes

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<sup>48</sup> Ibid, Section 2(a)

<sup>49</sup> Ibid, Section 2(q)

<sup>50</sup> Ibid, Section 2(f)

<sup>51</sup> Ibid, Section 2(s)

the victim of any kind of violence. Violence usually means physical abuse but it does not contain only this. The scope is broader than we think.

Domestic violence has many forms counting sexual violence, physical violence, emotional abuse, intimidation, threats of violence or economic deprivation. There are a number of dimensions of domestic violence: →

**Mode** – Physical, psychological, sexual and/or social.

**Frequency** – One off, occasional, chronic.

**Severity** – In standing of both psychological or physical harm and the need for

**Treatment** – fleeting or permanent injury–mild, moderate, severe up to homicide.

### **(1) Physical Violence**

Physical violence is the intentional use of physical force with the potential for causing injury, harm disability, or death, for example, hitting, shoving, biting, restraint, kicking or use of a weapon. The Domestic Violence Act, 2005 has defined physical abuses as any act or conduct which is of such a nature as to causes bodily pain, harm or danger of life, limb or health or impair of the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.<sup>52</sup>

### **(2) Sexual Violence**

Sexual violence is divided into three categories:

- (i) usage of physical power to compel a person to engage in a sexual act against their will, whether or not the act is completed.
- (ii) Attempted or completed sex act involving a person who is incapable to understand the nature or condition of the act, unable to decline

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<sup>52</sup> Ibid, Section 3

participation, unable to the communicate unwillingness to engage in the sexual act.

- (iii) Abusive sexual contact The Domestic Violence Act, 2005 has defined sexual abuse as any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women.<sup>53</sup>

### **(3) Psychological Violence**

Psychological/emotional violence involves violence to the victim cause by acts, threats of acts or coercive tactics. Emotional abuse can include, but is not limited to humiliating the victim, controlling what the victim can and cannot withholding information from the victim, deliberately doing something to make the victim feel diminished or embarrassed, isolating the victim from friends and family, and denying the victim access to money or other basic resource. It is considered emotional violence when there has been prior physical or sexual violence of prior threat of physical or sexual violence.

According to Domestic Violence Act, 2005, verbal and emotional abuse includes:

- (i) Insults, ridicule, humiliation, name calling and insults or ridicule especially with regard to not having a child a male child;<sup>54</sup>
- (ii) Repeated threats to cause physical pain to any person in whom the aggrieved person in interested.<sup>55</sup>

### **(4) Economic Abuse**

Economic abuse is when the abuser has complete control over the victim's money and other economic resources. Usually, this includes putting the victim on a strict 'allowance', suppression money at will and compelling the victim to

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<sup>53</sup> Ibid, Section 3

<sup>54</sup> Ibid Section 3

<sup>55</sup> Ibid

beg for the money until the abuser provides them some money. It is common for the victim to receive less money as the abuse continues. The Domestic Violence Act, 2005 explains economic abuse in detail as:

- (i) Deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessities for the aggrieved person and her children, if any stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenances;<sup>56</sup>
- (ii) Disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like other property in which the aggrieved person has an interest or is permitted to use by virtue of the domestic relationship or which may be rationally required by the aggrieved person; and<sup>57</sup>
- (iii) Prohibition or restriction to continued admission to resources of facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.<sup>58</sup>

#### **(5) Spiritual Violence**

It includes:

- (i) Using the spouse's or intimate partner's religious or spiritual beliefs to manipulate them; and

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<sup>56</sup> Ibid

<sup>57</sup> Ibid, Section 3

<sup>58</sup> Ibid



- (ii) Preventing the partner from practicing their religious or spiritual beliefs ridiculing the other person's religious or spiritual beliefs. Spiritual violence has not been including into The Domestic Violence Act, 2005

Xaxa Johani (2004) pointed out that “domestic violence transcends the boundaries of house, caste, class or religion, in all societies”. Atrocities committed to a woman may take various forms which are given below:

1. Physical violence leading to injury.
2. Verbal violence: Use of abusive and filthy language against a woman by her near and dear ones.
3. Sexual violence: Robbing women of their dignity not only by indecent behavior but also by raping.
4. Social-violence: Demeaning, disparaging and humiliating a woman.
5. Emotional violence: Deprivation of love and affection, concern sympathy and care.
6. Intellectual violence: Denial of rights to take part in decision making.
7. Others forms of violence: Include not providing women educational opportunities, denial of reproductive rights, denial of access to health facilities or opportunities to use political rights or committing atrocities like trafficking and prostitution.

**Other major provisions under this act include:**

- (i) Any female who is or has been in a domestic or family relationship if is exposed to any act of domestic violence can complain under this Act.
- (ii) Under section 5 any aggrieved women can complain to the concerned protection officer, police officer service provider or magistrate.<sup>59</sup>

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<sup>59</sup> Protection of Women from Domestic Violence Act, 2005

- (iii) Under section 7, shelter home and medical facilities can be provided to aggrieved woman.<sup>60</sup>
- (iv) Under section 17, every aggrieved woman has right to reside in shared household.<sup>61</sup>

The court in the case *S.R. Batra V. Smt. Taruna Batra*<sup>62</sup>, held that Section 2(s) of the Act has been drafted in a doubtful manner so, it requires judicial interpretation. The court held that under Section 17(1) of the Act<sup>63</sup> wife is entitled only to claim her right as residence in a shared household and the shared household would mean nothing but those houses that is related to husband or taken on rent or belongs to joint family of her husband. Supposedly, if the property does not belong to either of the above category then it would tantamount to exclusive property of husband's mother and not shared household.

The Bombay High Court in the case *Roma Rajesh Tiwari v. Rajesh Dinanath Tiwari*<sup>64</sup> expressed the objects of the Act i.e., to protect women from domestic violence and protect her right to reside in matrimonial residence or shared household.

- (v) Under section 18, protection order by magistrate can be given favor of aggrieved women.<sup>65</sup>
- (vi) Under Section 19, residence order may be passed by magistrate if he satisfied that domestic violence has taken place.

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<sup>60</sup> Ibid, Section 7 i.e., Duties of Medical facilities.

<sup>61</sup> Ibid, Section 17 i.e. Right to reside in a shared household.

<sup>62</sup> *S.R. Batra V. Smt. Taruna Batra*, AIR 2007 SC 1118

<sup>63</sup> Section 17(1) of Domestic Violence Act, "Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the same."

<sup>64</sup> *Roma Rajesh Tiwari v. Rajesh Dinanath Tiwari*, MANU/MH/2466/2017

<sup>65</sup> Ibid, Section 18

The Bombay High Court in *Sabita Mark Burges v. Mark Lionel Burges*<sup>66</sup>, held that the respondent may be directed to be removed himself from the shared household although he being the owner of such shared household under Section 19(1)(b). The reason behind is that although he is an owner but it does not mean that he has right to be violent with her wife.

In case of *Meenavathi v. Senthamarai Selvi*<sup>67</sup> the court interpreted the proviso to Section 19 of Domestic Violence Act and held that it cannot be passed against any woman.

Also, in the recent judgement of Delhi High Court in *Shachi Mahajan v. Santosh Mahajan*<sup>68</sup>, the court held that under Section 19 of the Act, when the subject property is being sold, it is the right of daughter in law to be provided with an alternative residence or shared household along with compensation.

Supreme Court in *Kamlesh Devi v Jaipal and Ors.*<sup>69</sup> held that only vague allegations are not sufficient to start the proceedings against the respondent.

- (vii) Under section 20, monetary relief does can be given to aggrieved woman to meet expenses or loses.<sup>70</sup>
- (viii) Under section 22 interim compensation can available to aggrieved woman.<sup>71</sup>
- (ix) Under section 30, imprisonment up to 1 year a fine up to 20,000 or both for breach of protection order by respondent.
- (x) Under section 33, protection officer can be prosecuted up to 1 year imprisonment or with a fine up to Rs. 20,000 or both for failure of his duties.

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<sup>66</sup> Sabita Mark Burges v. Mark Lionel Burges,2013 SCC Online BOM 631

<sup>67</sup>Meenavathi v. Senthamarai Selvi,MANU/TN/2547/2009

<sup>68</sup> Shachi Mahajan v. Santosh Mahajan,MANU/TN/2547/2009

<sup>69</sup> Kamlesh Devi v Jaipal and Ors.(2019)SCC 34053

<sup>70</sup> Ibid, Section 20

<sup>71</sup> Ibid, Section 22

In spite of the above given enormous response still an widespread range of violent activities at domestic front are happening in private as well as public places both, as reported through print and electronic media from time, which shows the need to reexamine domestic violence, not only as a problem of individual victims but as a societal issue of concern.

### **3.2.2.5 Precipitating Factors**

In patriarchal society such as Indian women and girls are not only socialized into being silent about their experience of violence but traditional norms teach them to accept, tolerate and even rationalize domestic violence. Women are supposed to hide scares physical as well as mental as it will damage their own image in the family and society violence against women is a complex phenomenon deeply rooted in the way society has setup cultures, beliefs, power relations, economic power imbalance and the masculine ideal of male-dominance. Domestic violence occurs in all people of all races, cultures, ethnicities, and religions can be perpetrators of domestic violence. Domestic violence is perpetrated by, and on, both men and women and occurs in same sex and opposite sex relationships. What is more degrading for women is that they have been not only left behind and neglected in the social milieu but they are subjected to harsh cruelties. There are many factors, which are responsible for domestic violence against women. 'Sinha, Archana (2011) in her article 'Gender Concerns and Domestic violence'. Describes for factors for domestic violence i.e. (i) Cultural (ii) Economic, (iii) Legal and (iv) Political.'<sup>72</sup>

#### **1. Cultural**

- (i) Gender Specific Socialization.
- (ii) Cultural definitions of appropriate sex roles.

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<sup>72</sup> Sinha, Archana (2011) in her article 'Gender Concerns and Domestic violence'

- (iii) Expectations of roles with in relationship.
- (iv) Belief in the inherent superiority of males.
- (v) Values that stretch men proprietary rights over women and girls.
- (vi) Nation of the family as the private sphere and under male control and customs of marriage (bride price/dowry).
- (vii) Acceptability of violence as a means to resolve conflict.

## **2. Economic**

- (i) Women's economic dependence on men.
- (ii) Limited access to cash and credit.
- (iii) Discriminatory laws regarding inheritance, property rights, use of communal lands and maintenance after divorce or widowhood.
- (iv) Partial access to employment in formal and informal sectors.
- (v) Limited access to education and training for women.

## **3. Legal**

- (i) Slighter legal status of women either by written law and or by practice.
- (ii) Laws concerning divorce, child custody, maintenance and inheritance.
- (iii) Legal description of rape and domestic abuse.
- (iv) Low levels of legal literacy amongst women.
- (v) Insensitive treatment of women and girls by police and judiciary.

## **4. Political**

- (i) Under representation of women in power, politics the media and in the legal and medical professions.
- (ii) Domestic violence not taken seriously.
- (iii) Nations of family being private and beyond control of the state.
- (iv) Risk of challenge to status quo/religious laws.
- (v) Limited organization of woman as a political force.

(vi) Limited participation of women in organized political system.<sup>73</sup>

**Some factors, which prevent a woman to seek justice through law are: Main Factors**

1. Chain of Patriarchy.
2. Challenge the inherent structure.

**Other Factors**

1. Individual fears and apprehension relating to consequences of leaving her matrimonial home, this is especially true if a woman is non-working and has no other source of support.
2. Lack of support from parental family and other social networks especially in terms of emotional and marital support.
3. In adequacy of social support network which compels women to 'Compromise' or reconcile.
4. Cultural forces which stigmatize a woman if she dares to challenges the power structure of the society.
5. Non availability of alternatives in terms of physical, economic and social rehabilitation.
6. Care and custody of children is an important issue which prevent women to take any drastic step.
7. insufficiency of legal provisions which take long time to give out justice, and
8. absence of political will to challenge the situation.

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<sup>73</sup> Sinha, Archana (2011) in her article 'Gender Concerns and Domestic violence'

Social factors also play major role in reporting number of crime or atrocities committed on women.<sup>74</sup>

All these factors may combine together to build a 'culture of silence' around the whole issue. Access to proper forums is yet another hurdle which when combined with the lack of awareness regarding women's rights act as the obstacle in the way to justice. A woman may also not lodge a complaint in the case where she has no place to live, when she leaves her matrimonial house or is deserted by her husband. The educational status, fear of the system and non-availability of safety do not determine the attitude towards women's changing factors that prohibits a woman from lodging a complaint against her husband.

In all this it is clearly seen, that the women do not have a say and her voice is throttled and muffled by the lord and master. Society uses symbolic emotional appeal to confine Indian women into the vicious circle of subjugation and oppression.

### **3.2.2.6 Beneficiaries of the PWDV Act, 2005:**

The PWDV Act<sup>75</sup> uses the term Aggrieved person to explain the complainant who can initiate the process of complaint or proceedings under it. It defines an aggrieved person as "any woman who is or has been in domestic relationship with the respondent and who alleges to have been subjected to any act of Domestic violence by respondent".<sup>76</sup> The Act does not differentiate between married or unmarried in the protection against domestic violence. Since the domestic relationship is defined clearly as explained above the law protects and provides remedies to the wife, ex-wife, widow and women in relationship or in a nature of marriage. In addition, several other categories of women

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<sup>74</sup> Ibid

<sup>75</sup> Protection of Women from Domestic Violence Act, 2005

<sup>76</sup> Ibid, Section 2(a)

facing domestic violence that were not marital in nature are also covered by this law, such as mother, daughter, sister, joint family member and children [male and female, Sec2(f)<sup>77</sup>], women related by consanguinity, marriage, or through relationship in the nature of marriage, adoption or are family members living together as a joint family.

The complaint of Domestic violence can be filed under this Act by the women victim or survivor of domestic violence but it is not necessary that she alone can file complaint under it.<sup>78</sup> Apart from her, any Protection Officer or any other person who have the reason to believe that an act of domestic violence has been, is being or is likely to be committed, can file a complaint which includes neighbors, relatives, social workers or any other concerned citizen.

A domestic worker would not be considered as an “aggrieved person” as she is not considered to share a domestic relationship with the respondent. Hence, she cannot file a complaint under this law, but has remedial measures available under Indian Penal Code. A complaint of domestic violence can be filed against “any male who has been or is in a domestic relation with the aggrieved person.”<sup>79</sup> Thus, a wife/woman in a relationship in the nature of marriage can file a complaint against her husband/partner. As per the term an aggrieved wife or female living in a relationship in the nature of marriage as given under this law clarify that an aggrieved daughter-in-law can file a complaint against her victimizing mother-in-law but not vice-versa.<sup>80</sup>(Jaising, 2009:23)

The issue has remained a controversial one since the judgement of *Sandhya Wankhede v. Manoj Bhimrao Wankhede*<sup>81</sup> was delivered. Section 2(q) of Domestic Violence Act defines respondent as “any adult person who is, or has been, in a domestic relationship

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<sup>77</sup> Ibid, Section 2(f)

<sup>78</sup> Ibid, Section 12(i)

<sup>79</sup> Ibid, Section 2(q)

<sup>80</sup> Jaising, 2009:23.

<sup>81</sup> *Sandhya Wankhede v. Manoj Bhimrao Wankhede*, (2011) 3 SCC 650



with the aggrieved person and against whom the aggrieved person has sought any relief under this act. Provided that an aggrieved 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”

Hence, previously it was held that complaint can be filed against an adult male member only. But the court increased the scope of definition and held that even female members can be admitted.<sup>82</sup>

Justice D Y Chandrachud along with others in *Ajay Kumar v. Lata*<sup>83</sup> held that aggrieved women can also file a complaint against husband’s relative or male partner.

However, divorced women are not entitled to get benefits under the Act as held in *Sadhana v. Hemant*.<sup>84</sup>

Any person who believes that an act of Domestic Violence has been, is being or is likely to be committed can give information about it to the Protection Officer or other concerned official. The complaint can be filed by relatives of the aggrieved persons, concerned neighbors, NGO’s, a social worker or an eye witness of the violence. It creates a social responsibility on the members of the community at large who have the knowledge of an imminent or already committed act of violence, to come forward to file a complaint on behalf of the victim which explains the obligation of each and every individual to react against the violence.

As per Section 4(2) of PWDVA no legal action can be taken against those who give such information to Protection Officer in good faith.<sup>85</sup> Besides informing the PO regarding the domestic violence an aggrieved person or an informant can approach local

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<sup>82</sup> Archana Hemant Nayak v. Urmilaben I. Naik & Anr., 2009 (3) Bom Cr 851

<sup>83</sup> Ajay Kumar v. Lata, MANU/SC/0651/2019.

<sup>84</sup> Sadhana v. Hemant, MANU/MH/0689/2019

<sup>85</sup> Protection of Women from Violence under Domestic Violence Act, 2005, Section 4(2)

police station to report domestic violence. Hence it is the responsibility of the police to record the details of the cases and to forward all information received to the Protection Officer promptly. The application for seeking one or more remedies under PWDVA has to be accompanied by Domestic Incidence Report (DIR). The fast legal action can only be triggered when aggrieved woman wishes to commence legal proceedings.

### **3.2.2.7 Rights and Remedies (Orders of relief available to the aggrieved/victims of Domestic Violence)**

The Protection of Women from Domestic Violence Act 2005/2010 protects three important rights of the victim:

- a) The right to be free from Violence.
- b) The right to reside in shared household.<sup>86</sup>
- c) The right to seek remedies.

#### **Remedies:**

The Protection of Women from Domestic Violence Act ,2005 provides wide range of remedies available to the aggrieved person explained below:

#### **(1) Protection Orders (Sec-18 of PWDVA)**

The protection of the women from Domestic Violence Act 2005/2010 prevents Domestic Violence through the issuance of Protection Order (Section-18 of PWDVA). To define Protection Order, we can say it is a method through which the court prohibits the respondent (perpetrator) from committing any further act of Domestic Violence. “The Magistrate may, after giving the aggrieved person and the respondent an

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<sup>86</sup> Protection of Women from Domestic Violence Act, 2005, Section 17

opportunity of being heard and on being satisfied by the evidences of domestic violence that has been taken place or is likely to take place can pass orders to stop the offender from:

- i) Committing any act of Violence.
- ii) Aiding and abetting the same.
- iii) Entering into the premises where woman is employed and in case the aggrieved person is child then this order prohibits the respondent entry in child's school or any other place frequented by the person.
- iv) Attempting to communicate with aggrieved person through any forms whatsoever.
- v) Taking away her assets including bank lockers, bank accounts and other property including dowry (Stridhan).
- vi) Committing violence to the dependents, relatives or any other person who helps the aggrieved person to get rid of the domestic violence.
- vii) Any other act that magistrate specified in the protection order".<sup>87</sup>

Protection Orders are actually referred to use to stop violence or to put an end to the acts of Violence and also to prevent the Victim from facing further acts of Violence. The law also states that any disobedience of Protection Oder amounts to Criminal offence.<sup>88</sup> The Protection order would be operational till the aggrieved person applies for a discharge that means removal of order.<sup>89</sup> Further it is the duty of the court to find that there is a change in circumstances that warrants the discharge of Protection order and also to ensure that aggrieved person has not been subjected to any kind of force before issuing the necessary order.

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<sup>87</sup> Ibid, Section 18

<sup>88</sup> Ibid, Section 3 (1)

<sup>89</sup> Ibid, Section 25 (1).

**(2) Residence order: (Section 19 of PWDVA,2005):**

The PWDVA,2005<sup>90</sup> protects women's right to residence in the matrimonial home. According to the law, those who either own the premises or in whose name the premises are leased out are entitled to reside in the same. Looking at the Indian society which is highly patriarchal, we find that most ownership and lease agreements are made in the name of male members of the family. Therefore, women who reside in such premises including wives, mothers, daughters and sisters face the danger of being dispossessed from the house and forced to live in destitute. It is also seen that the women are forced to tolerate and live in Domestic relationship with the fear of being homeless especially when they lack support from their parents as well as government support for shelter.

Women also in the fear of dispossession, lack the guts of filing case against the respondent. They fear the respondent of taking reprisal or revenge. Hence, the PWDVA,2005 provided for residence order, in order to prevent destitution of women and to empower them by protecting their rights to shelter. The law states that the aggrieved person has the right of residence in shared household and protects them against illegal possession from the same. Such rights exist irrespective of whether ownership/lease/rent agreement is in the name of respondent. Or any other person who may be the part of the respondent joint family. <sup>91</sup>This law empowers the court to issue residence order to secure the victim from dispossession of shared household. In the case if the victim is disposed before she could lodge the complaint against the respondent the court has the power to restore her right to residence in the household where she and the respondent have lived together in a Domestic relationship. Thus, for the entitlement of Protection under Section 17<sup>92</sup>, woman should fulfill the two facts namely:

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<sup>90</sup>Protection of Women from Domestic Violence Act, 2005

<sup>91</sup>Ibid Section 19 (1) (a)

<sup>92</sup>Ibid, section 17

- a) Her relationship with the opposite party must be domestic relationship.
- b) The house in respect of which she claims to enforce the right must be a shared household.

As per Section 19, “While disposing an application under sub section 1 of Section 12 for seeking relief under PWDVA the Magistrate:

- a. Passes the order for women to be dispossessed from the shared household and to stop and prevent any act that denies her right of peaceful occupation in the household.
- b. Directed the respondent to remove himself from shared household and also restraining the respondent and his relatives from entering any position of household where victim resides.
- c. This section also helps victim to secure an alternate accommodation as enjoyed by her in shared household and also make arrangement of payment of Rent and other payments and directions for the return of property, stridhan and any other valuables to the woman.
- d. The order gives detail of the living arrangement of aggrieved person and the respondent in such a way that the woman may not be subjected to further domestic violence.”<sup>93</sup>

**(3) Monetary Reliefs<sup>94</sup> or Compensation Orders<sup>95</sup>: (Section 20 and Section 22 of PWDVA,2005):**

Monetary relief or the other compensation can be claimed under this Act. This law tries to ensure that aggrieved person does not face financial hardships due to meager maintenance orders. Monetary relief for expenses resulting from Domestic Violence

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<sup>93</sup> Ibid, Section 19

<sup>94</sup> Ibid, Section 20

<sup>95</sup> Ibid, Section 22

included cost of treatment for injuries, loss of earnings, and loss cause due to destruction, damage or removal of any property <sup>96</sup>. It also includes maintenance of women and children in addition to maintenance already provided under Section 125 Cr.P.C (1973) and matrimonial laws. The court empowers the Magistrate to pass an order of providing lump sum payment or monthly installment according to need and circumstances may require.<sup>97</sup> Compensation for injuries caused may be taken as additional claim that aggrieved person can make for all injuries suffered including mental torture, emotional distress caused by Domestic Violence.<sup>98</sup> The monetary relief granted to victim shall be adequate, fair and reasonable and consistent with her standard of living.

The damages and compensation for such injuries derived from Tort Law are intended to help the woman, heal her psychological wounds and restore her sense of dignity. Domestic Violence offenses which are generally punished under Torts includes battery, assault, false imprisonment etc. in these cases the perpetrator husband physically abuses the victim (married women). The Violence is in nature of slapping, punching, kicking, and physically striking etc. It includes medical and other expenses, compensation for physical pain and suffering damages for nervous shock etc. (Kumar and Gupta, 2015: 122).

#### **(4) Custody Orders (Section 21 of PWDVA):**

Under this order the court can grant the victim the temporary custody of children at the time of applying protection orders. This order helps to prevent children from being used as pawns to coerce or emotionally blackmail the aggrieved person to continue living in the violent relationships. If the magistrate is of opinion that any visit of the respondent may be harmful to the child or children, the respondent may not be allowed to visit the

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<sup>96</sup> Ibid, Section 20 (1)

<sup>97</sup> Ibid, Section-20 (3)

<sup>98</sup> Ibid, Sec.22

children and visitation rights might be given to the other party upon the discretion of the court. The permanent custody of the children would have to be determined and settled in separate proceedings in the family court. Under this law, the aggrieved person cannot file the application for temporary custody alone. Such an application has to specify the necessity and has to be coupled with protection order since the main aim of the law is to prevent the Domestic Violence.<sup>99</sup>

**(5) Interim Orders:(Section 23 of PWDVA,2005)**

In any proceeding under this Act if the final orders in a case may take a long time court can pass an Interim order as he deems just and proper (when the proceedings are pending) to prevent further violence and provide immediate reliefs to the affected women, including right to residence.<sup>100</sup>

**(6) Ex-parte Orders:**

When the magistrate is satisfied with the application (prima facie) which clearly discloses that the respondent is committing or has committed an act of domestic violence or there is a possibility of committing further act of violence by the respondent, the ex-parte orders on the basis of the affidavit in such form as may be prescribed by the Magistrate to the aggrieved person. The ex-parte order is passed in the absence of the other party and without prior notice to the opposite party. In accordance with the National Justice, once the position is lodged with the court in normal course the court would serve a notice to the other party so that both the parties can be heard before an order is passed. If the court based on the aggrieved person's application determines that the respondent is committing or has committed or is likely to commit domestic violence,

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<sup>99</sup> Ibid, Section 21

<sup>100</sup>Ibid, Section 23

an ex-parte order may be passed.<sup>101</sup> The following orders are passed in favor of the woman (aggrieved) to protect her from the further act of domestic violence:

**Infrastructure Mechanism under this Act is constituted by the following entities collectively referred as PWDVA agencies.**

**(1) Protection officers:**

The key implementing agencies under PWDVA are the protection officers. They are ideally the outreach officers of the court who liaise between aggrieved persons, police and the service provider. They are appointed to receive complaints from victim and recorded and prepare Domestic Incidence Report (DIR) provide information about legal rights and remedies and facilitate victim access to justice and support services like Legal Medical Aid, Shelter Home and transport facilities etc. In addition to it, protection officer is also required to assist court in serving notices, collecting evidences and enforcing orders and also need to coordinate between other PWDVA agencies.<sup>102</sup>

**(2) Service providers:**

They are the voluntary organization or companies registered under the Societies Registration Act, 1860 and company registered under the Companies Act, 1956 with the objective of protecting rights and the interests of the women. There are recognized women organizations and women's NGO's which played and are playing pivotal role in providing services to women facing Domestic Violence. They provide facilities like counseling, shelter, medical aid, legal aid, financial support etc. The service providers are required to provide assistance by recording the domestic incidence report and forward a copy of it to Magistrate and Protection Officer if victim so desires; to enable

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<sup>101</sup> Ibid, Section 23

<sup>102</sup> Ibid, Section 9



victim to have access to other support services for example: to get the aggrieved personal medically examined, ensure the provision of shelter in the shelter home etc. The PWDVA protects all the action taken in good faith by service provider towards the prevention of commission of domestic violence.

Domestic violence is not unique in India. It occurs all around the world, but what sets it different from many other countries is the culture of silence that still surrounds it. Lawyer Monika Joshi says that the notion of Domestic Violence is rooted in patriarchy where women are regarded as inferior to men and abuse of women is widely condoned and beating is often justified.<sup>103</sup>

### **3.2.2.8 Miscellaneous**

The Act makes breach of the protection order or an interim protection order an offence punishable with one-year imprisonment or fine up to twenty thousand rupees or with both.<sup>104</sup> While framing charge for breach, the Magistrate may also frame charges under S.498A IPC or any other provision of that code or the Dowry Prohibition Act, 1961, if the facts so disclose.<sup>105</sup> Such an offence will be cognizable and non bailable.<sup>106</sup> Upon the sole testament of the aggrieved person, the Court may determine that such an offence has been committed.<sup>107</sup> If the protection officer fails or refuses to discharge his duties, it is punishable with imprisonment up to one year or twenty thousand rupees fine or both.<sup>108</sup> The Act shall have effect notwithstanding any other law in force without barring other available remedies.<sup>109</sup> The Central Government is to make rules for

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<sup>103</sup> <http://www.bbc.com/news/world-asia-india-29708612> visited on 29<sup>th</sup> April 2021

<sup>104</sup> Protection of Women from Domestic Violence Act, 2005, sec. 31 (1).

<sup>105</sup> Ibid., sec 31 (3)

<sup>106</sup> Ibid., sec 32(1)

<sup>107</sup> Ibid., sec 32 (2)

<sup>108</sup> Ibid., sec 33

<sup>109</sup> Ibid., sec 36.

carrying out the provisions of this Act.<sup>110</sup> Miscellaneous provisions make the Act sensitive to the problems existing in the legal system.

There is no doubt that laws are an instrument of change. Any change in society depends on implementation but implementation depends on interpretation. How can there be interpretation if there is no law? Such Acts provide the framework for distinguishing right and wrong. And this one clearly makes the point that domestic violence is wrong.

It is fortunate that the long-awaited legislation to deal with domestic violence is passed which has enthused the women and others concerned about gender injustice. A law meant to tackle the grave, widespread and often life-threatening problem of domestic violence is surely drafted in accordance with international standards and national consensus, refined though public debate and passed after due consideration. What needs to be done is implementation with the seriousness it deserves.

### **3.3 Judicial Trends**

In the case of *Roma Rajesh Tiwari vs. Rajesh Dinanath Tiwari*<sup>111</sup> (2017), the Court discussed the right of women to reside in her matrimonial home.

The Court even covers the case of live-in-relationship under the Act with some specific conditions and provided remedies to the victim under the Act.

There are various interpretations by the Court in which court provides various civil remedies to the victim of domestic violence.

In the Case of *D. Veluswamy vs. D. Patchaiammal*<sup>112</sup>

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<sup>110</sup> Ibid., sec 37.

<sup>111</sup> *Roma Rajesh Tiwari vs. Rajesh Dinanath Tiwari* (2017) SCC

<sup>112</sup> (2010) 10 SCC469

S.C. verdict a wider meaning of ‘an aggrieved person ‘under Section 2(a) of Domestic Violence Act was conferred wherein the Court enumerated five ingredients of live-in-relationship as follows-

- (i) Parties must behave as Husband & Wife and recognised as Husband and Wife in front of the society.
- (ii) Valid legal age of the parties.
- (iii) They must have voluntarily cohabited for a significant period of time.
- (iv) They should qualify to enter into marriage. (No spouse living)
- (v) They must have to share households.

In this case<sup>113</sup> the court also referred to the term ‘palimony’ which means grant of maintenance to women who has lived with a man for substantial period of time without marrying and is then deserted by him.

In the case of S.C. held that maintenance can be claimed under *the Lalita Toppo vs. State of Jharkhand and Another*<sup>114</sup>(2018), provision of the Domestic Violence Act, 2005, even if the claimant is not a legally wedded wife.

The Bench not only covers physical and mental abuse but also ‘Economic Abuse’; under Section 3(a) of the Act. Court says that the victim i.e., estranged wife or live-in partner would be entitled to the more relief than what is contemplated under Section 125 of Cr.P.C.

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<sup>113</sup> D. Veluswamy vs. D. Patchaiammal (2010) 10 SCC 469

<sup>114</sup> Lalita Toppo vs. State of Jharkhand and Another (2018) SCC

The Supreme Court upheld the Delhi High Court judgement *V.D. Bhanot v. Savita Bhanot*<sup>115</sup> that the application of it is applicable retrospectively and hence the aggrieved women who faced torment before the act came into existence can also file a case.

In *Vimla Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Ors.*<sup>116</sup>, the court held that in this context the Domestic Violence Act has to be read with Hindu Adoption and Maintenance Act, 1956. So, it is the responsibility of husbands to maintain their wives.

The court in *Binita Dass v. Uttam Kumar*<sup>117</sup> clarified that qualification and capacity to earn cannot be the ground to deny interim maintenance to wife.

Furthermore, Calcutta High Court in *Smt. Haimanti Mal v. State of West Bengal*, held that such compensation should not be a guess work but have some rational basis. Also, when the husband is in order to give less amount, show less income, then proper identification must be done and provide adequate and proportionate maintenance as done in *Manju Sharma v. Vipin*<sup>118</sup>.

Supreme Court recently in *Megha Khandelwal v. Rajat Khandelwal*<sup>119</sup> held that even if wife is well educated, it is an obligation of husband to pay maintenance.

Supreme court in *Krishna Bhattacharjee v. Sarathi Choudhary and Another*<sup>120</sup>, issued certain guidelines which are as follows:

- a. It is the duty of the court to analyse the facts from all around to check if it is legally sound and the court must not be biased for the same.

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<sup>115</sup> V.D. Bhanot v. Savita Bhanot, MANU/SC/0115/2012

<sup>116</sup> Vimla Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Ors., 2008 (4) SCC 649

<sup>117</sup> Binita Dass v. Uttam Kumar, MANU/DE/2870/2019

<sup>118</sup> Manju Sharma v. Vipin, MANU/DE/2061/2019

<sup>119</sup> Megha Khandelwal v. Rajat Khandelwal, MANU/SCOR/16958/2019

<sup>120</sup> Krishna Bhattacharjee v. Sarathi Choudhary and Another, 2016(2) SCC 705

- b. The principle 'justice to the cause is equivalent to the salt of ocean' should be considered and uphold the truth to impart justice.
- c. Before dismissing a case, it is the duty of the court to check if the aggrieved person under legislation have not challenged with situation of non-adjudication as the Act works for the benefit of women in society and uphold the principles enshrined in the Constitution of India.

### **3.4 CRITICAL ANALYSIS OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005**

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 dispute. This law is based on a wrong notion and assumes man as the sole perpetrators of domestic violence. This is overall a wrong impression and only confirms the gender bias in favour of females formed by this law. The law confers a right in favour of a woman without imposing any liability, while the man is overburdened with discriminative liabilities with total denial of any such similar right. The law is totally gender specific and rules out possibility of domestic violence against a man.<sup>121</sup>

Besides this section 125 of the Code of Criminal Procedure, which provides for grant of maintenance to wife, children, father and mother in a broader perspective, does not recognize persons having illegitimate relationships, entitled to claim maintenance except an illegitimate child. Section 125(4) specifically prohibits a wife living in adultery from claiming any maintenance from the husband under section 125(1) of the Code of Criminal Procedure.

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<sup>121</sup> <https://hanumant.com/law/articles/AdvNVijayaraj-DVA.doc> visited on 5th of April 2021

Prior to this Act there was no comprehensive legislation defining domestic violence except the offence of cruelty punishable under section 498-A, IPC. Critics feel that the term violence should not be given such a wider interpretation. The meaning of the term 'economic abuse' as given in section 3 of the Act<sup>122</sup> implies that even if a male member of family merely misappropriates, or disposes of the share of a women member of the family i.e., movable or immovable assets, he may be hauled up for committing domestic violence. This meaning is against the spirit of the Act and the basic concept of domestic violence. Again, the Act does not distinguish between actual abuse and threat of abuse and gives equal weightage to even a likelihood of abuse. Also in regards to the notion of emotional abuses, insults and verbal abuse, enshrined in the Act, the terms in itself are extremely relative and subjective, often depending on one's mindset and shockingly, the husband does not have any recourse in case of any abuse by the wife.<sup>123</sup> Refusal to pay any sum of money for whatsoever reason will attract the of this law. Non-payment of rent related to the shared household will also constitute an economic abuse even if the husband himself is devoid of sufficient resources or even if he is in jail.<sup>124</sup>

In this enactment the Magistrate has been entrusted with unaccountable powers as he is invested with the responsibility to take cognizance of the case and also for executing his own orders in favour of the aggrieved woman even without being approached for the execution of his orders. An additional disturbing aspect is that the Magistrate trying the case has to evaluate not only the individual incident of violence, but the overall circumstances as well.

Section 14 of the Protection of Women from Domestic Violence Act, 2005 contains a provision whereby the Magistrate may order the aggrieved person to undergo

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<sup>122</sup> Protection of Women from Domestic Violence Act, 2005

<sup>123</sup> <https://hanumant.com/law/articles/AdvNVijayaraj-DVA.doc> visited on 5th of April 2021

<sup>124</sup> Nagpal, Vijay and Singh, K. P., The Protection of Women from Domestic Violence Act 2005 - A Critique, CBI Bulletin, Jan-March, 12 (2007)

counselling jointly with the respondent and any member of the service provider<sup>125</sup>. This goes against all accepted principles of counselling. The victim, and the abuser are in an unequal situation and no joint counselling is possible in that situation. It can only lead to the disempowerment of the unequal party. Counselling is one of the methods of correcting abusive behaviour and hence, it is only appropriate that the abuser and not the victim is counselled. The victim may have the possibility of seeking voluntary counselling.

Section 16 of the Protection of Women from Domestic Violence Act, 2005 allows the Magistrate to hold proceeding in camera if either party to the proceedings so desire. But, in camera proceedings sometime, intimidate the aggrieved party in favour of the respondent. This is especially so when the aggrieved party is the only woman in the court facing a completely male phalanx of hostile, sneering Magistrates, lawyers, officials, police, male respondent, etc. The situation is to change this section is to allow for in-camera proceeding not when either party so desire but only if the aggrieved party so desires. The aggrieved party should be allowed to be accompanied by any relative/woman social worker etc., of her choice for her moral support.

Under the Act, complaint of domestic violence may be given to both the protection officer and the police officer as under section 498-A of the Indian Penal Code. Both the agencies can out their investigations respectively and submit their reports to the Magistrate. In case of contradictory reports of both the agencies, the duty rests upon the Magistrate, who is the ultimate authority to pass the decision. This double enquiry of the same offence is over to the major demerits of the Act.

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<sup>125</sup> Protection of Women from Domestic Violence Act,2005, Section 14

The Act is silent about non-compliance of some orders.<sup>126</sup> It shuts down the chance of reconciliation in future. The major inappropriate implication would be that it would shut down the chances of reconciliation in future. On the one hand, the Act punishes a man for forcing his wife to leave her job while on the other it provides maintenance to the very same wife. But the law does not provide for any such remedy to a male in any similar circumstances.

Under the Act, when no eye witnesses are available, the women will be the primary witness and her statement is considered as circumstantial evidence, to arrive at a conclusion on the facts of the case. This has almost empowered all women to punish men at their will.<sup>127</sup> The slack drafting of this, law will allow cunning and unscrupulous women to teach a lesson to any of her male relatives at her sole behest.

No doubt that the Act is landmark legislation in the Indian history and people of India welcomed the same with great enthusiasm yet, there is an apprehension in the minds of the people about the misuse of the Act against the innocent husband and his family members. It definitely cannot be said in general that the troubles and tortures of all kinds and differences always arises from the side of the husband and the in-laws. The wedded woman cannot be said to be just and fair in all cases. This Act is being misused in a number of cases where it is used as a weapon by the wives and their paternal relatives to put an innocent husband and their relatives to unnecessary harassment. Hence before going to apply the provisions of the Protection of Women from Domestic Violence Act, 2005, the concerned parties and authorities should think about the

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<sup>126</sup><https://www.researchgate.net/publication/348191054>. A Creative Connect International Publication 99 South Asian Law

<sup>127</sup><https://www.lawyersclubindia.com/forum/false-domestic-violence-figures-exposed-part-iii-24044.asp> visited on 21 April 2021



consequences of the application, so that innocent persons and their families are not put to unnecessary harassment.

### **3.5 Present Scenario: COVID-19 and Domestic Violence**

In the current day of Pandemic, not only India but the whole world is suffering from 'COVID-19' and lockdown, but the condition is worst for the women in present era. And after many researches, it has been found the cases of domestic violence are increased during the lockdown period. They are tortured or abused not only physically but also mentally and emotionally in every second during lockdown and faced everyday a new harm, injury on their body or on their mind.

The United Nations Secretary Antonio Guterres called for a "ceasefire" on 6 April 2020 to address the "horrifying global surge in domestic violence."<sup>128</sup>

To control COVID 19 situation, Prime Minister Narendra Modi announced the nationwide lockdown. And because of lockdown, National Commission for Women (NCW) received the number of complaints, which had doubled.

As we already know the present pandemic is not going to stop now and the cases of covid-19 are increasing day by day. Hence, to control this, lockdown and social distancing is necessary for the safety and security of all of us, but the question still remained same is this lockdown is safe for women in our houses. For now, the only solution for safety of woman is to spread awareness against Domestic Violence

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<sup>128</sup>United Nations Secretary Antonio Guterres address domestic violence on 6 April 2020

### 3.6 Causes and Instigators of Domestic Violence

In general, there are number of causes of domestic violence against women identified by various studies conducted in India and abroad These includes personal traits, mental state, family environment related to women, social theories, such as patriarchal ideologies, stress, depression, family issues, marital conflicts, addiction of alcohol/drug, financial status, jealousy, anger issues, insecurities, social stress, trust issues etc. In general, these causes can be broadly divided into:

- Individual problems which constitute stress, poverty, unemployment physically challenged and lack of material resources etc.
- One of the main reasons among all is psychological position of the person. They think men are superior to women and are not equal to men. That's why men have all the rights to exploit women to rule over her to control her and use her for their purposes. In Indian society women are considered as a thing which is made only for the enjoyment of the men on the earth. This kind of thinking is the biggest reason for domestic violence against women in India.<sup>129</sup>
- Stress is also one of the important causes of domestic violence. Almost every person is suffering from stress which made person frustrated and this results as domestic violence.<sup>130</sup>
- The personal traits are also a one of the reasons of domestic violence. Most of the accused of domestic violence having anger issues, short-tempered nature.
- Economical position of a person also plays a vital role in most of the cases relating to domestic violence. The financial status of the person is also playing an important role in domestic violence cases but it is not the sole reason for

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<sup>129</sup> <https://www.jurislawclub.com/post/domestic-violence-against-women-in-india> visited on 20 April 2021

<sup>130</sup> Ibid

domestic violence. The person jealous from his partner's income or its financial status may use threats or commits the act of domestic violence.

- Marital conflicts are most common cause among cases related to domestic violence. The insecurity or any other personal difference mostly results in domestic violence it may be physical, psychological or financial.<sup>131</sup>
- Lastly the socialization process in which women are socialized to be submissive and obedient. Men are similarly socialized wherein the use of abusive language and wife-beating are considered as an act of masculinity. Thus, the process of socialization leads both men and women to internalize their individual status within the society and define their role in relation to the other sex.

### **3.7 Consequences of the Domestic Violence**

Domestic violence is not considered serious unless it involves the visibility in the form of physical, sexual and psychological abuse. The spontaneous reaction to the domestic violence is a temporary phase but violence causes long term effects on the life of the victims in the form of various health issues. The type of violence is not the primary factor in determining long term outcome. More important other factors are duration of violence, its intensity and frequency. Domestic violence occurs throughout the life span and across the cultures.<sup>132</sup>

In prevailing phenomenon of domestic violence women are disproportionately at high risk of facing physical, sexual and psychological abuse which affects their physical and mental health. As compared to physical violence, emotional violence causes more harm to health because its effects are life-long. There are women who face the violent situation boldly and do not allow their personality to be adversely affected. But there

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<sup>131</sup> Ibid

<sup>132</sup> Jaising Indira, law of Domestic Violence, (Universal Law Pub. Co. Pvt. Ltd. Delhi, 2001).

are others who get mentally disturbed and disorganized. They restrict their social contacts and feel ashamed of their abusive situation. There are still others who get worried and become victims of chronic health problems. Some of the woman faced mental torture in the form of sarcastic remarks, ignorance and severe restrictions which ultimately develop sense of hatred for their own self. Some of the woman, by their husbands put them down in front of others and usually humiliate them on the frequent complaints regarding household chores. Most of the women revealed that they faced physical violence in the form of beating, slapping, punching etc. which gave them visible injuries on their bodies, requiring medical treatment. This physical and mental abuse led to various ill effects on their body and mind leading to various health problems like hypertension, diabetes, depression and stress etc.

In the urban areas only some of the women were aware of the “Protection of Women from Domestic Violence Act 2005” whereas in the rural areas, number of the women were ignorant about this Act and few were of the view that if ever there is any such law it is not for people like them as they were completely illiterate and ignorant. Few of them were of the view that such type of law<sup>133</sup> is not going to help in reducing the violence as they believed that it is the patriarchal mindset that needs to be changed first. They are not even allowed to speak or retaliate against the pain or injury which was inflicted on them especially through battering: reaching out to police or taking help of judicial system is out of question, it will not help even to the coming generation of girls, they also have to live with practice of discrimination, ignorance and pain.

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<sup>133</sup> “Protection of Women from Domestic Violence Act 2005”

### **3.8 Conclusion**

In conclusion, we can say that domestic violence is violent victimization of women within the boundaries of family, usually by men. It can be the husband, his parents, or siblings or any other resident who has the overt or covert latitude for actions that can cause physical or mental agonies to women. It happens behind closed doors and is most often denied by the very women who has been victim of violence.<sup>134</sup> Though some laws were formulated to prevent violence like for dowry and rape etc but there was no Act to deal with the violence against women in the domestic sphere till the Protection of Women from Domestic Violence Act was passed in 2005. This Act has played a vital role in safeguarding the rights of women and put them on their deserving place. This would mean conversing on them equal human rights and promising them a social status at par with their male counterparts.

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<sup>134</sup> Jaising Indira, law of Domestic Violence, 9-10, (Universal Law Pub. Co. Pvt. Ltd. Delhi, 2001).

## **CHAPTER IV**

# **OTHER LEGISLATIVE PROVISION FOR THE PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE IN INDIA**

### **4.1 Introduction**

The principle of gender equality is preserved in the Constitution of India in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. International Conventions and norms have been used by Courts in India in cases where there is a lacuna in domestic legislation. As to Criminal Law that deals with domestic violence, some limited recognition was given by passing the Criminal Law (Second Amendment) Act 1983, and the Dowry Prohibition (Amendment) Act 1986, which inserted new sections 498A<sup>135</sup> and 304B<sup>136</sup> respectively in the Indian Penal Code, 1860, and also made consequential amendments in the Criminal Procedure Code 1973 and the Indian Evidence Act 1872. Also, several lacunae exist in criminal justice system, some of which lie in inherent shortfalls in the law and others deal with the practice and implementation rather than the content of law. As to the Civil Law on domestic violence, the remedies available are under the laws of marriage and divorce on the ground of cruelty, and during the pendency of those proceedings' victims can ask for maintenance and alimony and also injunctions restraining them from dispossession from matrimonial home. Further remedies are available under the Family Courts Act

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<sup>135</sup> Indian Penal Code, Section 498: Husband or relative of husband of a women subjecting her to Cruelty

<sup>136</sup> Indian Penal Code, Section 304B: Dowry Death

1984, The Specific Relief Act 1963, The Civil Procedure Code 1908 and the Law of Torts. In addition, the Protection of Women from Domestic Violence Act 2005 was passed by the Parliament in August 2005, which comes as a ray of hope to millions of women who suffer abuse. In this chapter, all the above provisions are analysed, to find out the extent to which they provide protection to women subjected to domestic violence.

## **4.2 The Constitution of India and Gender Equality**

The principle of gender equality is well-preserved in the Constitution of India in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Preamble guarantees justice, liberty, equality and dignity of the individuals.<sup>137</sup> Article 14 confers on men and women equal rights and opportunities in the political, economic and social spheres. Article 15 prohibits discrimination against any citizen on the grounds of religion, race, caste, sex etc.<sup>138</sup> Article 15(3) makes a special provision allowing the state to make positive discriminations in favor of women. Article 16 provides for equality of opportunities in matters of public appointments for all citizens. Article 21 arranges down that no person shall be deprived of his life or personal liberty except rendering to the procedure established by law. Thus, these provisions ensure that women have a right to lead a dignified, honorable and peaceful life with liberty.<sup>139</sup> Article 39(a) lays down that the state shall direct its rule towards securing all citizens,

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<sup>137</sup> Preamble of the Constitution of India, states

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens:  
JUSTICE, social economic and political;  
LIBERTY of thought, expression, belief, faith and worship;  
EQUALITY of status and of opportunity; and to promote among them all.  
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

<sup>138</sup> Fundamental Rights, The Constitution of India.

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

<sup>139</sup> Fundamental Rights, The Constitution of India.

men and women, equally, the right to means of livelihood, while Article 39(c) ensures equal pay for equal work. Article 42 directs the state to make provision for safeguarding just and humane conditions of work and maternity relief.<sup>140</sup> Above all, the Constitution solemnly enjoins on every citizen through Article 51-A (e) to renounce the practices derogatory to the dignity of women.<sup>141</sup>

Constitution of India empowers the State to grasp proportions of positive partition for women for murdering the total money related, preparing and political obstructions gone up against by them.

### **Right to Equality: Article 14**

The Constitution of India articulates the general guideline of appropriate to uniformity and disallows the state from denying to any somebody reasonableness past to the charge or a similar guard of the law. Article 14 exemplifies the general standards of equity under the watchful eye of law and denies outlandish separation between people.

We have to take a gender at aggressive behavior at home as a disobedience of basic rights to live proudly and of appropriate to uniformity and equivalent security of law ensured the Indian Constitution. The most imperative part of abusive behavior at home is the way that "It occurs away from plain view" and is frequently denied by lady who has been casualty of savagery in light of the fact that:

1. Society has neglected to develop a solid social endorse against a man who utilizes constrain.
2. It is unfortunate that ladies acknowledge unfairness as opposed to concede disappointment in conjugal relationship.

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<sup>140</sup>Directive Principles of State Policy, The Constitution of India.

<sup>141</sup> Fundamental Duties, The Constitution of India.



3. Absence of help accessible to ladies even from her folks.
4. Thought for kids and other social elements.
5. Costly legitimate framework for getting equity.
6. Absence of learning about criminal strategy.

Article 14 of the Constitution of India confine class order, yet permits portrayal for legitimate purposes.

**Article 15<sup>142</sup>:**

Forceful conduct at home is one among a couple of assumes that hinder women their development, and this request endeavors to shield them from this naughtiness. It in certainty impacts a course of action among women and men, protecting only women from forceful conduct at home, yet this portrayal is set up on a justifiable differential, to be explicit, sexual introduction, and besides have an ordinary nexus. Advance, the foundation is far from optional, in that it is a well thought and vital undertaking to abbreviate forceful conduct at home.

**Article-15(3)<sup>143</sup>**

At this stage, it is moreover crucial to recall that it makes one-of-a-kind institutions like this for the benefit of women, thusly putting forth a unique defense to help them against the task of craftsmanship. Legitimate Approach: In case of *Mohit yadam and Anr.etc .V. State of Andhra Pradesh and Ors*, it is watched that: It keep the event of damaging behavior at home in the general populace.

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<sup>142</sup> Fundamental Rights, The Constitution of India

<sup>143</sup> Fundamental Rights, The Constitution of India

**Article 21<sup>144</sup>**

Along these lines, ladies additionally have major appropriate to human pride, to security, to sound condition, to essential training, to free legitimate guide and so forth, as subordinates to ideal to life.

**Article 23<sup>145</sup>**

This article prohibits traffic in human being means selling and buying men and women like goods and includes immoral traffic in women.

**Article 32<sup>146</sup> and 35:**

Appropriate to established cures "is the simple soul of the Constitution and its specific heart." beyond any doubt an affirmation of Fundamental Rights is inane without a compelling apparatus to authorize them. It accommodates a fruitful answer for the approval of other Fundamental Rights. Under this Article the Supreme Court's vitality to execute Fundamental Rights is most prominent. This privilege is limited and can likewise be repealed in specific circumstances as indicated by Articles 33 and 34.

**Article: 39 (a) and 39(d)<sup>147</sup>**

It controls the State to arrange its strategy towards anchoring for people likewise the advantage to an adequate technique for occupation and identical pay for comparable work for the two men and women. To propel value, on a commence of proportionate open entryway and to give free genuine guide by proper sanctioning or plot or whatever other way to deal with certification that open entryways for ensured fairness are not denied off to any subject by reason for money related or diverse ineptitudes.

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<sup>144</sup> Ibid

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Directive Principles of State Policy, Constitution of India

**Article 42<sup>148</sup>**

This article directs the state to make provisions for securing just and human conditions of work and for maternity benefit.

**Article 44<sup>149</sup>**

This article manages the state to anchor for local people a uniform fundamental code all through the zone of India. This specific objective is towards the accomplishment of sexual presentation esteem.

**Article 46<sup>150</sup>**

The State needs to advance with exceptional consideration the edifying and financial energy of the more fragile segments (ladies) of the comprehensive network and to shield them from social injustice and a wide range of maltreatment. The fix available to a setback under the request is select for her and in this manner in case in case she fails to practice them, and strategies a choice social event, it depends on upon the carefulness of the judge to give it a chance to out or remove it.

**Article 51 A<sup>151</sup>**

This article proclaims that it is a central obligation of each India resident to disavow rehearses deprecatory to the respect of women. Thus, the soul of sex correspondence, poise and equity swarms the whole system of our constitution. Precisely when explicit fix by procedure for affirm or by technique for change, adjustment or refusal of any interest, has been given under a comparable word for mediation. The inquiry and nature of medicinal value goes for restoring the energy of the loss. Relationship of the loss in

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<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Fundamental Duties, Constitution of India

the settlement technique is welcome amid the time spent medicinal value. It is a strategy of conscious exchange and obsession, explicitly or roundaboutly between the transgressor and the setback.

**Article 243** added by the 73rd & 74th amendment, in 1992 which provide reservation of 33 per cent seats for women in the direct elections to all panchayats and municipalities.<sup>152</sup>

Women confronting or battling savagery inside homes - to join in our interest for an extensive law on aggressive behavior at home. The question examined in this examination is the manner by which far the Domestic Violence Act, 2005 has prevailing with regards to satisfying the necessities of satisfactorily characterizing all types of aggressive behavior at home and giving redressal and assurance to its casualties. The issue has been handled on applied and pragmatic grounds, while the previously mentioned sanctioning is a vital initial phase as far as the ideas it brings into the Indian legitimate framework, the reasonability of its usage might be challenged on specific grounds.

The question, however, is: Have the women been able to gain the benefits delivered for them under the Constitution of India?

The Indian Constitution, while mentioning the term 'dignity' in its Preamble, provides for its structure in its detailed provisions of Fundamental Rights, Fundamental Duties and the Directive Principles of State Policy. The whole set of provisions regarding the right to equality, aim at providing dignity to human beings. The social handicaps, prejudices, biases, on the bases of caste, creed, sex, etc., have been Constitutionally prohibited. The right to freedom also emphasizes the dignity of men and women. Dignity is a complex term and cannot be ensured only by providing legal Constitutional

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<sup>152</sup> Article 243 of the Constitution of India

rights and by making welfare policies. The implementation of these rights is also important.<sup>153</sup>

The importance of right to dignity has been aptly emphasized by the International Commission of Jurists, that 'it is the duty of the legislature in a free society under the rule of law to create and maintain conditions which safeguard the dignity of persons as an individual. The dignity requires not only the recognition of political and civil rights of a person, but also creation of social, economic, educational and cultural conditions, which are essential for the full development of the personality'.<sup>154</sup>In simple words, it can be said that dignity can be ensured when every member of the society has a feeling that, he or she is a respectable member and no one can humiliate, harass, exploit and insult him or her on the basis of caste, creed, sex and status etc.<sup>155</sup>

In relation to women, the right to life of dignity in itself is a very complicated term. Women are governed by the Constitution and are therefore entitled to 'equality', 'freedom', and 'justice'. The legal structure also aims at providing basic minimum to women to live a life of dignity. Some progress has to some extent done away with those social practices, which directly challenge the dignity of women. These include the Sati system, infanticide, bigamy and polygamy. In other cases, laws do exist but social practices attacking the dignity of women also persist.<sup>156</sup> In particular, discrimination happens within the family, where norms regarding women's secondary status are reinforced in children from birth. Son-preference is one of the key aspects underlying social values that view girls as burden. Women are viewed as dependents within the family and face severe restrictions on their mobility, which further impedes their ability

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<sup>153</sup> Nisha Jain, 'Human Rights: A Woman's View Point', in Sehgal, B.P., (ed.), Human Rights in India, Problems and Perspectives, (New Delhi: Deep & Deep Pub, 1995), p. 164

<sup>154</sup> Peter Schneider, "Social Rights and the Concept of Human Rights" in Raphael, D.D., (ed.), Political Theory and the Rights of Man (London: Macmillan, 1967), p.86.

<sup>155</sup> Jain, supra note 153, p. 165

<sup>156</sup> Ibid.

to gain access to education and economic opportunities, which are fundamental freedoms under the Indian Constitution. Cultural norms regarding appropriate behavior for women often reinforce images of docility, passivity and subservience, severely curtailing for women the exposure and confidence they require to participate on an equal footing.<sup>157</sup>

In this context one area that is of vital concern to women is the area of domestic violence. Dowry deaths in India have received wide publicity throughout the world.<sup>158</sup> Further there is the problem of domestic violence where woman day after day is beaten, harassed and attacked by her own men. The problem of battered women remains a hidden crime because most of the cases go unreported as the crime is done within the four walls of home. The victim often fears social stigma and, in many cases, they don't have any option. Fear of living, so called family respect, worry about the future of children, financial problems and fear of divorce also contribute. Domestic violence does not limit to wife battering, it includes torture for dowry, sexual perversion and the forms which may range from minor burning to fractures, and sometimes lead to murder also.<sup>159</sup> It should be a matter of great concern to the entire society that such practices are allowed to prevail. Although, criminal laws have been amended in the recent past to make dowry deaths and cruelty against women as offences which are punishable; although dowry prohibition legislation<sup>160</sup>, where dowry related crimes have been defined and made punishable, the practical impact of these laws has not been visible as it should have been, had the society itself worked towards eliminating these crimes and brought the wrongdoers to book. Women who face violence within their homes do not

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<sup>157</sup> Justice J. N. Bhatt, "Gender Equality: Turmoil or Triumph/ 1998) 25, Indian Bar Review, pp 3-4.

<sup>158</sup> Justice Sujata V. Manohar., 'The International Regime for Gender Justice: Reflections in the Constitution of India' in Report of Colloquium on Domestic Violence, p.35.

<sup>159</sup> Jain, supra note 153, p. 166.

<sup>160</sup> Dowry Prohibition Act, 1961

have any other alternative except to leave their home when the violence becomes unbearable or threatens their lives.<sup>161</sup>

Dignity is attached to the identity of a human being as a person, when a human being does not enjoy the right to be a person, dignity does not exist at all. The problem in case of Indian women is that they lack a basis essence of identity and are supposed to survive as dependents of husband, father, and sons. The domestic violence, dowry related problems, death and suicides reveal the modernized version of attack upon women's dignity, when they are tortured physically and emotionally and their basic worth is put to question.<sup>162</sup>

Another area that is of vital concern to women in India is the area of personal laws an area which governs the entire family life starting from birth, guardianship marriage and divorce, custody of children, maintenance, adoption inheritance and succession. It is these personal laws, which are replete with gender discrimination. These are some of the oldest laws in force in India — laws which were formulated, adopted, modified by customs and traditions with religious roots, long before the idea of gender equality took shape anywhere. We have traditionally lived in a hierarchical society where occupation, caste and sex have its own set place in the social order and in the economic and political order. In this social context, the personal laws relating to marriage, inheritance and succession, adoption, custody of children, minority and guardianship and so on have evolved on a basis very different from gender equality. They have a religious and emotive appeal; and it makes the task of bringing about gender justice in true sense of the term in the area of personal laws extremely difficult.<sup>163</sup>

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<sup>161</sup> Justice Manohar, supra note 158.

<sup>162</sup> Jain, supra note 153, p. 165

<sup>163</sup> Justice Manohar, supra note 158, p.33.

In 1952, two very distinguished judges of this country, Chagla, J. and Gajendragadakar., J, held that personal laws were not within the ambit of Article 13(1) of the Constitution under which all laws in force at the commencement of the Constitution, in so far as they are inconsistent with Part III of the Constitution, shall be void.<sup>164</sup> As an outcome, personal laws could not be tested on the anvil of Articles 14 and 15. They require legislative replacement rather than judicial striking down.

The Constitution is, therefore a challenge as a working legal document. For its efficient functioning, it requires the society to change its mind set and to move away from traditional prejudices and inhibitions as far as women are concerned. Unless the society learns to look upon them as full-fledged human beings entitled to equal participation in the familial, social, economic and political life, bare legal equality will not bring about the expected total equality.

### **4.3 Incorporating International Law on Gender Equality and Violence Against Women**

The canvas of international law is ever changing with resolutions and conventions of various hues reflecting the ever-transient political moralities of nation states. In the 1940s, the post war regime of international human rights was conscious of the private and public divide. Since then, international law has seen a sea change and has progressed to break free of its 'formal' and 'public' mould. Nevertheless several international instruments starting with the Declaration of Human Rights in 1945, followed by the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Declaration on the Elimination of Violence Against Women, all contain yardsticks of gender equality

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<sup>164</sup>State v. Narayan, AIR 1952 Bom 84; Bhan Ram v. Baijnath, AIR 1962 SC 1476



which functionaries of the State Parties are required to strive towards in their various spheres.

### **4.3.1 WOMEN AND HUMAN RIGHTS**

It needs hardly any emphasis that women must have certain rights to improve their positions: these rights have been provided in conventions, constitution, international covenants including the universal declaration of human rights. The declaration provides the following rights:

- “Elimination of all forms of discrimination against women made on the basis of sex, which has purpose or effect of denying equal exercise of human endeavors.<sup>165</sup>
- Basic human rights and fundamental freedom should be guaranteed to women and this on an equal basis with men.
- All practices based on inferiority or superiority of either sex shall be eliminated.
- Assurance of family education with teaches that both men and women share a common role in raising child.
- Social and cultural patterns must be modified to eliminated sex role, stereotypes and nation of inferiority or superiority of either sex.
- Measures should be taken to suppress all form of exploitation of women including sexual and physical harassment.
- Right to vote elect to be elected and hold offices at all levels of government along with the right to participate information of government policy.
- The chance to represent their country at international level and to participate in international organizations.

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<sup>165</sup> United Nation Declaration of Human Right: Article 2

- Equal right to acquire, change or retain nationality.<sup>166</sup>
- Equal access to educational opportunity and elimination of stereotyping in education and textbooks.<sup>167</sup>
- Equal right to employment choice of profession, remuneration, and social security.<sup>168</sup>
- Guarantee of same legal capacity as men to contract, administer property and appear in courts or before tribunals.
- Freedom of movement, right to choose residence and domicile should be granted to women.
- Contractual and other provide restriction on legal capacity of women shall be declared null and void.
- Equal rights and responsibilities with men in marriage and family relationship.
- Equality during marriage and its dissolution.
- Equal rights to choose family name, profession or occupation.
- Equal rights to guardianship and adaptation of children.
- Equal rights and responsibilities and adaptation of children.”<sup>169</sup>
- Abolish all existing laws, customs and regulations that discrimination against women and establish institution of protect against discrimination.<sup>170</sup> (Shalu Nigam, 1998)

Women's rights have become an essential part of international human rights law in that violence against women is a violation of human rights for which States are responsible. States have an international obligation with regard to the protection of these rights, with

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<sup>166</sup> Ibid: Article 15

<sup>167</sup> Ibid, Section 26

<sup>168</sup> Ibid, Section 23

<sup>169</sup> Universal Declaration of Human Rights, 1948

<sup>170</sup> Shalu Nigam, 1998.

reference to international human rights law. Except "pirates" and "international war criminals", private individuals and agencies are not bound by international human rights law. But States may be responsible for their failure to meet international obligations even when violations originate in the conduct of private individuals.<sup>171</sup> Domestic violence infringes upon an individual's right to life, to security of person, and to freedom from torture, cruel, or inhuman and degrading treatment.<sup>172</sup>

Domestic violence is a violation of the human rights of women. This refers to domestic violence perpetrated by a private act or by the State.<sup>173</sup> (ECOSOC, Commission on Human Rights, 2004). Although it is the duty of States to ensure that there is no impunity for the perpetrators of violence within the domestic sphere, state policies may perpetuate and/or condone violence within the domestic sphere. It is contended that the role of state inaction in the continuation of the violence combined with the gender specific nature of domestic violence require that domestic violence be classified and treated as a human rights concern rather than as a mere domestic criminal justice concern.<sup>174</sup>

Under international human rights law, governments are not only obliged to refrain from committing human rights violations but also to prevent and respond to human rights abuses, without any discrimination and to take preventive and punitive steps where human rights violations by private actors occur. In this context, the human rights committee has clearly stated that a state not only has a duty to protect its citizens from such violations but also to investigate violations when they occur and to bring the perpetrators to justice<sup>175</sup>. (ECOSOC, Commission on Human Rights, 2004).

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<sup>171</sup> Coomaraswamy 1995.

<sup>172</sup> The Commission on Security and Cooperation in Europe, 2001.

<sup>173</sup> Economic and Socio Council, Commission on Human Rights, 2004

<sup>174</sup> Ibid

<sup>175</sup> Ibid

Under Article 51(c) of the Constitution of India, it is implicit that the government has an obligation to observe international law.<sup>176</sup> This contention is supported by the enabling provisions Article 253<sup>177</sup> read with entry 14 on the Union List in the Seventh Schedule of the Constitution.<sup>178</sup> The Apex Court, in a catena of rulings, has established that principles of international law, when consistent with fundamental rights and in harmony with the spirit of the Constitution should be read into the Constitution to expand the content and meaning of these rights even if India is not a State Party to any such regime.<sup>179</sup>

International Conventions and norms have been used in India in cases where there is a lacuna in domestic legislation. In the case of *Vellore Citizens Welfare Forum v. Union of India*,<sup>180</sup> it was held that any rule of customary international law which is not contrary to municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by Courts of law. However, the incorporation of international law into domestic law is possible only when the law does not come into conflict with an Act of Parliament. As held in the *Gramophone Co. of India Ltd v. B.B. Pandey*,<sup>181</sup> the will of the legislative bodies is still supreme and international law only fills the gaps in municipal law.

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<sup>176</sup> The Constitution of India, Article 51(c): 'The State shall endeavor to — foster respect for international law and treaty obligations in the dealings of organized people with one another'.

<sup>177</sup> The Constitution of India, Article 253, is about legislation for giving effect to international agreement states — 'Notwithstanding anything in the foregoing provisions of this chapter, Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'.

<sup>178</sup> Entry 14 on the Union List is about entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries

<sup>179</sup> *Val Samma Paul v. Cochin University* (1996) 3 SCC 545; *Vaisakha v. State of Rajasthan* (1997) 6 SCC 241; *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759

<sup>180</sup> AIR 1996 SC 2715.

<sup>181</sup> AIR 1984 SC 667

In another case, *Peoples Union of Civil Liberties v. Union of India*,<sup>182</sup> it was held that the State was liable to pay compensation to the affected parties on the basis of Article 9 (5) of the International Covenant on Civil and Political Rights. This Article states that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’<sup>183</sup>. It was further held that (with regard to applicability of international law in domestic law) a statute has to be interpreted and applied so that it conforms to and does not conflict with established international norms. Besides playing a role in interpretation and implementation of domestic legislation, international law should also influence the formulation of decisions and judgments by the judiciary. This move of combining international law as part of domestic law is useful particularly with respect to women because it expands the amplitude of their rights and can ensure that, concepts such as gender equality and protection and prevention from violence are read into the fundamental rights in the Constitution. The passing of such guidelines would usually fall within the purview of the legislature.

In the *Vishakha case*<sup>184</sup>, heavy dependance has been placed on numerous Conventions and Declarations that have been signed by the policymaking body of India with regard to the duty of the government to safeguard women’s rights to protection from violence and prevent discrimination. These include the Convention of Elimination of All Forms of Discrimination Against Women (CEDAW) and the Beijing Platform for Action of the Fourth World Conference on Women in Beijing. Article 11<sup>185</sup> and Article 12<sup>186</sup> of

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<sup>182</sup> AIR 1997 SC 1203.

<sup>183</sup> Article 9 (5) of the International Covenant on Civil and Political Rights

<sup>184</sup> AIR 1997 SC 3011

<sup>185</sup> Article 11 of CEDAW states: ‘State Parties shall take appropriate measures to eliminate discrimination against, women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) the right to work as an inalienable right of all human beings.... (f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction’.

<sup>186</sup> Article 24 of CEDAW states: ‘State Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention’.

the CEDAW were referred to in the judgement. The guidelines, especially with reference to the definition of sexual harassment, have been borrowed heavily from CEDAW.

In *C Masilmani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*<sup>187</sup> and *Madhu Kishwar v. State of Bihar*<sup>188</sup> the principles of CEDAW were invoked to interpret the Hindu women's rights to property under S.14 of the Hindu Succession Act 1956. The Supreme Court has held that:

“Section 14 of the Hindu Succession Act 1956 should be construed pleasantly with the Constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu Women. The right to elimination of gender-based discrimination (particularly in respect of property) so as to attain economic empowerment, forms part of Universal human rights. Article 2 (f) of CEDAW states that states are obligated to take all appropriate measures, including legislation to abolish or modify gender-based discrimination in the existing laws, regulations, customs, and practices that constitute discrimination against women. Article 15(3) of the Indian Constitution positively protects such acts and actions”.

Also, in *Apparel Export Promotion Council v. A.K. Chopra*<sup>189</sup> in setting aside a High Court's re-appreciation of evidence in a case of sexual harassment, the Supreme Court said: “In cases involving violation of human rights, the Courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no discrepancy between the international norms and the domestic law inhabiting the field. In the instant case, High Court appears to have totally ignored

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<sup>187</sup> (1996) 8 SCC 524.

<sup>188</sup> (1996) 5 SCC 125.

<sup>189</sup> (1999)1 SCC 759

the intent and content of the International Convention and norms while dealing with the case.”<sup>190</sup>

Thus, the generosity of woman’s rights has been extended outside what is available under the domestic law of India to what has been provided in international law. The Courts have relied on the international instruments not only in interpreting legislation, but also see these instruments as facets of the fundamental rights guaranteed under the Constitution.

And also, at the Fourth World Conference on Women in Beijing the Government of India made an official commitment to protect women’s right by undertaking various steps, and stated that it would formulate and implement a national policy on women.<sup>191</sup> Government pledges under CEDAW must be satisfied in terms of its own obligations under international law. The integration of international law can therefore be an important catalyst for strengthening the administration of justice in the area of violence against women.

#### **4.4 Criminal Law Relating to Domestic Violence**

As to criminal law that deals with domestic violence there is no specific legislation in India. This is an area that has traditionally been un-addressed by the law, mainly because it has been considered to be in the ‘private domain’. It is only very recently that Indian Criminal Law gave some limited recognition to domestic violence.

As to general provisions, under the Indian Penal Code 1860 (IPC) the physical abuse of women can be charged under section 352, for criminal force or assault and under section 354, for outraging the modesty of women. The cases of wife-battering may be

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<sup>190</sup> Apparel Export Promotion Council v. A.K. Chopra (1999)1 SCC 759

<sup>191</sup> These obligations of the government include setting up a Commission for Women’s Rights to act as public defender of women’s human rights and to monitor the implementation of the Platform for Action which shall provide a common forum to discuss and implement women’s rights at a national level.

covered by general provisions contained in the IPC relating to voluntarily causing hurt and voluntarily causing grievous hurt under sections 323 to 329. The harassment of brides who are beaten or tortured when they refuse to comply with dowry demands sometimes results in murder or suicide. The general provisions of IPC were generally applied to such cases.

But these provisions did not take into justification the specific state of women facing violence within the home as against assault by the husband and in-laws. It was enormously difficult for women to prove violence by husbands and in-laws beyond reasonable doubt. There would be no witnesses to validate her evidence as the wrongdoing is committed within the four walls of the home. Even if the beating did not result in grievous hurt<sup>192</sup> (S.325 IPC), the routine and persistent beatings would cause grave injury and mental trauma to the women. Normally, complaints can be itemized only after an offence has been committed. But in a domestic situation a woman needed protection even before a crime is committed when she apprehends danger to her life as she has been living with her assaulter and has also been dependent on him.<sup>193</sup> This led the government to make a special provision for protection against violence under all circumstances by passing the Criminal Law (Second Amendment) Act, 1983 and the Dowry Prohibition (Amendment) Act 1986 respectively.

The Criminal Law Amendments created special categories of offence under the Indian Penal Code to deal with cruelty by husband or his relatives and dowry death. And also, certain other provisions were inserted under the Indian Evidence Act 1872 and the Code of Criminal Procedure 1973 (Cr.P.C.).

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<sup>192</sup> Indian Penal Code: Section 325

<sup>193</sup> Mohd. Umar., “Bride Burning in India: A Socio Legal Study (New Delhi: A.P.H. Publishing Corp, 1998), pp 187-188.



#### 4.4.1 Cruelty by the Husband or Relatives of the Husband

With the object to curtail the growth of increasing violence and cruelty inflicted upon the wife by her husband and in-laws, IPC has been amended by incorporating a new chapter XX-A and a new section 498A by the Criminal Law (Second Amendment) Act, 1983. The amendment relating to dowry violence introduced two new types of offences on violence against women in the IPC A new section 498A<sup>194</sup> of the Penal Code dealt with 'cruelty' and 'harassment for dowry'.

Cruelty was however defined as willful conduct, which was likely to drive a woman to commit suicide or to cause her grave physical or mental injury.<sup>195</sup> The section defined harassment for dowry as harassment of a woman by her husband or relative of his, to coerce her or her relatives into giving dowry. Although this segment's primary purpose may have been to transaction with dowry violence, it had a wider significance since domestic violence came to be perceived as criminal conduct. The punishment was a term, which could be extended to 3 years imprisonment with a fine.

The term 'cruelty' under S.498A takes within its sweep both mental and physical agony and torture.<sup>196</sup> The concept of cruelty varies from place to place and individual to individual and according to the social and economic status of the person involved. The

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<sup>194</sup> Inserted by Criminal Law (Second Amendment) Act 1983. Act 46 of 1983. The section came into effect on 25 December 1983. Section 498A reads as under:

498A Husband or relative of husband subjecting her to cruelty —whoever being the husband or the relative of the husband of woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, 'cruelty' means—

a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause injury or danger to life and limb or health (whether mental or physical) of the woman; or  
b) harassment of the woman where harassment is with the 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 meet such a demand

<sup>195</sup> Ibid

<sup>196</sup> Pawan Kumar v. State of Haryana, (1998) 3 9CC 309

question whether the act complained of is an act of cruelty has to be determined from the whole fact and relationship between the parties. The cultural and unpredictable state of life amongst them are factors from where the cruelty has to be incidental, and will depend on the facts of each case.<sup>197</sup> In *State of Maharashtra v. Ashok Chotelal Shukla*<sup>198</sup> the Court held that in order to convict a person for a crime under S.498A IPC, the prosecution has to prove that the accused committed acts of harassment or cruelty as anticipated by the section and that the harassment or cruelty was the reason of the suicide.

The legal commencement of cruelty is generally defined as conduct of such a character as to have instigate danger of life, limb or health (bodily or mental) or as to give rise to a sensible anxiety of such danger.<sup>199</sup>

Some of the available case laws, however, shows that the Courts have often taken a very strict view, and S.498A has been defined very narrowly to include cruelty and harassment of only a very grave nature. The determination of the improvement was to punish cruelty, which would include not only harassment for dowry but also any willful conduct which would be likely to cause grave injury or danger to life, limb or health (both mental and physical). In many cases this objective has not been realized.<sup>200</sup>

But in some cases, the judicial trend has been most encouraging as the same is evident from analyzing a few cases. In *Mukund Chitins v. Madhuri Chitrus*,<sup>201</sup> on the wedding night itself the husband suspected the chastity of the wife. The resentment that commenced soon concluded into a separation within less than a month's time.

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<sup>197</sup>Sarojakshan Shankar Neryar v. State of Maharashtra, 1995 Cri L.J. 340 (Bom)

<sup>198</sup> (1997) 11 SCC 26.

<sup>199</sup> Wharton's Law Lexicon, 1976, Reprint Ed. p.288.

<sup>200</sup> Kirti Singh., 'Violence Against Women and the Indian Law' in Goonesekere Savitri, (ed.), Violence, Law and Women's Rights in South Asia, (New Delhi: Sage Pub, 2004), p.142

<sup>201</sup>(1991) SUPP (2) SCC 359

Allegations and counter-allegations came to be made. The husband resorted to mudslinging and character assassination. A complaint of theft was also lodged against the wife and a search warrant was taken out and the wife's residence was searched for ornaments alleged to have been stolen by her and an inventory was prepared. All this led to the filing a complaint by the wife under S.498A of IPC. The Court held the husband guilty under S.498A and observed that this should prove an eye opener to those who believe that they can get away by casting aspersion on a woman to serve their ends and to silence her.

In another case *Arjun Kamble v. State of Maharashtra*<sup>202</sup> the Court held that the harassment of a woman with a interpreted to coercing her or any person related to her to meet any unlawful demand for any property will amount to cruelty punishable under S.498A. The fact that the demand is in conformity with custom or usage does not render it in any way lawful. The cruelty contemplated by S.498A is far wider. Of course, ordinary notions of what constitutes cruelty regard being had to the explanation will be the criterion for judging an accusation under S.498A. A hypersensitive wife affected by every little word or gesture cannot complain of cruelty under S.498A. But constantly pestering a wife year after year for valuable presents allegedly in conformity with custom, taunting her and making life miserable for her all the time, would attract S.498A.

And in *Pawan Kumar v. State of Haryana*,<sup>203</sup> the Court held that willful misconduct soon after marriage and quarrel a day before death would amount to cruelty under S.498A.

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<sup>202</sup> (1993) MH LJ 1007

<sup>203</sup> (1998) 1 SC 565. 51 (1997) 3 Crimes 362

*In Pyarelal v. State of Haryana*,<sup>204</sup> it was held that the act of taking a child away from the mother amounts to cruelty under S.498A. *In State of Karnataka v. C. Prakash*,<sup>205</sup> apart from other general evidence, very strong reliance was making by the Court on the letter written by the deceased wife hardly a week prior to the incident. In this letter the deceased wife had stated that the accused for no reason at all was whipping and beating her. The Court held that, the action undoubtedly amounted to cruelty under S.498A. And also, in *Sita Ram v. State of Haryana and anr*,<sup>206</sup> the Court held that compelling a wife to leave the matrimonial home and forcing her to live with the parents was an act of cruelty.

In all the above cases, the Courts interpretation of the word 'cruelty' broadly represent a welcome change and all these cases are an important precedent which should be cited frequently and followed.

The introduction of S.498A has not altered the requirement of standard of proof. There is no absolute standard of proof in a criminal trial and the question whether, the charges have been met beyond a reasonable doubt would be dependent upon the facts and circumstances of each case. The doubt must be of a sensible person and the standard embraced must be of a reasonable and just person for coming to a conclusion considering the particular subject matter.<sup>207</sup> The offence under S.498A is cognizable and triable by a Magistrate First Class. The bar of limitation to take cognizance of offence under S.468 Cr.P.C. would not apply to matrimonial offence where the allegations are cruelty, torture etc. The general rule of limitation would not apply

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<sup>204</sup> (1997)11 SCC 552.

<sup>205</sup> (1998) Cri. LJ. 1673 (Kant.)

<sup>206</sup> (1997) 3 Crimes 362

<sup>207</sup> *State of West Bengal v. Orilal Jaiswal* (1994) 1 SCC 73.

against cruelty to women. The offence of cruelty is in the nature of a continuing offence.<sup>208</sup>

Further, the Criminal Law (Second Amendment) Act, 1983 has inserted a new section 198A,<sup>209</sup> in the Cr.P.C. to ensure that the husband and the in-laws of the married woman are not harassed by a complaint lodged by a person who is having personal grudge against them, and is not concerned with the death of the married woman but motivated by an ulterior purpose.

#### **4.4.2 Dowry Death**

Before the 1986 Amendment in cases of dowry demands where death/suicide had occurred the police generally charged the husband and in-laws of the victim either under section 302<sup>210</sup> IPC for murder or section 306,<sup>211</sup> IPC for abetment to suicide. Murder by burning is extremely difficult to prove. Perhaps that is why dowry-death through burning are common. A victim is led to suicide through extreme harassment or cruelty. Most of the bride burning cases registered by the police relate to abetment to suicide under section 306 IPC and not murders. Therefore, the legislature passed the Dowry Prohibition (Amendment) Act, 1986 and introduced a new offence of Dowry Death by

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<sup>208</sup> Vanka v. V Venkata Reddy (1993) 3 SCC 4.

<sup>209</sup> Sec. 198A of Cr.P.C. reads as under:

Section 198A: Prosecution of offences under section 498A of the Indian Penal Code- No Court shall take cognizance of an offence punishable under section 498A of the IPC except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister, or with the leave of take Court, by any other person related to her by blood, marriage or adoption.

<sup>210</sup> Section 302 reads as under: 302 Punishment for Murder- whoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine.

<sup>211</sup>Section 306 of Indian Penal Code, 1860

inserting new section 304B<sup>212</sup> in IPC and also a new Section 113B<sup>213</sup> in the Indian Evidence Act, relating to a presumption as to dowry death.

Under S.304B, if a woman died an unnatural death within 7 years of marriage and it was shown that just before her death she had been subjected to cruelty or harassment by her husband or his families for dowry, such a death shall be believed to have been caused by the husband or his relatives. The punishment for causing this death is imprisonment for a minimum of 7 years and maximum of life. And Sec 113B of Evidence Act raises a presumption against the husband or his relatives for having caused the death, if there was evidence that he or the relatives has harassed the deceased for dowry.

The Supreme Court has held that S.304B has the following essentials:

- (1) the death of the woman should be caused by burns or bodily injury or otherwise than under normal circumstances.
- (2) death should have occurred within 7 years of her marriage.
- (3) she must have been subjected to cruelty or harassment by her husband or any relative of her husband soon before her death, and

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<sup>212</sup> Section 304B reads as under:

304B. Dowry death- (1) where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation — For the purpose of this section 'dowry' shall have the same meaning as in Sec.2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

<sup>213</sup>Evidence Act, 1872, Section 113B

(4) such cruelty or harassment should be for or in links with demand for dowry.<sup>214</sup>The concept of cruelty or harassment must be taken from the explanation to S.498A. IPC.<sup>215</sup>

As dowry death occurs within the four walls of the house, the concept of 'presumption as to dowry death' was introduced under S.113B of the Evidence Act. In order, to invoke legal presumption, it is necessary to prove that the deceased was subjected to cruelty or harassment.<sup>216</sup> Further, the presumption under S304B and S. 113B only apply if the offence takes place within 7 years of marriage. The sections read in conjunction will shift the burden of proof from the prosecution on to the husband or his relatives accused of the offence. This is an exodus from the usual rule of evidence and was introduced to reinforce the hands of the prosecution. The provision of S.113B is mandatory in nature.<sup>217</sup> The Court has also opined that S. 113 B could be applied retrospectively as it is procedural in nature.<sup>218</sup>

As no direct evidence is available in dowry death offence the Courts must rely upon circumstantial evidence and infer from the material available.<sup>219</sup> In one of the cases, the Court held that the conduct of the husband is not trying to put out the flames and not taking her to hospital will be taken as circumstantial evidence against the husband.<sup>220</sup> Along with circumstantial evidence, the Courts also rely upon the dying assertion of the deceased.<sup>221</sup>

In *Shanti v. State of Haryana*<sup>222</sup> the issue before the Supreme Court was whether S.304B and S.498A IPC are mutually exclusive. The Court experiential that these

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<sup>214</sup> *Shanti v. State of Haryana*, (1991) 1 HLR 409

<sup>215</sup> *Ibid.*

<sup>216</sup> *Sham Lai v. State of Haryana*, (1997) 9 SCC 759.

<sup>217</sup> *Ibid.*

<sup>218</sup> *State of Punjab v. Iqbal Singh*, (1991) 3 SCC

<sup>219</sup> (1989) Cri.L.J. 1196

<sup>220</sup> *Govindappa v. State of Karnataka*, (1998) 2 SCC 763

<sup>221</sup> *Om Prakash v. State of Punjab*, (1992) 4 SCC 212.

<sup>222</sup> (1991) 1 SCC 371.

provisions deal with two separate offences and are not mutually exclusive. Under S.304B it is the “dowry death” that is punishable and such death should have occurred within 7 years of the marriage. No such period is mentioned in S.498A and the husband or his relatives would be liable for subjecting the woman to “cruelty” any time after the marriage. And in another case, the Court held that, there is nothing in the section that excludes the application of S.302 of IPC if S.304B applies.<sup>223</sup> Where the dowry death takes place after seven years of marriage, then the other provision of the IPC is applicable, viz S.300, S.302, S.304.

In many dowry cases, police inaction and corruption often delay the disposal of cases under S.304B and also results in many cases to not even reach the Courts.

In *Bikshapati v State of A.P.*,<sup>224</sup> the statements of the main witnesses were not recorded for one and a half year and the girl’s father had to approach senior police officers 'with a complaint against the investigating officers for not carrying about their duties. The case had to be transferred to another police officer before the case for abetment to suicide and cruelty was filed in the Court. In this case, the Court also relied upon the Madras High Court Judgment in a case of dowry death where the police had failed to register the case and the Court ordered a fuller and deeper investigation by the special state-level investigating agency, the crime branch criminal investigation department.

#### **4.4.3. Suicide by Married Women and Abetment of Suicide**

In numerous cases of dowry death, a defense is frequently pleaded that the married woman died by committing suicide. And in fact, her husband and his relatives usually attempt to paint the dowry death with the color of suicide. But if it is proved that they abetted her to commit suicide they can be punished. For the offence of abetment to

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<sup>223</sup> (1994) 2 Crimes 776

<sup>224</sup> (1989) 2 HLR 430. A.P



commit suicide S.306<sup>225</sup> and S.107<sup>226</sup> of IPC should be referred to. S.306 of IPC punishes the person who abets the commission of suicide with imprisonment, which may extend to ten years and also fine. Under section S.107 of IPC, a person is said to 'abet' another when he actively suggests or stimulates, provokes, incite indirect. Nonetheless, the act of abetment must be so potent that direct result of which is the commission of suicide.

Having regard to the difficulty in establishing the cause of death whether the husband's and/or his relatives' conduct and treatment induced her to commit suicide the legislature stepped in by introducing S.113A<sup>227</sup> to the Indian Evidence Act by the Criminal Law (Second Amendment) Act, 1983 which is one of the most significant amendments, that allowed the Courts to presume that in certain circumstances, a husband or his relatives had abetted the suicide of a woman.

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<sup>225</sup> Sec. 306 reads as under:

306. Abetment of suicide. —If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>226</sup> Sec. 107 reads as under:

107 Abetment of a thing — A person abets the doing of a thing, who Firstly -instigates any persons to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing - if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who, by willful misrepresentation, or by willful concealment of material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

<sup>227</sup> Section 113A reads as under:

113A. Presumption as to abetment of suicide by a married woman — When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty the Court will presume having regard to all the circumstances of the case, that such a suicide had been abetted by her husband or by such relative of her husband.

Explanation for the purposes of this section - 'Cruelty' shall have the same meaning as in S.498A IPC.

While referring to S.113A of the Indian Evidence Act, the Supreme Court has clarified that the Courts can presume that suicide by a woman has been abetted by the husband or a relative when two factors are present: (a) that the woman has committed suicide within a period of seven years from the date of marriage, and (b) that the husband or his relative had subjected her to cruelty. Cruelty for this purpose is defined in S.498A of the IPC.<sup>228</sup> A large number of dowry deaths occur due to the continuous harassment of young brides who commit suicide by setting themselves on fire.

In *Gurbachan Singh v. Satpal Singh*,<sup>229</sup> Ravinder Kaur, the deceased girl was said to have committed suicide by sprinkling kerosene oil on her body and then set herself on fire. The girl's father gave evidence that when he visited his daughter, she complained to him about her in-laws maltreating her for dowry, and accusing her of carrying an illegitimate child. Two days prior to the incident when the girl's sister visited her, she complained to her about her in-law's cruel behavior. The Supreme Court holding that in such cases direct evidence was hardly available, and that circumstantial evidence and the conduct of the accused persons should be taken into consideration held that the persistent ill-treatment of the girl for dowry amounted to abetment of suicide. The Court considered the conduct of the in-laws and husband in not informing the police after the suicide and not taking steps to take her to the hospital. The Court held that the circumstantial evidence and the fact that the in-laws and the husband made no attempt to save her proved their culpability.

In this case, the Supreme Court rejected the view of the High Court that the case had not been proved beyond reasonable doubt. It criticized the High Court judgement and said that though criminal charges must be proved beyond all reasonable doubt, the doubt 'must be of a reasonable man' and warned against an 'exaggerated devotion to

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<sup>228</sup> Brijlalv. Premchandand ors, (1989) 2 HLR 124.

<sup>229</sup> (1990)1 HLR 353 SC.

the decree of benefit of doubt'. The Supreme Court further held that 'justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent, letting the guilt escape is not doing justice according to law.

In one of the cases<sup>230</sup> before the Supreme Court, the question was whether S. 113A of the Evidence Act could be retrospectively applied. The Court held that the Evidence Act is part of the law of the procedure and changes in the Evidence Act like changes in other procedures are retrospective in nature and thus S.113A would apply retrospectively. The Court went on to say that if it is revealed that a woman commits suicide within a period of seven years from the date of her marriage, and that she had been subjected to cruelty as mentioned in S.498A IPC a presumption could be upraised under S. 113A of the Evidence Act.

The Amendment Act of 1983 by inserting S.174 (3) in the Cr.P.C 1973 made it compulsory that a post-mortem be conducted in all cases in which a woman committed suicide or died within seven years of marriage in 'circumstances raising a reasonable suspicion 'that some other person was involved or if there was any doubt regarding the cause of death.'<sup>231</sup> And by inserting S.174 (1) in Cr.P.C. the 1983.

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<sup>230</sup> Romesh Kumar v. State of Punjab, (1987) 1 HLR 189.

<sup>231</sup> Sec. 174(3) of the Cr.P.C. 1973 reads as under:

When (i) the case involves the suicide by a woman within seven years of her marriage; or (ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or (iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or (iv) there is any doubt regarding the cause of death; or (v) the police officer for any other reason considers it expedient to do so, he shall, subject to such rules as the state government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the state government....'

Amendment Act made a provision for inquest by an Executive Magistrate<sup>232</sup> in cases in which the woman had committed suicide or died in suspicious circumstances within seven years of marriage.

#### **4.4.4 Problems of Evidence**

In matters involving criminal acts the prosecution is under a heavy responsibility to prove the case beyond reasonable doubt. In cases of dowry death, harassment and cruelty, dowry related murders and suicide, the prosecution is under duty to produce evidence in the proof of these crimes. The burden is heavy. If the prosecution fails to prove any of the ingredients of the offence the case is lost. The law as it stood before 1983 was least helpful to the prosecution. The two amendments to the law made in 1983 and 1986 created presumption as regard harassment or cruelty and dowry death.

As the death or suicide takes place generally in the marital home, only the family members have privy of knowledge to the gruesome events. Prosecution hardly gets direct evidence. Many a time case is based on circumstantial evidence like letters written by the brides to her parents, evidence of neighbors and the dying declaration.

An analysis of some Supreme Court judgments show that judges have not been able to devise criteria for determining domestic violence, nor have they awarded punishment consistently. The rules of circumstantial evidence, which normally surround crimes of secrecy such as murder, have been applied inflexibly gender related crimes. The gender aspects of domestic violence have not reinforced the rulings of the Supreme Court

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<sup>232</sup> Sec.174(1) of the Cr.P.C., 1973 reads as under:

Police to inquire and report on suicide, etc. — (1) when the officer in-charge of a police station or some other police officer specially empowered by the state government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests.....

subsequent in outcomes, which are not meaningfully different from other criminal prosecutions for murder.

For instance, in *Sharad Sarda v. State of Maharashtra*<sup>233</sup>, the Supreme Court relied on section 313 of the Cr.P.C., which says that if the accused is not given an opportunity to explain circumstances, which are against him, such circumstances cannot be used against the accused. The appeal was allowed as the Court concluded that the guilt of the accused husband was not proved beyond reasonable doubt. Sharad Sarda was acquitted of all charges and released.

The Supreme Court in the case of *Thurukanni Pompiah v. State of Mysore*<sup>234</sup> has observed that the dependability of the dying declaration should be exposed to a close inspection, considering that it was made in the lack of the accused who had no prospect to test its reliability by cross examination. If the Court finds that the dying declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case consider it unsafe to convict the accused on the basis of the dying declaration alone without further corroboration.

The Courts have insisted that the circumstantial evidence against the accused should be definite, conclusive in nature and must be consistent with the guilt. In *State of Uttar Pradesh v. Dr. Ravindra Mittal*<sup>235</sup> the Supreme Court has laid down the essential ingredients of circumstantial evidence. They are: (a) the circumstances from which the conclusion is drawn should be fully proved; (b) the circumstances should be conclusive in nature; (c) all the facts so established should be consistent only with the hypothesis

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<sup>233</sup> (1984) 4 SCC 116

<sup>234</sup> AIR 1965 SC 939

<sup>235</sup> AIR 1992 SC 2045.

of guilt and inconsistent with innocence; (d) the circumstances should, to a moral certainty exclude the possibility of guilt of any person other than the accused.

The Supreme Court has observed that, while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete, pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences; the one in favor of the accused must be accepted. The condition relied upon must be initiated to have been completely established and the increasing effect of all the facts so established must be consistent only with the assumption of guilt<sup>236</sup>.

In the case of *Sharad Birdichand v State of Maharashtra*,<sup>237</sup> the High Court of Bombay, while convicting the accused gave circumstances, which according to it, proved the prosecution case that the accused husband had administered poison to his wife. One of the situations is that the deceased was 4 to 6 weeks expectant and other circumstances were relating to the conduct of the accused, his motive to kill and of giving false information as well as making haste to dispose of the body etc. In a sequence of circumstantial evidence these false explanations were used as additional relations. The Supreme Court after a lengthy examination of the different probabilities arising on the incriminating and other circumstances gave the benefit of doubt and acquitted the accused.

The above judgments do not acknowledge that domestic violence is a closed-door crime, ignored by neighbors and the community. The judgments also reveal a glaring ignorance about the reality of the lives of many battered women that they may still 'love

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<sup>236</sup> AIR 1992 SC 84

<sup>237</sup> AIR 1987 SC 1622.

‘their husbands, they may not be willing to jeopardize their marriages, they may not be likely to write letters to their family members complaining about domestic violence and dowry demands and so on. There is no distinct pattern discernible in the judgments of the Supreme Court and a great deal of subjectively is evidenced in the judgments. The doctrine of presumption of innocence operates heavily in favor of accused, even though sections 113A and 113B of the Evidence Act clearly transfer the burden of proving that he did not cause the death, to the accused. A heavy reliance on S.498A and S.304B of the IPC, which have severe penalties on conviction, creates its own backlash, as judges want stronger and clearer proof of guilt.’<sup>238</sup>

#### **4.4.5 Marital Rape**

A man commits rape when he engages in intercourse with a woman, not his wife, by force or threat of force, against her will and without her consent This is the traditional common law definition of rape. Chapter XVI (Sections 299-377) of the Indian Penal Code on the ‘offences against human body’ contains sections 375,<sup>239</sup> 376A, 376B,

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<sup>238</sup> Nilima Dutta, “Domestic Violence- Tolerating the Intolerable”, Lawyers Collective, January,1999, p.9

<sup>239</sup> Section 375 of the Indian Penal Code reads as under:

375 Rape — A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling wider any of the six following descriptions:

First- Against her will

Secondly -Without her consent

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when at the time of giving such consent be reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly -With or without her consent when she is under eighteen years of age.

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376C, 376D, which exclusively deal with the offence of rape. The provisions regarding marital rape can be inferred from the following two areas:

a) The exception attached to S.375 which reads as: “sexual intercourse by a man with his own wife, the wife not being under fifteen years of age is not rape”

b) S.376 B inserted by Criminal Law (Second Amendment) Act 1983 which reads as:

“Whoever has sexual intercourse with his own wife, who is living separately from him under a ruling of parting, or under any custom or usage without his consent shall be penalized with imprisonment of either description of a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine”

Thus, only two groups of married women are covered by the rape legislation those being under 15 years of age and those who are separated from their husbands under S.376B IPC. While the rape of a girl below 12 years of age may be punished with imprisonment for a period of ten years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is matrimonial relationship with the victim. In the words of Reginald, A Nelson,<sup>240</sup> the object of this exception under S.375 is to protect the married woman who are less than fifteen years against being forced into premature sexual intercourse with their husbands with disastrous consequences to themselves and also the infant mortality and maternal mortality, which may follow cohabitation.

It would be appropriate to understand the aforesaid provision in the light of the Hindu Marriage Act 1955. Section 5 of the Act which deals with valid conditions to constitute a Hindu Marriage, lays down in clause (iii) that the bridegroom must be of 21 years of age and the bride, 18 years of age. Nevertheless, if this section is contravened the marriage is not void nor voidable. But the contravention of the above-mentioned clause

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<sup>240</sup> Reginald A. Nelson, ‘The Indian Penal Code’, Vol. II, (1970) p.2025 cited in S. V .Joga Rao, “Marital Rape - A Critical Review”, (1989) Crim L.J. p.146



is made punishable under S.18 of the Hindu Marriage Act, 1955 with simple imprisonment, which may extend to fifteen days or fine up to one thousand rupees or both. In such a circumstance, if the husband commits sexual intercourse with his wife (who is below 15 years of age) he will be liable for rape under the exception attached to S.375, even though there is consensual intercourse between the spouses.<sup>241</sup>

In India marital rape exists defacto but not dejure. While there have been some advances in Indian legislation in relation to domestic violence this has mainly been confined to physical rather than sexual abuse. Women who experience and wish to challenge sexual violence from their husbands are currently denied State protection as S.375 of IPC has general marital rape exemption. The foundation of this exemption can be traced back to statements made by Sir Matthew Hale, C.J. in 17th century England. Hale wrote, “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract”.<sup>242</sup> This recognized the view that once married, a woman does not possess the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct breaking of the principles of human rights and provides husbands with a ‘authority to rape’ their wives.<sup>243</sup>

Even though the husband will not be criminally liable for performing sexual intercourse with his wife (who is above fifteen years of age and who is not separately living from him) without regard to her consent, but it does not follow that the law regards the wife as a thing made over to be the absolute property of her husband or as a person outside the protection of criminal law. outlining the history of judicial decisions on imposing

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<sup>241</sup> S.V. Joga Rao, “Marital Rape -A Critical Review”, (1989) Cri. L.J p. 147

<sup>242</sup> Hale, History of the pleas of the Crown (1778), p.629 cited in Peter English, “The Husband Who Rapes His Wife”, (1970) N. LJ p.1223

<sup>243</sup> Saurabh Mishra and Sarvesh Singh, “Marital Rape- Myth, Reality and Need for Criminalization”, (2003) Cri LJ. p.122.

of serious injury by the husband on the wife the Court in *Queen Empress v. Haree Mythee*,<sup>244</sup> observed that in the case of married women the law of rape does not apply between husband and wife after the age of fifteen, but even if the wife is over the age of fifteen the husband has no right to disregard her physical safety, for instance, if the circumstances be such that intercourse is likely to cause her death, or that it is probably dangerous to her life. In this case the husband was convicted under S.338 of IPC<sup>245</sup> for causing hemorrhage due to intercourse, which led to the death of the child wife aged eleven years. In another case *Emperor v. Shahu Meharab*,<sup>246</sup> the husband was convicted under S.304A of IPC,<sup>247</sup> for causing death of his child wife by a rash or negligent act of sexual intercourse with her.

In *State of Maharashtra v. Madhukar Narayan Mardhikar*<sup>248</sup> the Supreme Court has extended the concept of right to privacy in a broader perspective by holding that “even a woman of easy virtue is entitled to privacy and no one can invade her privacy as when he likes. So similarly, it is not exposed to any and every person to violate her person as when he desires. She is correspondingly entitled to the protection of law”.<sup>249</sup> It would follow that as the law stands presently, all women do have a right to privacy. This includes the right to have sex or not, but within the veil of marriage, this seems like a dead letter as forcible sex, against the wishes of the wife, violating her personal interest is yet not recognized. In *Bodhisattawa v. Gautam*, the Supreme Court said that rape is

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<sup>244</sup> (1891) ILR 18 Cal 49

<sup>245</sup> Sec.338 IPC deals with causing grievous hurt by doing an act so rashly or negligently as to endanger life or personal safety of others.

<sup>246</sup> AIR 1977 Sind 42.

<sup>247</sup> See 304 IPC deals with culpable homicide not amounting to murder.

<sup>248</sup> AIR 1991 SC 207

<sup>249</sup> Ibid

a crime against basic human rights and is also violative of the victim's fundamental rights, but refused to recognize marital rape.<sup>250</sup>

According to the above provisions and judicial pronouncements, the husband has the right to have sexual intercourse with his own wife, but if his acts result into an offence, undoubtedly, he is liable to be punished under the Penal Code.

Owing to the sociological changes, recently public and judicial opinions have begun to oppose the exemption. Some progress towards criminalizing marital rape took place in 1983 when section 376B was added in the IPC, which criminalized the rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Fifth Law Commission of India.<sup>251</sup> The Committee forbidden the argument that marriage is a license to rape. Thus, a husband can now be indicted and imprisoned up to 7 years, under S.376B of IPC. However, this is only piece-meal legislation and much more needs to be done by the Parliament as regards the issue of marital rape. When the Law Commission in its 42nd report supported the presence of sexual intercourse by a man with his minor wife as an offence it was realized as a ray of hope.<sup>252</sup> The Joint Committee that revised the proposal dismissed the sanction. The Committee argued that a husband could not be found guilty of raping his wife whatever be the age. When a man marries a woman, sex is also a part of the package. Nevertheless, the Joint Committee supported the suggestion of the Law Commission that forcible and non-consensual intercourse by a husband on his wife living separately be penalized.<sup>253</sup>

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<sup>250</sup> Ratna Kapur, and Shomona Khanna, Memorandum on Rape Laws Relating to Sexual Offences, (Delhi: Centre for Feminist Legal Research, 1996), p.39.

<sup>251</sup> Law Commission of India, 42nd Report on the Indian Penal Code (Government of India 1971) para 16,115 p.277.

<sup>252</sup> Ibid

<sup>253</sup> The Report of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, the Gazette India, Extraordinary, Part II, Sec.2, p.546

However, even the Fifteenth Law Commission of India, in March 2000, in its latest report, 'Review of Rape Law in India unfortunately, did not favor the deletion of the marital rape exemption from S.375 IPC on the ground that such a move would amount to 'excessive interference with marital relationship'<sup>254</sup> Contemporary feminist critiques of rape law believe that a non-consensual sexual intercourse with woman not only unjustifiably disregards her legitimate control over her body but also amounts to a brutal attack on her dignity and argue that rape law is premised on the conservative and deeply rooted 'pro-male' and 'gender-bias and 'assumptions derogatory to women'.<sup>255</sup> As of now, the law in India relating to marital rape is wholly inadequate in providing supporting mechanisms for women to exercise-bodily integrity and sexual autonomy.

#### **4.5 Civil Law Relating to 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 and judicial separation. Other civil laws relevant to situations of domestic violence are with respect to maintenance, alimony and matrimonial home. There is no specific remedy to a spouse who does not wish to move for a divorce or judicial separation. Further, domestic violence in a non-matrimonial situation is not recognized. In such cases, one has to resort to general civil law. Remedies addressing the violence itself, such as non-molestation orders available in other jurisdictions, both in matrimonial and non-matrimonial situations, are not explicitly recognized under Indian civil law. It follows that for civil remedies against domestic violence per se would have to be found in the Specific Relief Act and the Civil Procedure Code. And also, the Law

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<sup>254</sup> Law Commission of India, 172nd Report on Review of Rape Laws (Government of India, 2000), para.3

<sup>255</sup> Ratna Kapur and Brenda Cossman, 'Subversive Sites: Feminist Engagements with Law in India' (New Delhi: Sage Publication, 1996); Vasudha Dhagamwar, 'Law, Power and Justice', (New Delhi; Sage Publication, 1992).

of Torts, which prohibits certain kinds of harmful activities and provide for remedies either damages or injunction or both.

#### **4.5.1 Remedies under the Laws of Marriage and Divorce**

##### **4.5.1.1 Judicial Separation or Divorce on Ground of Cruelty**

Cruelty is a ground for divorce as well as judicial separation under all the personal laws in India, besides the Special Marriage Act. The earliest law in India making cruelty a ground for divorce was surprisingly, the Dissolution of Muslim Marriages Act, 1939 which permitted a Muslim wife to obtain a decree of divorce if her husband had treated her with cruelty. In this Act, cruelty was given a wide meaning to include types of behavior other than physical violence.<sup>256</sup> The special Marriages Act enacted in 1954 came as a reprieve for a small section of women, as it made cruelty a ground for divorce.<sup>257</sup> A Hindu woman whose marriage had been solemnized under the Hindu Marriage Act, 1955 had to wait till as late as 1976 to obtain a divorce on grounds of cruelty by her husband, by an amendment passed in that year.<sup>258</sup>

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<sup>256</sup> The Dissolution of Muslim Marriage Act, 1939, in Section 2(ix) provides cruelty as a ground for dissolution of marriage only to wife and states six conditions as under:

That the husband,  
habitually assaults her or makes her life miserable by cruelty of conduct even if such cruelty does not amount to physical ill-treatment; or  
associates with woman of evil-repute or leads on infamous life; or  
attempts to force her to lead an immoral life; or  
disposes of her property or prevents her from exercising legal rights over it; or  
obstructs her in the observance of her religious profession or practice; or  
has more wives than one and does not treat her equitably in accordance with injunctions of the Quran.

<sup>257</sup>The Special Marriage Act 1954, provides cruelty as a ground for divorce and judicial separation under section 27(1Xd) and section 23 as follows:

Treated the petitioner with cruelty after marriage.

<sup>258</sup> The Hindu Marriage Act 1955, provides cruelty as a ground for divorce and judicial separation under section 13 (1) (i) (a) and section 10 as follows:

Treated the petitioner with cruelty after marriage

Prior to an amendment of 1988,<sup>259</sup> a Parsi woman could only obtain a divorce on the ground of cruelty under the Parsi Marriage and Divorce Act, 1936, if her husband had caused her 'grievous hurt', which was defined as: emasculation, permanent privation of a limb, or an eye, or of hearing in either ear, or permanent disfiguration of the head or face and any hurt endangering her life. For a Christian woman, before the Indian Divorce Act 1869, was amended in 2001,<sup>260</sup> cruelty simpliciter was not sufficient as a ground for divorce as it was necessary to prove adultery in addition to cruelty and woman seeking divorce had to prove an aggravated form of adultery.

Cruelty is not defined uniformly in the different personal laws and sometimes it is not defined at all. 'Cruelty' if legally defined receives a restricted meaning and not every act or course of conduct, which would be called cruel in the popular sense amounts to cruelty in law. Acts of cruelty are infinitely variable and no list can be drawn up of acts which do or even may amount to cruelty and those which do not. Conduct which is undoubtedly cruel in one case is equally clearly not cruel in other case because of the presence of some other fact or circumstances. Consequently, it is dangerous to use one case, as a precedent for another presenting similar facts and all that can be done here is to attempt and extract and formulate from decided cases the main principles by which the Courts will be guided.<sup>261</sup>

The perception of cruelty is very subjective fluctuating with time, place and persons. Cruelty has to be well-defined with regard to social conditions, as they exist in the present day. In *Dastane v Dastane*,<sup>262</sup> the Supreme Court took a new stance by opining

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<sup>259</sup> The Parsi Marriage and Divorce Act, as amended in 1988 provides cruelty as a ground for divorce and judicial separation under section 32 and section 34 as follows:

Treated the petitioner with such cruelty as to cause reasonable apprehension of harm or injury.

<sup>260</sup> The Indian Divorce Act 1869, as amended in 2001, provides cruelty as a ground for divorce and judicial separation under section 10 and section 22 as follows:

Treated the petitioner with such cruelty as to cause reasonable apprehension of harm or injury.

<sup>261</sup> Bromley, P.M., 'Family Laws', 4th ed., (London: Butterworths) p.151

<sup>262</sup> AIR 1975 SC 1534.

that it is not necessary that cruelty must be of such character as to cause danger to life limb or health as to give rise to a sensible uneasiness of such a danger. But what the Courts must determine is whether the petitioner proves that the respondent's such cruelty is such, as to cause a reasonable apprehension in mind that it will be damaging or distressing to live with the respondent. In *Keshao Rao v. Nisha*<sup>263</sup> the Supreme Court opined that the Courts have to interpret and analyze and define what would constitute cruelty in a given case, depending upon many factors such as social status, background, traditions, customs, community and caste, upbringing, public opinion prevailing in the locality etc. Cruelty should be the type, which will satisfy the conscience of the Court that the relationship between the parties has deteriorated to such an extent that it has become impossible from them to live together without mental agony, distress, or torture. It need not be of such character as to cause danger to life limb or health.

Thus, cruelty includes not only acts of physical violence of one spouse against the other causing injury to body, limb or health, which have been traditionally considered to amount to cruelty but also includes mental cruelty which causes emotional suffering. A solo act of physical violence may extent to cruelty. Similarly, series of small acts of violence may cumulatively amount to cruelty. In physical cruelty, actual danger to life need not be proved. In one of the very early English case,<sup>264</sup> the husband who had left his wife in 1950, visited the matrimonial home two years later and struck the wife a blow on the face which gave her a black eye. The House of Lords held that a single act of cruelty of an inflamed nature and sufficiently gross to excite terror is sufficient to constitute cruelty. This construction of cruelty is more or less same in all the Indian personal law statutes, except under the Muslim Law.<sup>265</sup>

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<sup>263</sup> AIR 1984 413 Bom.

<sup>264</sup> *Britt v. Britt* (1953) 3 All ER 769.

<sup>265</sup> Mononita Das, "Cruelty a Part and Parcel of Domestic Violence: The Legal Relief for Indian Woman", (2003) Vol .XXX (4) Indian Bar Review, p.682

Under Muslim Law ‘assault’ simpliciter is not a ground for claiming a matrimonial relief of divorce. It must be habitual assault, which in the context, would mean repeated acts of assault. For instance, in the case of *Khachern v. Khairunissa*,<sup>266</sup> within the first twenty days of marriage, in the matrimonial home, the wife was assaulted by the husband, ill-treated and bolted inside a room, it was held by the Court that it amounted to habitual assault. It may be that no single act of assault may amount to cruelty, because of its mildness but if these acts were continued for certain duration their accumulated effect would amount to cruelty under Muslim Law.<sup>267</sup>

Mental cruelty is a species of domestic violence and consists of conduct, which causes mental or emotional suffering. For instance, the conduct of the husband in indulging in love affairs or even promising to marry another woman amounts to cruelty.<sup>268</sup> There cannot be greater cruelty than to compel a chaste wife to submit to the overtures of other persons out of an ignoble desire to make gain by prostituting the wife.<sup>269</sup> The law even protects a woman against disclosing any conjugal confidence between the spouses and if the husband insists for the same it would amount to cruelty.<sup>270</sup> A mere allegation of unchastity may cause mental agony and amount to cruelty.<sup>271</sup> Thus, it may state that cruelty in the legal sense need not merely be physical assault, it may be such that which would undermine her health or reasonably affect her happiness.

Through a process of judicial interpretation, the word ‘cruelty’, which embraces domestic violence, the meaning of the word in relation to the matrimonial field has evolved and some of them are as follows:

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<sup>266</sup> AIR 1952 638 All.

<sup>267</sup> Das, supra note 258

<sup>268</sup> Lalita Devi v. Radha Mohan, AIR 1976 Raj.

<sup>269</sup> Krishna Ravi v. Chuni, AIR 1981 P & H 119.

<sup>270</sup> Appa v. State, AIR 1971 Mad. 194.

<sup>271</sup> Nandkishore v. Miami Bai, AIR 1979 MP 45.



- Refusal of the spouse to have sexual intercourse with other;
- Insistence on sexual practices which are repugnant to the other spouse;
- Punching, slapping, kicking or beating of a spouse;
- Constant quarrelling and nagging;
- Adultery'
- Dowry demands after marriage.<sup>272</sup>

Some of the acts of cruelty mentioned above are instances of domestic violence but in order to amount to 'cruelty' the act need not necessarily be an act of violence of criminal nature. The legal concept of cruelty is not confined to cases of personal danger. Conduct of the husband that renders the continuance of cohabitation and the performance of conjugal duties impossible or onerous would amount to cruelty.<sup>273</sup>

Thus, domestic violence has been recognized by the existing civil laws only in the context of dissolution of marriage and as being a ground for judicial separation or divorce. However, when faced with situations of cruelty, many women may not want to take the extreme step of commencing proceeding for divorce or judicial separation.

#### **4.5.1.2 Maintenance**

The common problems many women face is lack of adequate finances to initiate and continue legal proceedings on the breakdown of a marriage. Most of the personal laws have provisions for giving maintenance to the woman during the proceedings to enable her to continue with the litigation. The maintenance given while the case is in Court is

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<sup>272</sup> Dipankar Gupta, "Statutory Frame work for Protection of Rights of Women- Procedural Aspects in Report of Colloquium on Domestic Violence, p.109.

<sup>273</sup> Ibid

called maintenance pendente lite or interim or temporary maintenance.<sup>274</sup> And to take care of a very practical and serious problem that a wife faces after divorce that she is rendered homeless and shelter less, most personal laws make provisions for permanent alimony. Alimony is an order granting a certain amount of maintenance to be paid continuously at regular intervals after all proceedings are completed in Court and orders have been passed by the judge. Alimony can be given in periodical sums or in a lump sum.<sup>275</sup>

A most interesting aspect of permanent alimony is the various theories under which a Court will grant permanent alimony to an indigent wife. Some have granted alimony as a subsistence allowance. Some have granted it reasoning that a divorced woman has no position in Hindu society. No Courts have awarded permanent alimony on the theory that the marriage was an economic partnership, to which both the husband and wife contributed equally.

In addition to maintenance, which can be claimed under the marriage laws Hindu women can claim maintenance under the Hindu Adoption and Maintenance Act 1956. Under this Act a woman can claim maintenance as well as separate residence from her husband, if he has committed any of the matrimonial offence such as cruelty, adultery, etc., without filing a petition for divorce.<sup>276</sup> An award under sec. 18 of the Hindu Adoption and Maintenance Act fulfils a different function from the award under the Hindu Marriage Act. The former Act was meant to aid neglected, abandoned and deserted women who are left with few financial resources, while a marriage is legally in existence.

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<sup>274</sup> The Hindu Marriage Act (HMA) 1955, Sec 24

<sup>275</sup> Ibid., Sec 25

<sup>276</sup> The Hindu Adoption and Maintenance Act, 1956, Sec. 18

The provision of the Indian Divorce Act, which is particularly detrimental to women, is section 38, which enables the Court to appoint a trustee for the wife to whom maintenance payments shall be made. Such a provision in effect treats a woman like a child, preventing her from having complete control of her personal finances. The main difference with reference to interim maintenance between the Hindu Marriage Act and Indian Divorce Act was that, Section 36 of the Indian Divorce Act set a ceiling on the amount of maintenance at one-fifth of the husband's income. This provision seriously handicapped the wife's ability to litigate because of her lack of resources. But this provision has been deleted by the Amendment Act 2001. The Parsi Marriage and Divorce Act is a virtual reproduction of the Hindu Marriage Act. The only area in which it differs is section 41, which parallels the trustee provision of section 38 of the Indian Divorce Act with the same detrimental effects. The maintenance provisions under the Special Marriage Act are similar to those under the Hindu Marriage Act in criteria and procedure.

But the unsatisfactory aspect of maintenance is the extremely low amount of maintenance awarded. In assessing the amount of the award, Courts depend heavily on the determination of income of the spouses. Most income of the Indian society is unreported, leaving great discrepancy between the actual standards of living and income reported. A more just manner of ascertaining what a wife's maintenance would be depending upon the husband's standard of living, rather than on reported income. The wife's maintenance award should be able to match her husband's standard of living.

And also, most of the unsatisfactory holdings are a result of the theory under which Court's award maintenance and alimony. Most Courts award them as a subsistence payment who has no other means of survival. Instead, Courts should recognize that

maintenance is payment for the economic partnership that existed between the spouses for the duration of the marriage.

#### **4.5.1.3 Matrimonial Home**

For married women, the security of the marital home may turn out to be merely an illusion if their husband turns them out of the house or harasses them so much that they can no longer stay at home. And also, a wife is faced with a very practical and serious problem after divorce or judicial separation, as she is rendered homeless and shelter less. Generally, married women are economically dependent on their husbands, and the marital home is the husband's property. "The wife will normally not have a legally recognized proprietary interest in her own home. This means that if she is forced to leave, her husband can try to justify her eviction by asserting that he has the right to do what he wants with his property. But for women in such circumstances, the problem of losing their marital home is acute. Their lives are severely disrupted, and they suddenly face the burden of establishing a new home for themselves and their children. Married women cannot always rely on their own family to take them in, nor are they likely to have independent resources to obtain immediate, safe and suitable alternative housing".<sup>277</sup>

Indian laws are inadequate in this regard and a woman whose marriage has broken, whether de jure or de facto, has nowhere to go. In fact, there are innumerable cases where tortured and harassed wives cling to matrimony and suffer simply because they know that once they step out, the doors of the matrimonial home will be locked to them forever.<sup>278</sup> Some of the judgments referred to here have bearing on the issue of the matrimonial home.

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<sup>277</sup> Freddy Farm, 'Women's Right to Matrimonial Home \ The Lawyers, April-May 1979, p.24.

<sup>278</sup> Ibid

The Bombay High Court took a more sympathetic view on *Shanta Wadhwa v. Purshottam Wadhwa*.<sup>279</sup> Here the wife asked for a judicial separation on the ground of the husband's physical and emotional cruelty, and sought the right to stay in the home. The Court observed that the wife's right to maintenance by the husband under the Hindu Adoption and Maintenance Act included residence and ruled that the matrimonial home itself was maintenance to which she was due. It stated that the wife's right to stay in the home existed whether the husband, or the wife, or both spouses owned the property. In a later case, *Abdul Rahim v. Padma*,<sup>280</sup> the Bombay High Court refused to grant an injunction excluding a wife from the matrimonial home after she had made allegations against her husband. The wife had been excluded from the home after divorce proceedings had been initiated but since had moved back in. Title to the property was in dispute. The Court accepted that the wife had a right to stay in the home, noting that the husband had not provided alternative accommodation. However, the Court also observed that she had no right to live in all or any particular section of the flat, it ordered the flat to be partitioned and the husband and wife to live in separate areas.

#### **4.5.1.4 Family Courts**

As the disputes relating to family violence need special approach and speedy settlements because of emotional aspects of the family affairs and also as the conventional procedure is not suitable for the disputes concerning couples, Parliament passed the Family Courts Act, 1984. The object of the Act being to encourage conciliation in and secure speedy settlement of disputes relating to marriage and family affairs.<sup>281</sup> In Family Courts the parties in a suit and their counsel are not engaged in winning or defeating a legal action, but parties, judge's social workers, welfare officers

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<sup>279</sup> (1977) Mah L.R. 661

<sup>280</sup> AIR 1982 Bom 341

<sup>281</sup> The Family Courts Act (FCA), 1984, Preamble.

and psychiatrists all are engaged in finding out a solution to the problem or problems engaging the attention of the Courts.

Under the Act, to begin with, Family Courts are to be set up for a town or city whose population exceeds one million. It is also provided that State Governments may also set up Family Courts for other areas.<sup>282</sup> In selecting persons for appointment as judge's preference is to be given to women, and every endeavor is to be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected.<sup>283</sup>

All family law matters such as marriage, matrimonial causes, maintenance and alimony, custody, education and support of children, and settlement of property come within the jurisdiction of the Family Courts.<sup>284</sup> It follows that the so-called para familial matters such as inter-spousal assaults, and other offences of criminal nature between the spouses,<sup>285</sup> inter-spousal torts and contracts have not been brought under the jurisdiction of the 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 dispute relating to violence between spouses will not come under Family Courts jurisdiction unless some matrimonial relief (divorce or judicial separation or maintenance) is sought under the petition.

The Act opts for a less formal procedure. Although the provisions of the Code of Civil Procedure, 1908, and of the Code of Criminal Procedure 1973 are made applicable to

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<sup>282</sup> Ibid., sec.3

<sup>283</sup> Ibid., Sec.4 (4).

<sup>284</sup> Ibid., Explanation to sec.7

<sup>285</sup> Offence under sec.498A of the Indian Penal Code, 1860.

the suits and proceedings before a Family Court, the family has power to lay down its own procedure with a view to arrive at a settlement or as the truth of the facts.<sup>286</sup> A Family Court may receive as evidence any report, statement, documents, information or matter that may assist it to deal effectively with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act 1872.<sup>287</sup> That in every suit or proceeding, the proceedings may be held in camera if the Family Court or one of the parties so desires.<sup>288</sup> No party to a suit or proceeding before a Family Court shall be entitled as of right to be represented by a legal practitioner. However, if the Court considers it necessary in the interest of justice it may seek the assistance of a legal expert as amicus curie.<sup>289</sup>

Provisions have been made for auxiliary services under the Act, that in every suit or proceeding endeavor shall be made by the Family Court in the first instance where it is possible to do so, consistent with the nature and circumstances of the case to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding.<sup>290</sup> In case there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceedings for such period as it thinks fit.<sup>291</sup> Such a provision exists in the Hindu Marriage Act also.<sup>292</sup> The former provision uses the words 'settlement' and the latter, 'reconciliation'. That is, the Family Court will assist and persuade the parties in finding a solution to a problem while the Hindu Marriage Act the Court will have to attempt to harmonize the parties in order to save a breaking marriage.

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<sup>286</sup> Family Court Act, Section 10

<sup>287</sup> Ibid., Sec. 14

<sup>288</sup> Ibid., sec.11

<sup>289</sup> Ibid., sec. 13

<sup>290</sup> Ibid. sec. 9

<sup>291</sup> Ibid., sec.9 (2).

<sup>292</sup>The Hindu Marriage Act, 1955, sec. 23 (2)

In every suit or proceedings, it is open to a Family Court to secure the services of a medical expert (preferably a woman where available) including a person professionally engaged in promoting the welfare of the family.<sup>293</sup> But under the Act, there is no provision as to how or in what manner the services of a medical expert or of a person who is professionally engaged in promoting the welfare of the family is to be obtained by the Family Courts. While taking assistance, it will raise a question whether it will be agreeable to the parties to undergo the treatment or diagnosis of an expert. 'In absence of any provision in the Act, the Family Court cannot order the parties to a suit or proceedings to submit themselves to the treatment provided by, or diagnosis to be made by the expert. There may be question of payment to be provided for. The result is that this provision in the Act, though very laudable, may lay dormant for lack of any implementation machinery.

In conclusion, it may be stated that the Act makes it possible for a victim of family violence; to seek matrimonial reliefs without delay as Family Courts have a less formal and more active investigational and inquisitional procedure. Whether the Family Courts will be able to promote conciliation in disputes relating to family violence is doubtful. Disputes relating to family violence per se do not come under the jurisdiction of Family Courts and the Act does not provide any additional relief to a victim of family violence.

## **4.5.2 Remedies under General Civil Law**

### **4.5.2.1 Code of Civil Procedure, 1908 (CPC)**

Civil Procedure Code deals with injunctions of a temporary nature, which are granted to protect the rights of the plaintiff pending the disposal of the suit.<sup>294</sup> An injunction may be granted which is one-time in nature and which may be sufficient to protect the

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<sup>293</sup> FCA, sec. 12

<sup>294</sup> CPC Order 39.



rights of the plaintiff during the pendency of the suit.<sup>295</sup> An injunction, which is continuing in nature, intended to restrain repetition or continuance of breach or injury by the defendant may also be granted.<sup>296</sup> An injunction sought under the above provisions cannot stand on its own but only as an interim relief in a substantive suit for some legal civil remedy. The Court also can take a penal action by way of attachment of the property or by imprisonment of the person committing breach of an injunction order.<sup>297</sup>

#### **4.5.2.2 Specific Relief Act, 1963**

The Specific Relief Act provides for an action for injunction for protection of rights whether legal or equitable.<sup>298</sup> An injunction is nothing but a legal process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing the wrongful act. The injunction can be 'mandatory' i.e. compelling the defendant to do an act in order to protect or enforce the rights of the plaintiff or the injunction can be 'restrictive' i.e. prohibiting the defendant from doing an act or acts which threatens to take away the rights or entitlements of the plaintiff.<sup>299</sup> Further, the relief under this section can be permanent or temporary in nature.<sup>300</sup> An order may be made pending the disposal of a suit with the object of protecting the rights of the plaintiff pending the disposal of the suit. An order thus made is a temporary injunction. An order made after the determination of the suit with the object of giving effect to and protecting the rights urged in the suit is a perpetual injunction, which is

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<sup>295</sup> Ibid., Order 39, rule 1

<sup>296</sup> Ibid., Order 39, rule 2

<sup>297</sup> Ibid., Order 39, rule 2A

<sup>298</sup> The Specific Relief Act, sec.36.

<sup>299</sup> Ibid., sec.39

<sup>300</sup> Ibid., sec.38.

permanent in nature.<sup>301</sup> The plaintiff in addition to a prayer for injunction can also claim damages.<sup>302</sup>

The scope of the provisions of the Specific Relief Act with respect to injunctions is very wide. There is no bar against provisions of the Specific Relief Act being applied to a situation involving domestic violence. However, the provisions of this Act have never been resorted to in situations of domestic violence. Perusal of the case law under this enactment indicates that over a period of time, the Courts have given a narrow construction to the provisions of the Act.<sup>303</sup>

A wife who has been illegally thrown out of the 'matrimonial home' by her husband or any other person can sue for re-entry of the house under the specific Relief Act, even though a wife's right is not specifically recognized by the provisions which is a general one.<sup>304</sup> The jurisdiction of the Court under this section is very limited. The Court does not decide the title of the property in question, nor can it direct the parties to remove or erect any structure on the property. This is a special and speedy remedy for recovery of possession without establishing title available to persons who have some legal right to the property and are illegally ousted from the same. The object of this section is to discourage proceedings calculated to lead to serious breaks of peace and to provide against the person, who has taken law into his own hands, and derived any benefit from the process. Interim injunction to ensure that the house in question is not alienated, destroyed, removed, altered or demolished, can be issued in a suit under Section 6.

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<sup>301</sup> Ibid., sec.37

<sup>302</sup> Ibid., sec.40

<sup>303</sup> 'Civil Law Relating to Domestic Violence', in Report of Colloquium on Domestic Violence', p.77

<sup>304</sup> Supra note 291, sec.6.

#### **4.5.2.3 Remedies under the Law of Torts:**

Law of Torts prohibits certain kinds of harmful activities and provides for remedies either damages or injunction, or both. 'Trespass to the person' is the area under the Law of Torts, which will provide remedy for domestic violence. The three relevant subheads under 'Trespass to the person' are: 'battery' 'assault', and 'false imprisonment'.

'Battery' is the intentional application of any physical force to another person without any lawful justification. Even though the force used is very trivial and does not cause any harm, the wrong is still constituted. Physical hurt need not be there.<sup>305</sup>

'Assault' is an act of the defendant, which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant. Waving a stick but not actually using it, is thus assault.<sup>306</sup>

'False imprisonment' consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. When a person is confined within the four walls or if prevented from leaving the place, it is false imprisonment.<sup>307</sup>

At common law there could be no action between husband and wife for tort. Neither the wife could sue her husband nor the husband could sue his wife, if the other spouse committed a tort. Married Women's Property Act 1882 made a change and permitted a married woman to sue her husband in tort for the protection and security of her property. But she could not sue her husband if he caused her any personal injuries.<sup>308</sup> Law Reform (Husband and Wife) Act, 1962 abolished the rule prohibiting actions between spouses.

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<sup>305</sup> Ratanlal & Dhirajalal's, The Law of Torts, 23 ed., Reprint 1998, (New Delhi: Wadhwa and Company Law Publishers), p.217.

<sup>306</sup> Ibid., p.216

<sup>307</sup> Ibid., p.219

<sup>308</sup> Ibid., p.33

Now husband and wife can sue each other as if they were unmarried. The Act, however places a restriction on an action during marriage by one spouse against another and the Court has been given a power to stay the action if it appears that no substantial benefit will accrue to either party from the proceeding.<sup>309</sup> Thus, though they apply fully, very little use of these remedies has been made use of by the litigants or Courts. However, cruelty has many facets other than physical violence or threat of physical violence and in such areas the Law of Torts is not of much assistance.

#### **4.6 Conclusion**

In conclusion we can say that Constitution of India, International Convention, Indian Penal Code by inserting provision of Section 498A and 304B, Criminal Procedure Code, 1973, Dowry Prohibition Act, 1961 etc. have been used by the Courts in India in cases where there is lacuna in domestic legislation. As to the Civil Law on domestic Violence, the remedies available are under the laws of marriage and divorce on the ground of cruelty and during the pendency of those proceeding, victims can ask for maintenance and alimony and also injunctions restraining them from dispossession from matrimonial home. Further remedies are available under the Family Courts Act 1984, The Specific Relief Act 1963, The Civil Procedure Code 1908 and the Law of Torts. So, all the above provisions are analysed, to find out the extent to which they provide protection to women subjected to domestic violence. But found that they are not focus all type of abuses or violence which are committed within four wall or in the family by her husband or his relatives. So, in addition, the Protection of Women from Domestic Violence Act 2005 was passed by the Parliament in August 2005, which comes as a ray of hope to millions of women who suffer abuse i.e., physical, psychological, economic etc.

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<sup>309</sup> Ibid

## **CHAPTER V**

### **CONCLUSION AND SUGGESTION**

#### **5.1 Conclusion**

The entire debate on the problem of domestic violence against women of rural and urban areas of India brings out that the problem of domestic violence is as old as the institution of the family. It is pervasive in all type of societies in various forms and magnitude. The problem of domestic violence usually remained unreported and invisible; usually confined to the closed doors. It was because of domestic violence seen as private affair, the information on the magnitude and severity of the problem to be measured became difficult and also led to the situation where many questions remained unanswered. These barriers and obstacles make the victims of domestic violence so reluctant that they refuse to complain about their victimization. This inability to complain about their subjugation is due to their weak structural position in the patriarchal set-up where men's position as superior to women is legitimized and institutionalized through societal norms. The phenomenon of domestic violence is taken as an issue which can be sorted out within the four walls of house and some amount of violence is considered as part of the normal wear and tear of marriage.<sup>310</sup> If we look at the position of women in the Indian context, lot of change in the status of women is witnessed but in terms of their personal conditions the change is not for better but for the worst. Everyday cases of atrocities against women are showing rising trend. Women are facing domestic violence every day in various forms, some direct and some indirect. The equality of status guaranteed by the Constitution of India has become a myth for millions of women suffering in their own home where they feel to be the safest

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<sup>310</sup> (Mishra 2006:25)

at the hands of members within their own family. The phenomenon of domestic violence is basically rooted in the socio-cultural fabric of India where the society is highly patriarchal that discriminates between males and females where former is highly preferred and latter unwanted or more of a liability. This gap is still so widened that gender discrimination is seen in various types of violent practices within home. Since families and home are always denoted as a private domain whatever is happening here largely remains free from legal restraints and unacknowledged as a crime. In the research study an effort was made to study the concept of domestic violence and to trace the causes and consequences of the domestic violence. The role of legal mechanism to deal with the menace was also studied and few case studies were conducted to study the phenomenon of domestic violence in real life context.

The Constitution of India and India's endorsement of various International Conventions promise gender equality. The Constitution guarantees equality, equal protection of laws, equality of status and opportunity, thus redeeming the promise of justice: social economic and political. These provisions actually do not provide the necessary legal environment for getting what women need, namely a chance to lead a full life with dignity, secure in their bodily integrity. Among the many manifestations of the violations of the fundamental rights of women, domestic violence is one of the most vicious. The range of domestic violence against women is such that, their very right to life in the literal sense of the word is in jeopardy.

A problematic area in Constitutional law is the sanctity accorded to personal laws. These personal laws govern all aspects of a women's family life. The Courts have held that these personal laws cannot be tested against the standards laid down by the fundamental rights guaranteed in the Constitution. In other words, in the area where it affects her most, the 'private' sphere of the family, there is no place for the concept of equality. Nevertheless, the Courts have played a significant role in bringing about

gender equality by interpreting existing laws liberally. The Courts have laid down guidelines in accordance with international standards where there is no legislation or provision of law. However, with respect to the discriminatory personal laws, it would not be possible for the Courts to do away with the entire set of laws covering all social relationships that violate Art. 14 as they would have to be replaced with a complete new set or code of laws.

As to the statutory protection, both civil and criminal, for domestic violence against women, most of the changes came in the form of criminal law. As part of the general trend on reform of Criminal law, cruelty by a husband or his relatives to his wife was made an offence by S.498A, IPC<sup>311</sup> and consequential amendments, in the Cr.P.C., Evidence Act, etc., were made. Section 498A, IPC was the first recognition of domestic violence in law. Though this Amendment was enacted as early as 1983, not many cases have been brought to look and there have not been many convictions. As was the objective, the offence is more or less closely related to perpetration of violence for not bringing enough dowry. Under S.498A, IPC cruelty is defined as conduct that is likely to drive a woman to commit suicide or to cause grave injury. Harassment limited to dowry demands is also included in the definition of cruelty this section. But it does not include all types of violence committed within the precincts of the home. Thus, the remedy provided under the criminal law for domestic violence is of a very limited character.

Several lacuna exist in criminal justice system. Some of these problems lie in inherent shortfalls in the law, while others deal with the practice and implementation rather than the content of the law. Moreover, a woman in distress may not want to access the criminal justice system where the intervention of the police, not particularly known for

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<sup>311</sup> Indian Penal Code, Section 498A: Husband or relative of husband of a woman subjecting her to cruelty.

their sensitivity is, involved. And also, right from registering a First Information Report (FIR) to the actual trial, the system is conducive to defeating the aim of justice. As criminal law culminates in punishment for the accused, many a times complaints are not filed mostly because it will involve the punishment of the husband or his relatives. Even if such victims gather courage and file criminal complaint, it will become difficult for the prosecution to be carried to its logical end as the saying goes 'it is difficult to fight with an alligator while remaining in waters'.

As to civil law on domestic violence the remedies available are under the laws of marriage and divorce. They are not having sufficient teeth to restrain domestic violence. Women have been filing petitions for divorce and judicial separation and during the pendency of those proceedings have been asking for interim protection orders such as injunctions restraining dispossession from matrimonial home. Final reliefs on the proof of cruelty by the offending spouse may result in severance of marriage remedy, which would be worse than disease. And also, civil actions available at present are lengthy and cumbersome and have not proved to be efficacious remedies. The remedies under the general civil law are also not adequate enough to serve the purpose.

The options open to women suffering domestic violence are unrealistic. It is difficult to imagine any marriage surviving a criminal trial and imprisonment. It is a choice between tolerating the violence or ending the marriage. Thus, the most urgent need is a civil law relating to domestic violence, which is passed by the Parliament as The Protection of Women from Domestic Violence Act, 2005. 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. The focus of the Act is to provide an expeditious civil remedy to deal with domestic violence. It recognizes domestic violence as a distinct civil wrong and provides unique remedies.



## 5.2 Findings

- The domestic violence is not only increase but is also assuming subtler forms every day. It is not limited to wife beating only which is the most common abuse worldwide irrespective of class, religion, community and caste backgrounds but also assuming various other forms.
- Although the causes for the domestic violence were different, the basic factor found in the study was the unequal power relationship. This inequity stemming from patriarchal structure of power was seen as the basic cause of violence.
- The unequal power relationship on the one hand has encouraged the powerful (male) to commit violence and continue with it and, on the other hand it has forced the powerless (female) to become submissive and suffer subsequently in silence. However, it was seen in the case studies undertaken that some women have taken initiative and fought back to live life on their own terms.
- One of the features of the cases undertaken or studied was the incompatibility of the spouses which actually gave rise to marital conflict that culminated into perpetration of violence in physical, sexual, emotional and economic forms. The incompatibility among spouses was because of socio-economic backgrounds, the ego problem, high expectations / aspirations as well as lack of tolerance which was found mainly in the urban areas. Among many problems, dowry was seen as deep-rooted problem in the study, faced domestic violence because of dowry demands by in-law's family. This forced the bride to face continuous harassment and torture by husband and his family for not bringing home the amount of demanded dowry.
- Husband's alcoholism and drug addiction was seen as one of the most important contributing factors for domestic violence in the study. In rural areas and in urban areas many of them were found who faced domestic violence because of

alcoholism. In the study the addiction of alcohol and drugs has been seen having two-way relationships with poverty. They were both the cause and effect of the poverty and seen in further deepening the frustration because of lack of work and loss of livelihood.

- Another important cause for domestic violence in the form of emotional abuse revealed in the study was found in both rural and urban areas in the form of misbehavior by the husband just because the women were not good in doing household chores like cooking, cleaning, washing and not taking proper care of the in-law's family.
- Area and the social categories have not revealed much difference. It was found in the study that domestic violence was reported across all ages, castes, classes, religions, income, educational levels and regions (rural or urban). There was not much variation between urban and rural areas regarding the incidences of the domestic violence however a prominent difference which was seen was that in rural areas domestic violence was more in families with low-income group in the form of wife beating and use of alcoholism.
- In general, it is assumed that mother-in-law usually play main role in inflicting violence against daughter-in-law. In confirmation to this traditional stereotype statement, it was found in the study that after husband the mother-in-law was the contributory factor in perpetuating domestic violence against the respondents.
- It is generally believed that women living in extended and joint families are required to make adjustments with a large number of family members as compared with those living in nuclear families. The study undertaken revealed that there was not much difference in prevalence of domestic abuse in this context. Whether the family was joint or nuclear the domestic violence was found in both types of families, irrespective of more or less family members. However, in joint families the mother-in-law and other family members

exercised more direct control on the women, consequently there were more restrictions and much more work in the joint families.

- Another factor for the domestic violence against the respondent was the extramarital affair of the husbands which was found to be more in urban areas as compared to the rural areas. The role of technology like Face book and WhatsApp has been seen as the contributing factor for domestic violence, as it created lot of suspicion and insecurity among the couples.
- The first and foremost resort of the affected victims of the domestic violence is usually the natal family. It was also found in the study that the total respondents took the shelter at their parent's house after being abused. This was followed by relatives, friends and neighbors' homes. There were few respondents (urban areas only) who were living independently on rented houses. The cases of using shelter or short stay homes run either by government or by some private agencies were nil.
- Domestic Violence also includes placing a woman in fear of imminent serious bodily harm by threat or force. In the study it was revealed that the respondents faced mental torture in the form of sarcastic remarks, ignorance and severe restrictions which ultimately developed sense of hatred for their own self.
- The respondents especially from rural areas revealed that they faced physical violence in the form of beating, slapping, punching etc. which gave them visible injuries on their bodies requiring medical treatment. The respondents revealed that the physical and mental abuse led to various ill effects on their body and mind leading to various health problems like hypertension, diabetes, depression and stress.
- The majority of the affected women i.e., many of remained in abusive married relationship firstly because of the children and their future, secondly because of the lack of support source and thirdly because of poor and unsupportive parents

and lastly, because they took it as social stigma/ shame and had a hope that this type of relationship would become better and peaceful in future.

- It was found that most of the respondents were totally unaware of the PWDV Act 2005. In the urban areas the respondents were aware of the Act while in the rural areas all of the respondents were ignorant about the Act and few were of the view that if there is any such law it is not for people like them as they were totally illiterate and ignorant. A few of them who have heard seem to be ignorant about its usage and its implementation.
- It was found in the study that the respondents were forced to go to Women Cell or police station and register their cases due to the cruelty by the husband /in-law's family. However, on the other hand there were cases where the reason for the domestic violence was on petty issues which could be solved through mutual understanding and reconciliation.

### **5.3 Suggestions**

To curb the problem of Domestic Violence various measures or remedial actions are required:

- It is very important to generate awareness among women especially poor and illiterate regarding the provision of various rights and legal safeguard measures provided under various Acts.
- There should be proper implementation of the Act in reality as mere enactment of Act would not help to fight domestic violence.
- Appointment of Protection officers to be made (preferably women) so that the victims get the real person to approach to lodge the complaint of domestic violence.

- Other agencies like shelter or short stay homes and separate medical facility for the victim of domestic violence.
- Structural changes are required to fight against the menace of domestic violence. Women and men should be sensitized equally to be as equals in the society.
- Social attitudinal changes are much required to consider both sexes as equals, and socialization right from the beginning be done so that both sexes grow as equals.
- In the study it was found that after the husband, it was mother-in-law who was instigator of violence against the daughter-in-law, so attitude towards women needs to be changed.
- There is a need to make people aware regarding dowry and its menace. They should be sensitized not to give or take dowry as it was seen that in many cases women were seen suffering in silence for dowry violence against them.
- Media, both print and electronic should seriously play important role highlighting the issues pertaining to violence against women and also educate women regarding their legal rights.
- One more Women Cell along with women police stations to be made to cater to the needs of large number of people facing domestic violence.
- The programme which propagates discriminatory and oppressive attitude towards women in media like T.V., Face book, and other electronic media should be discouraged.
- Proper Counseling Centers should be established to decrease the rate of divorce. There should focus be on counseling of men. The centers should try to reconcile the spouses so that their homes can be protected which will definitely reduce the number of broken families.

- Women should be made aware and fight against the old tradition, customs and beliefs that are making their life burdensome due conservative thinking.
- The focus should not be on relief measures only but on structural changes which would empower women and help them to shun learned helplessness and hence make them less vulnerable to violence. These include education, good job and enough property in their name.
- The PWDV Act 2005/2010 should be centrally sponsored so that it can be implemented whole heartedly by various States.

Proper training and appointment of various agencies provided under the Act should be made for better results.

Thus, we can conclude that there is ever increasing trend of domestic violence taking new forms. The incidents of domestic violence against women have been observed in rural as well as in urban areas, at all educational levels, in every economic class, in different age groups and in different forms despite the available provisions to protect and safeguard the rights of women. The situation could improve when the relationship between the sexes is seen essentially complimentary and of equality.

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