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ON THE TOPIC  
**DOMESTIC VIOLENCE: AN ANALYSIS OF EXISTING  
LEGISLATIVE MEASURES**

Under the Guidance and Supervision of  
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## **CERTIFICATE**

This is to certify that **ASHIMA P. A.**, Reg. No: LM 0117010 has submitted her Dissertation titled, “**DOMESTIC VIOLENCE: AN ANALYSIS OF EXISTING LEGISLATIVE MEASURES**” in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitution and Administrative Law to The National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by her is original, bona-fide and genuine.

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## DECLARATION

I declare that this dissertation titled, “**DOMESTIC VIOLENCE: AN ANALYSIS OF EXISTING LEGISLATIVE MEASURES**”, researched and submitted by me to The National University of Advanced Legal Studies in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitution and Administrative Law, under the guidance and supervision of **Dr. Sheeba S. Dhar** is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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## ABBREVIATIONS

|          |  |
|----------|--|
| AIR      | All India Reporter   |
| Art.     | Article  |
| Cal      | Calcutta   |
| Cl.      | Clause   |
| CPC      | Civil Procedure Code   |
| Cri.L.J. | Criminal Law Journal   |
| Cr.P.C   | Criminal Procedure Code  |
| CSW      | Commission on the Status of Women  |
| ECOSOC   | Economic and Social Council  |
| ed.      | Edition  |
| eg.      | Example  |
| etc.     | Etcetera   |
| Guj      | Gujarat  |
| HC       | High Court   |
| ICCPR    | International Covenant on Civil and Political Rights                       |
| ICESCR   | International Covenant on Economic, Social and Cultural Rights             |
| ILR      | Indian Law Report  |
| IPC      | Indian Penal Code  |
| J&K      | Jammu And Kashmir  |
| Ker      | Kerala   |
| LCRWI    | Lawyers Collective Women's Rights Initiative                               |
| Mad      | Madras   |
| P & H    | Punjab And Haryana   |
| PCPNDT   | The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex |

|            |   |
|------------|---|
|            | Selection) Act  |
| PWDV       | Protection of Women against Domestic Violence Act, 2005 |
| PWDV Rules | Protection of Women from Domestic Violence Rules        |
| SC         | Supreme Court   |
| SCC        | Supreme Court Cases                                     |
| SCR        | Supreme Court Report                                    |
| Sec        | Section   |
| Supra      | Above   |
| UDHR       | Universal Declaration of Human Rights                   |

# **Chapter 1**

## **Introduction**

Violence generally refers to those actions or behavior which cause destruction, pain or suffering on someone or something. Violence against women is a technical term used to mean, collectively, the violent acts that are committed particularly against women. It is one of the most prevalent forms of grave human rights violation, and stands as an obstacle to the achievement of the objectives of equality, development and peace<sup>1</sup>, by denying women, their equality, security, dignity and also their rights to enjoy fundamental freedoms. This is present in every country, cutting across boundaries of culture, age, income, education etc.

Kofi Annan, former Secretary-General of the United Nations, says:

*“Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace.”*<sup>2</sup>

The incidence of violence against women has been increasing over the years. It can be considered as a deep rooted social sickness. We come across so many incidents which occur basically against women. In India, where half the population is women, they have always been ill treated and deprived of their rights. Increasing incidents of violence against women like rape, exploitation, bride burning, feoticide, dowry deaths, wife beating etc. are all indicative of the shameful and depressed condition of women in Indian society. They have been victims of torture, abuse, and humiliation for ages.

The global campaign intended to eradicate violence against women in the recent years points out the extremity of the wrongs and atrocities committed against women. The United Nations General Assembly defines the term violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or

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<sup>1</sup> Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, A/CONF.177/20 (Sep. 1995).

<sup>2</sup> UN Women, (2000), <http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm> (last visited Jan.05, 2018).

psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>3</sup> This definition refers to the gender based roots of violence and recognizes it as one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.<sup>4</sup> The Declaration specifies that it is a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women.<sup>5</sup> This definition is much broader so as to encompass physical, sexual and psychological abuse or harm done towards women in the family, community or perpetrated or condoned by the State where it occurs.<sup>6</sup> Thus it includes acts both in private and public life.

This definition given by the U.N. Declaration on the Elimination of Violence against Women was expanded in 1995 Beijing Platform for Action, by including forced sterilization, forced abortion, coerced and forced use of contraceptives, prenatal sex selection and female infanticide as acts of violence.

World Bank estimates violence against women as a serious health issue which causes ill health more than traffic accidents and malaria combined. They consider it as serious a cause of death and incapacity among women of reproductive age as cancer.<sup>7</sup>

Generally, violence against women may take place within the family, or within the general community. Of all human groups, family is the most important primary group. It is the foundation of all social life and plays significant role in social strength and social solidarity. A family results from the physiological union of two married persons who create the other members of the unit. The World Population Plan of Action recognises family as the basic unit of society. It recommends that family should be protected by appropriate legislation and policy, and suggests introduction of national legislation having direct bearing on the welfare of the family and its

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<sup>3</sup> A/RES/48/104, Declaration on the Elimination of Violence against Women art.1 (1993).

<sup>4</sup> *Id.* Preamble.

<sup>5</sup> *Id.*

<sup>6</sup> A/RES/48/104, DEVAW art.2.(1993).

<sup>7</sup> Caren Grown, *Indicators and Indexes of Gender Inequality: What Do They Measure and What Do They Miss?*, in *EQUALITY FOR WOMEN WHERE DO WE STAND ON MILLENNIUM DEVELOPMENT GOAL 3?* 93 (MAYRA BUVINIC ET AL., 2008).

members. It proposed that family ties should be strengthened by giving recognition to the importance of love and mutual respect within the family unit.

In order to improve the overall quality of life, men and women should be given equal status both in the family and in society.<sup>8</sup> A woman who gives birth and nurtures life, who channels tradition and preserves culture, is the foundation stone of a family. India, being a patriarchal society<sup>9</sup>, imposes grave injustice to her. There is a bias towards men, mainly in marital relationships. The traditional Indian society considers him as superior in matrimonial relationships. It is only recently law recognized that men and women have equal rights and women began to assert their rights and.<sup>10</sup> But it is inappropriate to think that some of the practices have disappeared from our society.<sup>11</sup> Many times, they are subjected to physical and psychological harassment, as a result of which they are unable to take their own decisions, voice their opinions or protect themselves and their children for fear of further consequences. She is often in great danger in the place where she should be the safest, i.e. within her family. The home which should be the safer place for a woman has become a place where she faces a regime of terror and violence at the hands of somebody close to her, or somebody should be able to trust. Sometimes, even their basic human rights are denied irrespective of their economic status, religion and caste.

Domestic Violence or intimate partner violence is one of the most common forms of violence against women. This is a specifically recognized human rights issue and an issue of international concern, since it is considered as a fundamental violation of women's human rights. Many of the International and regional agreements call for laws and awareness raising programmes as well as services available to women.<sup>12</sup> In India it is deeply rooted in the patriarchal outlook about gender relations. This is also

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<sup>8</sup> World Population Conference, *World Population Plan of Action* (1974).

<sup>9</sup> "Patriarchal societies propagate the ideology of motherhood which restrict women's mobility and burdens them with the responsibilities to nurture and rear children. The biological factor to bear children is linked to the social position of women's responsibilities of motherhood: nurturing, educating and raising children by devoting themselves to family. Man is considered the head of the family and controls women's sexuality, labour or production, reproduction and mobility." See: SURANJITA RAY, UNDERSTANDING PATRIARCHY 2 & 16 (2006), [http://www.du.ac.in/fileadmin/DU/Academics/course\\_material/hrge\\_06.pdf](http://www.du.ac.in/fileadmin/DU/Academics/course_material/hrge_06.pdf) (last visited Jan. 16, 2018)

<sup>10</sup> Dr. Kamlesh Tayal, *Gender Law and Politics*, 1 B.S.L.J. 28 (2014).

<sup>11</sup> Romana Asmat & Sidra Mehboob, *Human Rights and Gender Justice*, 6 V.L.J. 181 (2016).

<sup>12</sup> ROXANNA CARRILLO ET AL., NOT A MINUTE MORE: ENDING VIOLENCE AGAINST WOMEN 6 (2003), <https://www.un.org/ruleoflaw/blog/document/not-a-minute-more-ending-violence-against-women/> (last visited Jan 16, 2018)

viewed as an important public health problem in current period. Martha Albertson Fineman made it clear that “domestic violence implies the incidents of familial or intimate battering having reference to an idealized family unit functioning in a protected and secluded manner, appropriately shielded from the public”.<sup>13</sup> “Battering” is when violence occurs frequently in the same relationship. Therefore, abusing repeatedly a woman in a family relationship will amount to domestic violence. In many instances, physical abuse accompanies psychological abuse as well as sexual abuse. Some of these abusive relationships lead to killing of women by their partners or relatives. Researchers say that these kinds of murders in USA are usually committed with guns than with other types of weapons.<sup>14</sup> But in India, death by fire and beating are more general, rather than death by gun.<sup>15</sup> Reports show that one out of five deaths among women occurred during mid 1980’s in Greater Bombay were regarded as ‘accidental burns’.<sup>16</sup> The public health officials in India doubted it as actual murder of women.<sup>17</sup>

In traditional societies, Women are considered as inferior to men and are dominated by them even through the use of force. Husbands are supposed to ‘own’ women. In most of the cultural settings, women are assumed to respect and obey their husbands and expected to take care of their children. If she fails to perform her role, husband has the right to beat or inflict physical harms on her.<sup>18</sup> In such societies a woman is believed to commit disgrace on family if she cause damage to her sexual purity, may it through rape or through voluntarily engaging in sex with someone other than her spouse. Some of those societies also practice ‘honour killings’ in order to retain their family honour.

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<sup>13</sup> M A Fineman, *Preface to M A FINEMAN & R MYKITIUK, THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE*, at xvii (1994).

<sup>14</sup> Violence Policy Center, *When Men Murder Women: An Analysis Of 1996 Homicide Data* (2000) <http://www.vpc.org/publications/when-men-murder-women-an-analysis-of-1996-homicide-data/> (Feb. 16, 2018).

<sup>15</sup> Etienne G. Krug et al., *WORLD REPORT ON VIOLENCE AND HEALTH*, WORLD HEALTH ORGANIZATION [WHO], (2002), [http://apps.who.int/iris/bitstream/10665/42495/1/9241545615\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf).

<sup>16</sup> Malini Karkal, *How the other half dies in Bombay*, 20 E.P.W. 1424 (1985).

<sup>17</sup> WHO, *supra* note 15.

<sup>18</sup> Shireen J. Jejeebhoy, *Wife-Beating in Rural India: A Husband's Right? Evidence from Survey Data*, 33 E.P.W. 855-862 (1998).

Many of the communities excuse and approve these practices tacitly through their cultural, social and religious customs and norms.<sup>19</sup> Neighbours, friends, authorities and even police hesitate to intervene in the cases of abuse since they often consider it as a very private domain.<sup>20</sup> Even women themselves are reluctant to raise and report the issues relating to these abuses.<sup>21</sup> It is often seen that societies differentiates the reasons and levels of abuses practiced by men. They distinguish between just and unjust reasons and also between acceptable and unacceptable levels of abuse. Other people will interfere into the matter only when a man pass beyond the rights granted by the communities to inflict physical abuse on woman.<sup>22</sup>

According to the National Crime Records Bureau data 2015 even though there was a slight dip in the incidence of crimes against women generally, there was an increase of 8.2% (from 426 cases in 2014 to 461 cases in 2015) in the incidence of domestic violence during 2015 over 2014. However, as per 2016 data there is an inconsiderable decrease in the domestic violence cases (437 cases), while the crime rate standstill.<sup>23</sup>

World Report on Violence and Health<sup>24</sup> says children who witness these kinds of violences between adults are highly affected. It may result in a whole range of emotional and behavioural problems, including anxiety, depression, poor school performance, low self-esteem, disobedience, nightmares and physical health complaints. Exposure to violence in the home will lead them to be aggressive and antisocial in adulthood.<sup>25</sup>

The issue of domestic violence was outside the domain of law. It was only recognized in different matrimonial laws where cruelty is a valid ground for divorce but there is no provision of immediate relief to stop the violence in the family. In 1983, violence against married woman was recognized as a specific criminal offence

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<sup>19</sup> Commented by Ms. Mary Wandia, Africa Women's Rights Coordinator for the Non-Governmental Action Aid International, See *infra* note 20.

<sup>20</sup> Mary Kimani, *Taking on Violence Against Women in Africa, International Norms, Local Activism Start to Alter Laws, Attitudes*, 21 *Africa Renewal* 4 (2007) <http://www.un.org/en/africarenewal/vol21no2/212-violence-against-women.html>

<sup>21</sup> *Id.*

<sup>22</sup> WHO, *supra* note 15.

<sup>23</sup> NATIONAL CRIME RECORDS BUREAU, *CRIME IN INDIA 2016*, (2017), <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>

<sup>24</sup> WHO, *supra* note 15.

<sup>25</sup> *Id.*



by the introduction of section 498-A into the Indian Penal Code. It intended to protect a married woman from being subjected to cruelty by the husband or his relatives. Inflicting physical or mental harm as well as harassment for dowry will fall within the ambit of this provision. The offence under this section is cognizable, non compoundable and non bailable. This provision along with Sections 304 B and 306 was the only weapon which woman had for fighting cruelty against her. Apparently, these provisions were misused and a new comprehensive Act, which can be considered as an extension of these provisions, got enacted. The enactment of Protection of Women from Domestic Violence Act, 2005, may be considered as major move in addressing the issue of domestic violence. It recognizes for the first time the occurrence of continual violence within the home, which may go beyond mere physical abuse, in such detail and seeks to rectify it. Though this law essentially strives to give protection to the wife or living in a relationship in the nature of marriage from domestic violence, it also extends protection to other women living in a household like sisters, mother or widows. Thus the Act includes relations of consanguinity, marriage, or through relationships in the nature of marriage, adoption, or joint family.

Still, a numerous number of violent practices occur against women in the form of harassment, exploitation, bride burning, female foeticide and infanticide, sexually exploiting, abusing and many other forms. We all are very exposed to more and more reports of sexual harassment and domestic violence which frequently lead to suicide and murder.

### **Research problem**

Over the past several decades, the government has taken steps to prevent and respond to domestic violence through legislative and non-legislative measures. Laws do much to discourage domestic violence by criminalizing such violence as well as by providing civil remedies for the victims. Still, women continue to be re victimized and many of the perpetrators appear to flout the law with impunity.

### **Objectives**

- To study elaborately the existing law to prevent violence against women at home

- To identify the forms and extent of violence against women living in a domestic relationship
- To examine how far the State takes steps to settle the matters effectively
- To evaluate the existing situation of the Kerala State mechanisms for implementing PWDV Act, 2005
- To make suggestions for suitable changes

### **Research questions**

- Whether the existing law is adequate enough to protect women from domestic violence?
- How far the state takes steps to settle the matters effectively?

### **Hypothesis**

- State machineries fail, at various fronts, in the attempt to implement the PWDV Act.

### **Methodology**

- The study was essentially doctrinal and analytical in nature. The empirical data was also collected for the research and it was limited to State of Kerala where the RTI applications were administered. The respondents targeted for collection of empirical data were Social Justice Department of the Kerala Government, Kerala State Social Welfare Board, Protection Officers, Service Providers, Counseling Centres and Shelter Homes.
- The relevant material is collected from primary and secondary sources.

### **Literature review**

A review of the literature on the history and evolution of the Protection of Women from Domestic Violence Act, 2005 was undertaken. Pre-2005 scenario regarding the legal protection against domestic violence in India was analysed and a study related to the various support services installed by the Government of Kerala was also done.

This will cover books, journals, articles published in various online sources and newspapers and also reports by various committees and organizations. Furthermore, several statutes, especially which are women specific were analyzed in detail. Articles and relevant cases utilised were found mostly from online databases like lexisnexis, heinonline, indian kanoon, manupatra, scc online, westlaw etc. using the keywords such as “domestic violence”, “intimate partner violence”, “women empowerment” etc. A review of the views of the constitution makers as expressed in the Constituent Assembly regarding the protection of women was also conducted

### **Scope and limitations of the Study**

Focus of the study is essentially on the implementation of the Protection of Women from Domestic Violence Act, 2005 in the State of Kerala. The study intends to examine how far the State of Kerala takes steps to implement the Act effectively. To achieve this, information is also sought through filing application under Right to Information Act, 2005 from the State established machineries for dealing with matters related to Domestic violence. Geographically, the collection of information extends to the districts of Kerala. Since all districts have one protection officer each, everyone is included in study. From the available list<sup>26</sup> of 92 Service Providing Centres, 41 Counselling Centres and 14 Shelter Homes samples were taken using stratified sampling technique.

Information is gathered from those selected samples with regard to their working and also the cases filed under the Act. This is to know about the measures adopted by the State for the effective working of functionaries and about their present working status. This indicates the responsiveness of the government with regards to the issues of domestic violence. Even though the study is geographically limited as it concentrates only on Kerala, the information sought will help to spot the lacunae in the implementation of the law and thus induce to better working and service of the machineries. At the same time, there are also some other constraints on the study. Since some of the institutions did not respond to the RTI application filed, there is a slight shortfall in data needed. Resort to appellate authorities is not possible in the present scenario as the study is strictly time bound. It is also found that some of the functionaries are currently inoperative.

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<sup>26</sup> <http://www.swb.kerala.gov.in/>

In short, keeping these limitations in mind, this research study attempts to review the existing legal remedies to combat the problem of domestic violence, the changed situation with the advent of the new Act on domestic violence and to enquire upon as to what extent the State Government has taken steps to implement the Act.

### **Scheme of Chapters**

The current study has been arranged orderly in six chapters including introduction. The first chapter introduces the subject and the research methodology adopted to conduct the research. It also includes the statement of problem, objectives of the study, hypothesis and also the scope and limitations of the study.

The second chapter is titled, “Protection of Women – Constitutional Perspective”. As the title says the chapter deals with protection available to women under the Constitution of India. Preamble to the Constitution, fundamental rights, including equality of the sexes and also preferential treatment of women are discussed. Directive Principles of State Policy containing a great deal of directives requiring the States to take measures for protection of women and for betterment of their status are also discussed. Fundamental duties to be followed by citizens of India are not left unattended. Issue of violence and discrimination against women existed in political arena has been pointed out and the headway towards strengthening women’s involvement in Indian democratic process was done through the 73rd and 74th Amendment Acts are also detailed. In addition to this, discussion of human rights of women recognised through various international instruments, treaties etc are also included to give a finish to the chapter.

Third chapter named “Evaluation of pre 2005 legal framework on domestic violence” extends the study to the legislative measures existed to protect the victims of domestic violence prior to the enactment of the PWDV Act, 2005. To get a proper picture of the situation of women at home, before and after the passing of the 2005 Act, the framework of civil and criminal remedies which were available prior to 2005 are analyzed and the differences are perceived.

The fourth chapter is titled as “The Protection of Women from Domestic Violence Act, 2005 – An Analysis”. Events which led to the enactment of the legislation are discussed firstly. After that the aims and objectives of the Act are examined. Analysis

of the Act included definition of the term domestic violence, concepts of domestic relationship, shared household etc. After that a detailed study of the machineries for implementation of the law and the reliefs available thereunder are done. Procedure for obtaining reliefs under the Act forms the last part of the chapter. Important judicial interpretations with respect to the provisions are also analysed elaborately.

Chapter five constitutes the implementation part. It is titled as “Effectiveness of State Mechanisms to Implement the Act”. The chapter fundamentally deals with the existing State mechanisms to implement the law. Starting with the duties of Government stipulated under the Act, the chapter goes through the various support services which the Kerala Government has been constituted for the helping women as well as for the implementation. Inferences drawn from the analysis of the mechanisms are also included in the same chapter.

Chapter six is “Conclusion and Suggestions” which is the last chapter of the work. Wholesome conclusion of the main study is incorporated in the chapter. This is followed by various suggestions for improvement in the implementation of the law.

## Chapter 2

### Protection of Women – Constitutional Perspective

India is a democratic country with written Constitution. Democracy is a participatory arrangement where every individual is a citizen. He or she is not a spectator but a citizen who has role to play in the development of nation.

According to Wade and Philips, a Constitution is the basic document of a country having a special legal sanctity that sets the framework and the principal functions of the organs of the Government of a State and declares the principles governing the operation of these organs. It aims at creating legal norms, social philosophy and economic values which are to be affected by striking synthesis, harmony and fundamental adjustment between individual rights and social interest to achieve the desired community goals.<sup>27</sup>

The Constitution of India was enacted and adopted around the same period the Universal Declaration of Human Rights was drafted.<sup>28</sup> The framers of the Indian Constitution were highly influenced by it, which finally resulted in the incorporation of most of the human rights contained in the UDHR. Through its Preamble, the Indian Constitution promises to secure every citizen justice – social, economic and political. It accords everyone liberty of thoughts, expression of belief, faith and worship and guarantees equality of opportunity and equal status to men and women.

The Constitution of India has given attention to the general rights of women as individuals and citizens of the country. Their participation in the development of the country has been ensured through the provisions of Fundamental Rights and Directive principles of the State Policy. Part III of the Indian Constitution, including Articles 12 to 35, which is considered as the heart of the Constitution, deals with Fundamental Rights, which comprises of natural basic human rights. These rights are justiciable and are equally available to women as they are available to men. Main characteristic of Part III rights is that, it can be suspended only in the manner prescribed by the Constitution.

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<sup>27</sup> MOHAMMAD SHABBIR, AMBEDKAR ON LAW, CONSTITUTION AND SOCIAL JUSTICE 227 (2005)

<sup>28</sup> The Constitution of India was enacted in 1949 and UDHR was in 1948

Women are naturally a weaker sex was first recognized by US Supreme Court in a celebrated 1908 decision of *Muller v. Oregon*<sup>29</sup>. In this case, the US Supreme Court stated that “the women’s physical structure and performance of maternal functions places her at a disadvantage for subsistence is obvious. History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength and this control in various forms, with diminishing intensity, has continued to the present. Education was long denied to her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even that and consequent increase of capacity for business affairs it is still true that in the struggle for subsistence, she is not an equal competitor with her brother. She will still be where some legislation to protect her seems necessary to secure a real equality or right”.

In simple words, women are at a disadvantaged position in the society mainly due to their physical structure and performance of maternal functions. In order to bring them on the same level as men, there is a need for special provisions being made for them. Based on this decision the courts upheld the state laws as necessary for the protection of the female happiness of the home and the progress of the commonweal.<sup>30</sup> The Indian constitution drafters realized this fact and incorporated special provisions to lift up the condition of women with an aim to give them a fair and equal chance in the society.

In *Valsamma Paul v. Cochin University*<sup>31</sup>, it was held by the Supreme Court that human rights are derived from the dignity and worth inherent in human beings. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights and they are independent and have mutual reinforcement. The human rights of women including girl child are therefore an inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedom of women and their equal participation in political, social, economic and cultural life are concomitants for national development, social and family stability, and growth - culturally, socially and

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<sup>29</sup> 208 U.S. 412 (1908)

<sup>30</sup> MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN (3rd ed. 2012)

<sup>31</sup> (1996) 3 SCC 545

economically. All forms of discrimination on grounds of gender are violative of fundamental freedom and human rights.

Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, played an important role in shaping special provisions for the protection and upliftment of the status of women in India. He spoke out loudly against the issues of women and advocated for their equality. He declared that “I strongly believe in the movements run by women. If they are truly taken into confidence, they may change the present picture of society which is very miserable. In past, they have played a significant role in improving the condition of weaker section and classes”.<sup>32</sup> Dr. Ambedkar was very much concerned about maintaining the dignity of women. His efforts ended up with the inclusion of special provisions apart from the general provisions that are applicable to both men and women in the Constitution of India.

Along with him, many other eminent personalities like Dr. Rajendra Prasad and Pandit Jawaharlal Nehru also argued for women’s rights and for their protection.<sup>33</sup> Thus the framers of the Constitution were conscious about the intensity of problems of setting women free from economic, social or political restrictions. They realised the need for drafting a Constitution that protects the rights of weaker and vulnerable sections of society and to provide additional safeguards in order to bring them to the mainstreams. Accordingly, they framed the Constitution that provides not only equality of the sexes but also preferential treatment /special status to women to make up for the backwardness they have been experiencing for long.

### **Constitution of India and Rights of Women**

The opening words of the Preamble give the source from which the Constitution comes or derives its power. It starts by saying ‘we, the people of India’, therefore making it clear that it is the people who have given to themselves the Indian Constitution. In short, the source of authority in India is the people and not the State or any section of society. As it is derived from the people, no political party or section of the people can challenge it. Thus, it is the people of India, who solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic. The word

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<sup>32</sup> Dr. M.R.Singariya, *Dr. B R Ambedkar and Women Empowerment in India*, 2 J.R.H.S.S. 2 (2014).

<sup>33</sup> Ankita Chakraborty, *Gender Justice Under Indian Constitution*, 2 I.J.L.D.A.I. 15 (2016).



“socialist” aims at eliminating inequality in income, status and standards of life. It was held in the case of *Samatha v. State of Andhra Pradesh*<sup>34</sup> thus the framers of the Constitution were conscious about the intensity of problems of setting women free from economic, social or political restrictions. They realised the need for drafting a Constitution that protects the rights of weaker and vulnerable sections of society and to provide additional safeguards in order to bring them to the mainstreams sections of the society in a secular integrated Bharat, with dignity of persons and equality of status to all.<sup>35</sup>

Among other things, the Preamble promises to secure every citizen, social, economic and political justice. The concept of social justice is a dynamic device to mitigate the sufferings of the poor, weak and deprived sections of the society and to elevate them to the level of equality, to live a life with dignity of person.<sup>36</sup> It ensures the elimination of all forms of inequalities which may result from inequality in wealth, status, religion, caste, sex, race etc. Economic justice should be understood as a corollary to social justice. It demands that there should be no discrimination between man and man, on the basis of economic values. This concept demands a socialist pattern of society. Finally, political justice demands free and fair participation of the people in the political life of the country. The concept disallows unnecessary distinction between men and women in political matters. The provision in itself involves universal adult suffrage.

Another main objective of the Preamble to the Constitution of India is to secure all citizens equality. It is not equality generally, but equality of status and of opportunity. The source of the Constitution is traced to the people, irrespective of their caste, sex, race, religion etc. It clearly states that everyone should be equal in terms of status and everyone should be given equal opportunities. Unless and until the people are given equal opportunity to enjoy their rights, the documental disposition of those rights is pointless. In *Indira Sawhney v. Union of India*<sup>37</sup>, it was held that the trinity of the goals of the Constitution, viz. Socialism, secularism and democracy cannot be realized unless all sections of society participate in the State power equally,

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<sup>34</sup> (1997) 8 SCC 191: AIR 1997 SC 3297

<sup>35</sup> *Id.* ¶ 79

<sup>36</sup> *Consumer Education & Research Centre v. Union Of India & Others*, 1995 AIR 922, 1995 SCC (3) 42

<sup>37</sup> 1992 Supp (3) SCC 217: AIR 1993 SC 477

irrespective of their caste, community, race, religion and sex and all discrimination in the sharing of the state power made on those grounds, are eliminated by positive measures. Inequality ill-favours fraternity, which is also an objective of the Preamble, and unity, remains a dream without fraternity.

The Preamble talks about the dignified life of an individual and this dignity should be safeguarded through ensuring fundamental rights to the individuals. P. N. Bhagwati J.<sup>38</sup> says “fundamental rights represent the basic values cherished by the people of this country since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent”. These fundamental rights are essentially human rights to which every man and woman is entitled. The Constitution makers were aware of the fact that women are subjected to discrimination and unequal treatment from time immemorial. Consequently they incorporated several provisions which are primarily intended to elevate the status of women in the society.

### **Fundamental Rights and Women**

Equality being one of the magnificent cornerstones of Indian democracy<sup>39</sup> has been guaranteed in Articles 14-18 of the Constitution. It directs that women shall not only have equal rights and privileges with men but also that the state shall make provisions both general and special for the welfare of women. The doctrine of equality before law is a necessary effect of ‘Rule of Law’ which pervades the Indian Constitution.<sup>40</sup> the concept of equality and right to equality is declared by the SC to be the basic structure of the Constitution and any treatment of equals unequally and unequal as equals will be violation of it.<sup>41</sup>

Article 14<sup>42</sup> incorporates the principle of equality before law and prohibits unreasonable discrimination between persons. According to these provisions, women are quite equal with men in all fields of administration, judiciary or defence whatsoever. Equality secured under Article 14 is subject to certain reasonable

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<sup>38</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597

<sup>39</sup> *Indra Sawhney v. Union Of India And Others*, AIR 1993 SC 477, 1992 Supp 2 SCR 454

<sup>40</sup> *Ashutosh Gupta v. State Of Rajasthan & Ors*, AIR 2002 SC 1533

<sup>41</sup> MP JAIN, *INDIAN CONSTITUTIONAL LAW* (6th ed. 2010)

<sup>42</sup> INDIA CONST. art. 14 - Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

exceptions. That means, it is subject to reasonable classification<sup>43</sup>, because absolute equality might lead to inequality.<sup>44</sup> However, classification based on sex is not permissible.<sup>45</sup>

While Article 14 holds within its sphere general principles of equality, Article 15 provides specific application of this rule. Article 15 expands the scope of Article 14 by giving a clear direction to the State and its instrumentalities against discrimination on grounds of religion, race, sex, caste, or place of birth or any of them, and also it prohibits the citizens from making discrimination with regard to access or use of public places on grounds only of religion, race caste, sex, or place of birth or any of them. Therefore, all the laws should be applied to both sexes without any discrimination on the ground of gender. A law under which a female proprietress is deprived of the right to hold and enjoy her property merely on the ground of sex was held by the SC to be violative of Article 15.<sup>46</sup>

There is a specific provision in Article 15 (3), which empowers the State to make “any special provision for women and children”, even in violation of the fundamental obligation of non-discrimination among citizens, inter alia on the ground of sex. This can be in the form of either affirmative action or reservation.<sup>47</sup> Provisions for reservation of seats for women in local bodies or in educational institutions are valid.<sup>48</sup> The Supreme Court in *Government of Andhra Pradesh v. P. B. Vijay Kumar*<sup>49</sup> has lucidly explained the purpose of this clause, that “the insertion of clause (3) of Article 15. In relation to women is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men

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<sup>43</sup> The classification in order to be constitutional must always rest upon real and substantial distinction bearing a reasonable and just relation to things in respect to which classification is made. See: *Chiranjit Lal Chowdhuri v. Union of India & Ors*, 1951 AIR 41, 1950 SCR 869

<sup>44</sup> *Kedar Nath Bajoria v. State of West Bengal*, AIR 1953 SC 404; 1954 SCR 30

<sup>45</sup> *Chitra Ghosh v. Union of India*, AIR 1970 SC 35

<sup>46</sup> *Mrs. A. Cracknell v. State of Uttar Pradesh & Ors.*, AIR 1952 All 746

<sup>47</sup> *Government of Andhra Pradesh v. P. B. Vijay Kumar*, AIR 1995 SC 1648

<sup>48</sup> *Dattatraya Motiram v. State of Bombay*, AIR 1953 Bom 311; *P. Sagar v. State of A. P.* , AIR 1968 AP 165

<sup>49</sup> AIR 1995 SC 1648

and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women”.

Article 16 is a specific application of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article 15(1) with respect to the opportunity for employment or appointment to any office under the State. The right is given to all citizens irrespective of gender. It is not a right to public employment as such; rather it is only a right to be considered for public employment.

Article 16(2) prohibits discrimination and, thus, assured the effective enforcement of fundamental rights guaranteed under Article 16(1).<sup>50</sup> It lays down specific grounds such as, religion, race, caste, sex, descent, place of birth, residence or any of them, on which citizens are not to be discriminated against each other in matters of opportunity and offices under the State. Discrimination on the basis of sex has been specifically prohibited so as to bring women at par with men. Sex shall not be the sole ground of ineligibility for any post.

The Indian Judiciary’s approach in dealing with the matters relating to equality or women favouring legislations was not uniform earlier. They followed a differential analysis in grouping men and women. Gradually, in cases like *Air India v. Nargesh Meerza*<sup>51</sup> and *C.B Muthamma v. Union of India*<sup>52</sup>, this approach was overlooked and paved the way for ensuring gender justice. Since then, the Supreme Court of India has always been the champion in maintaining and elaborating the concept of equality. Unfavourable discrimination against women was struck down by the Supreme Court of India from time to time. If some disability is attached, for being of fair sex, will amounts to hostile discrimination against women violative of Article 14 of the Constitution of India. This will equally apply to pregnant woman because pregnancy is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. The decision of *Air India v. Nargesh Meerza*<sup>53</sup> was on this point. The Apex Court<sup>54</sup> was of the opinion that a woman shall not be denied employment merely on the ground that she is a woman. Also the rules,

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<sup>50</sup> *General Manager, Southern Railway v. Rangachari*, AIR 1969 SC 36

<sup>51</sup> 1981 AIR 1829, 1982 SCR (1) 438

<sup>52</sup> 1979 AIR 1868, 1980 SCR (1) 668

<sup>53</sup> 1981 AIR 1829, 1982 SCR (1) 438

<sup>54</sup> *Air India v. Nargesh Meerza*, 1981 AIR 1829, 1982 SCR (1) 438

which express a hangover of masculine culture, created as an attempt to dominate the weaker sex was struck down by the Apex Court.<sup>55</sup> In cases like *Gita Hariharan v. R.B.I*<sup>56</sup>, *Dattatraya Motiram v. State of Bombay*<sup>57</sup>, *Government of A.P v. P.B. Vijaya Kumar*<sup>58</sup> etc the Supreme Court of India upheld the protective discrimination guaranteed to women, resulting in the validation of various legislations that discriminate in favour of women. This has provided a room for negotiating the rights of women.

In *Yusuf Abdul Aziz v. State of Bombay*<sup>59</sup>, and *Sowmithri Vishnu v. Union of India*<sup>60</sup> upholding the protection to women, the court justified Section 497 of the IPC<sup>61</sup>, that punishes only man and exempts woman though she may be equally guilty, on the ground of public morality and necessity for treating unequals unequally, for the purpose of betterment of the weaker sections of the citizens. Likewise, the Supreme Court of India justified the validity of Section 14(1) of the Hindu Succession Act, 1956 in pursuance of Article 15 (3) by extending the ownership of property from limited to full ownership to a female.<sup>62</sup>

Article 14 upholds payment of equal pay for equal works. Unequal pay for essentially equal work cannot be accepted on the basis of an artificial classification between two kinds of work and employment. It has been decided in the case of *Mackinnon Mackenzie & Co. Ltd v. Audrey D'Costa & Anr*<sup>63</sup> that, if both men and women are doing practically the same kind of work, the employer is bound to pay equal remuneration unless it is shown that the women are not fit to do the work.

Article 21 of the Constitution of India gives right to life and liberty. 'Right to life' does not merely mean animal existence but means something more, namely, the right

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<sup>55</sup> *C.B Muthamma v. Union of India*, 1979 AIR 1868, 1980 SCR (1) 668

<sup>56</sup> (1999) 2S.C.C. 228

<sup>57</sup> A.I.R. 1953 Bom.842

<sup>58</sup> A.I.R. 1995 S.C. 1648.

<sup>59</sup> AIR 1954 SC 321:1954 SCR 930.

<sup>60</sup> AIR 1985 SC 1618.

<sup>61</sup> § 497 - Adultery—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

<sup>62</sup> *Thota Sesharathamma And Anr v. Thota Manikyamma*, 1991 SCR (3) 717, 1991 SCC (4) 312

<sup>63</sup> 1987 AIR 1281, 1987 SCR (2) 659

to live with human dignity.<sup>64</sup> Thus, the Right would include all those aspects of life which go to make a life meaningful, complete and worth-living.<sup>65</sup> Rape, is therefore, a crime against basic human rights and is also violative of the victim's right to life contained in Article 21.<sup>66</sup> No person can rape even a prostitute just because she is a woman of easy virtue.<sup>67</sup> The Court clearly says that unchastity does not make a woman "open to any and every person to violate her person as and when he wishes".<sup>68</sup>

The right to live with human dignity, free from exploitation was recognised in *Bandhua Mukti Morcha v. Union of India*.<sup>69</sup> LIC questionnaire seeking information about menstrual periods and past pregnancies from a person seeking employment was held to be an invasion of privacy in *Neera Mathur v. LIC*.<sup>70</sup> In the landmark case of *Vishaka v. State of Rajasthan*,<sup>71</sup> sexual harassment of working women was held to amount to violation of the rights guaranteed by Articles 14, 15, and 21. The Court issued detailed guidelines, for the prevention of sexual harassment of women at workplace and to ensure equal working conditions, by observing that when women are subjected to gender specific violation, it will amount to serious impairment of equality in employment. Court in *Apparel Export Promotion Council v. A. K. Chopra*<sup>72</sup> endorsed this decision thereby upholding the removal of the Private Secretary to the Chairman of the Council from service for molesting a female employee physically.

The Courts in various cases relating to public employment have nullified many provisions which are discriminatory in nature. These provisions, in fact, kept women in disadvantageous position in a way providing advantages to men. The requirement that a married woman should obtain her husband's consent before applying for public

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<sup>64</sup> See: *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors.*, AIR 1981 SC 746; *State of Maharashtra v. Chandrabhan*, AIR 1983 SC 803; *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*, AIR 1986 SC 180; and *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Ors.*, AIR 1991 SC 101

<sup>65</sup> *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty*, 1996 AIR 922, 1996 SCC (1) 490

<sup>66</sup> *Id.*

<sup>67</sup> *State of Maharashtra v. Madhukar N Mardikar*, (1991) SCC 57

<sup>68</sup> *Id.*

<sup>69</sup> (1984) 3 SCC 161: AIR 1984 SC 802

<sup>70</sup> (1992) 1 SCC 286

<sup>71</sup> (1997) 6 SCC 241: AIR 1997 SC 3011

<sup>72</sup> AIR 1999 SC 625

employment was held unconstitutional in *Maya Devi v. State of Maharashtra*<sup>73</sup>, as such a requirement is an anachronistic obstacle to women's equality.<sup>74</sup>

The Constitution of India provides for the prohibition of trafficking in human beings and forced labour under Article 23. This prohibition applies not only to State but also to private persons, bodies, and organizations.<sup>75</sup> Prostitution, selling and buying of human beings for immoral purposes etc are some forms of traffic in human beings,<sup>76</sup> which have been prevailing in our country for a long time. Article 23, in fact, contemplates legislation for the enforcement of the constitutional prohibition. While dealing with a public interest litigation pleading separate schools and hostels for the children of prostitutes<sup>77</sup>, the Honorable Supreme Court focused its attention on the conditions of women under prostitution and their children living in the prostitute homes, and subsequently provided certain directions to restrain them from various forms of prostitution. The Court was of the opinion that rather considering them as offenders in society; they should be treated as victims of adverse socio-economic circumstances.<sup>78</sup> Their children should not be permitted to live in inferno and the undesirable surroundings of prostitute homes.<sup>79</sup> This is particularly so for young girls whose body and mind is likely to be abused with growing age for being admitted into the profession of their mothers.<sup>80</sup>

### **Directive Principles for the Protection of Women**

The framers of the Constitution dreamt for the construction of a welfare state but it was not possible to place some worthwhile provisions on the same regard as fundamental rights are placed. Therefore, they incorporated these principles in the Constitution under Directive Principles of State Policy<sup>81</sup> as instructions, which the Centre and the States are ought to follow. The governing authorities of the country are duty bound to direct their activities in accordance with these ideals. They are to be

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<sup>73</sup> (1986) 1 SCR 743

<sup>74</sup> as cited in *Galla Mandi Mahila Shramik Sangh v. State of M.P. and Ors.*, AIR 2002 MP 266

<sup>75</sup> V.N.SHUKLA, CONSTITUTION OF INDIA 251 (*Revised by M. P. Singh 12th ed.*, 2013)

<sup>76</sup> *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522

<sup>77</sup> *Gaurav Jain v. Union of India*, (1997) 8 SCC 114

<sup>78</sup> *Gaurav Jain v. Union of India*, (1997) 8 SCC 114

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Chapter IV of the Constitution of India

followed in such a manner so as to meet the ideals of welfare state. The main objective was to secure social economic and political justice resulting in uplifting weaker sections of the society.

Part IV of the Constitution of India enshrines the Directive Principles of State Policy. It contains a great deal of directives for protection of women and for betterment of their status. Article 38 requires the State to make efforts to curtail inequalities in status, facilities and opportunities. It necessitates the State to secure and protect a social order in which social, economic and political justice exists in all the institutions of national life. Article 39 points out certain principles which are to be followed by the State. The State has to direct its policy towards securing the citizens the right to an adequate means of livelihood, equal pay for equal work etc. State should see that the health and strength of working women are not abused. Economic necessity is not a sanctuary to abuse her person or she should not be forced to an unsuited avocation. As decided in the case of *Kesavanantha Bharati v. State of Kerala*<sup>82</sup>, the main objective of this provision is the social and economic welfare of society and to create an egalitarian social order. Another provision, i.e., Article 42 provides for just and humane conditions of work and maternity relief. Therefore, taking Articles 39 and 42 together, a female worker cannot be forced to undertake heavy manual works during her advanced stage of pregnancy. The SC in *K. Rajendran v. State of Tamil Nadu*<sup>83</sup>, expressed that even though Article 38 is not enforceable by the court, it is still fundamental in the governance of the country. Though it is not enforceable by law it can always provide a valid ground for determining the legal efficacy of the action. The Court observed in the case of *Dattatraya Motiram More v. State of Bombay*<sup>84</sup> that if the State has provided a facility of special maternity homes to women by enacting special legal provisions; those provisions cannot be said violative of Article 15(1). According to Article 44 of the Constitution the State shall endeavour to secure for the citizens, a Uniform Civil Code, throughout the territory of India. The real intention of this directive was to achieve gender justice. India is a country of diversity with secularism as one of the basic principles. Almost all the religions of the world are practiced in India. Each religious community has their own practices relating to

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<sup>82</sup> (1973) 4 SCC 225

<sup>83</sup> 1982 AIR 1107, 1982 SCR (3) 628

<sup>84</sup> AIR 1953 Bom 311



marriage, inheritance, maintenance etc. And many of these practices are found to be unfair to women, in one way or another. Indian independence movement activist, K. M. Munshi, who was also a member of the Constituent Assembly, remarked that “if the personal law of inheritance, succession, etc. is considered as a part of religion, the equality of women can never be achieved.” Although no Uniform Civil Code has been implemented, the Supreme Court has acknowledged the need for the Code in order to eliminate discrimination among people. India’s first woman Chief Justice of a High Court, Leila Seth expressed her opinion on the introduction of a common civil code that the Code will always help to put an end to those harmful customary practices causing threat to women and it will not act as a barrier to practice religion but will lead to the conferment of equal property rights and other rights relating to inheritance, adoption etc. Upon women even if her father or husband converts to another religion. This will also ensure her protection from polygamy and arbitrary divorce. Finally, Article 46 mandates the State to promotion educational and economic interests of weaker sections of the society and for the protection from social injustice and all forms of exploitation. Thus it is clear that the state has an obligation to make all possible efforts to reform the backward conditions of the women in all respects.

### **Citizens’ duty towards women**

Part IV-A of the Constitution of India incorporates certain fundamental duties ought to be followed by every citizen of India. Under this part there is only one provision, i.e., Article 51 A, which was added by the 42nd Amendment of the Constitution in 1976, consisting of eleven fundamental duties<sup>85</sup> for citizens. The eleventh duty was added by the 86th Constitutional Amendment in 2002. Contrary to fundamental

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<sup>85</sup> Article 51A. Fundamental duties—It shall be the duty of every citizen of India—

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

rights, which extend to all persons, fundamental duties are limited to the citizens. Clause (e) of the provision makes it a duty of every citizen to promote harmony and the spirit of common brotherhood amongst all the people transcending diversities.<sup>86</sup> Along with that, it mandates everyone to denounce such practices that are derogatory to the dignity of women.<sup>87</sup> These duties are non justiciable and cannot be enforced in a court of law, but can be enforced by enacting appropriate legislation by the Parliament. However, this provision has been invoked by the Courts in numerous decisions.<sup>88</sup>

### **Overcoming Barriers of Participation**

Issues of violence and discrimination against women were existed in political arena also. When compared with men, their involvement in politics was not so imposing. Several socio economic factors like illiteracy, poverty etc. blocked their way not only to public offices but also to voting. To make democracy really of the people, for the people and by the people, the government should bring about equal participation of people in democratic process. It is not just participation but active involvement of women must be ensured.

A serious headway towards strengthening women's involvement in democratic process was done through the 73rd and 74th Amendment Acts of the Constitution in 1993. The amendments inserted in the Constitution part IX and IXA titled "The Panchayats" and "The Municipalities" respectively. The provisions, inter alia, provided for reservation of seats for women in election to the local self governing bodies. According to Article 243 D one-third of total number of seats should be reserved for women in every panchayats. It enjoins that one-third offices of chairpersons at all levels should be reserved for them. As per Article 243 T seats should be reserved for women in direct elections to every municipality, similarly.

### **WOMEN'S RIGHTS AS HUMAN RIGHTS**

Since the establishment of United Nations in 1945, attaining equality between men and women has been one of the most basic promises of human rights. "To reaffirm

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<sup>86</sup> INDIA CONST. art. 51A, cl. (e).

<sup>87</sup> *Id.*

<sup>88</sup> *A.I.I.M.S. Students Union v. A.I.I.M.S. & Ors*, (2002) 1 SCC 428

faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women”, is one of objectives of the UN as set forth in the Charter of the United Nations<sup>89</sup>. Moreover, Article 1 states that one of its purposes is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. It is the duty of the General Assembly to make studies and recommendations for this purpose.<sup>90</sup> This prohibition of distinction on the basis of sex is also echoed under Article 55 that stipulates international economic and social cooperation.

The Economic and Social Council (ECOSOC) established a global intergovernmental body named “the Commission on the Status of Women” (CSW) within 1 year of UN’s adoption. The Commission was obligated solely for the promotion of gender equality and women empowerment. This functional commission is significant in advancing rights of women and archiving the state of things regarding their lives all over the world.<sup>91</sup>

The Universal Declaration of Human Rights, 1948 reaffirmed the United Nations values. It proclaims that “all human beings are born free and equal in dignity and rights” and that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion,... or other status”. Thus it indicates the equal allocation of rights to both men and women.

The Commission on Human Rights which was established in 1946 drafted 2 covenants on human rights after this landmark declaration. Along with UDHR these instruments namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), form International Bill of Human Rights. Both ICCPR and ICESCR provide same provisions regarding equal rights for men and women<sup>92</sup> and the prohibition of

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<sup>89</sup> Charter of the United Nations and Statute of the International Court of Justice (1945)

<sup>90</sup> U.N. Charter art.13, ¶ 1.

<sup>91</sup> UN Women, *Commission on the Status of Women*, <http://www.unwomen.org/en/csw>

<sup>92</sup> International Covenant on Civil and Political Rights (ICCPR), art. 3, Dec. 16, 1966, G.A.Res. 2200A (XXI)., International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 3, Dec. 16, 1966, G.A.Res. 2200A (XXI).

discrimination on the basis of sex<sup>93</sup>. All the international treaties are legally binding on the ratifying States. Apart from guaranteeing rights, the state parties to the covenants have to submit reports to Human Rights Committee under ICCPR<sup>94</sup> and to the Economic and Social Council under ICESCR<sup>95</sup> on the measures adopted to ensure the rights recognized there under. These bodies also consider complaints with regards to the violation of recognized rights. The complaints may be individual, State or inter-state. These covenants guarantee, inter alia, freedom of movement, right to life and liberty, rights relating to family, marriage as well as children, right to health, maternity protection etc.

It was in 1967, the Declaration on the Elimination of Discrimination against Women was proclaimed by the UN General Assembly. Even though the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights etc have made some kind of progress with in matters concerning equality of rights; discrimination against women continued to exist considerably.<sup>96</sup> The resolution stipulated that such discrimination is discrepant to human dignity as well as welfare of the family and society. Maximum participation of men and women in all fields is necessary not only for the complete development of a country, but also for the peace and welfare of the world. Discrimination against women would prevent their participation on equal terms with men, in each and every area of life and is an obstacle to the full development of their potentialities in the service of their countries and of humanity. The Declaration makes it obligatory on the member states to take appropriate measures to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women,<sup>97</sup> as it expressly states that discrimination against women, denying or limiting their equality of rights with men would constitute an offence against dignity<sup>98</sup>.

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<sup>93</sup> ICCPR, art. 3, Dec. 16, 1966, G.A.Res. 2200A (XXI); ICESCR, art. 2, Dec. 16, 1966, G.A.Res. 2200A (XXI).

<sup>94</sup> ICCPR, art. 40, Dec. 16, 1966, G.A.Res. 2200A (XXI).

<sup>95</sup> ICESCR, art. 16, Dec. 16, 1966, G.A.Res. 2200A (XXI).

<sup>96</sup> A/RES/22/2263, Declaration on the Elimination of Discrimination against Women, Preamble (1967)

<sup>97</sup> A/RES/22/2263, *supra* note 96, art.2.

<sup>98</sup> A/RES/22/2263, *supra* note 96, art.1.

The Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979, which was regarded as “the bill of rights for women”, defined “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”<sup>99</sup>. The Convention pronounces to abolish not only discriminatory laws but also customs, regulations and practice which are discriminatory in nature. Preamble to the convention clearly states that the role of women in procreation should not be a basis for discrimination. The upbringing of children requires a sharing of responsibility between men and women and society as a whole.<sup>100</sup> it also requires the States Parties to adopt steps to eliminate discrimination against women in all matters relating to marriage and family relations.<sup>101</sup> the Convention also takes into account civil, political, economic, social and cultural rights of women such as right to vote as well as to be eligible for election to all publicly elected bodies; to participate in the formulation of government policy, to hold public office, to acquire, change or retain one’s nationality, right to health, education etc. And it is for the first time a treaty recognizes the reproductive rights of women. It also envisions that State Parties must take affirmative actions to advance the status of women as it helps in attaining equality in all fields. The Convention is now legally binding on 165 States. They submit their report on the actions they took for the proper implementation of the Convention in every 4 years. In 1999, an Optional Protocol to the Convention was opened for ratification in order to enable the victims of gender discrimination to submit their complaints to treaty monitoring body.

There are many other treaties though not women specific prohibit sex based discrimination. The Convention on the Rights of the Child<sup>102</sup> and the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families<sup>103</sup> are some of them. The Committee against Torture, working under the Convention

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<sup>99</sup> G. A. Res. 34/180, CEDAW, art. 1 (Dec. 18, 1979).

<sup>100</sup> *Id.*, Preamble

<sup>101</sup> G. A. Res. 34/180, *supra* note 99, art. 16

<sup>102</sup> Convention on the Rights of the Child, art. 2, Nov. 20, 1989, G. A. Res. 44/25

<sup>103</sup> Convention on the Rights of the Child, art. 7, Nov. 20, 1989, G. A. Res. 44/25

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also answers constantly the matters of violence against women.

Rights of women have been a serious concern in a number of global commits. The United Nations declared 1975 as International Women's Year and conducted the World Conference on Women in Mexico City in the same year to evoke the international community about the persistent issue of gender discrimination against women.<sup>104</sup> Subsequently, the Conference designated 1976-1985 as the United Nations Decade for Women and adopted a World Plan of Action for the realization of 3 main objectives such as equality, development and peace laid down by the General Assembly within 10 years of its commencement.

The 2nd World Conference on Women was hosted by Copenhagen in order to review the Plan of Action adopted in 1975. It was during this Conference, the Convention on the Elimination of All Forms of Discrimination against Women was opened for ratification. The report of this Conference<sup>105</sup> mentioned the term "domestic violence" a number of times. It was for the first time an official document of UN explicitly refers to domestic violence. It obligated the State Parties to enact and implement legislation for the prevention of sexual and domestic violence against women and to take appropriate measures for their fair treatment in criminal procedures.<sup>106</sup>

In 1985 the third international conference on women was held in Nairobi to review and appraise the achievement of United Nations Decade for Women. The Conference adopted The Nairobi Forward-looking Strategies for the Advancement of Women that provide guidelines for action to the governments of the member states until 2000 that connects furtherance of peace for the extermination of violence against women. The document links promotion of peace and development with the participation of women and pushes the state parties to take constitutional and legal measure for the eradication of gender discrimination.

The first 3 conferences on women led to the growth of women movements on the global scene and set foundation for the subsequent conferences including UN World

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<sup>104</sup> 1975 World Conference on Women,

[http://www.5wwc.org/conference\\_background/1975\\_WCW.html](http://www.5wwc.org/conference_background/1975_WCW.html)

<sup>105</sup> 2nd Women's World Conference, *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*, A/CONF. 94/35 (July 1980).

<sup>106</sup> *Id.* ¶ 65

Conference on Human Rights held in Vienna in 1993, International Conference on Population and Development, 1994 held in Cairo, and the 4th World Conference on Women held in 1995 in Beijing. The 4th Conference was the largest among the other conferences on women. The Beijing Declaration affirmed women's rights as human rights<sup>107</sup> and devoted to take effective action against violations of these rights and freedoms<sup>108</sup> as well as to prevent and eliminate all forms of violence against them<sup>109</sup>. The 1993 World Conference on Human Rights resulted in the appointment of the first Special Rapporteur on Violence against Women at the UN Human Rights Commission and in the same year the Declaration on the Elimination of Violence against Women was adopted by the United Nations General Assembly.<sup>110</sup>

Furthermore, in order to speed up the progress of empowerment of women and gender equality, the UN General Assembly established United Nations Entity for Gender Equality and the Empowerment of Women which is also known as UN Women in 2010. This organisation merged 4 distinct UN international bodies such as Division for the Advancement of Women (DAW), International Research and Training Institute for the Advancement of Women (INSTRAW), Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), United Nations Development Fund for Women (UNIFEM) which were functioning wholly for the empowerment of women as well as the promotion of gender equality.

Human rights are rights inherent to all human beings, irrespective of their race, sex, nationality, ethnicity, language, religion, or any other status.<sup>111</sup> They are the basic rights to which all humans are entitled. It is a globally accepted fact that each and every person is deserved to be treated with respect and dignity. However, reality is too far from the theoretical concepts and legal texts that provide such non discriminatory rights. Woman, a human being, is regarded as a part of weaker sections of the society. Being ill treated and discriminated, they are constantly fighting to live a life with dignity and free from violence. They often bear the effect of discrimination in each

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<sup>107</sup> Beijing Declaration, *supra* note 1, ¶ 14

<sup>108</sup> Beijing Declaration, *supra* note 1, ¶ 23

<sup>109</sup> Beijing Declaration, *supra* note 1, ¶ 29

<sup>110</sup> 1985 World Conference on Women,

[http://www.5wwc.org/conference\\_background/1985\\_WCW.html](http://www.5wwc.org/conference_background/1985_WCW.html)

<sup>111</sup> United Nations, *Human Rights*, <http://www.un.org/en/sections/issues-depth/human-rights/>

stage of their lives as daughters, sisters, wives etc. Like any other person, woman is also entitled to the right to life and personal liberty.<sup>112</sup>

Domestic violence, whether physical, sexual, psychological or economic is a direct attack on the dignity of women. It is a social disease that cropped up as a consequence of gender inequalities planted in the community, supported by existing structures of power in gender relations, entrenched by traditional educational systems, ingrained by religious and dogmatic beliefs and media influences.<sup>113</sup> it abrades the individuality and personhood of a woman. More than the destruction of a woman's right to dignified life, this evil vehemently disturbs the very substructure of the society.

What needs to be done is to encourage and empower women in each sphere of her life to advance her status in the society. She should be provided and placed in a position to enjoy her personhood in every sense. Hillary Rodham Clinton once said that "Women are the largest untapped reservoir of talent in this world". Reducing inequalities and empowering women by providing them with violence free atmosphere would definitely contribute to the national development. While dignified life is a fundamental right of every citizen including woman,<sup>114</sup> at the same time it is the duty of every person to renounce practices derogatory to the dignity of women.<sup>115</sup>

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<sup>112</sup> INDIA CONST. art. 21.

<sup>113</sup> Adnaan Murtazaa, Domestic Violence Against Women: A Human Rights Issue (2017), <https://kashmirobsvserver.net/2017/features/domestic-violence-against-women-human-rights-issue-26861> (Apr. 19th, 2018)

<sup>114</sup> INDIA CONST. art. 21.

<sup>115</sup> INDIA CONST. art. 51A cl. (e)



## **Chapter 3**

### **Evaluation of pre 2005 legal framework on Domestic Violence**

In order to uphold the constitutional commitments, attempts have been made to convert these rights and protections incorporated in the Constitution into reality. Several legislative enactments intended to eliminate violence against women and to safeguard their rights effectively, have been passed by the State from time to time. The Protection of Women from Domestic Violence Act, 2005, is one such legislation enacted with a view to guard the victims of domestic violence and to give them proper reliefs.

Prior to the enactment of this Act, there existed several legislative measures to protect the victims of domestic violence, though the term as such was not explicitly referred. To get a proper picture of the situation of women at home, before and after the passing of the 2005 Act, the framework of civil and criminal remedies which were available prior to 2005 should be analyzed and the differences should be perceived.

#### **DOMESTIC VIOLENCE UNDER CIVIL LAW**

Under the civil law, no provision for immediate relief was available to the victims or to stop violence in family. It was not even considered as an issue in civil laws. It was only recognized in matrimonial proceedings where cruelty is a valid ground for divorce or judicial separation.

#### **Code of Civil Procedure and Specific Relief Act**

In a sense, injunctions available in Code of Civil Procedure<sup>116</sup> and Specific Relief Act<sup>117</sup> can be sought in matrimonial cases. Since injunction is a legal process through which a person is restrained from doing a specific act that invades other's rights, it is possible for a victim of domestic violence to seek it for restraining the abuser from treating her with cruelty or violence whether physically or mentally.<sup>118</sup> However,

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<sup>116</sup> Order 39 – “temporary injunction to restrain certain acts of the defendant I husband or for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the wife's property or otherwise causing injury to the wife in relation to the suit property”.

<sup>117</sup> Specific Relief Act, §§ 37 - 42 (1963).

<sup>118</sup> *Shri Vidyanidhi Dalmia v. Smt. Nilanjana Dalmia*, 150(2008)DLT19; I(2008)DMC848; 2008(102)DRJ611.

these injunctory reliefs cannot be claimed as a matter of right as they are discretionary in nature. The petitioner has to prove that she has a genuine cause and no ulterior or oblique motive behind her request.<sup>119</sup>

### **Law of Tort**

Law of tort also provides certain remedies to the victim of domestic violence. A tort is an action or inaction that damages or injures another person. That kind of injury or harm may be caused to a person or that person's property. Domestic violence is considered as a civil wrong as the acts cause injury on another. Trespass to a person like assault, battery and false imprisonment causes liability on the person committing the wrong. Those are the generally punished torts that apply in the context of domestic violence. Other tort causes of action like intentional infliction of emotional distress and negligence are also available for a victim to sue the abuser.<sup>120</sup>

Battery is when defendant, without the consent of the plaintiff, makes harmful bodily contact with him.<sup>121</sup> Slapping, kicking, punching, pushing, stabbing, throwing objects etc are common act that constitute battery in domestic violence context. Sexual battery may be said to be a form of domestic violence. An abuser may coerce a person to have sexual relations against her will through force or threats. But when it comes to the matter of married couples, Indian law shows archaic sentiments.<sup>122</sup> The Supreme Court in its judgment held that "Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape".<sup>123</sup> Since it is not possible to bring a suit against the husband for rape, the wife may be able to sue him for battery when the sexual interference is accompanied with extreme violence.

Any action that causes a person to fear that a battery will be committed upon him is an assault. This requires no contact because its essence is conduct which leads the claimant to apprehend the application of force. In the majority of cases an assault precedes a battery, perhaps by only a very brief interval, but there are examples of battery in which the claimant has no opportunity of experiencing any apprehension

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<sup>119</sup> *Id.*

<sup>120</sup> Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. Kan. L. Rev 695 (2014).

<sup>121</sup> *Id.*

<sup>122</sup> *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013,

[http://supremecourtindia.nic.in/supremecourt/2013/17790/17790\\_2013\\_Judgement\\_11-Oct-2017.pdf](http://supremecourtindia.nic.in/supremecourt/2013/17790/17790_2013_Judgement_11-Oct-2017.pdf)

<sup>123</sup> *Id.*

before the force is applied. For example, a blow from behind inflicted by an unseen assailant.<sup>124</sup> Just as there can be a battery without an assault, so also there can be an assault without a battery. Sometimes words alone may constitute an assault.

This is the infliction of bodily restraint which is not expressly or impliedly authorized by the law. Neither physical contact nor anything resembling a prison is necessary. In order to amount to false imprisonment there must be a total restraint, for howsoever short time, on the liberty of person without lawful justification.<sup>125</sup> So, if a wife is restrained from leaving her husband's house that is false imprisonment.<sup>126</sup> There is no false imprisonment where the claimant consents to the defendant's order, but she is not to be taken as consenting simply because she does not resist by force.<sup>127</sup>

Tort law provides for monetary compensation and injunctions as remedy. So the victims may claim compensation for the medical expenses incurred and also for the physical pain and suffering caused. Damages in tort are generally unliquidated and are determined by the court on the facts and circumstances.

Even though these remedies are available, it becomes difficult for the aggrieved to invoke these against the abuser staying with her under the same roof. If a civil injunction is violated, to the maximum the violator could be punished with fine or a few days of imprisonment. Instead of providing a long term protection for the victim, the complicated procedures and litigation costs will intensify her vulnerability. Also, there is no history of awarding damages to women against the abuser for trespass in Indian legal system. It provides no sufficient protection for the women who have been subjected to violence. Apparently, the practice of giving damages has got off the ground in other common law jurisdictions.<sup>128</sup> This instance could be referred to influence the judges to develop law in like manner.

## **PROTECTION AVAILABLE UNDER CRIMINAL LAW**

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<sup>124</sup> *Bici v. Ministry of Defence*, (2004)EWHC 786 (QB).

<sup>125</sup> Definition given in the case of *Onkarmal v. Banwarilal*, AIR 1962 Raj 127. This was based on the dictum of Paterson, J in *Bird v. Jones*, (1845) 7 QB 742.

<sup>126</sup> *Warner v. Riddiford*, 4 C. B. (N.S.) 180 (1858) - it was held that if a person be restrained from leaving his own house or any part of it, is false imprisonment.

<sup>127</sup> *Hepburn v. C C Thames Valley*, (2002) ECWA Civ 1841.

<sup>128</sup> *Church v. Church*, 1983 N.L.J. 317.

One of the choices to get protection from domestic violence is to approach criminal courts. Although Indian criminal law, comprising of substantive and procedural laws, generally deals with the crimes that are perpetrated against the public as a whole, there are provisions specifically concerned with the wrongs committed against women. Those provisions provide for the punishment of the perpetrators regardless of his relationship with the sufferer. It is true that domestic violence has not been specifically recognized as an offence under the criminal law. Theoretically still, those provisions can be made available to sue the husbands who abuse their wives physically or mentally.

### **Indian Penal Code, 1860**

Indian Penal Code expressly says that every person would be punishable for his acts or omissions carried out in contravention to its provisions.<sup>129</sup> This applies to each and every citizen of India. The code is an exhaustive one containing all the substantive elements of criminal law. It also supplies specific provisions for the offences against women in Chapters like 16 and 20 that deal with offences affecting human body<sup>130</sup> and offences relating to marriage<sup>131</sup>, respectively. These provisions help for the protection of women who are exposed to offences “relating to her sexual identity”. A woman killed during the course of a home invasion can be considered as a victim of homicide but woman killed during a domestic violence incident is more likely a victim of a gender based killing.<sup>132</sup> She is killed because she is a woman. Despite the fact that these provisions provide some protection to the victims, most of them are now supplemented by specific laws to give them greater protection.

The Indian Penal Code provides certain provisions that deal with different domestic violence which may range from “serious offence such as suicide and dowry death to relatively milder offences like assault”.

Whatever the form may be, physical violence in every sense is an offence. Two types of physical hurt have been recognized by the Indian Penal Code. They are simple hurt

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<sup>129</sup> Indian Penal Code (IPC) § 2 (1860).

<sup>130</sup> Dowry Death, Miscarriage, Kidnapping and Abduction, Outraging the Modesty of a Woman etc.

<sup>131</sup> Bigamy, Adultery, Cruelty etc.

<sup>132</sup> Dabney P Evans, Why do women need special laws to protect them from violence?, (Nov. 26th, 2015), <http://theconversation.com/why-do-women-need-special-laws-to-protect-them-from-violence-50944>, (Mar. 2nd 2018, 1:47 pm).

and grievous hurt. Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.<sup>133</sup> Section 320 contemplates grievous hurt which includes certain kinds of hurt which are grievous in nature.<sup>134</sup> Inflicting bodily pain is a general kind of domestic violence prevalent everywhere. To be punished as a crime, the pain must be sufficient enough to constitute hurt and need to be done with intention. However, It is not necessary that there must be injury apparent on the person. In addition, if hurt is caused using dangerous weapons the punishment is severe. So, if a family member, either male or female, harasses physically a woman, they could be booked under this provision.

Every person is entitled to freedom of movement under the Constitution of India, which is guaranteed with the right to live with human dignity. Wrongful restraint<sup>135</sup> and wrongful confinement<sup>136</sup> will obstruct a person's liberty and freedom. Wrongfully confining a wife in marital home by her spouse or relative of the spouse is a most occurring form of domestic violence. Different forms and punishment for those has been prescribed by the Code under Sections 339 to 348.

Section 406 that speaks about criminal breach of trust can be invoked when there is a misappropriation of the wife's property by her husband or in laws. As per IPC, when a person misappropriate a property entrusted with him for his own use or uses such property dishonestly violating the law, it is called criminal breach of trust.<sup>137</sup> Such a person is liable for punishment with maximum of 3 years imprisonment or fine.<sup>138</sup> It is true that this provision does not particularly deals with harassment related to dowry. But, the Apex Court applied this provision in a dowry related matter. The decision says that even if the possession of the dowry property is with the husband or the family members, the title of same remains with the woman. So, if the husband or his family members refuse to give the entrusted dowry property to the wife, malafidely retaining them for making wrongful gain they can be prosecuted under this provision. In normal cases, the existence of a special agreement must be established in order to invoke the provision. However, as stridhana property is an exclusive property of the

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<sup>133</sup> IPC § 319 (1860).

<sup>134</sup> IPC § 320 (1860).

<sup>135</sup> IPC § 339 (1860).

<sup>136</sup> IPC § 340 (1860).

<sup>137</sup> IPC § 405(1860).

<sup>138</sup> IPC § 406 (1860).

married woman, it is not necessary to establish any special agreement to show that the property was given to the spouse or his relatives.<sup>139</sup>

Assaulting a woman or even using a word, gesture or act with an intention to outrage or insult her modesty is also a punishable offence under the Indian Penal Code.<sup>140</sup> Though these provisions do not offer a specific protection from harassment within the family, it provides general protection to women from such violence occurring in the society.

Rape is one among the various sexual offences contemplated in Indian Penal Code committed against women. It is most brutal form of sexual offence that violates the privacy and personal integrity of woman.<sup>141</sup> Moreover, they are subjected to psychological trauma and torture even after the process. Court always makes the presumption of rape in favour of the woman who makes the allegation of rape that she did not consent for the act.<sup>142</sup> This is because rape is not merely a physical assault but degrades the very soul of a helpless woman.<sup>143</sup> This is not strictly an offence occurring in a family. Even though, the possibility of this offence occurring within the family cannot be ruled out. The inquiry and trial of these cases are conducted in camera.<sup>144</sup> That much of significance is attached by the Indian legal system. The Supreme Court in *State of Andhra Pradesh v. Gangula Satya Murthy*<sup>145</sup> has decided in this respect. The Court stated that “the Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity”. The Indian Penal Code also prescribes a minimum

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<sup>139</sup> *Smt. Rashmi Kumar v. Mahesh Kumar Bhada*, (1997) 2 SCC 397.

<sup>140</sup> IPC §§ 354, 509 (1860). Section 354: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 509: Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

<sup>141</sup> *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393, 1996 SCC (2) 384.

<sup>142</sup> Indian Evidence Act (IEA) § 114 A (1872).

<sup>143</sup> *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393, 1996 SCC (2) 384.

<sup>144</sup> Code of Criminal Procedure (CrPC) § 327(2) (1973); *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393, 1996 SCC (2) 384.

<sup>145</sup> (1997) 1 SCC 272.

punishment with rigorous imprisonment of not less than 7 years which may extend to imprisonment for life.<sup>146</sup>

However, when it comes to the concept of marital rape, Indian legal system has given only a limited recognition. Judiciary in India often neglected to look at marital rape as an issue.<sup>147</sup> It is not regarded as an offence unless the victim is under 15 years of age.<sup>148</sup> Exception 2 to Section 375 of IPC expressly states that “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”. Thus it could be inferred that a man having sexual intercourse with his wife who is under 15 years of age would be punished for rape. Sexual intercourse without the consent of his wife above 15 years of age can be considered as rape only if she is living separately under an order of judicial separation. In most of the strained and violent marriage relationships the wives are exposed to the activities causing sexual abasement. But these kinds of activities could be brought under Section 377 of Indian Penal Code that provides for the punishment for “unnatural offences”. However, it is rarely applied in the cases relating to marriage.

Making bigamy an offence under the Indian Penal Code, the lawmakers intend to give a security cover to the institution of marriage thereby trying to conserve it. Whoever marrying again during the lifetime of the spouse is guilty of the offence of bigamy.<sup>149</sup> Similarly, marrying another concealing the fact of his previous marriage is also an offence.<sup>150</sup> Personal laws other than Muslim personal laws prohibit bigamy and make such marriage void. Except Muslims, no one has the liberty to remarry when the spouse is living without committing bigamy. However, a Muslim can remarry only if he has a capacity to treat his both wives equally. But, when a person converts to Islam and remarry during the lifetime of his first wife, it cannot be treated as valid if the only intention for his conversion was to marry another, deserting his spouse. Such a conversion is treated as malafide and will be charged for bigamy.<sup>151</sup>

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<sup>146</sup> IPC § 376 (1860).

<sup>147</sup> *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013.

<sup>148</sup> IPC § 375 excp. 2 (1860).

<sup>149</sup> IPC § 494 (1860).

<sup>150</sup> IPC § 495 (1860).

<sup>151</sup> *Sarla Mudgal and President, Kalyani v. Union of India*, (1995) 3 S.C.C 635

Sec. 5 of Hindu Marriage Act explicitly proscribes bigamy by saying that “a marriage may be solemnized if neither party has a spouse living at the time of the marriage”.<sup>152</sup> A marriage solemnized otherwise is null and void<sup>153</sup> and also punishable under Indian Penal Code<sup>154</sup>. Likewise, Parsi Marriage and Divorce Act, 1936 also makes it a penal offence.<sup>155</sup> Section 19 of the Indian Divorce Act, 1872 provides that a decree of nullity on the ground of bigamy may be obtained. Though these provisions are available, this form of domestic violence compels most of the victims to be silent and suffer the injury. The spouse has to prove the “solemnization of the second marriage” in order to prove the guilty of bigamy.<sup>156</sup> In reality this task of establishing the validity of the subsequent marriage is not an easy one to the victim wife. They often be reluctant to move court due to economic constraints and social compulsions.

Adultery is another offence that is punishable under the Indian Penal Code. Having sexual intercourse with the wife of another man, that too without the consent of that man is guilty of adultery.<sup>157</sup> The wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime.<sup>158</sup> This has made as a ground for divorce under Indian Divorce Act, 1869, Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936 etc. However if the wife is compelled to have adulterous relationship by her own husband, it cannot be brought under this provision of adultery. Thus it is clear that the law is obviously biased by considering woman as a property of her husband in essence.

Causing miscarriage and causing injuries to unborn children are punishable offences under Sections 312 - 316 of the Indian Penal Code. It is still a practice that killing fetus if it is found to be female. There are instances wherein the wife is forced to terminate pregnancy in such situations. The Code says whoever knowingly causes miscarriage not in good faith for the purpose of saving the life of the woman is guilty of the offence and will be punished for a term of 3 years imprisonment and fine.<sup>159</sup> The act is aggravated if the women are quick with child that means if she is of 5

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<sup>152</sup> Hindu Marriage Act (HMA) § 5 (i) (1955)

<sup>153</sup> HMA § 11 (1955)

<sup>154</sup> HMA § 17 (1955)

<sup>155</sup> Parsi Marriage and Divorce Act § 5 (1936).

<sup>156</sup> *B.S. Lokhande v. State of Maharashtra*, (1965) 2 SCR 837.

<sup>157</sup> IPC § 497 (1860).

<sup>158</sup> *Revathi v. Union of India*, AIR 1988 SC 835.

<sup>159</sup> IPC § 312 (1860).



months of pregnancy.<sup>160</sup> It is during this period the mother will feel a peculiar sensation about the movement of the fetus.<sup>161</sup> This is punishable with 7 years of imprisonment. The punishment will be life imprisonment or for a term of 10 years, if the miscarriage is caused without the consent of the mother, regardless of the stage of her pregnancy. However, if done with good intention by a medical practitioner, it is not an offence. The Code also prescribes punishments for causing death in the meanwhile<sup>162</sup>, and for preventing a child being born alive or to cause it to die after birth<sup>163</sup>. Pre - natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 and the Medical Termination of Pregnancy Act, 1971 has been enacted with an intention to prevent the miscarriages conducted unlawfully and also to prevent feticide and infanticide.

Apart from these general provisions, there are some provisions which specifically have an implication in domestic violence. Abetment of suicide is one among them. Physical and mental torture to which the bride is being exposed to during domestic violence can drive her to commit suicide. Section 306 of Indian Penal Code contemplates the punishment for abetment of suicide. It states that the person who abets the commission of suicide by another is guilty and will be punished with maximum of 10 years of imprisonment and fine.<sup>164</sup> The abettor cannot be made guilty under the provisions for dowry death in these cases. After the significant amendment in 1983 that introduced Section 113A in Indian Evidence Act, 1872, the face of law has changed. According to this provision when a woman commits suicide within a period of seven years after her marriage and from evidence it is clear that the suicide was the result of cruelty to which she had been subjected, the court will presume that the husband or his relative is an abettor.<sup>165</sup> Cruelty dispensed in such situations has the same meaning as in Section 498A of the Indian Penal Code.<sup>166</sup> In such cases the only necessary thing that is to be proved by the prosecution is cruelty and it is that led the woman to commit suicide. There should be a connection between cruelty and

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<sup>160</sup> *Intiaz Ismail Shaikh v. State of Gujarat*, 2008 (Guj H C), <https://indiankanoon.org/doc/708692/>

<sup>161</sup> *Id.* see DR. JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY (25th ed. 2016)

<sup>162</sup> IPC § 314 (1860).

<sup>163</sup> IPC § 315 (1860).

<sup>164</sup> IPC § 306 (1860).

<sup>165</sup> IEA § 113 A (1872).

<sup>166</sup> IEA § 113 A expl. (1872).

suicide. Unless he is proved guilty of cruelty, no presumption of abetment is available against him under this Section.<sup>167</sup> In a case, the Calcutta High Court set aside the conviction of the husband and his mother by the trial court for want of evidence of torture that has been alleged by the prosecution.<sup>168</sup> In such cases the availability of direct evidence is rare and mostly the decision will be made on circumstantial evidence. That too is insufficient often. In *Gurbachan Singh v. Satpal Singh*<sup>169</sup>, the Supreme Court rejected the decision of the High Court on circumstantial evidence that the conduct of the members in the deceased woman's matrimonial home and the deceased complaining to her parents about the harassment by her in laws altogether prove their culpability. The Supreme Court criticized that the prosecution must prove the criminal charges beyond reasonable grounds and that doubt must be of a reasonable man.<sup>170</sup>

But, when occurrence of cruelty is established, the burden will shift to the husband or relative. Thus the burden is on the husband or his relative who is presumed to be an abettor, to prove that there was no abetment from his part. *Surender v. State of Haryana*<sup>171</sup> is such a case wherein husband of deceased pregnant woman was punished for the offence of abetment of suicide. This was a clear case of cruelty.

Cruelty as a matrimonial offence was inserted in the Indian Penal Code by the Criminal Law (Second Amendment) Act of 1983. Section 498A of Indian Penal Code states what kind of acts will amount to cruelty and also prescribes a punishment with imprisonment for maximum of 3 years and fine. Willful conduct on the part of the husband or the relative of the husband which is likely to drive a woman to commit suicide or to cause physical or mental injury to her life, limb or health will amount to cruelty.<sup>172</sup> Along with that, harassing her with a view to coerce her or her relative to meet any unlawful demand for property or valuable is also cruelty.<sup>173</sup> Therefore, to convict a person for cruelty, the prosecution has to establish the actual commission of acts amounting to cruelty. Cruelty here means not only physical but also mental

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<sup>167</sup> *Ashok Kumar v. State of Punjab*, 1987 Cri.L.J., 412.

<sup>168</sup> *Shyama Devi v. State of West Bengal*, 1987, Cri, LJ. 1163.

<sup>169</sup> 1990 AIR 209.

<sup>170</sup> *Gurbachan Singh v. Satpal Singh*, 1990 AIR 209.

<sup>171</sup> 2007 SCC 210.

<sup>172</sup> IPC § 498A expln. (a) (1860).

<sup>173</sup> IPC § 498A expln. (b) (1860).

cruelty. This provision intends to prevent all forms of cruelty against women in marital relationship and fights against the menace of dowry deaths. Technically speaking, a woman who is subjected to violence can approach police and lodge a case against the abusers even without any proof. This is so because burden of proof is on the person who causes violence. He must prove that he has not committed the offence. Cruelty under this provision is cognizable and also non-bailable and non-compoundable.

Constitutionality of this provision was challenged in the case of *Inder Raj Malik v. Sunita Malik*<sup>174</sup>. The issue was that the investigating authorities and courts get arbitrary power through this provision and this offends the provisions of Article 14 of the Constitution. Thus Section 498A is ultra vires the Constitution. However, the Court upheld the constitutional validity of this provision saying that “it does not come into conflict with Article 14”.

Similar decision was given by the Supreme Court in *Sushil Kumar Sharma v. Union of India*<sup>175</sup>. Both the decisions were on the subject that the provision is being misused. The Supreme Court while upholding the validity added that “the object of the provision is to strike at the roots of dowry menace”.<sup>176</sup>

In most of the cases courts have taken only a narrow view that the provision will include only the acts which are of grave nature. Not every sorts of harassment would attract the Section<sup>177</sup> but only those acts which will drive a woman to commit suicide or which will coerce her to meet any unlawful demand of property will amount to cruelty. It has to be conclusively established that the beating and harassment was with a view to force the woman to commit suicide or to fulfill the illegal demands.<sup>178</sup>

Malimath Committee in its report on Reforms of Criminal Justice System, 2003 made recommendations to make this offence bailable and compoundable as it makes reconciliation and returning to marital home almost impossible. The reason they put forward was that the provision is often misused by women by registering false

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<sup>174</sup> 1986 CriLJ 1510.

<sup>175</sup> 2005 (3) RCR (Cri.) 745 SC; AIR 2005 SC 3100.

<sup>176</sup> *Sushil Kumar Sharma v. Union of India*, 2005 (3) RCR (Cri.)745 SC; AIR 2005 SC 3100.

<sup>177</sup> *Sarla Prabhakar Waghmare v. State of Maharashtra*, 1990 CriLJ 407 (Bom).

<sup>178</sup> *Id.*

complaint for taking revenge on husband and his relatives.<sup>179</sup> After making a complaint she may change her mind and condone and forgive the perpetrator.<sup>180</sup> The husband may also realize his mistakes and come forward to begin a new loving relationship. At this juncture she cannot seek conciliation even if she like to due to legal obstacles.<sup>181</sup> She will not be permitted to withdraw the complaint. Thus the doors for returning to family life stand closed for her.<sup>182</sup> Thus the provision helps neither the spouses.<sup>183</sup> Nevertheless, the Supreme Court in the case of *Sushil Kumar Sharma v. Union of India*<sup>184</sup> held that “mere possibility of abuse of a provision of law does not per se invalidate a legislation”.<sup>185</sup>

It was the 1986 Criminal Law Amendment Act that inserted Section 304B in the Indian Penal Code. The Section recognized “dowry death” as an offence. It says if a woman dies within seven years of her marital life by any burns or bodily injuries and it is established that she faced cruelty or harassment by her husband or in laws soon before her death, it is considered as dowry death.<sup>186</sup> The cruelty or harassment to which she was subjected should be in connection with any demand for dowry.<sup>187</sup> Such husband or in laws who caused cruelty will be guilty of the offence of dowry death.<sup>188</sup> they’ll be punished with imprisonment for minimum of 7 years which may extend to life imprisonment in certain cases.<sup>189</sup> the term dowry in this Section has the same meaning as in ‘the Dowry Prohibition Act, 1961’. Thus any property or valuable security that is given before or any time after the marriage is treated as dowry.<sup>190</sup>

‘Dowry death’ is a cognizable and non bailable offence and it applies only to a married woman. Burden of proof shifts to the person who is alleged to have committed cruelty on the deceased to prove that he has not committed the offence.

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<sup>179</sup> *Amisha Bhandari v. State of Haryana*, 2005(2)RCR (Cri.) 429(P&H).

<sup>180</sup> 1 COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM GOVERNMENT OF INDIA, REPORT 291 (2003).

<sup>181</sup> *Id.* at 191.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> AIR 2005 SC 3100, 2005 (3) RCR (Cri.) 745 SC

<sup>185</sup> *Sushil Kumar Sharma v. Union of India*, AIR 2005 SC 3100, 2005 (3) RCR (Cri.) 745 SC

<sup>186</sup> IPC § 304B (1) (1860).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> IPC § 304B (2) (1860).

<sup>190</sup> Dowry Prohibition Act § 2 (1961)

Even though, in order to invoke the presumption under Section 113B of the Indian Evidence Act, it has to be established that the woman died due to harassment or cruelty. The expression ‘soon before death’ under Section 113B of the Evidence Act and 304B of Indian Penal Code depends upon the facts and circumstances of each cases. There is no precise period specified. The Apex Court in *Kaliyaperumal and Anr v. State of Tamil Nadu*<sup>191</sup> observed that the interval between cruelty and the death must not be large. There must exist a proximate and live link between the effect of cruelty and the death.<sup>192</sup> If it is very remote in time, that cannot be considered for the matter concerned.<sup>193</sup>

Supreme Court in *Appasaheb v. State of Maharashtra*<sup>194</sup>, gave ‘dowry’ a narrow definition by commenting that the money asked for by the accused was for meeting domestic expenses and for purchasing manure. Similar view was taken by the Andhra Pradesh High Court in *Saro Ram v. State*.<sup>195</sup> But in *Pawan Kumar v. State of Haryana*<sup>196</sup>, Supreme Court observed ‘demand for dowry’ also include demands for property or valuables made after marriage, and there need not be any agreement for dowry between the parties, to bring that demand within the meaning of the Section.<sup>197</sup>

Even though the Courts give different interpretations to these provisions, it could be seen that since the insertion of dowry death provision the courts are always on a take that possible amount of punishment must be given to the convicts<sup>198</sup> except in a few cases like *Hem Chand v. State of Haryana*<sup>199</sup> wherein it was held that “awarding extreme punishment of imprisonment for life should be in rare cases and not in every case”.

So precisely, unless the conditions prescribed under Section 304B are proved, the presumption under Section 113B cannot be invoke. The conditions to be proved are, the death must have caused by any burns or bodily injury or otherwise than under

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<sup>191</sup> (2004) 9 SCC 157

<sup>192</sup> *Kaliyaperumal and Anr v. State of Tamil Nadu*, (2004) 9 SCC 157

<sup>193</sup> *Id.*

<sup>194</sup> AIR 2007 SC 763

<sup>195</sup> (2005) CriLJ 457 AP

<sup>196</sup> (1998) 3 SCC 309

<sup>197</sup> *Pawan Kumar v. State of Haryana*, (1998) 3 SCC 309

<sup>198</sup> *Surinder Kumar v. State, (Delhi Administration)*, AIR 1987 SC 692

<sup>199</sup> AIR 1995 SC 120

normal circumstances, the death must have occurred within seven years of her marriage, she must have subjected to cruelty or harassment, such harassment or cruelty should have caused 'soon before her death', the cruelty must have done by the woman's husband or in laws and finally, such cruelty must have been in connection any demand for dowry. When these conditions are proved, the burden of proof would shift to the husband or the in laws that he is not guilty of the offence.

The Hon'ble Supreme Court of India remarked that "the degradation of society due to the pernicious system of dowry and the unconscionable demands made by greedy and unscrupulous husbands and their parents and relatives resulting in an alarming number of suicidal and dowry deaths by women has shocked the Legislative conscience to such an extent that the Legislature has deemed it necessary to provide additional provisions of law, procedural as well as substantive, to combat the evil and has consequently introduced Sections 113A and 113B of the Indian Evidence Act and Sections 304B and 498A of the Indian Penal Code".<sup>200</sup> Thus, the Supreme Court has made clear the rationale behind the introduction of these provisions through its decision.<sup>201</sup> When the situation proved insufficiency of existing laws to check dowry deaths, the legislature introduced these strict provisions

The most important thing to be considered while dealing with a case falling under these provisions is that the death has been happened within 7 years of marriage. Court held that "this period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life".<sup>202</sup> Section 498A would be attracted if the married woman is subjected to cruelty or by her husband or his relatives. If such cruelty was imposed for, or in connection with, any demand for dowry and it has lead to her death within 7 years of marriage, then, section 304B would be attracted. These provisions together provide discriminatory protection to women from the torture and inhumane treatment of a ruthless husband and his family members.

### **The Code of Criminal Procedure**

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<sup>200</sup> *Brij Lal v. Premchand & Ors*, 1989 SCR (2) 612

<sup>201</sup> *Id.*

<sup>202</sup> *State of Punjab v. Iqbal Singh and Ors*, 1991 AIR 1532, 1991 SCR (2) 790

The victims of domestic violence are often abandoned or live separately from the husbands. At this juncture the victims who are housewives may fall into financial troubles as they are not in a position to maintain themselves with children. Such deserted and destitute women have a reasonable provision for maintenance through the Criminal Procedure Code.

In spite of the fact that Cr.P.C is a procedural law, it also provides some substantive provisions and confers certain rights.<sup>203</sup> Chapter 9 of the Cr.P.C speaks about “order for maintenance of wives, children and parents”. Section 125 gives a right for maintenance to wives, children and parents. By virtue of this provision a magistrate may order a person having sufficient means upon proof of neglect or refusal to maintain his wife, children and parents who are unable to maintain themselves, for payment of maintenance. Thus, a wife who is unable to maintain herself may claim for maintenance under this provision. A woman who is not remarried after obtaining divorce from the husband can also invoke a claim under this provision.<sup>204</sup>

If the person fails to comply with the order, the magistrate may issue warrant for levying the amount due in the manner provided for levying fines and may sentence such person for the whole or any part of each month's allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.<sup>205</sup> If the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider the grounds of refusal stated by her, and may make an order under this section.<sup>206</sup>

If the wife refuses to live with her husband as she is living in adultery or they are living separately by mutual consent cannot claim for such allowance from the husband.<sup>207</sup>

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<sup>203</sup> Section 125 is a substantive provision, *Balan Nair v. Bhavani Amma Valsamma*, 1987 Cr.L.J. 399 (Ker.) F.B

<sup>204</sup> CrPC § 125 (1) expln. (b) (1973)

<sup>205</sup> CrPC § 125 (3) (1973)

<sup>206</sup> CrPC § 125 (3) proviso 2 (1973); Explanation to the proviso - If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him

<sup>207</sup> CrPC §§ 125 (4), (5) (1973)

This provision applies to every wives and husbands irrespective of the religion or community they belong to. However, it is according to their personal law, the validity of their marriage is determined.

This is a statutory right and a parallel remedy is available under the personal laws.<sup>208</sup> Thus, the remedy under Section 125 of Cr.P.C cannot be made available, if the woman has already invoked a claim for maintenance under the civil or personal laws.<sup>209</sup> A criminal court is bound by the decision of the civil court.<sup>210</sup> Section 127 (2) of the CrPC clearly says that when a civil court has passed a decree for maintenance, the magistrate should cancel its order passed under Section 125.<sup>211</sup> If after the decision of a criminal court, a different finding has been made by the civil court, the magistrate should alter the same.<sup>212</sup>

Earlier, matters concerned with the claim of maintenance were under the jurisdiction of the Magistrate of the first class. After the enactment of Family Courts Act in 1984, it is now with the Family Courts, the jurisdiction to deal with those matters rest. Family courts are constituted for the speedy settlement of disputes relating to marriage and family affairs and connected matters.<sup>213</sup> Thus it expressly except the Judicial First Class Magistrate from exercising its jurisdiction under Section 125 of crpc.<sup>214</sup>

## **SPECIAL LEGISLATIONS IN RELATION TO DOMESTIC VIOLENCE**

The laws, except some provisions, discussed before are not gender specific. However, these provisions, to an extent, have been reassessed from time to time and modified by amending them in order to balance the changing situations.

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<sup>208</sup> eg. under hindu law Section 24 of Hindu Marriage Act, 1955 provides for maintenance. In muslim law also a wife has the right to be maintained by her husband. Muslim women (Protection of Rights on Divorce) Act, 1986 enables a divorced Muslim to claim maintenance

<sup>209</sup> See: *K.R. Sagayaraj v. Mrs.C. Rajammal*, CRL. O.P. No. 22949 of 2001 & M.P. Nos. 1 of 2009 & 1 of 2010; *Saroja v. Janardhanan*, 2001 CriLJ 3111

<sup>210</sup> *Murlidhar Chintaman Waghmare v. Smt. Pratibha Murlidhar Waghmare*, 1986 (1) BomCR 358

<sup>211</sup> Section 127 (2): Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly

<sup>212</sup> *Vanajakshamma and Ors. v. P. Gopala Krishna*, AIR 1970 Mys 305

<sup>213</sup> Family Courts Act, Preamble (1984)

<sup>214</sup> Family Courts Act, § 7(2)(a) (1984) : The Family courts have and exercise the jurisdiction exercisable by a Magistrate of first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure Code,1973



Nevertheless, the necessity of specific legislations to deal with the socio-economic inequalities against women was intensified as the prevailing laws were insufficient to meet the issues. This led the Parliament to enact new legislations that particularly deal with those issues. Some of them deal with different sorts of domestic violence.

### **The Dowry Prohibition Act, 1961**

The Dowry Prohibition Act, 1961 was the first legal framework that recognised dowry as a “social evil”. The legislation was introduced to prohibit the practice of dowry and related harassments. It makes the act of giving or taking or abetting to give and take dowry a punishable offence.<sup>215</sup> It applies to each and every citizen of India irrespective of the communities they belong to.

The Act was amended twice, in 1984 and 1986. Significant changes have been brought in with a view to make it much more stronger. It was the Dowry Prohibition (Amendment) Act, 1984 that enhanced, for the first time, the punishment for giving or taking dowry from six months imprisonment and a fine of rupees five thousand.<sup>216</sup> However, the Dowry Prohibition (Amendment) Act was enacted in 1986 due to the ineffectiveness of the previous amendment. This amendment broadened the definition of dowry given under the Act to some extent by including the words “any time after the marriage” as a substitute for “or after the marriage”. Now persistent demand for dowry even after the marriage can be dealt with.

Section 2 of the Act supplies definition for the term dowry. It denotes dowry as a property or a valuable security<sup>217</sup> given or agreed to be given by one party to the other party to the marriage at the time of the marriage or before or even after the marriage.<sup>218</sup> It excludes Mahr or dower in Islam that is given to the wife by the husband from the purview of the definition.<sup>219</sup> Also, such presents which are customary in nature cannot be considered as dowry if their value is not excessive of

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<sup>215</sup> Dowry Prohibition Act § 3 (1961)

<sup>216</sup> The 1984 amendment prescribes punishment “With imprisonment for a term which shall not be less than six months, but which may extend to 2 years and with fine which may extend to ten thousand rupees or the amount of the value of such dowry, whichever is more”

<sup>217</sup> Explanation II—The expression “valuable security” has the same meaning as in section 30 of the Indian Penal Code

<sup>218</sup> Dowry Prohibition Act § 2 (1961)

<sup>219</sup> *Id.*

the financial status of the person giving it.<sup>220</sup> However there exists no clarity regarding the customary nature of the presents and the requirement that it not to be excessive of the financial status.

The Act contemplates punishment for giving or taking dowry or abetting giving or taking dowry and also for demanding dowry under Sections 3 and 4 respectively. After the 1986 amendment, section 3 provides for punishment with imprisonment minimum of 5 years, and with fine of minimum fifteen thousand rupees or the dowry amount, whichever is more. Punishment under Section 4 is minimum imprisonment of 6 months with a maximum of 2 years and with fine up to ten thousand rupees.

For the implementation of this Act, dowry prohibition officers are appointed and conferred with certain powers to see whether the provisions of the Act are complied with.<sup>221</sup> It is their function to prevent the taking or demanding of dowry and to collect evidence for the prosecution of persons committing offences under the Act.<sup>222</sup>

Offences under this Act are cognizable and non bailable which are to be investigated and tried according to the provisions of the Code of Criminal Procedure.<sup>223</sup>

There is no period of limitation within which the complaint should be filed under this Act. Also the provisions shift the burden of proof to the accused from the complainant.<sup>224</sup> He has to prove that he had not committed an offence under the Act.

Judicial response on this subject was much appreciated. The Hon'ble Supreme Court unhesitatingly held in *Shobha Rani v. Madhukar Reddy*<sup>225</sup> that a demand for dowry by itself is bad enough and it amounts to cruelty. In such a case a wife is entitled to get a decree for dissolution of her marriage. Demand for dowry includes the demand of additional amount of dowry or money.<sup>226</sup>

The role of judiciary in eradicating the evil of dowry and it's duty to keep up with the objectives of the Act has been emphasised in many cases. The comment given in *State*

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<sup>220</sup> Dowry Prohibition Act § 3(2) Proviso (1961)

<sup>221</sup> Dowry Prohibition Act § 8B Proviso (1961)

<sup>222</sup> Dowry Prohibition Act § 8B (2) (b) & (c) (1961)

<sup>223</sup> Dowry Prohibition Act § 8 (1961)

<sup>224</sup> Dowry Prohibition Act § 8A (1961)

<sup>225</sup> AIR 1988 SC 12

<sup>226</sup> *Prem Singh v. State of Haryana*, AIR 1998 SC 299

*of Karnataka v. M.V. Manjunath Gowda*<sup>227</sup> is an example. The Supreme Court was of the opinion that “the practice of giving and demanding dowry is a social evil having deleterious effect on the entire civilized society and has to be condemned by the strong hands of judiciary. Despite various amendments providing deterrent punishment for curbing the increasing menace of dowry deaths, the evil practice of dowry remains unabated. The Court cannot be oblivious to the intentment of the legislature and the purpose for which the enactment of the law and amendment has been effected. Every court must be sensitized to the enactment of the law and the purpose for which it is made by the legislature. It must be given a meaningful interpretation so as to advance the cause of interest of the society as a whole. No leniency is warranted to the perpetrator of the crime against the society”. The Court made it clear that the proper interpretation of the provisions is essential for preventing the increase of this menace.

One of its observations regarding the demand of dowry was that, “a person who enters into a marital arrangement cannot be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money.”<sup>228</sup> Thus even when there is no valid marriage, the provisions of the Act would apply. The Court interpreted the provisions so as to cover the offending acts of such persons who have undergone some kind of marriage apparently and assumed the position of husband by living and cohabiting with that woman.<sup>229</sup>

In spite of this stringent law, dowry remains as a continuing practice. There is no clarity with the customary nature of the presents given and the requirement that it be not excessive to the financial status contemplated in the proviso to Section 3 of the Act. Such presents are not clearly distinguished from dowry. No definite ceiling has been put on the value of the gifts that can be given. Also it is always difficult to show, if the demand for dowry is made after a couple of years of marriage, that it is in connection with the marriage. These all makes the Act inefficient to some extent.

### **The Commission of Sati Prevention Act, 1987**

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<sup>227</sup> (2003) 2 SCC 188

<sup>228</sup> *Reema Aggarwal v. Anupam and Ors*, AIR 2004 SC 1418

<sup>229</sup> *Id.*

Sati is a practice usually seen among the Hindu communities in India. In this practice, a recently widowed woman either voluntarily or by use of force or coercion commits suicide as a result of her husband's death.<sup>230</sup> Woman burning to death on her husband's funeral pyre is a common form of Sati and it is a manifestation of domestic violence.<sup>231</sup> Burying alive with the husband's dead body and drowning are other forms of this evil practice.<sup>232</sup>

No religion has enjoined this practice as an indispensable duty. History shows that the custom has originated from the self immolation of goddess Sati.

The Commission of Sati Prevention Act, 1987 was enacted to provide effective prevention of the practice of Sati that has been prevailing in different communities in India. Several State legislations were passed after the well documented case of Roop Kanwar in Rajasthan.<sup>233</sup> Its subsequent glorification led to the introduction of this Central legislation.

Section 2 (c) of the Act defines the term 'Sati'. As per the Section Sati means the act of burning or burying alive of any widow or woman along with the body of her deceased husband or any other relative or with anything associated with the husband or such relative, even if it is voluntary on the part of that woman.

The Act criminalizes the attempt and abetment to commit sati and its glorification. Abetment is a grievous offence than the attempt to commit Sati. Punishment for attempt is maximum of six months of imprisonment and fine,<sup>234</sup> whereas; it is very severe for the offence of abetment. If a person attempts to commit sati, abettor is liable for punishment punishable with imprisonment for life and fine but if the person commits sati, the abettor shall be punished with death or imprisonment for life and fine.<sup>235</sup>

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<sup>230</sup> Linda Heaphy, The Practice Of Sati (Widow Burning), (May 2nd, 2017), <https://kashgar.com.au/blogs/history/the-practice-of-sati-widow-burning>, (Mar. 29th, 2018)

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> In this case a eighteen year old girl was burnt alive after the death of her husband as sati. See: *Madan Singh v. State of Rajasthan*, 1988 (1) WLN 551

<sup>234</sup> Commission of Sati Prevention Act § 3 (1987).

<sup>235</sup> Commission of Sati Prevention Act § 4 (1987).

Inducement to a woman to get her burnt or buried alive, participating in any procession in connection with the commission of sati or even being present at the place where sati is committed as an active participant etc. will amount to abetment.<sup>236</sup>

Glorification of sati through its observance, support, justification, propagation etc.,<sup>237</sup> is also contemplated as an offence that is punishable with imprisonment for a term not less than 1 year which may extend to 7 years and with fine minimum of Rs. 5000 which may extend to Rs.30000.<sup>238</sup>

While trying the offence of attempt to sati, the Special Court is supposed to take into consideration the circumstances that led to the commission of the offence and also the mental state of the person committed the offence.

### **The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994**

Sex selective abortion is an ingrained issue in India. The techniques used to determine genetic or metabolic disorders of the foetus turned to be blight on the life of a female child. The medical practitioners began to use this for the purpose of identifying the sex of the foetus. To prevent the birth of a female child, the patriarchal families force the mother to abort the child in the womb. The patriarchal societies consider female children as a burden. Their general preference for male child results in female foeticide and infanticide.

Forced termination of pregnancy is another manifestation of domestic violence. This is not only discriminatory but also affects the status and dignity of women adversely. Realizing this, the Parliament enacted Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act in 1994. The Act was amended in 2002 and termed it as The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act in order to revamp the regulations on the use of techniques for sex selection.

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<sup>236</sup> Commission of Sati Prevention Act § 4 expln (a) to (g) (1987).

<sup>237</sup> Commission of Sati Prevention Act § 2 (b) (1987).

<sup>238</sup> Commission of Sati Prevention Act § 5 (1987).

The Act recommends the law enforcing bodies to take severe action against the incidents of female foeticide. It provides for the prohibition of sex selection and the misuse of the prenatal diagnostic techniques that may lead to female foeticide.

A person seeking the aid of a medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in the Act, is liable for punishment with imprisonment for maximum of 3 years and with fine which may extend to Rs. 50000 for the first offence and for any subsequent conviction with imprisonment which may extend to 5 years and with fine which may extend to Rs. 1 lakh.<sup>239</sup>

The regulatory measures to keep a check on sex determination and female foeticide under the Act include regulation and compulsory registration of Genetic Counseling Centers, Genetic Laboratories and Genetic Clinics,<sup>240</sup> regulation of use pre-natal diagnostic techniques,<sup>241</sup> constitution of Central Supervisory Board<sup>242</sup> and advisory committees,<sup>243</sup> prohibition of advertisement relating to pre-natal determination of sex,<sup>244</sup> etc.

### **The Child Marriage Restraint Act, 1929**

Child marriage is a deep rooted problem in India. It is usually practiced on the veil of religious traditions or customs. Marrying off female children before attaining their mental and physical maturity often results in experiencing domestic violence.

UNICEF reported that girls who marry before the age of eighteen are more likely to experience domestic violence. Study shows those girls have 22% of higher probability of being a victim of domestic violence.<sup>245</sup> It is common among those who had married as children.<sup>246</sup>

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<sup>239</sup> The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act (PCPNDT Act) § 23 (3) (1994)

<sup>240</sup> PCPNDT Act §§ 3 & 18 - 21 (1994)

<sup>241</sup> PCPNDT Act § 4 (1994)

<sup>242</sup> PCPNDT Act § 7 (1994)

<sup>243</sup> PCPNDT Act § 16 (1994)

<sup>244</sup> PCPNDT Act § 22 (1994)

<sup>245</sup> JENI KLUGMAN ET AL., VOICE AND AGENCY: EMPOWERING WOMEN AND GIRLS FOR SHARED PROSPERITY 68 (2014).

<sup>246</sup> *Id.*

The Child Marriage Restraint Act, 1929, which is also known as Sharda Act, recognised child marriage as a criminal offence. The main purpose of the legislation was to restrain the solemnization of child marriages.<sup>247</sup> Marriage of girls under the age of 18 years and of boys below the age of 21 years is a punishable offence under this Act. This was applicable to all marriages performed in every community in India.

The legislation at present stands repealed and replaced by the Prohibition of Child Marriage Act, 2006.<sup>248</sup> The 1929 Act does not prohibit or prevent but only restrains the solemnization of child marriage and prescribes penalty for it. It gives civil court to issue injunction prohibiting such marriage from taking place.

But, the purpose of 2006 Act is to prohibit the solemnization of child marriage.<sup>249</sup> it has made child marriage a cognizable and non bailable offence.

Unlike the previous legislation, the Prohibition of child marriage Act, 2006 makes such marriages voidable giving an option to the child in the marriage to file a petition for annulling the marriage<sup>250</sup> and also suggests the appointment of Child Marriage Prohibition Officers in every state with the responsibility of preventing child marriages in the country.<sup>251</sup> Under this Act, Magistrate of the first class or a Metropolitan Magistrate has the power to issue injunction to prohibit the occurrence of child marriages.

## **LIMITATIONS**

Analysing the pre 2005 scenario, it gives an appreciation that the remedies available under civil or criminal law were very limited for a victim of domestic violence. The court proceedings under these laws were prolonged and did not provide any emergency relief to the victim. During this elongated proceedings the victim, having little recourse to remedies, was invariably at the leniency of the offender.

Till PWDV Act, 2005 the term ‘domestic violence’ was not specifically defined anywhere. Violence to which women subjected in intimate relationships were not

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<sup>247</sup> The Child Marriage Restraint Act, preamble (1929)

<sup>248</sup> However, the 1929 Act was the law regarding child marriage before the enactment of the PWDV Act, 2005

<sup>249</sup> The Prohibition of Child Marriage Act, preamble (2006)

<sup>250</sup> The Prohibition of Child Marriage Act, § 3 (2006)

<sup>251</sup> The Prohibition of Child Marriage Act, § 16 (2006)

substantially recognised. This was mainly due to the disregard of domestic relationships and the possibility of females getting abused at various stages of their life. Only those who are legally married could use these laws. The laws were on the assumption that women are harassed and mistreated at home only in their relationships which are in marital nature. As a result of this, legal protection was available only in matrimonial proceedings and that of women under relationships outside marriage were not assured. That means laws assumed domestic violence happens against wives and daughters in law alone. Mothers, sisters, daughters and those who are in relationships in the nature of marriage are not covered.

When we consider the social stigma that the victims are facing, they are more needful for the maintenance and shelters than the prosecution and conviction of the abusers. The way in which the issues were dealt with by civil and criminal law instruments was the major shortcoming. The deficiency in law to provide protection from abuse in a way contributed to the misuse of the provisions of Sec. 498A. Instead of accosting violence, legal system gave more attention for sentencing the offenders. There is a widespread belief among the Indian public that this provision is used primarily to file false charges to harass or blackmail an innocent spouse and his relatives.<sup>252</sup> The court in *C. Veerulu v. State of Andhra Pradesh*<sup>253</sup> demanded a stop to the unhealthy trend of false complaints that had been resulting in unnecessary misery to the husband and his relatives.<sup>254</sup>

The existing criminal procedures were highly based on documentation and evidence with regards to the events occurred. Obtaining evidence with respect to the incidents happened in a domestic relationship, especially in a conjugal space is something not easy to fulfill. Thus, prevailing criminal law devices were incapable of keeping the problems in check. Application of civil laws in another way included prolonged proceedings of judicial separation or divorce throughout of which the victim has to remain without any source of reliefs.

Domestic violence was not regarded as an independent issue that warrants an instant legal interference. Only options available to the victims were either to obtain divorce

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<sup>252</sup> Abeyratne & Jain, *Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality*, 21 AM. U. J. GENDER & SOC. POL'Y & L. 333 (2013).

<sup>253</sup> 1989 Cr. L.J. (NOC) 52.

<sup>254</sup> Jain, *supra* note 252.



under the civil law or to resort to Section 498A of the Indian Penal Code. That too only after occurrence of offence. No preventive measures were available to curb the evil. Also, the sufferers had to approach different courts for getting different reliefs resulting in multiple litigations for the same connected issues.<sup>255</sup>

This complex situation, where the insufficiency of these instruments to check the issue was felt, contributed for the urgent need for a legal intervention. Thus, the PWDV Act providing a mixture of both civil and criminal remedies got enacted and recognised domestic violence as a specific independent issue in our country.

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<sup>255</sup> Family Courts, Criminal Courts, District Courts

## **Chapter 4**

### **The Protection of Women from Domestic Violence Act, 2005 – An Analysis**

For the most part, domestic violence against women was a private concern. This is why even police hesitates to intervene in such cases. Women were expected to tolerate to every situation silently and to live with adequate adjustments. Instead of perceiving it as a crime, in most of the communities, abuse against women were excused and approved impliedly through their cultural and religious customs and norms. The fact that women themselves are often unwilling to raise and report violence in a way leads to an inference that they are responsible for society's such attitudes. This basic comprehension of domestic violence as an individual responsibility has made the existing legal measures to fall short. Many of the laws remained unsuccessful in pursuing its goals.

National laws provided protection against domestic violence only in an implicit manner. The laws recognized cruelty<sup>256</sup> and dowry deaths<sup>257</sup> as a separate crime, outlawed dowry related harassments and proscribed the practice of dowry through special legislation<sup>258</sup>. However, only women who are married could use all these laws.

Understanding the significance of the social and economic costs of gender based violence various international commissions and instruments have been formed and they laid their efforts in curbing the menace and protecting human rights of women.

The UN commission on the Status of Women was established 'to promote implementation of the principle that men and women shall have equal rights'. The Universal Declaration of Human Rights upholds the right of everyone to live with dignity. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) was established to monitor the situation of women and requires the member States to make legislations "to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of

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<sup>256</sup> IPC § 498A (1860).

<sup>257</sup> IPC § 304B (1860).

<sup>258</sup> Dowry Prohibition Act (1961).

equality with men”.<sup>259</sup> It’s General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.<sup>260</sup>

India being a signatory to these international instruments failed to satisfy the requirements through its existing laws. It couldn’t conform to the definition of ‘violence against women’ in the instruments. The then existing laws didn’t even provide a proper definition for the term ‘domestic violence’ to contemplate exhaustively the experiences of women in domestic relationships. It was in this context, to eliminate the inadequacies; they enacted the Protection of Women against Domestic Violence Act, 2005.

## **EVOLUTION OF PWDV ACT**

The shortcomings of national laws strongly recommended for a comprehensive legislation that provides adequate remedies for those who suffer. Domestic Violence as an endemic and pervasive reality of women’s life as well as fundamental violation of their human rights was particularly featured only in 1990’s.<sup>261</sup>

World conferences of women like Fourth World Conference of Women at Beijing Conference, 1995 and Vienna Congress on Human Rights, 1994 considered it as a pivotal issue and recognized rights of women as a human right. However, the situation required redefinition of violence against women at home. Thus, there had been efforts and movements for a complete reformulation of what composes violence against women in intimate relations, nationally and globally.

Feminist organizations in India like Lawyers Collective Women's Rights Initiative (LCWRI) campaigned for a separate civil law on domestic violence in early 90’s.<sup>262</sup> In 1992 they prepared a Bill and spread among other women groups.

Later, the National Commission for Women drafted the Domestic Violence to Women (Prevention) Bill in 1994. The feminist forums harshly criticized this and insisted the

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<sup>259</sup> G. A. Res. 34/180, CEDAW, art. 3 (Dec. 18, 1979).

<sup>260</sup> *Hiral Harsora v. Kusum Harsora*, AIR 2016 SC 4774.

<sup>261</sup> Shobha Venkatesh Ghosh, *Contextualising Domestic Violence: Family, Community, State, in BEHIND CLOSED DOORS: DOMESTIC VIOLENCE IN INDIA* 51 (RINKI BHATTACHARYA, 2004).

<sup>262</sup> Lawyers Collective, Women’s Rights, <http://www.lawyerscollective.org/our-initiatives/womens-rights> (Apr. 21, 2018).

Government to prepare a policy framework to combat violence against women within the home. The Lawyers Collective formulated another bill and presented it to the government in 1999.<sup>263</sup> The Department of Women and Child called them for consultation on the proposed bill. After a number of discussions “it was decided that the LCWRI Bill would be taken as the basis for any future law on domestic violence”.

Subsequently, as a first initiative on the subject, the Ministry of Human Resources Development introduced a bill titled “The Domestic Violence against Women (Prevention) Bill, 2001”. However, the bill was far different from the one prepared by LCWRI. Rather obtaining expected acclamation, the bill got a bad press due to its inclusion of faulty provisions.<sup>264</sup>

The Union Ministry of Human Resource Development again took a move to introduce “Protection from Domestic Violence Bill, 2002” which was similar to that of the 2001 Bill in Parliament on March 8, International Women's Day. This also failed to get applause from the women forums and organizations that represented the domestic violence victims. Some of them asked for substantial amendments to the provisions,<sup>265</sup> while others opined that amendments would not suffice because even the main provisions are defective in nature<sup>266</sup>. Finally, a Standing Committee was appointed to reexamine the Bill and to make proper recommendations. After discussions with various departments of Government, Women’s Organizations, Commissions, NGOs etc the Committee in December 2002 submitted its report to parliament. It lay pending in Lok Sabha until the government was taken over by the United Progressive Alliance (UPA). The bill formed a part of UPA Government’s Common Minimum Programme.

Ultimately, the Department of Women and Child Development reconsidered it and introduced in parliament with necessary changes. It received President’s assent in September 2005 and came into force as “The Protection of Women from Domestic

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<sup>263</sup> T. K. Rajalakshmi, *Adding Insult To Injury*, 19 FRONTLINE (2002).

<sup>264</sup> “The bill in its provision was ideologically regressive in its exorbitation of the family. It placed the welfare of the family above the wellbeing of the victimized woman; actually it was providing means of women's subjugation, sub standardization”

<sup>265</sup> LCWRI

<sup>266</sup> All India Democratic Women's Association (AIDWA)

Violence Act, 2005” by October 2006. “The Protection of Women from Domestic Violence Rules, 2005” was also issued simultaneously.

### **AIMS AND OBJECTIVES**

The main purpose of the Act is to give adequate protection to women who suffer harassments within home. The Act actually provides new rights as well as a new forum for enforcement of existing rights. Its Preamble states that the Act is “to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto”. Thus, it advocates not only the protection but also the need for securing the constitutional rights of women in domestic relationship. Rather than just cognizance of an offence committed against a woman, it stresses the recognition of fundamental human rights of each and every woman.<sup>267</sup> Their rights are thus recognized even in the private domain of family. By that means, the legislation breaks the society’s traditional attitude towards women that they are born to live with adjustments and they should suffer everything silently.

The Act through its procedural safeguards aims to ensure access to justice and that the aggrieved persons are getting reliefs efficiently and expeditiously. An action can be brought under it even if the acts of domestic violence were committed before its implementation.<sup>268</sup> The Act mainly provides civil remedies. In legal sense it could be stated that it contains civil remedies which is enforced through criminal machinery. Thus it provides a mixture of civil remedies and criminal penalties. However, the Act does not aim to punish the person committing domestic violence like any other criminal laws. It is primarily concerned about the protection of the victims and tries to prevent it occurring again. The Act could punish the perpetrator only when he oversteps the orders passed under it.

### **DEFINITION OF DOMESTIC VIOLENCE**

For the first time in the Indian legal history, the PWDV Act provided a wide definition of the term “domestic violence” thereby broadening and clarifying the

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<sup>267</sup> Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177 (2006). [hereinafter Vyas]. <http://repository.law.umich.edu/mjgl/vol13/iss1/5>

<sup>268</sup> *V.D. Bhanot v. Savita Bhanot*, [2012] 1 S.C.R. 867.

concept. It gives a comprehensive definition in Section 3 of the Act that conforms to the UN Framework for Model Legislation on Domestic Violence. The provision explains what all come to constitute domestic violence. It says that any act, omission, commission or conduct of a person that harms, injures or endangers the health, safety, life, limb or well-being, of the aggrieved person whether mental or physical would amount to domestic violence.<sup>269</sup> This includes all forms of conduct that will lead to physical, sexual, verbal and emotional, and economic abuse.<sup>270</sup> Furthermore, harassments with a view to coerce the aggrieved person or her relatives to meet any unlawful demand for dowry, property or valuable security would come under the purview of this definition.<sup>271</sup> Any such conduct that has the effect of threatening<sup>272</sup> or causing physical or mental harm or injury<sup>273</sup> to the aggrieved person would also constitute domestic violence.

Thus, a person is facing domestic violence if she is beaten up, threatened or harassed in her home by a person with whom she resides in the same house.<sup>274</sup>

The provision in its explanation defines physical, sexual, verbal and emotional, and economic abuse. Any act or conduct that causes bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person will comprise physical abuse.<sup>275</sup> It also includes in its ambit assault, criminal intimidation and criminal force.<sup>276</sup> Beating, slapping, hitting, biting, kicking, punching, pushing, shoving are examples of physical violence.<sup>277</sup> The complainant's perception that her children are at a risk of physical violence can also be brought under this provision.<sup>278</sup>

Sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.<sup>279</sup> Forced sexual intercourse, forces to look at pornography, child sexual abuse etc are some forms of sexual

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<sup>269</sup> PWDV Act § 3 (a) (2005).

<sup>270</sup> *Id.*

<sup>271</sup> PWDV Act § 3 (b) (2005).

<sup>272</sup> PWDV Act § 3 (c) (2005).

<sup>273</sup> PWDV Act § 3 (d) (2005).

<sup>274</sup> Protection of Women from Domestic Violence Rules (PWDV Rules), Form IV (2006).

<sup>275</sup> PWDV Act § 3 expln I cl. (i) (2005).

<sup>276</sup> PWDV Act § 3 expln I cl. (i) (2005).

<sup>277</sup> PWDV Rules, Form IV (2006).

<sup>278</sup> PWDV Rules, Form V (2006).

<sup>279</sup> PWDV Act § 3 expln I cl. (ii) (2005).

abuse.<sup>280</sup> Through this definition the Act recognizes the concept of marital rape. Until the enactment of this legislation, Judiciary in India often neglected to look at marital rape as an issue. It was not regarded as an offence unless the victim is less than 15 years of age. By incorporating sexual abuse as a form of domestic violence, the protection is extended to wives also.

Verbal and emotional abuse has been defined to include insults, ridicule, humiliation, name calling and insults or ridicule especially with regard to not having a child or a male child.<sup>281</sup> Repeated threats to cause physical pain to any person in whom the aggrieved person is interested would also come under its purview.<sup>282</sup> Preventing a person from attending school or college; preventing her from taking up a job, preventing from leaving the house, preventing from marrying a person of her choice, threat to commit suicide etc. will form verbal and emotional violence.<sup>283</sup>

None of the legislations that were prevailing in India before the enactment of PWDV Act, 2005 deal with the concept of economic abuse. The term has been elaborately explained under this statute. Any deprivation of economic or financial resources to which the aggrieved is entitled or which she requires out of necessity including household necessities, her stridhan, property either jointly or separately owned, payment of rent of shared household and maintenance.<sup>284</sup> This implies not only the right of the aggrieved person to use the resources but also her right to possess as well.<sup>285</sup>

It also encompasses the disposal of household effects, alienation of movable or immovable assets valuables, shares, securities, bonds, stridhan etc and properties in which the aggrieved person has any interest.<sup>286</sup> Prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship also amount to economic abuse.<sup>287</sup> The last two

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<sup>280</sup> PWDV Rules, Form IV (2006).

<sup>281</sup> PWDV Act § 3 expln I cl. (iii) (2005).

<sup>282</sup> *Id.*

<sup>283</sup> PWDV Rules, Form IV (2006).

<sup>284</sup> PWDV Act § 3 expln I cl. (iv) (a) (2005).

<sup>285</sup> Vyas, *supra* note 267.

<sup>286</sup> PWDV Act § 3 expln I cl. (iv) (b) (2005).

<sup>287</sup> PWDV Act § 3 expln I cl. (iv) (c) (2005).

provisions<sup>288</sup> are related to the resources which the aggrieved person is entitled to by virtue of her domestic relationship.<sup>289</sup> Therefore, not providing money for maintenance, not providing food, medicines etc., stopping from carrying on employment, not allowing to use salary wages etc., stopping from accessing or using any part of house etc. would come within its ambit.<sup>290</sup>

From this definition of domestic violence it is perceived that the Act does not only deal with persistent abuse. Even a sole act of commission or omission may constitute domestic violence if that act satisfies the requirements set down in the statute.

This provision that deals with the definition of domestic violence makes it clear that such violence is gender neutral. Not only men but women also commit physical abuse, verbal abuse, emotional abuse and economic abuse against other women. Even sexual abuse may be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral.<sup>291</sup>

## **SCOPE OF THE ACT**

The scope and applicability of the Act has been widened through judicial interference.

An “aggrieved person” is permitted to institute proceedings under this Act. Any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent is an aggrieved person.<sup>292</sup> The requirement is that the woman should have been in a domestic relationship with the respondent. For that the respondent and the aggrieved should be in a relation by consanguinity, marriage, or in the nature of marriage, adoption etc and have at least lived together in a shared household. Therefore, woman who is a wife, sister, widow, mother, daughter, living in a relationship in the nature of

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<sup>288</sup> PWDV Act § 3 expln I cl. (iv) (b) & (c) (2005).

<sup>289</sup> Vyas, *supra* note 267.

<sup>290</sup> PWDV Rules, Form IV (2006).

<sup>291</sup> *Hiral Harsora v. Kusum Harsora*, AIR 2016 SC 4774.

<sup>292</sup> PWDV Act § 2 (a) (2005).



marriage with the perpetrator etc., is entitled to protection under the law. Even a judicially separated wife can be an “aggrieved person”.<sup>293</sup>

The application of the definition of “aggrieved person” also extends to a child<sup>294</sup> whether he or she be an adopted, step or foster child. Children can file a suit against a parent or parents who are inflicting physical, mental or economical sufferings on them.<sup>295</sup> In case he or she is not in a position to reach the court on his or her own, ‘any other person’ can file a complaint on behalf of that child.<sup>296</sup> Accordingly, children as well as women are the principal beneficiaries of this law.<sup>297</sup>

Under the Act, “respondent” is an adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act.<sup>298</sup> Thus this section allows an aggrieved person to file a suit only against an adult male relative. However, proviso to this section states 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.<sup>299</sup> Even though the expression “woman” or “female” has not been used, female relatives of the husband or male partner can also be arraigned as a respondent. There has been many decisions in this regard.

The Hon’ble Supreme Court in the case of *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade & Ors*<sup>300</sup>, viewed that, if the Legislature intended to exclude females, they would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. The term “relative” has been given restrictive meaning. It is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made by an aggrieved wife.

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<sup>293</sup> *Krishna Bhattacharjee v. Sarathi Choudhury & Anr.*, ( 2016 ) 2 SCC 705.

<sup>294</sup> PWDV Act § 2 (b) (2005). “child” means any person below the age of eighteen years and includes any adopted, step or foster child”.

<sup>295</sup> Madhu Purnima Kishwar, Well - Intentioned but Over Ambitious - A Review of the New Domestic Violence Act, (2008) <http://manushi.in/articles.php?articleId=141&ptype=&pgno=2#.Ww3QXu6FPIU>, (Apr.22nd 2018) (hereinafter Kishwar).

<sup>296</sup> PWDV Act § 12 (2005); see: Kishwar, *supra* note 295.

<sup>297</sup> Kishwar, *supra* note 295.

<sup>298</sup> PWDV Act § 2 (q) (2005).

<sup>299</sup> PWDV Act § 2 (q) proviso (2005).

<sup>300</sup> (2011) 3 SCC 650

Rajasthan High Court in *Sarita v. Smt. Umrao*<sup>301</sup>, held that “the expression “relative” is quite broad and it includes all relations of the husband irrespective gender or sex”.<sup>302</sup>

However, this is applicable only if the aggrieved person is a wife or a female in a relationship in the nature of marriage. In an ordinary case, it is possible to file a complaint against an adult male only.

The expression “adult person” in the definition clarifies that women who evict the aggrieved person from the shared household are not covered under the definition. Being it so, the adult male person may, without standing in front, put forward other female persons and make them evict the aggrieved person. By this the very object and purpose of the Act can be defeated easily.

On account of this, the Apex Court in *Hiral P. Harsora & Ors v. Kusum Narottamdas Harsora & Ors*<sup>303</sup> struck down the prefix “adult male” before the word “person” in Section 2(q). The Court considered the statement of objects and reasons to the PWDV Bill, 2005, and ruled that the definition is not based on any intelligible differentia and not in tune with the object that the Act is sought to be achieved.

The court observed that the categorization of “adult male person” puts a limit on the effective application of the socially beneficial legislation that is intended to secure women from all forms of domestic violence. It is against the concept of giving protection from domestic violence “of any kind”. Also it is violative of Article 14 of the Constitution as it discriminates between persons similarly situated. In view of this, the Court deleted the words “adult male” from the definition thereby rendering the proviso otiose. Consequently, the Court deleted it too.

By this, the Court has expanded the ambit of the definition making it possible for an aggrieved person to file a suit against female relatives as well. For instance, a mother

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<sup>301</sup> 2008 (1) RCr.D 97 (Raj)

<sup>302</sup> See: *Nand Kishore v. State of Rajasthan*, R.L.W.2008(4)Raj3432; *Rema Devi v. State of Kerala*, (2009) D.M.C. 297

<sup>303</sup> AIR 2016 SC 4774.

in law can now file a suit against her daughter in law and a daughter can file against her mother and vice versa.<sup>304</sup>

### **Concept of Domestic Relationship**

If an aggrieved person wants to file a case against the respondent, she must be in a domestic relationship with the respondent. The principle is that, no relief is available for a woman unless there is a domestic relation between her and the respondent. In *Manmohan Attavar v. Neelam Manmohan Attavar*<sup>305</sup>, the Supreme Court ruled that an order under the Domestic Violence Act allowing a party to occupy a household cannot be issued if both the parties had not lived in a domestic relationship in the household. There are several cases in which the courts had dismissed complaints as it is not maintainable due to the lack of existence of domestic relationship between the parties.<sup>306</sup>

The Act defines “domestic relationship” as “a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family”.<sup>307</sup>

It is regarded as the basis for a woman to invoke the jurisdiction under the Act.<sup>308</sup> So the relationship should be present when the complaint is registered.

The definition speaks of a relationship existing between 2 persons who live or have lived together in a shared household and are related by consanguinity, marriage etc. The definition clearly says “are related” and not “were related”.<sup>309</sup> Thus it supports

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<sup>304</sup> Aparna Chandra, Violence Act: Critiquing the SC Decision in *Harsora v. Harsora*, (Oct. 14th, 2016), <http://www.livelaw.in/women-respondents-domestic-violence-act-critiquing-sc-decision-harsora-v-harsora/>, (Apr. 22nd, 2018)

<sup>305</sup> a(2017) 8 SCC 550

<sup>306</sup> *Amit Agrawal and Ors v. Sanjay Aggarwal and Ors*, (2016) 3 RCR (Cri) 356 : 2017 Cri LJ 3570 : (2016) 3 HLR 372; *Babita v. State & Ors*, 2016(159)DRJ249.

<sup>307</sup> PWDV Act § 2 (f) (2005).

<sup>308</sup> *Amit Agrawal and Ors v. Sanjay Aggarwal and Ors*, (2016) 3 RCR (Cri) 356 : 2017 Cri LJ 3570 : (2016) 3 HLR 372

<sup>309</sup> *Id.*

the view that the legislature intend to protect women who are living in a domestic relationship.<sup>310</sup>

Also the definition speaks of living together at any point of time and not having relation at any point of time.<sup>311</sup> Therefore, if the relationship continued and the parties have lived together at any point of time in a shared household, the person can be arraigned as a respondent.<sup>312</sup>

When we consider the expressions “who is” or “has been” used in the definition of “aggrieved person”<sup>313</sup>, it is seen that domestic relation should be in the present and not in the past.<sup>314</sup> Both the words are used in present tense. So, a perusal of these 2 provisions gives a view that no one can be made respondent if the relationship does not continue. An aggrieved person cannot sue a person on the ground of a past relationship.<sup>315</sup> Both the parties must be present and alive at the time of making a complaint.<sup>316</sup>

Until the enactment of this Act, no specific protection was available to women from ill treatment and harassment inflicted by the members of her own family. PWDV Act not only applies in marital context but also extends its protection to such relations as well. Under this Act a woman can register complaint against an abusive father<sup>317</sup> or any other male relative.

Another significant feature is that the definition legally recognised live- in-relationships which were not socially accepted in India by adding the words “relationship in the nature of marriage”. This supports the view that the legislature’s intention was to give women in live in relationships the same protection in domestic violence cases as married women receives. By this it recognizes the rights of women

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> PWDV Act § 2 (a) (2005). “aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

<sup>314</sup> *Amit Agrawal and Ors v. Sanjay Aggarwal and Ors*, (2016) 3 RCR (Cri) 356 : 2017 Cri LJ 3570 : (2016) 3 HLR 372

<sup>315</sup> *Harbans Lal Malik v. Payal Malik*, (2010) DLT 67.

<sup>316</sup> *Id.*

<sup>317</sup> *Chitraganthan v. Seema*, I (2008) D.M.C. 365.

whose marriage cannot be proved or not valid in the eyes of law. This also protects those women involved in fraudulent marriages from domestic violence.

However, all live-in- relationships will not amount to relationships in the nature of marriage.<sup>318</sup> The Supreme Court has interpreted the expression “relationship in the nature of marriage” as “a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized”.<sup>319</sup> It has also laid down non exhaustive list of guidelines for testing under what circumstances, a live-in relationship will fall within the expression “relationship in the nature of marriage” and to get some insight of such relationships.<sup>320</sup>

“Relationship in the nature of marriage” is also described as defacto relationship, marriage - like relationship, cohabitation, couple relationship, committed intimate relationship etc.<sup>321</sup> howsoever, the definition does not recognizes same sex relationships and no aggrieved person in such a relationship is entitled to reliefs under the Act.

Hence, the provisions under the Act can be invoked only when there exist a domestic relationship between the aggrieved and respondent. Once the relationship ceases or comes to an end after the decree of divorce, no one can file a complaint under this Act. At the same time, a judicially separated wife can file a complaint against her husband.<sup>322</sup>

### **Concept of Shared Household**

The Act defines “shared household” as “a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which

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<sup>318</sup> *Indra Sarma v. V.K.V.Sarma*, AIR 2014 SC 309; *D.Velusamy v. D.Patchaiammal*, AIR 2011 SC 479.

<sup>319</sup> *Indra Sarma v. V.K.V.Sarma*, AIR 2014 SC 309.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Krishna Bhattacharjee v. Sarathi Choudhury & Anr.*, ( 2016 ) 2 SCC 705.

may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household”.<sup>323</sup> Hence, it is not necessary that a shared household must be owned or co-owned by the respondent.

Every woman in a domestic relationship has the right to reside in the shared household even though she has no legal interests in the same.<sup>324</sup> She should not be evicted from the shared household except in accordance with the procedure established by law.<sup>325</sup> Denial of right to reside in the shared household by prohibiting or restricting access to the same is regarded to be economic abuse under the Act.<sup>326</sup>

In order to claim the right, it is necessary that the two parties had lived in a domestic relationship in the household.<sup>327</sup> Such right would cease from the time of divorce as domestic relationship between them comes to an end.

Considering the definition of “shared household”, the Supreme Court in *S.R. Batra and Anr. v. Smt. Taruna Batra*<sup>328</sup> viewed that although it is not very happily worded, it should be given a sensible interpretation that will not create any absurdity or chaos in society. The Court ruled that not every property in which the parties lived together in the past becomes a shared household.<sup>329</sup> “Shared household” would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member.<sup>330</sup> A property exclusively owned by the parents of the husband cannot be considered as a shared household.<sup>331</sup>

## **MACHINERIES FOR IMPLEMENTATION**

The Act has devised various machineries for its effective implementation. These machineries provide proper assistance to the women when she needs support because of the incidence of domestic violence. Among them the, Protection Officers and

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<sup>323</sup> PWDV Act § 2 (s) (2005).

<sup>324</sup> PWDV Act § 17 (1) (2005).

<sup>325</sup> PWDV Act § 17 (2) (2005).

<sup>326</sup> PWDV Act § 3 expln I cl. (iv) (c) (2005).

<sup>327</sup> *Manmohan Attavar v. Neelam Manmohan Attavar*, (2017) 8 SCC 550.

<sup>328</sup> 2007 3 S.C.C. 169.

<sup>329</sup> *S.R. Batra and Anr. v. Smt. Taruna Batra*, 2007 3 S.C.C. 169.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

Service Providers are declared to be public servant under the Act.<sup>332</sup> It is for the first time in India voluntary organizations are given a status of public officers.

### **Protection Officers**

The Act provides for the appointment of Protection Officers for giving support to the victims by protecting them from domestic violence as well as taking all reasonable measures to prevent recurrence of domestic violence.<sup>333</sup> The State Government appoints such officers in each district. Women will be given priority while making appointments to the post of protection officer.<sup>334</sup> These officers functions under the control and supervision of the Magistrate and

Perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.<sup>335</sup>

The officer may be of Government or a member of an NGO<sup>336</sup> and should have at least 3 years of experience in social sector<sup>337</sup>. His/her tenure will be a minimum period of three years.<sup>338</sup> State Government should provide them necessary office assistance for the efficient discharge of their functions under the Act.<sup>339</sup>

The Protection Officers carry out a variety of duties so as to provide the aggrieved person reliefs obtainable under the Act. They perform as a connecting point between society and the judiciary. Their main duty is to assist the Magistrate in the discharge of his functions under this Act.<sup>340</sup> the officer is under a duty to make a domestic incident report<sup>341</sup> to the Magistrate upon receipt of a complaint of domestic violence and inform the concerned police station as well as the service providers in that area.<sup>342</sup> He/she should make an application to the Magistrate for issuance of protection order

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<sup>332</sup> PWDV Act § 30 (2005).

<sup>333</sup> PWDV Rules, r. 8(2) (2006).

<sup>334</sup> PWDV Rules, r. 3 (1) proviso (2006); PWDV Act § 8 (2) (2005).

<sup>335</sup> PWDV Act § 9 (2) (2005).

<sup>336</sup> PWDV Rules, r. 3(1) (2006).

<sup>337</sup> PWDV Rules, r. 3(2) (2006).

<sup>338</sup> PWDV Rules, r. 3(3) (2006).

<sup>339</sup> PWDV Rules, r. 3(4) (2006).

<sup>340</sup> PWDV Act § 9 (1) (a) (2005).

<sup>341</sup> PWDV Act § 2 (e) (2005).“Domestic incident report” means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person.

<sup>342</sup> PWDV Act § 9 (1) (b) (2005).

if the aggrieved person desires to do so.<sup>343</sup> along with these duties the protection officer should ensure legal aid to the aggrieved person,<sup>344</sup> maintain a list of all service providers, shelter homes and medical facilities,<sup>345</sup> make available a safe shelter home,<sup>346</sup> get the victim medically examined if she has sustained bodily injuries,<sup>347</sup> and also to ensure that the order for monetary relief under Section 20 of the Act is complied with and executed in accordance with the provisions of the Code of Criminal Procedure, 1973<sup>348</sup>.

Apart from the duties specified under the Act, the rules of 2006 also prescribes some duties and functions of protection officers.<sup>349</sup> In emergency situations, the Protection

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<sup>343</sup> PWDV Act § 9 (1) (c) (2005).

<sup>344</sup> PWDV Act § 9 (1) (d) (2005).

<sup>345</sup> PWDV Act § 9 (1) (e) (2005).

<sup>346</sup> PWDV Act § 9 (1) (f) (2005).

<sup>347</sup> PWDV Act § 9 (1) (g) (2005).

<sup>348</sup> PWDV Act § 9 (1) (h) (2005).

<sup>349</sup> PWDV Rules, r. 8 (2006): Duties and functions of Protection Officers.- (1) It shall be the duty of the Protection Officer -

(i) to assist the aggrieved person in making a complaint under the Act, if the aggrieved person so desires;

(ii) to provide her information on the rights of aggrieved persons under the Act as given in Form IV which shall be in English or in a vernacular local language;

(iii) to assist the person in making any application under section 12, or sub-section (2) of section 23 or any other provision of the Act or the rules made there under;

(iv) to prepare a "Safety Plan" including measures to prevent further domestic violence to the aggrieved person, in consultation with the aggrieved person in Form V, after making an assessment of the dangers involved in the situation and on an application being moved under section 12;

(v) to provide legal aid to the aggrieved person, through the State Legal Aid Services Authority;

(vi) to assist the aggrieved person and any child in obtaining medical aid at a medical facility including providing transportation to get the medical facility;

(vii) to assist in obtaining transportation for the aggrieved person and any child to the shelter;

(viii) to inform the service providers registered under the Act that their services may be required in the proceedings under the Act and to invite applications from service providers seeking particulars of their members to be appointed as Counselors in proceedings under the Act under sub-section (1) of section 14 or Welfare Experts under section 15;

(ix) to scrutinize the applications for appointment as Counselors and forward a list of available Counselors to the Magistrate;

(x) to revise once in three years the list of available Counselors by inviting fresh applications and forward a revised list of Counselors on the basis thereof to the concerned Magistrate;

(xii) to Provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incidence of domestic violence;

(xiii) to liaise between the aggrieved person or persons, polices and service provider in the manner provided under the Act and these rules;

(xiv) to maintain proper records of the service providers, medical facility and shelter homes in the area of his jurisdiction.

(2) In addition to the duties and functions assigned to a Protection officer under clauses (a) to (h) of sub-section 9, it shall be the duty of every Protection Officer-

(a) to protect the aggrieved persons from domestic violence, in accordance with the provisions of the Act and these rules;



Officer is obliged to have recourse to police assistance and he will have to prepare and present the domestic incident report without any delay to the Magistrate.<sup>350</sup> The domestic incident report of the Protection Officer is substantial in deciding the domestic violence cases.

The officer has to make certain enquiries in regard to granting interim reliefs to the aggrieved person and has to aid and assist the court and aggrieved person in many ways.<sup>351</sup>

Any person who has reason to believe that such an act of domestic violence has taken place or is likely to take place can inform the Protection Officer.<sup>352</sup> If that person is giving such information in good faith, he'll not be incurred any liability whether civil or criminal.<sup>353</sup> The aggrieved person herself can inform, but it is totally optional for her to approach a Protection Officer. She may approach the Magistrate directly by presenting an application seeking relief.

If the Protection Officer fails or refuses to discharge his duties as directed by the Magistrate without any sufficient cause, he'll be punished with either imprisonment for a term which may extend to one year, or fine which may extend to twenty

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(b) to take all reasonable measures to prevent recurrence of domestic violence against the aggrieved person, in accordance with the provisions of the Act and these rules.

<sup>350</sup> PWDV Rules, r. 9 (2006).

<sup>351</sup> PWDV Rules, r.10 (2006): Certain other duties of the Protection Officers-(1) The Protection Officer, if directed to do so in writing, by the Magistrate shall-

(a) conduct a home visit of the shared household premises and make preliminary enquiry if the court requires clarification, in regard to granting ex-parte interim relief to the aggrieved person under the Act and pass an order for such home visit;

(b) after making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents as may be directed by the court;

(c) restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person;

(d) assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision as may be directed by the court.

(e) assist the court in enforcement of orders in the proceedings under the Act in the manner directed by the Magistrate, including orders under section 12, section 18, section 19, section 20, section 21 or section 23 in such manner as may be directed by the court.

(f) take the assistance of the police, if required, in confiscating any weapon involved in the alleged domestic violence.

(2) The Protection Officer shall also perform such other duties as may be assigned to him by the State Government or the Magistrate in giving effect to the provisions of the Act and these rules from time to time.

(3) The Magistrate may, in addition to the orders for effective relief in any case, also issue directions relating general practice for better handling of the cases, to the Protection Officers within his jurisdiction and the Protection Officers shall be bound to carry out the same.

<sup>352</sup> PWDV Act § 4 (1) (2005).

<sup>353</sup> PWDV Act § 4 (2) (2005).

thousand rupees, or both.<sup>354</sup> However, he'll not be made liable for any damage caused or likely to be caused by anything done in good faith or intended to be done under the Act or Rules framed thereunder.<sup>355</sup>

### **Service Providers**

The law realises that legal machineries alone would be insufficient to protect the victims and to combat the evil of domestic violence. In order to protect her right to live with dignity, the Act recognised several organisations to support the aggrieved persons. Service Providers are constituted mainly to provide assistance to the Protection Officers in protecting the aggrieved persons and preventing the recurrence of domestic violence. It is a voluntary association formed with an objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance.<sup>356</sup>

Such an association will be eligible, for being registered as a service provider, only if they have been rendering similar kind of services for at least three years.<sup>357</sup> Normally, service provider would be a NGO functioning for safeguarding rights of women. They have to submit the domestic incident report recorded by them to the Magistrate and Protection Officers, forward the medical report, after getting the aggrieved medically examined, to the protection officer and the concerned police station, ensure that the aggrieved person is provided shelter in a shelter home, etc.<sup>358</sup>

If the service providers are running a medical facility, counseling centre or a shelter home, it has to be approved by the State Government that they fulfill the requirements for running such a facility.<sup>359</sup>

Necessary qualifications that are required to be fulfilled by the Service Provider are clearly envisaged under the Rules.<sup>360</sup> The State Government also has to ensure that the

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<sup>354</sup> PWDV Act § 33 (2005).

<sup>355</sup> PWDV Act § 35 (2005).

<sup>356</sup> PWDV Act § 10 (1) (2005).

<sup>357</sup> PWDV Rules, r. 11 (3) (a) (2006).

<sup>358</sup> PWDV Act § 10 (2005).

<sup>359</sup> PWDV Rules, r. 11 (b) & (c) (2006).

<sup>360</sup> PWDV Rules, r. 11 (2006).

service providers function strictly in conformity with the provisions of the Act and Rules framed thereunder.

### **Shelter Homes and Medical Facilities**

The Service Providers should be registered and fulfill the statutory requirements for running a medical facility or a counseling center, etc.<sup>361</sup> The Act imposes certain responsibilities on the government to supply medical facilities and shelter homes in the expectation that a woman in pain will be in need of all these provisions. The State Government is under a duty to notify medical facilities and shelter homes which cannot refuse to provide services to aggrieved women.<sup>362</sup>

If an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, he is under a legal obligation to provide the same.<sup>363</sup> They should not refuse shelter to an aggrieved person on the ground that a domestic incident report has not lodged.<sup>364</sup> If the aggrieved person so desires, the shelter home should not disclose her identity or communicate the same to the person complained against.<sup>365</sup>

Similarly, an aggrieved person or, on her behalf a Protection Officer or a service provider requests the person in charge of a medical facility to provide any medical aid to her, such person should provide medical aid to the aggrieved person.<sup>366</sup> She should not be refused the facilities just because a domestic incident report has not been lodged.<sup>367</sup> A copy of medical examination report is to be given free of cost to the aggrieved person.<sup>368</sup>

### **Counseling**

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<sup>361</sup> ROSS KIDD ET AL., REDUCING HIV STIGMA AND GENDER-BASED VIOLENCE: TOOLKIT FOR HEALTH CARE PROVIDERS IN INDIA 218 (2007) (hereinafter KIDD)

<sup>362</sup> LCWRI, STAYING ALIVE FIRST MONITORING & EVALUATION REPORT 2007 ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005 10 (2007) (hereinafter LCRWI)

<sup>363</sup> PWDV Act § 6 (2005) read with PWDV Rules, r. 16 (2006).

<sup>364</sup> PWDV Rules, r. 16 (2) (2006).

<sup>365</sup> PWDV Rules, r. 16 (3) (2006).

<sup>366</sup> PWDV Act § 7 (2005).

<sup>367</sup> PWDV Rules, r. 17 (2) (2006).

<sup>368</sup> PWDV Rules, r. 17 (4) (2006).

Counseling has a significant role in the framework, in order to help victim to relieve the agony happened to her. An order for counseling will be passed by Magistrate only after passing an order for interim relief. Details regarding the appointment of a counselor are enunciated in the Rules.<sup>369</sup> any person who is interested or connected with the subject matter of the dispute or is related to any one of the parties or to those who represent them are not eligible to be appointed as Counselors unless such objection is waived by all the parties in writing.<sup>370</sup> Preference is given to women while appointing the counselors.<sup>371</sup>

Procedure for counseling is also laid down in the Rules.<sup>372</sup> They function under the supervision of the court or the Protection Officer.<sup>373</sup> According to the Rules, the

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<sup>369</sup> PWDV Rules, r. 13 (2006).

<sup>370</sup> PWDV Rules, r. 13 (2) (2006).

<sup>371</sup> PWDV Rules, r. 13 (3) (2006).

<sup>372</sup> PWDV Rules, r. 14 (2006): Procedure to be followed by Counselors-

(1) The Counselor shall work under the general supervision of the court or the Protection Officer or both.

(2) The Counselor shall convene a meeting at a place convenient to the aggrieved person or both the parties.

(3) The factors warranting counseling shall include the factor that the respondent shall furnish an undertaking that he would refrain from causing such domestic violence as complained by the complainant and in appropriate cases an undertaking that he will not try to meet, or communicate in any manner through letter or telephone, electronic mail or through any medium except in the counseling proceedings before the counselor or as permissible by law or order of a court of competent jurisdiction.

(4) The Counselor shall conduct the counseling proceedings bearing in mind that that the counseling shall be in the nature of getting an assurance, that the incidence of domestic violence shall not get repeated.

(5) The respondent shall not be allowed to plead any counter justification for the alleged act of domestic violence in counseling the fact that and any justification for the alleged act of domestic violence in counseling the fact that and any justification for the act of domestic violence by the respondent is not allowed to be a part of the Counseling proceeding should be made known to the respondent, before the proceeding begin.

(6) The respondent shall furnish an undertaking to the Counselor that he would refrain from causing such domestic violence as complained by the aggrieved person and in appropriate cases an undertaking that he will not try to meet, or communicate in any manner through letter or telephone, e-mail, or through any other medium except in the counseling proceedings before the Counselor.

(7) If the aggrieved person so desires, the Counselor shall make efforts of arriving at a settlement of the matter.

(8) The limited scope of the efforts of the Counselor shall be to arrive at the understanding of the grievances of the aggrieved person and the best possible redressal of her grievances and the efforts shall be to focus on evolving remedies or measures for such redressal.

(9) The Counselor shall strive to arrive at a settlement of the dispute by suggesting measures for redressal of grievances of the aggrieved person by taking into account the measures or remedies suggested by the parties for counseling and reformulating the terms for the settlement, wherever required.

(10) The Counselor shall not be bound by the provisions of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973, and his action shall be guided by the principles of fairness and justice and aimed at finding way to bring an end domestic violence to the

principal function of a Counselor is to produce an effective remedy to the parties concerned and to prevent the violence.

## **RELIEFS AVAILABLE UNDER THE ACT**

The PWDV Act dispenses many courses for an aggrieved woman to obtain relief. The Act makes no attempt to replace the reliefs available under subsisting laws. In fact, it augments the existing laws and does not act in derogation to the provisions of any other legislation in force.<sup>374</sup> It intends to aid women in emergency situations. Once she gets relief under this Act, she may have recourse to other laws afterward. For instance, if a husband or his relatives infringe the rights of the wife, they may be punished under Section 498A of the Indian Penal Code, along with the charges framed under the PWDV Act. So, in addition to PWDV Act, one can avail the remedies obtainable under other laws as well.

One of the significant features of the Act is that it recognizes tortuous liability in cases of domestic violence. It provides provisions for economic assistance by means of compensation, exemplary damages, maintenance etc.

Sections 18 - 23 deal with reliefs envisaged under the Act. The different forms of reliefs are Protection Orders, Residence Orders, Monetary Relief, Custody Order,

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satisfaction of the aggrieved person and in making such an effort the Counselor shall give due regard to the wishes and sensibilities of the aggrieved person.

(11) The Counselor shall submit his report to the Magistrate as expeditiously as possible for appropriate action.

(12) In the event the Counselor arrives at a resolution of the dispute, he shall record the terms of settlement and get the same endorsed by the parties.

(13) The court may, on being satisfied about the efficacy of the solution and after making a preliminary enquiry from the parties and after, recording reasons for such satisfaction, which may include undertaking by the respondents to refrain from repeating acts of domestic violence, admitted to have been committed by the respondents, accept the terms with or without conditions.

(14) The court shall, on being so satisfied with the report of counseling, pass an order, recording the terms of the settlement or an order modifying the terms of the settlement on being so requested by the aggrieved person, with the consent of the parties.

(15) In cases, where a settlement cannot be arrived at in the counseling proceedings, the Counselor shall report the failure of such proceedings to the Court and the court shall proceed with the case in accordance with the provisions of the Act.

(16) The record of proceedings shall not be deemed to be material on record in the case on the basis of which any inference may be drawn or an order may be passed solely based on it.

(17) The Court shall pass an order s. 25, only after being satisfied that the application for such an order is not vitiated by force, fraud or coercion or any other factor and the reasons for such satisfaction shall be recorded in writing in the order, which may include any undertaking or surety given by the respondent.

<sup>373</sup> PWDV Rules, r. 14 (1) (2006).

<sup>374</sup> PWDV Act § 36 (2005).

Compensation Order and Interim and Ex parte Orders. These civil remedies, which are obtainable only through courts, are non punitive but restorative in nature. These reliefs may also be sought in any legal proceeding, before a civil court, family court or a criminal court, regardless of whether such proceeding was initiated before or after the commencement of this Act.<sup>375</sup> In case any relief has been obtained by the aggrieved person in any other proceedings, she has to inform that to the Magistrate.<sup>376</sup>

### **Protection order**

The Magistrate, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person.<sup>377</sup> These are restraining in nature to restrain the respondent from performing certain acts as mentioned in the Act.

By passing a protection order the court may prohibit the respondent from committing any act of domestic violence<sup>378</sup>; aiding or abetting someone in that regard<sup>379</sup>; entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person<sup>380</sup>; attempting to communicate with the aggrieved person in any form<sup>381</sup>; alienating any assets, operating bank lockers or bank accounts pertaining to both the parties, jointly or to the respondent alone, including her stridhan or any other property held either jointly or separately by the parties without the leave of the Magistrate<sup>382</sup>; causing violence to the dependants, or any person who give the aggrieved person assistance from domestic violence<sup>383</sup>; and also committing any other act as specified in the protection order<sup>384</sup>.

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<sup>375</sup> PWDV Act § 26 (1) (2005).

<sup>376</sup> PWDV Act § 26 (3) (2005).

<sup>377</sup> PWDV Act § 18 (2005).

<sup>378</sup> PWDV Act § 18 (a) (2005).

<sup>379</sup> PWDV Act § 18 (b) (2005).

<sup>380</sup> PWDV Act § 18 (c) (2005).

<sup>381</sup> PWDV Act § 18 (d) (2005).

<sup>382</sup> PWDV Act § 18 (f) (2005).

<sup>383</sup> PWDV Act § 18 (g) (2005).

<sup>384</sup> PWDV Act § 18 (h) (2005).

This order will be operative till an application for discharge is made by the aggrieved person.<sup>385</sup> After receiving the application the Magistrate has to see that whether the circumstances have changed in such a manner that may call for the alteration, modification or revocation of any order.<sup>386</sup> Then, he may pass appropriate order thereby recording reasons in writing.<sup>387</sup>

In comparison to the rigorous provisions of Section 498A of Indian Penal Code, the remedy available under the Act is much lenient and benevolent as it is civil in nature. Moreover, it provides an immediate relief to the aggrieved person from being abused.

### **Residence order**

Women who are facing domestic violence often fear of getting excluded from their matrimonial home or shared household. If they try to seek aid from law enforcing bodies or anyone else, the respondent may evict her from the premises as revenge. In such cases are forced to destitution mostly. This fear compels them to tolerate all the tortures and abuses to which they are being exposed.

This is why the Act ensures the right of every woman in a domestic relationship to reside in a shared household irrespective of her having any legal interests in the same.<sup>388</sup> As per the Act, she should not be evicted from the shared household except in accordance with the procedure established by law.<sup>389</sup>

To enforce this right to residence, the Act contemplates a provision for the issuance of residence order. While disposing of an application of an aggrieved person seeking reliefs the Magistrate may pass a residence order restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household irrespective of the respondent having any legal or equitable interest in the shared household<sup>390</sup>; directing the respondent to remove himself from the shared household<sup>391</sup>; restraining the respondent or any of his relatives from entering any

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<sup>385</sup> PWDV Act § 25 (1) (2005).

<sup>386</sup> PWDV Act § 25 (2) (2005).

<sup>387</sup> *Id.*

<sup>388</sup> PWDV Act § 17 (1) (2005).

<sup>389</sup> PWDV Act § 17 (2) (2005).

<sup>390</sup> PWDV Act § 19 (1) (a) (2005).

<sup>391</sup> PWDV Act § 19 (1) (b) (2005).

portion of the shared household in which the aggrieved person resides<sup>392</sup>; restraining the respondent from alienating or disposing off or encumbering the shared household<sup>393</sup>; restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate<sup>394</sup>; or directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same<sup>395</sup>. However, the made it clear that in case the respondent is a woman, no residence order directing her to remove herself from the shared household can be sought.<sup>396</sup>

Apart from passing those directions specified in the Act, the Magistrate is empowered to impose any reasonable additional conditions necessary to provide safety to the aggrieved person or her child.<sup>397</sup> With a view to prevent the commission of domestic violence, the Magistrate may require the respondent to execute a bond.<sup>398</sup> If the situation so requires, the court may also pass an additional order that directs the officer in charge of the nearest police station to give protection to the aggrieved person<sup>399</sup> and also to assist in the implementation of the protection order.<sup>400</sup> Orders imposing certain obligations on the respondent relating to the discharge of rent and other payments and directing him/her to return the aggrieved person her stridhan or any other valuable security to which the aggrieved is entitled are the other reliefs a Magistrate can be passed under this provision

Supreme Court in the landmark decision of *S.R. Batra and Anr. v. Smt. Taruna Batra*<sup>401</sup> denied residence orders on the ground that the shared household was owned by the parents and not the husband. The court ruled that "...the wife is entitled to claim a right to residence in a shared household, and a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member." Many cases relied on

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<sup>392</sup> PWDV Act § 19 (1) (c) (2005).

<sup>393</sup> PWDV Act § 19 (1) (d) (2005).

<sup>394</sup> PWDV Act § 19 (1) (e) (2005).

<sup>395</sup> PWDV Act § 19 (1) (f) (2005).

<sup>396</sup> PWDV Act § 19 (1) (f) proviso (2005).

<sup>397</sup> PWDV Act § 19 (2) (2005).

<sup>398</sup> PWDV Act § 19 (3) (2005).

<sup>399</sup> PWDV Act § 19 (5) (2005).

<sup>400</sup> PWDV Act § 19 (7) (2005).

<sup>401</sup> 2007 3 S.C.C. 169.



this judgment and denied residence orders. However, there are reported cases wherein the respondents relied upon *Batra* judgment but failed to prevent the court from granting residence orders. For instance, it was reported that in a case in Madhya Pradesh<sup>402</sup> the court passed a residence order even though the shared household was in the name of the mother-in-law. The Court held that just because the house was in the mother in-law's name, it cannot be assumed that the source of income used to acquire the property was her. The respondents could not produce any documents for revealing the source of income in this case.

Most importantly, the residence order or the right to reside envisaged under the Act does not create any right or title of ownership on the aggrieved person. It only protects women from their illegal dispossession from the shared household.<sup>403</sup>

### **Monetary reliefs**

While disposing of an application of an aggrieved person seeking reliefs the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.<sup>404</sup> Such relief may include, inter alia, loss of earnings, medical expenses, loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person, or any maintenance to the victim and her children.<sup>405</sup> Such an order must be adequate, fair and reasonable and must be in consistent with the standard of living the aggrieved person is accustomed to.<sup>406</sup>

The Act gives a special provision to ensure that the requirements of the order are strictly complied with by the respondent. When the respondent fails to make payment in terms of the order, the Magistrate may direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salary or debt due to or accrued to the credit of the respondent

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<sup>402</sup> Order dated 09.07.2007, explained in : LCRWI, *supra* note 362, at 60.

<sup>403</sup> LCRWI, *supra* note 362, at 82.

<sup>404</sup> PWDV Act § 20 (1) (2005).

<sup>405</sup> PWDV Act § 20 (1)(a) - (d) (2005).

<sup>406</sup> PWDV Act § 20 (2) (2005).

which may be adjusted towards the monetary relief payable by the respondent.<sup>407</sup> This provision resembles the “garnishee order” under the Code of Civil Procedure.<sup>408</sup> by a garnishee order the garnishee, a third person who is indebted to the judgment debtor, is directed to pay to the garnisher, ie., the decree holder the money that he is liable to pay to the judgment debtor, since the latter is indebted to the garnisher. In this context, aggrieved person is the garnisher is, respondent is the judgment debtor and employer or debtor of the respondent will be the garnishee. Therefore, when the respondent commits any breach of a monetary order, his debtor would be directed to deliver the debt to the victim, instead of paying the same to the respondent.

The exact amount of monetary relief to be paid by the respondent depends ultimately upon the specific facts and circumstances of each case. Neither the Act nor the judiciary has laid down any specific criteria for fixing the amount. The Act only says that an order for monetary relief must be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.<sup>409</sup>

### **Custody orders**

The Magistrate may, at any stage of hearing, grant an order for temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify the arrangements for visiting such child or children by the respondent.<sup>410</sup> He may direct the Protection Officer to supervise and facilitate the visits of the respondent.<sup>411</sup> If the Court feels that the visit may be harmful to the child, the court may refuse to allow such visit.<sup>412</sup>

Custody provided under this Act is temporary in nature as the matters of permanent custody are governed by personal or civil laws. In a case the Gujarat High Court refused to pass interim orders granting temporary custody, as matters of permanent custody are to be decided under the Guardians and Ward Act and this was considered a ‘short cut’ manner of obtaining custody.<sup>413</sup> Anyhow, such an order will be passed

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<sup>407</sup> PWDV Act § 20 (6) (2005).

<sup>408</sup> Civil Procedure Code (CPC), o.21 r.46 (1908).

<sup>409</sup> PWDV Act § 20 (2) (2005).

<sup>410</sup> PWDV Act § 21 (2005).

<sup>411</sup> LCRWI, *supra* note 362, at 61.

<sup>412</sup> PWDV Act § 21 proviso (2005).

<sup>413</sup> LCRWI, *supra* note 362, at 64

only in applications for protection orders or for any other relief under the Act.<sup>414</sup> The Act provides only for an interim custody of the child for temporary period till disposal of main petition filed by the parties.<sup>415</sup> Thus, the aggrieved person cannot file an application for temporary custody of children alone. Furthermore, the Magistrate cannot grant interim custody to the respondent under this Act, since the respondent has no right to make such application.<sup>416</sup>

While deciding on temporary custody, the court must look at the interests and welfare of the child.<sup>417</sup> The Act thereby ensures progressive growth of a child in a violence free atmosphere. World Report on Violence and Health<sup>418</sup> says children who witness these kinds of violence between adults are highly affected. It may result in a whole range of emotional and behavioral problems, including anxiety, depression, poor school performance, low self-esteem, disobedience, nightmares and physical health complaints. Exposure to violence in the home will lead them to be aggressive and anti social in adulthood.<sup>419</sup>

### **Compensation orders**

In addition to other reliefs, the Act also provides for compensation order. The Magistrate may pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional

Distress caused by that respondent.<sup>420</sup> For passing such an order it is necessary that the aggrieved person has claimed for compensation by moving an application under Sec. 22. The court cannot *suo motu* pass an order regarding the payment of compensation.<sup>421</sup>

The Act also provides for interim orders in any proceedings that may be additionally passed whenever the Magistrate deems just and proper.<sup>422</sup> Such interim orders can be

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<sup>414</sup> PWDV Act § 21 (2005).

<sup>415</sup> *Girija Patel v. Vijay R Rao*, MANU/KA/0360/2015

<sup>416</sup> *Id.*

<sup>417</sup> LCRWI, *supra* note 362, at 9

<sup>418</sup> WHO, *supra* note 15.

<sup>419</sup> WHO, *supra* note 15.

<sup>420</sup> PWDV Act § 22 (2005).

<sup>421</sup> *Sanjeev Kumar Agarwal v. Rashmi Agarwal*, 2015 CRLJ(NOC)472 ALL.

<sup>422</sup> PWDV Act § 23 (1) (2005).

granted ex parte also.<sup>423</sup> If an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, the Magistrate may grant an ex parte order against the respondent under section 18, section 19, section 20, section 21 or, as the case may be, section 22.<sup>424</sup>

## **PROCEDURE FOR OBTAINING RELIEFS**

The first and foremost step is information to the Protection Officer. Any person who has reason to believe that such an act of domestic violence has taken place or is likely to take place can inform the Protection Officer.<sup>425</sup> If that person is giving such information in good faith, he'll not be incurred any liability whether civil or criminal.<sup>426</sup> The aggrieved person herself can inform, but it is totally optional for her to approach a Protection Officer. She may approach the Magistrate directly by presenting an application seeking relief.

Thereafter, the Police Officer, Protection Officer, Service Provider or Magistrate, who has received a complaint from the aggrieved person must inform her of her right to make an application for obtaining relief by way of protection order, an order for monetary relief, a custody order, a residence order, a compensation order etc.<sup>427</sup> She should be made known of the availability of services of the Protection Officers, Service Providers, including shelter homes, medical facilities, etc.<sup>428</sup> Furthermore, she should be informed of her right to free legal services under the Legal Services Authorities Act 1987; and her right to file a complaint under section 498 A of the Indian Penal Code.<sup>429</sup> He or she should ensure that the victim gets all the benefits mentioned.<sup>430</sup>

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<sup>423</sup> *Sulochana v. Kuttappan*, (2007) Cri.L.J 2057.

<sup>424</sup> PWDV Act § 23 (2) (2005).

<sup>425</sup> PWDV Act § 4 (1) (2005).

<sup>426</sup> PWDV Act § 4 (2) (2005).

<sup>427</sup> PWDV Act § 5 (a) (2005).

<sup>428</sup> PWDV Act § 5 (b) & (c) (2005). See: KIDD, *supra* note 361, at 221

<sup>429</sup> PWDV Act § 5 (d) & (e) (2005).

<sup>430</sup> KIDD, *supra* note 361, at 222.

On receipt of a complaint of domestic violence from an aggrieved person the Protection Officer shall make a Domestic Incident Report in the prescribed form.<sup>431</sup> Such a report is to be sent to the Magistrate and forward copies thereof to the police officer in charge of the concerned police station and to the service providers in that area.<sup>432</sup> A Service Provider also has the power to record the domestic incident report in the prescribed form if the aggrieved person so desires and forward a copy thereof to the Magistrate and the Protection Officer in the area.<sup>433</sup>

It is the duty of a Protection Officer to prepare, on an application being moved under Section 12, a “Safety Plan” including measures to prevent further domestic violence to the aggrieved person after making an assessment of the dangers involved in the situation.<sup>434</sup>

The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, within the local limits of which the aggrieved person permanently or temporarily resides or carries on business or is employed; or the respondent resides or carries on business or is employed; or the cause of action has arisen shall be the competent court to grant the orders as well as to try offences under the Act.<sup>435</sup>

As soon as the issue reaches the Magistrate, he/she will fix the first date of the hearing, which shall not ordinarily be beyond 3 days from the receipt of the application by the Court, and shall endeavor to dispose every application within a period of sixty days from the date of the first hearing.<sup>436</sup> The respondent must be informed of the date fixed for hearing via notice by the Magistrate through the Protection Officer, who’ll serve it on the respondent within a maximum period of two days.<sup>437</sup> The manner in which notice should be served and the effects of non serving are stated elaborately in the Protection of Women from Domestic Violence Rules, 2006.<sup>438</sup>

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<sup>431</sup> PWDV Act § 2 (e) (2005).

<sup>432</sup> PWDV Act § 9 (1) (b) (2005).

<sup>433</sup> PWDV Act § 10 (2) (a) (2005).

<sup>434</sup> PWDV Rules, r. 8 (1) (iv) (2006).

<sup>435</sup> PWDV Act § 27 (2005).

<sup>436</sup> PWDV Act § 12 (4) & (5) (2005).

<sup>437</sup> PWDV Act § 13 (1) (2005).

<sup>438</sup> PWDV Rules, r. 12 (2006) :Means of service of notices.-

At any stage of the proceedings, the Magistrate may direct the respondent or the aggrieved person, either singly or jointly, to undergo counseling with any member of a service provider who possesses such qualifications and experience in counseling.<sup>439</sup>

The Court also has the option to secure services of an expert in promoting family welfare, who is preferably a woman, for assisting him/ her in discharging his/her functions.<sup>440</sup> If the circumstances of the case so warrant, he/she may conduct the proceedings in camera.<sup>441</sup>

In the meantime, the aggrieved person has the right to reside in a shared household whether or not she has any right, title or beneficial interest in the same.<sup>442</sup> She shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law.<sup>443</sup>

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(1) The notice for appearance in respect of the proceedings under the Act shall contain the names of the person alleged to have committed domestic violence, the nature of domestic violence and such details which may facilitate the identification of person concerned.

(2) The service of notices shall be made in the following manner, namely:-

(a) The notices in respect of the proceedings under the Act shall be served by the Protection Officer or any other person directed by him to serve the notice, on behalf of the Protection Officer, at the address where the respondent is stated to be ordinarily residing in India by the complainant or aggrieved person or where the respondent is stated to be gainfully employed by the complainant or aggrieved person, as the case may be.

(b) The notice shall be delivered to any person in charge of such place at the moment and in case of such delivery not being possible it shall be pasted at a conspicuous place on the premises.

(c) For serving the notices under section 13 or any other provision of the Act, the provisions under Order V of the Civil Procedure Code, 1908 (5 of 1908) or the provisions under Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) as far as practicable may be adopted.

(d) any order passed for such service of notices shall entail the same consequences, as an order passed under Order V of the Civil Procedure Code, 1908 or Chapter VI of the Code of Criminal Procedure, 1973, respectively, depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act and in addition to the procedure prescribed under the Order V or Chapter VI, the court may direct any other steps necessary with a view to expediting the proceedings to adhere to the time limit provided in the Act.

(3) On statement on the date fixed for appearance of the respondent, or a report of the person authorized to serve the notices under the Act, that service has been effected appropriate orders shall be passed by the court on any pending application for interim relief, after hearing the complainant or the respondent, or both.

(4) When a protection order is passed restraining the respondent from entering the shared household or the respondent is ordered to stay away or not to contact the petitioner, no action of the aggrieved person including an invitation by the aggrieved person shall be considered as waiving the restraint imposed on the respondent, by the order of the court, unless such protection order is duly modified in accordance with the provisions of sub-section (2) of section 25.

<sup>439</sup> PWDV Act § 14 (2005).

<sup>440</sup> PWDV Act § 15 (2005).

<sup>441</sup> PWDV Act § 16 (2005).

<sup>442</sup> PWDV Act § 17 (1) (2005).

<sup>443</sup> PWDV Act § 17 (2) (2005).

The Magistrate, after giving both parties an opportunity of being heard, and satisfied that domestic violence has taken place, can pass a protection order or a residence order, direct the respondent to pay the aggrieved person monetary relief and in addition, can pass compensation orders, custody orders and ex-parte orders.<sup>444</sup> He/she may impose any additional conditions or pass any direction other than those envisaged under the Act which he may deem reasonably necessary to provide for the safety of the aggrieved person or her child.<sup>445</sup> It is to be ensured that a copy of any such order is given free-of-cost to the parties.<sup>446</sup>

If the protection order has been breached by the respondent, it shall be punished with either imprisonment which may extend to 1 year or fine which may extend to Rs. 20000 or both.<sup>447</sup> The protection officer must immediately rescue the aggrieved person by seeking help from the local police station, if she seeks assistance at any time after a protection order has been breached.<sup>448</sup> She should be assisted to lodge a report to the local police authorities in appropriate cases.<sup>449</sup> It shall be tried by the same Magistrate who passed the breached order.<sup>450</sup> If the facts disclose the commission of an offence under section 498A of the Indian Penal Code or the Dowry Prohibition Act, 1961, the Magistrate while framing the charges may also frame under those provisions.<sup>451</sup> Once such charges are framed, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 and proceed to summarily try the offence of the breach of Protection Order.<sup>452</sup> While enlarging the person on bail arrested under the Act, the Court may impose certain conditions to protect the aggrieved person and to ensure the presence of the accused before the court.<sup>453</sup>

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<sup>444</sup> KIDD, *supra* note 361, at 222.

<sup>445</sup> PWDV Act § 19 (2) (2005).

<sup>446</sup> PWDV Act § 24 (2005).

<sup>447</sup> PWDV Act § 31 (1) (2005).

<sup>448</sup> PWDV Rules, r. 15 (5) (2006).

<sup>449</sup> *Id.*

<sup>450</sup> PWDV Act § 31 (2) (2005).

<sup>451</sup> PWDV Act § 31 (3) (2005).

<sup>452</sup> PWDV Rules, r. 15 (6) (2006).

<sup>453</sup> PWDV Rules, r. 15 (9) (2006): While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the court, which may include—

(a) an order restraining the accused from threatening to commit or committing an act of domestic violence;

The Central and the State Government are under the duty to take enough measures to ensure that the provisions of this Act are given wide publicity through media; Central and State government officers including police officers, members of the judicial services, etc., are given periodic sensitization and awareness trainings on issues addressed by this Act; there is effective coordination between the services provided by concerned Ministries and Departments dealing with law, home affairs, health and human resources, and that there is a periodic review of the same.<sup>454</sup>

From an analysis of the procedures enumerated in the Act, it is understood that the framework is interplay of several institutions like Police, Judiciary etc. They have an effect on each other during the process of combating domestic violence. The cooperation of various governmental and nongovernmental organizations produces a combined effect greater than the sum of their separate effects.

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- (b) an order preventing the accused from harassing, telephoning or making any contact with the aggrieved person;
  - (c) an order directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit;
  - (d) an order prohibiting the possession or use of firearm or any other dangerous weapon;
  - (e) an order prohibiting the consumption of alcohol or other drugs;
  - (f) any other order required for protection, safety and adequate relief to the aggrieved person

<sup>454</sup> KIDD, *supra* note 361, at 222



## **Chapter 5**

### **Effectiveness of State Mechanisms to Implement the Act**

The Protection on Domestic Violence Act, 2005 explicitly states the duties of the Central and State Government in order to combat the evil of domestic violence. Section 11 stipulates that the Central Government and every State Government should take all measures to give wide publicity to the provisions of the Act through public media including television, radio and the print media at regular basis.<sup>455</sup> The Central Government and State Government officers including the police officers and the members of the judicial services must be provided periodic sensitization and awareness training on the issues addressed by the Act.<sup>456</sup> Services of Ministers and Departments dealing with law, home affairs including law and order, health and human resources is indispensable to address issues of domestic violence. In this regard, the Government has to undertake steps to maintain effective coordination between them and to conduct a periodical review of the same as well. Along with this, protocols for the various Ministries concerned with the delivery of services to women under the Act including the courts should be prepared and published by the Government.

It is the duty of the State Government to appoint Protection Officers<sup>457</sup> and Service Providers as well as to provide necessary office assistance to them for the efficient discharge of their functions under the law<sup>458</sup>. The State could register a Service Provider only after making necessary enquiries and satisfying itself about the suitability of such applicant.<sup>459</sup> Similarly, if the applicant is running a medical facility, or a psychiatric counseling centre, or a vocational training institution, the State has to ensure that it fulfills the requirements for running such a facility or institution laid down by the respective regulatory authorities regulating the respective professions or institutions.<sup>460</sup> Also, the State Government has to inspect the shelter home, prepare a report and record its finding on the report, detailing the maximum capacity for intake

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<sup>455</sup> PWDV Act § 11 (a) (2005).

<sup>456</sup> PWDV Act § 11 (b) (2005).

<sup>457</sup> PWDV Rules, r. 3 (1) (2006).

<sup>458</sup> PWDV Rules, r. 3 (4) (2006).

<sup>459</sup> PWDV Rules, r. 11 (2006).

<sup>460</sup> PWDV Rules, r. 11(3) (b) (2006).

of persons seeking shelter; its security arrangements and communication media for the use of the inmates. Ultimately, it is for the State Government to provide the list of service providers in the various localities to the concerned Protection Officers and to publish such list on newspapers or on its website.

## **ASSESSMENT OF EXISTING STATE MECHANISMS TO IMPLEMENT THE ACT**

### **Police Stations**

In order to deal with the harassment against women, their desertion, denial of rights, family feud etc, all the districts of Kerala have Vanitha Police Stations and Women's Cells constituted solely of Women Officers. Kerala has 17 Women Cells comprising of a State Women Cell and District Women Cells in each Police District. 2 cell each in Thiruvananthapuram, Kozhikode and Kochi and 1 each in all other districts. The State Women Cell, headed by a Lady Superintendent of Police, is situated at Thiruvananthapuram. A Woman Circle Inspector would be in charge of District Women Cell. They have the duty to protect the rights of women and their dignity as well. They provide counseling free of charge and lodge cases against offenders in certain situations. If the offences are cognizable and not so grave in nature, the Cell would try to settle it within them.

For aiding women who seek police assistance, service of Women Desks is made available in many of the Police Stations of the State. Through the desk, women can approach police fearlessly and unhesitant. A Women Police Constable or Women Head Constable of the respective police stations would be in charge of women desks. They hear complaints of women relating to atrocities at home, workplaces etc. And refer appropriate matters to the higher officials. There is no complexity in submitting petitions. A petition written on a white paper with the postal address of the petitioner submitted either directly or by post would suffice.

### **State Women's Commission**

Kerala Women's Commission is a statutory body constituted under Kerala Women's Commission Act, 1990. As stated by the Act, the Commission is tasked with improving the status of women in the State of Kerala and with inquiring into unfair

practices affecting women and the connected matters.<sup>461</sup> The Commission cause in investigations on issues women and report as well as recommend the Government on corrective measures and other actions to be taken.<sup>462</sup> They also study the lacunae, inadequacies or shortcomings in the laws that affect the constitutional right to equality and fair treatment of women and suggest accordingly proper remedial executive and legislative measures to be adopted.<sup>463</sup>

The Commission has been conducting awareness classes and seminars on various legislations relating to women like the PWDV Act, 2005, the Dowry Prohibition Act, 1961, the Indecent Representation of Women (Prohibition) Act, 1986 etc. Holding of adalats for the peaceful settlement of family squabbles between spouses is an important function of the Commission. Cases pertaining to domestic violence are usually referred to police or Protection Officers of the concerned district. It may also order for a departmental inquiry in necessary cases. The Commission is getting overwhelmed with the complaints of domestic violence but police acts unresponsively in most of the cases.

For the proper understanding of people regarding the issues of women and the legislative measures for their protection, various steps have been taken by the Commission. It prepares and circulates booklets, brochures etc on legislations for the protection of women, create documentaries, advertisements etc and publish through visual medias and on camps organized by them. Counseling classes are also provided for married couples as well as for those whose are about to marry. In addition to this, legal aid cells are also set up for providing free legal assistance for those approaching the Commission. Ultimately, they conduct studies and researches on different issues of women and submit its report to the Government.

Compared to the other State Commissions, Kerala Women's Commission exhibits more clarity and transparency in their works. However, minimum infrastructure and insufficient funds sometimes cause restrictions on their work.

### **Vigilance Cells (Jagratha Samities)**

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<sup>461</sup> Kerala Women's Commission Act (KWC Act), Preamble (1990)

<sup>462</sup> (KWC Act), § 16 (1) (i) & (ii) (1990).

<sup>463</sup> (KWC Act), § 16 (1) (iii) (1990).

In furtherance of creating a social environment that resolve and prevent harassment and denial of rights and liberties of women, the State Government recommended for the establishment of Vigilance Cells at district and below level under the supervision of State Women's Commission. It holds a kind of judicial power and has the duty to take up women issues and conduct proper enquiries thereby making decisions on such matters. To accelerate the process of protecting women rights the SDC-capdeck (Capacity Development for Decentralization in Kerala) acts in an essential manner.

Members of Vigilance Cells for Panchayats/ Municipal/ Corporation vary. They may consist of Circle Inspector or Sub Inspector of the concerned Police Station, a Woman social worker, a woman legal expert, a woman doctor of PHC, official of the social welfare department etc.

These Cells extend their services in providing legal aid, counseling and other support to the victims of violence. If they become unsuccessful in handling an issue they would report it to the police and provide complete assistance to the victim. In addition to this, they also conduct awareness programmes for the public.

Till now only some local self governing bodies have constituted Jagratha Samities and out of the constituted only a few are functioning actively. As the local self governing bodies are already vested with huge responsibilities, it is becoming difficult to accomplish all the objectives of the Committees.

### **Kerala State Social Welfare Board**

It is an autonomous body working with the support of Central Social Welfare Board. It aims at working for the integrated development of children and women in the State of Kerala. The board implements Government's various welfare schemes with the help of NGOs and other voluntary organisations working for the welfare of people. The Chairperson of the Board would be a woman social worker. The members usually are representatives of each district.

Some of its activities include providing care for destitute women and children, setting up care homes, juvenile homes, old age homes and Mahila Mandiram, etc. The Board has been working keenly for the development and implementation of the PWDV Act.

It has conducted various programmes and seminars on the challenges faced by women at home.

### **Kerala State Women's Development Corporation (KSWDC)**

The Kerala State Women's Development Corporation was established with the aim of broadening opportunities for the women in socio economic and political spheres and to enhance their status in the society. It is essentially a loan lending component acting as a helping hand in enhancing women's participative role. It's mission is to built a just and equal society by encouraging and empowering women providing proper support system. Economic dependence is found to be one of the main causes of domestic violence. In order to make women come forward breaking their economic hurdles, KSWDC has developed many schemes and programmes. It conducts gender awareness programmes, career grooming services, and vocational training facilities seek to address women's needs and concerns.<sup>464</sup> Thus the Corporation has transformed the lives of many women and readied them to meet the challenges of life.<sup>465</sup>

### **Social Justice Department**

The Social Justice Department of the Kerala Government is a nodal agency that lays a solid foundation to support and strengthen the socio economic development schemes and welfare plans of the Government. The Department has appointed 14 Women Protection Officers and recognised 92 Service Providing Centres and 14 Shelter Homes so far.

The Social Justice Directorate has conducted various programmes in connection with the PWDV Act. Media campaign is one among them. This includes production and tecasting of short films and documentaries with the help of Kerala State Film Development Corporation and Doordarshan. In addition to this documentaries and audio spots are broadcasted through All India Radio. A printed booklet naming "Sthreeyum Niyamavum" has distributed amid the stakeholders. It contains the PWDV Act, rules and orders connected to it. Along with it a brochure consisting of

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<sup>464</sup> Kerala State Women's Development Corporation, <http://kswdc.org/who-we-are-2/>, (May. 19th, 2018)

<sup>465</sup> *Id.*

the addresses and details of the service providers, protection officers etc has also published. Thus, the department has been creating awareness about the law through print medias.

By providing training as well as sensitization programmes to the stakeholders and conducting capacity building programmes for protection officers the government is trying to make the machineries under the law work efficiently. Police Officers and even Judiciary are given all the training needed for effective dealing of DV matters. In order strengthen their efficiency, Shelter homes as well as Office of protection officers have been computerized and provided with telephone connections. Protection Officers are also given photocopy machines. A Women Web Portal<sup>466</sup> as a collaborative women repository has been installed. Monitoring Committees have been set up in State and District levels. In its valuable initiatives, role of the department in the implementation of PWDV Act is conspicuously evident.

### **Protection Officers**

The Social Justice Department of the Government of Kerala has created 14 posts of Protection Officers. Each district is headed by a Women Protection Officer. However, with respect to 2 districts it is found that a single Protection Officer is working for both. Even if most of the officers are graduates of law, there are also science graduates holding the post. On receipt of a complaint of domestic violence from an aggrieved person the Protection Officer shall make a Domestic Incident Report in the prescribed form.<sup>467</sup> Such a report is to be sent to the Magistrate and forward copies thereof to the police officer in charge of the concerned police station and to the service providers in that area.<sup>468</sup> All the Protection Officers claim that currently not a single case is pending to be settled through them. No data is available with regards to the nature of cases they receive mostly. Half of them opine that even though occurrence of verbal or emotional abuses is unabated, they come across with physical abuses largely. From the available data more than 752 awareness classes have been conducted throughout the State under the supervision of protection officers so far. Notable among them was “Sradha” initiated by the Social Justice Department for

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<sup>466</sup> [www.keralawomen.gov.in](http://www.keralawomen.gov.in)

<sup>467</sup> PWDV Act § 2 (e) (2005).

<sup>468</sup> PWDV Act § 9 (1) (b) (2005).

creating awareness among the service providers and other officials of the department on various laws relating to women and children. These programmes were found highly effective. Insufficiency of funds received from the State Government creates difficulty in their performance. By means of ensuring timely submission of annual reports and conducting review meetings, the State Government checks the effective functioning of Protection Officers. 90% of them are not satisfied with the provisions provided by the State. Lack of infrastructure facilities adversely affects their smooth functioning. Apparently, provisions for travel and festival allowances have been made by the State Government.

### **Service Providers**

Service Providers are constituted mainly to provide assistance to the Protection Officers in protecting the aggrieved persons and preventing the recurrence of domestic violence. It is a voluntary association formed with an objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance.<sup>469</sup> 46 Service Providers were selected and filed RTI application. Out of them around 29 imparted information. Offices of 4 were closed and for that, the reason is unknown. Every service provider ensured the service of a counselor who usually is a law graduate. They provide enough medical facilities as well as assistance of clinical psychologists to the victims of domestic violence. Some of them are running shelter homes as well. State Government provides fund for their functioning, but it is found insufficient. Submission of annual reports is ensured and timely inspections are conducted by the Kerala State Social Welfare Board to check the effective working of the institution.

### **Shelter Homes**

The Government of Kerala has recognised 14 shelter homes under the PWDV Act. Information was sought from all 14 and 10 out of them responded within the time limit. All of them have enough infrastructure facilities to work smoothly. Fulfilling all the basic needs of the victims and helping them to make use of all the available resources necessary to become self reliant, they ensure minimum standard of living atmosphere to the victims. Basic needs include food, clothing, secured shelter etc.

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<sup>469</sup> PWDV Act § 10 (1) (2005).

Some of them also provide short stay facilities. Medical aid is provided, including periodical medical check-up, 24 hours ambulance availability and so on. As a part of mental rehabilitation, counseling, psychological sessions, awareness classes etc are conducted. Legal aid and Police help are supplied at necessary situations. By providing job assistance and financial support shelter homes are running in a productive manner. For this purpose, they impart vocational training in tailoring, handicraft etc. to the inmates. Educational support and schooling, as well as a crèche for children below 4 years of age, are some other facilities they furnish. Recreational activities and celebrations are conducted additionally for the mental well being of the inmates.

Shelter homes are receiving financial assistance from Kerala State Social Welfare Board on a yearly basis. However, this amount is inadequate to deal with domestic violence cases and to provide basic amenities to the victims. Sometimes they don't even give proper installment of funds. Apart from the salaries to the staffs no other incentives and allowances have received from the government. Even the honorarium provided by the Government is very low. Meagre contribution of NGOs does not help them to overcome the situation

## **INFERENCES**

The Kerala State Government through its Department of Social Justice endeavored to effectual implementation of the PWDV Act. For this purpose Protection officers, Service Providers, Family Counseling Centres, Shelter Homes etc have established and recognised under the Act.

The Minister for Health and Family Welfare, Shrimati K. K. Shylaja while attending a seminar at State level on “PWDV Act 2005” conducted by Kerala Social Welfare Board pointed out that “even though women in the State are said to be empowered, there seems to be an alarming rise in domestic violence in Kerala”. People in Kerala are still holding a conservative attitude. Reformation is possible only if they do away with their mindset. The Minister added further that “society continues to be in the grip of a feudal mindset along with the exploitative capitalist norms.. There is only a



facade of change, and it keeps on clashing with a conservative mindset.. These truths have to be kept in mind while implementing rules against domestic violence”<sup>470</sup>

The State Government has adopted a plan to establish ‘one-stop crisis centres’ in Kerala within 2 years out of central funds at an approximate cost of Rs. 40, 00,000. In its first phase, centres will be constituted in 4 districts and the remaining districts will be considered in the succeeding phase. These centres will extend medical aid, police protection, short stay facilities etc. Along with that, the centre will offer shelter to the victim of sexual and physical abuse. Report says the One Stop Crisis Centres in other States often are far for the women from the villages with limited mobility and financial resources at her disposal.<sup>471</sup>

For executing projects, including implementation of institutional services, under PWDV Act, a sum of money has been allotted in State budget in every financial year. Still, these funds are found to be inadequate for keeping the machineries flawless in their working. Lack of infrastructure facilities and omission of incentives and other allowances desist them from performing certain functions.

Role of Police Stations in the process is noteworthy. Constitution of Women’s Cells and Women Desks is a major step taken forward for assisting women who sprawl in difficulty. However, there were instances where women received cold responses from the officers dampening the victim’s hope.<sup>472</sup> This has discouraged them from further approaching the officers. Some of them are not even aware of such desks set up for their assistance. Campaigns in educational institutions, associations, public places etc would help in making it further popular.

Social Justice Department and Social Welfare Board claim the appointment of separate protection officers in each district. It is found that a post in one of the districts is still vacant and the officer of neighboring district is given charge for the

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<sup>470</sup> *Concern over rise in domestic violence in State*, THE HINDU (Nov. 27. 2017), <http://www.thehindu.com/todays-paper/tp-national/tp-kerala/concern-over-rise-in-domestic-violence-in-state/article20947406.ece>

<sup>471</sup> Nisha Agrawal, *State govts must step up to prioritise Domestic Violence Act*, THE INDIAN EXPRESS (Oct. 26, 2016), <http://indianexpress.com/article/blogs/state-govts-must-step-up-to-prioritise-domestic-violence-act-3103336/>

<sup>472</sup> Mini Muringatheri, *Most women unaware of 24-hour helpline in Kerala: Survey*, THE HINDU (Oct. 22nd, 2013), <http://www.thehindu.com/news/national/kerala/most-women-unaware-of-24hour-helpline-in-kerala-survey/article5260676.ece>

time being. In effect, a single officer is working for two districts. Assignment of responsibilities of one more district on a single officer seems to be an extra burden on her. Even if she is on a temporary charge she could not afford to perform, since she is already overwhelmed by the tasks at hand. This shows that the Government's declaration that women protection officers would be appointed soon has not been fulfilled yet.<sup>473</sup> Along with this some of the Protection Officers expressed that periodic scrutiny of the officers are not done appropriately.

In order to assist the Protection Officers in distributing notices received from Court among the complainants and opposite parties within a given time, Messengers have been appointed on contract basis. They are appointed by Kerala Mahila Samakhya Society, an organisation authorized under Human Resource Development Authority, and given monthly honorarium.<sup>474</sup>

It was opined by a Protection Officer that an officer having appropriate knowledge in law can serve better as a protection officer. At least they should be having masters' degree in Psychology, Sociology or Social Work. Even though most of the protection officers in Kerala are law graduates, officers with degree in science streams are also given charge. Similar is in the case of Counselors.

Status of safe places for the victims to stay in is also despairing.<sup>475</sup> Kerala is one of the States having less number of shelter homes functioning.

Previously, a Government Order was passed for the formulation of a project for rehabilitation and welfare of victims of various forms of abuse including domestic violence.<sup>476</sup> Through this victims and their dependants are provided financial assistance for shelter, food, medical aid, education etc. Domestic violence victims whose case has been settled through court are not considered under this project. Monetary aid up to Rs. 25000 has been given. Additional amount can be provided with the permission of the Director of Social Welfare Board if the condition is justifiable. For the implementation of the project District Level Monitoring Committees headed by respective District Collectors have been constituted under the

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<sup>473</sup> See *supra* note 470.

<sup>474</sup> G. O. (Rt) No. 336/2015/SJD.

<sup>475</sup> See *supra* note 471.

<sup>476</sup> G. O. (Rt) No. 427/2011/SWD.

Act. On receiving requests from victims, the protection officers conduct inquiries and place the deserving applications before the Monitoring Committee.

The Order limited financial assistance to victims belonging to BPL (below poverty line) section. Since in domestic violence cases victims often fall into financial troubles as they do not have any other source of income to maintain themselves with children; refusal of financial assistance merely because they do not belong to BPL section would be unreasonable. Keeping this in view, the Government of Kerala passed another order substituting the requirement of ‘annual family income’ with ‘annual income of the domestic violence victim’.<sup>477</sup> Accordingly, a domestic violence victim having annual income of not more than Rs. 1 lakh is entitled to the financial aid schemed for rehabilitation and welfare of victims of various forms of abuse.

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<sup>477</sup> G. O. (M.S) No. 21/2015/SJD.

## Chapter 6

### Conclusion & Suggestions

Domestic violence has been a matter of profound concern as it threatens and restrains women from taking a decisive role in her family thereby affecting her human rights negatively. In fact, it undermines faith in the rule of law which is the very basis of civil society that requires State to be governed by the law. Law performs an established function by stipulating what conduct of a person is not allowable. Violence against women at home is such an act that is explicitly made impermissible under the Protection of Women from Domestic Violence Act, 2005 and it has been supported by penalties. It is well recognised as socially intolerable behaviour, whether as an offence or infraction of human rights. Understanding the significance of the social and economic costs of this various international commissions and instruments had embraced the cause and laid efforts in curbing the menace. Main difficulty was to integrate those international principles into national legislations.

The traditional Indian society considers men as superior, mainly in marital relationships. There's always been a bias towards them. The role of women within the household was highly retrenched. Reason for indefinite continuation of this gender directed inequality has been effectively considered as patriarchal dominance within the family and not due to behavioural problems, alcoholism or drug addiction. Patriarchal societies promulgate the philosophy of motherhood that inhibits women's mobility and distresses them with responsibilities of nurturing and bringing up children.<sup>478</sup> Man who is superior in the family controls the strength, sexuality, production and reproduction and their social movement as well.<sup>479</sup>

The Constitution of India has given attention to the general rights of women as individuals and citizens of the country. Their participation in the development of the country has been ensured through the provisions of Fundamental Rights and Directive principles of the State Policy. Fundamental Rights, which comprises of natural basic human rights, are equally available to women as they are available to men. The

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<sup>478</sup> SURANJITA RAY, UNDERSTANDING PATRIARCHY 2 & 16 (2006),  
[http://www.du.ac.in/fileadmin/DU/Academics/course\\_material/hrge\\_06.pdf](http://www.du.ac.in/fileadmin/DU/Academics/course_material/hrge_06.pdf) (last visited Jan. 16, 2018)

<sup>479</sup> *Id.*

framers of the Constitution were conscious about the intensity of problems of setting women free from economic, social or political restrictions. They realised the need for drafting a Constitution that protects the rights of weaker and vulnerable sections of society and to provide additional safeguards in order to bring them to the mainstreams. The resulting Constitution provided not only equality of the sexes but also preferential treatment to women to make up for the backwardness they have been experiencing for long.

Since the establishment of United Nations attaining equality between men and women has been one of the most basic promises of human rights. Significance of marriage and family relations and the rights thereof has been embodied in many of the international human rights instruments. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which is also known as “the bill of rights for women” gave a stimulus but still it stayed quiet with regards to the matter of domestic violence. However, it required States Parties to adopt necessary steps to eliminate discrimination against women in all matters relating to marriage and family relations.<sup>480</sup> Eventually, world took note of the intensity of matters of violence and discrimination.

The pre 2005 legal framework on domestic violence in India was insufficient to handle the issue. The only choices available to a domestic violence victim were to recourse to either criminal law remedy under Sec. 498A of IPC or the civil law remedy of divorce. Inadequacies of available civil and criminal law remedies, accentuation of culture specific marital cruelty and dowry deaths, non recognition of relationships in the nature of marriage, unavailability of preventive measures etc. ruined the condition. Feminist organisations in India took up the UN Framework for Model Legislation that asserted on enactment of legislations on the issue. It emphasized on legislating against domestic violence exhaustively in the domestic systems.

Rise of a new statute that bravely intervened into private sphere of family was marked in the year of 2005. For the first time in the Indian legal history, the Act provided a wide definition of the term “domestic violence” encompassing all sorts of violence that continued to exist in a latent manner, thereby broadening and clarifying the

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<sup>480</sup> CEDAW, art. 16 (1979)

concept. The concepts of physical, sexual, verbal and emotional, and economic abuse are incorporated and explained in the Act. It also provides exhaustive remedies.

The judicial decisions that arose mostly with regards to the interpretation of concepts like domestic relationship, shared household, aggrieved person etc. Each verdict was a result of scrutiny of the specific facts and circumstances of that particular case. Judgments of *S.R. Batra v. Taruna Batra*<sup>481</sup>, *Velusamy v. D. Patchaiammal*<sup>482</sup>, etc. are crucial decisions that gave rise to criticisms with respect to culture-specific facets of Indian context. Certain confusions arose during implementation of the Act. The Indian judiciary did not go deeply into it thereby resulting in conceptual blurriness of actual life experiences of women.

Duties of the State Government are stipulated in the Act clearly. It extends from giving publicity to the provisions of the Act to appointment of Protection Officers and Service Providers. The Kerala State Government through its Department of Social Justice endeavoured to effectual implementation of the PWDV Act. For this purpose Protection officers, Service Providers, Family Counselling Centres, Shelter Homes etc have established and recognised under the Act. though not constituted under the PWDV Act, Vanitha Police Stations and Women's Cells work for the protection of women. Service of Women Desks are also made available in many of the Police Stations of the State. State Women's Commission and Jagratha Samities constituted thereunder help the Government to overcome the constraints in implementing the Act. Kerala State Women's Development Corporation formed with a mission to built a just and equal society by encouraging and empowering women providing proper support system, has transformed the lives of many women and readied them to meet the challenges of life.<sup>483</sup>

For making its initiatives work convincingly, the Kerala Government has been issuing orders relating to the recognition and allotment of funds for the functioning of various institutional services from time to time. The Social Justice Department and Kerala State Welfare Board have been underpinning developments in all spheres for the upliftment of women. Research shows that the Government has been conducting

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<sup>481</sup> 2007 3 S.C.C. 169.

<sup>482</sup> AIR 2011 SC 479.

<sup>483</sup> <http://kswdc.org/who-we-are-2/>, Kerala State Women's Development Corporation

periodic reviews and providing assistance to ensure the effective functioning of the machineries. In spite of this wide range of activities, inconsistency is felt in some of its initiatives. For instance in providing infrastructure facilities to the functionaries. Even though the Government conducts periodic inspections and provides assistance to them, inadequacy of facilities available to them for their effective functioning has not been resolved. Status of safe places for the victims to stay in is also despairing.<sup>484</sup> Kerala is one of the States having less number of shelter homes functioning.

It is true that there may exist a number of constraints in the process of putting an Act into effect. A law cannot be executed completely until specific measures have been adopted. Hence, simply making recommendations and suggestions will not suffice to. It should be put in force in earnest for helping the end party, and here it is victim of domestic violence.

The Gender Advisor of Government of Kerala, Dr. T. K. Anandi while speaking on “PWDV Act 2005 and its impact on Women” identified that “in spite of the good indications that the life expectancy of women in Kerala is on its increase and around 78% of girls are getting higher education, there is 5% growth in cases of domestic violence”. Kerala stands at a lower level than Bihar with respect to the freedom of women in taking decisive role in family.<sup>485</sup> Further, proportion of dependency level is also higher.<sup>486</sup> Gender sensitization is a requisite in judiciary, police as well as medical spheres.<sup>487</sup>

## **SUGGESTIONS**

Suggestions are proposed to bring about changes in the policies, procedures and practices of the support system. The basic objective of this study is to impart needed services for the women victims of domestic violence. It is felt that, if necessary changes are brought about it will strengthen the working of the institutions.

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<sup>484</sup> Nisha Agrawal, State govts must step up to prioritise Domestic Violence Act, The Indian Express, available at <http://indianexpress.com/article/blogs/state-govts-must-step-up-to-prioritise-domestic-violence-act-3103336/>

<sup>485</sup> Dr. T. K. Anandi, Gender Advisor, Government of Kerala, PWDV Act 2005 and its Impact on Women, Talk at the State Level Seminar on PWDV Act, 2005 (Nov. 26th, 2017).

<sup>486</sup> *Id.*

<sup>487</sup> See *supra* note 470.

The number of staffs in the Vanitha police stations and cells should be increased to enable systematic functioning of the system. Women Cell should function in a separate building with sufficient facilities of rooms for counseling, waiting rooms, toilets etc. Once a victim is linked to protection officer and service providers, follow-ups of the case should be made compulsorily and an officer should be posted in charge of the same. Regular training should be given to staffs of Women Cells. Periodical review should be made on the cases of domestic violence and devise strategies to prevent them.

Protection Officer should be given intense training on the prevalence and process of handling cases of domestic violence. The office of protection officer should have adequate number of staffs to reduce the workload and for minimizing the delay in the Court. The office of the protection officer should comprise of a lawyer, a counselor and voluntary social workers to assist the women victims to file complaint under domestic violence act.

Separate funds should be granted to family counseling centres for dealing with the cases of domestic violence which needs special intervention. Community counseling should be made mandatory on weekly basis. More focus should be given on capacity building of the victims of domestic violence. Training should be given on special programmes for developing self worth, self confidence, motivation and assertiveness training, battered counseling, anger management techniques and career management.

Establish and recognize adequate number of Shelter Homes for providing safe stay and rehabilitation of the victim. Their intake capacity should be increased. Enhance the amount of funds allocated to the shelter homes. Provisions for children under five years should be given special attention. Facilities like crèches attached to homes, toys and other aids for children's development should be available in the shelter homes.

Law alone cannot change a social situation. Human nature should be changed. Cultural thinking awakening from education is necessary for societal transformation. Counseling and awareness programmes must be conducted starting from school level. Necessity to strengthen and maintain family stability should be taught in schools by including it as a course component of the curriculum.



All the officials involved in execution of the legislation must be given exhaustive training with respect to its content. Capacity building programmes on domestic violence will help to provide them in-depth understanding on the law thereby leading to a uniform implementation. System of research and regular monitoring mechanism will strengthen the accountability among them.

With the help of clinical psychologists, psychological counseling can be provided. This will help her to release herself from the state of mental suffering.

Making a situation ideal for women's contribution in workforce by inducing their ability to work is essential to attain an overall positive outcome. To go along with the victim should be the essence of the implementation.

The aim is to cause access to justice more sustainable to victims who may not at every time need criminal proceedings, but seek interference by saving the probability of compromise.

The entry point should be allocation of budget. Instead of utilizing resources of welfare schemes, the State Governments should allocate their budget appropriately initiating a separate plan for its implementation. With appropriate budgets backing the law, the required infrastructure would also fall into place.<sup>488</sup> An important affirmative thing to be noted is that unlike other State Governments, the Government of Kerala does not appoint its officers on a contractual basis. Instead it appoints them on Government payroll with complete benefits.<sup>489</sup>

Domestic violence free society is not possible; however, reducing the rate and intensity of its occurrence is within the bounds. For this, the State is under the obligation to see whether the services are being rendered to the women. It should hasten to accentuate the implementation of the law by ensuring requisite allotment of budget and utilization thereof, adequate infrastructure facilities and committed officials to undertake cases and maintaining effective coordination between Ministers and Departments dealing with law, home affairs, health and human resources along with various support services as these are indispensable to address issues of domestic violence as well as

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<sup>488</sup> See *supra* note 471.

<sup>489</sup> See *supra* note 471.

the effective execution of the law. Ultimately, it is important to make sure that the legislation functions for the end person, ie., sufferer of domestic violence.<sup>490</sup>

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<sup>490</sup> See *supra* note 471.

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<http://kswdc.org/>

<http://www.keralawomen.gov.in/>

### **E Newspapers**

- The Hindu
- The Indian Express

### **Seminars**

- State Level Seminar on PWDV Act, 2005, Nov. 26th, 2017.

## Appendix

### ➤ RTI Application submitted to Protection Officers

#### Application to be submitted for Information under Right to Information Act, 2005

To,

(1) Full name of the applicant : Ashima P A

(2) Address :

(3) Particulars of information :

Subject: Request for Information under Protection of Women from Domestic  
Violence Act 2005

- a. Qualification of the officer
- b. Year of appointment
- c. No. of domestic violence cases received
- d. No. of cases settled  
Out of that:
  - i. No. of cases settled through courts
  - ii. No. of cases settled through counsellors
- e. No. of cases pending
- f. Nature of cases you receive mostly and their numbers:
  - i. Physical abuse
  - ii. Sexual abuse
  - iii. Verbal/emotional abuse
  - iv. Others
- g. No. of cases referred to service providers
- h. No. of cases referred to shelter homes
- i. No. of cases reported to Police Station
- j. No. of cases for which clinical psychologists assistance provided
- k. No. of awareness classes conducted
  - i. How far these programmes are effective?
- l. From where do you receive funds for proper functioning of the institution? (State/Centre)
  - i. Whether the funds available are sufficient enough
- m. Whether there is periodic scrutiny of the working of the officers by the Government?
- n. Whether annual reports are submitted timely?
- o. Whether the time limit for submitting reports is enough
- p. Do you have proper infrastructure facilities to work smoothly?
- q. Methods of disposing cases
- r. Procedures followed
- s. Other incentives & allowances received from the government

- t. Reasons of DV Cases
  - i. Due to Alcohol or Drugs
  - ii. Due to Dowry
  - iii. Due to extramarital relationship
  - iv. Due to Psychiatric issues
  - v. Due to Mobile and Social Media
  - vi. Due to adjust mental problem
  - vii. Due to relatives issues

- (4) Year to which the information pertains :
- (5) Other relative reference, if any :

Place : Ernakulam

Date :



➤ **RTI Application submitted to Service Providers**

**Application to be submitted for Information under Right to Information Act,  
2005**

To,

(1) Full name of the applicant : Ashima P A

(2) Address :

(3) Particulars of information :

Subject: Request for Information under Protection of Women from Domestic  
Violence Act 2005

- a. Qualification of the officer
- b. Year of appointment
- c. No. of domestic violence cases received
- d. No. of cases settled
- e. No. of cases pending
- f. Nature of cases you receive mostly and their numbers:
  - i. Physical abuse
  - ii. Sexual abuse
  - iii. Verbal/emotional abuse
  - iv. Others
- g. No. of cases referred to shelter homes
- h. No. of cases reported to Police Station
- i. No. of cases for which clinical psychologists assistance provided
- j. No. of awareness classes conducted
  - i. How far these programmes are effective?
- k. From where do you receive funds for proper functioning of the institution? (State/Centre)
  - i. Whether the funds available are sufficient enough
- l. Whether there is periodic scrutiny of the working of the officers by the Government?
- m. Whether annual reports are submitted timely?
- n. Whether the time limit for submitting reports is enough
- o. Do you have proper infrastructure facilities to work smoothly?
- p. Other incentives & allowances received from the government
- q. Reasons of DV Cases
  - i. Due to Alcohol or Drugs
  - ii. Due to Dowry
  - iii. Due to extramarital relationship
  - iv. Due to Psychiatric issues
  - v. Due to Mobile and Social Media
  - vi. Due to adjust mental problem

vii. Due to relatives issues

(4) Year to which the information pertains :

(5) Other relative reference, if any :

Place : Ernakulam

Date:

➤ **RTI Application submitted to Counselling Centres**

**Application to be submitted for Information under Right to Information Act,  
2005**

To,

(1) Full name of the applicant : Ashima P A

(2) Address :

(3) Particulars of information :  
Subject: Request for Information under Protection of Women from Domestic  
Violence Act 2005

- a. Qualification of the officer
- b. Year of appointment
- c. No. of domestic violence cases received
- d. No. of cases settled
- e. No. of cases pending
- f. Nature of cases you receive mostly and their numbers:
  - i. Physical abuse
  - ii. Sexual abuse
  - iii. Verbal/emotional abuse
  - iv. Others
- g. No. of cases referred to shelter homes
- h. No. of cases reported to Police Station
- i. No. of cases for which clinical psychologists assistance provided
- j. From where do you receive funds for proper functioning of the institution? (State/Centre)
  - i. Whether the funds available are sufficient enough
- k. Whether there is periodic scrutiny of the working of the officers by the Government?
- l. Whether annual reports are submitted timely?
- m. Whether the time limit for submitting reports is enough
- n. Do you have proper infrastructure facilities to work smoothly?
- o. Other incentives & allowances received from the government
- p. Reasons of DV Cases
  - i. Due to Alcohol or Drugs
  - ii. Due to Dowry
  - iii. Due to extramarital relationship
  - iv. Due to Psychiatric issues
  - v. Due to Mobile and Social Media
  - vi. Due to adjust mental problem
  - vii. Due to relatives issues

(4) Year to which the information pertains :

(5) Other relative reference, if any :

Place : Ernakulam

Date:

➤ **Application submitted to Shelter Homes**

**Application to be submitted for Information under Right to Information Act,  
2005**

To,

(1) Full name of the applicant : Ashima P A

(2) Address :

(3) Particulars of information :

Subject: Request for Information under Protection of Women from Domestic  
Violence Act, 2005

- a. Year of constitution as a shelter home under the Protection of Women from Domestic Violence Act, 2005
- b. No. of domestic violence cases received till now
- c. Do you have proper infrastructure facilities to work smoothly?
- d. How do you ensure minimum standard of living atmosphere to the victims
- e. Whether the State provide sufficient financial assistance
  - i. To deal with Domestic Violence cases
  - ii. To provide basic amenities to the victims
- f. Other incentives & allowances received from the government

(4) Year to which the information pertains :

(5) Other relative reference, if any :

Place : Ernakulam

Date:

➤ **Application submitted to Social Justice Department & Kerala State Social Welfare Board**

**Application to be submitted for Information under Right to Information Act, 2005**

To,

- (1) Full name of the applicant : Ashima P A
- (2) Address :
- (3) Particulars of information :
- Subject: Request for Information under Protection of Women from Domestic Violence Act, 2005
- a. Details of machineries appointed for the implementation of DV Act (Protection officers, Service providers etc. )
  - b. Details of dv cases reported to these machineries of 14 districts in State of Kerala
    - i. No. of domestic violence cases received
    - ii. No. of cases settled
    - Out of that:
      1. No. of cases settled through courts
      2. No. of cases settled through counsellors
    - iii. No. of cases pending
    - iv. Nature of cases you receive mostly and the numbers:
      1. Physical abuse
      2. Sexual abuse
      3. Verbal/emotional abuse
      4. Others
    - v. No. of cases referred to service providers
    - vi. No. of cases referred to shelter homes
    - vii. No. of cases reported to Police Station
    - viii. No. of cases for which clinical psychologists assistance provided
    - ix. No. of awareness classes conducted
  - c. How do you ensure submission of timely reports by these machineries
  - d. Whether sufficient trainings are provided to the officers
  - e. From where do you receive funds for proper implementation of the Act (State/Centre)
    - i. How much funds do you receive?
- (4) Year to which the information pertains :
- (5) Other relative reference, if any :

Place : Ernakulam  
Date: