The existing legislative measures to protect women from domestic violence prior to the passing of the Act of 2005 is to be understood as to analyze and differentiate the limitations felt and the need to enact a new legislation on the issue. The starting point for the discussion is the overarching mandate ie. the Constitution of India , the supreme law of the land. Several enactments that originated during the British colonial rule are also to be discussed. The broad framework of civil and criminal remedies that existed prior to 2005 in India is the subject matter of this chapter.

5.1 Constitutional Framework

The Indian Constitution is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. One of the golden ideals of the Constitution is the Fundamental Rights which are guaranteed and comprises of the natural basic human rights, inherent in human beings. The rights of women have the originating source in the Constitution as all Indian laws emerge from and are clothed with sanctity by the Constitution. Protection of women from domestic violence as a specific right was not specifically conferred to women in India until the enactment of the Protection of Women
from Domestic Violence Act, 2005. The Constitution of India has focused on the general rights of women as individuals and citizens of the country. As a consequence of the provisions under the Fundamental Rights and Directive Principles of State Policy, the overall participation and productive quality of women in the developmental process of the country is ensured.

The Indian Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women.\(^1\) The constitutionally guaranteed fundamental right to equality before the law\(^2\) and non-discrimination on the ground of sex\(^3\) has received wide judicial interpretations to ensure gender justice to women.\(^4\) In The sphere of right to equality no uniform judicial approach has been followed by the Indian judiciary in analyzing the legal position of women. In the early cases, the courts has employed a differential analysis in classifying between men and women as a group and in upholding legislations that conferred advantageous position to women.\(^5\) Gradually in cases relating to public employment, discriminatory provisions favourable to men etc., the differential approach were disregarded and assured a welcoming step in ensuring gender justice.\(^6\)

\(^2\) Constitution of India, Part III, Art. 14 confers the equality before the law or the equal protection of the laws to every person.
\(^3\) *Id.*, Art. 15 (1) prohibits any kind of discrimination on the grounds of religion race, caste, sex or place of birth.
The protective discrimination guaranteed to women provides a large space for negotiating the right for women. Legislations that discriminate in favour of women have also been upheld under Article 15(3) of the Constitution of India. Freedom of speech and expression and the freedom to practice and carry out any occupation, trade or business applicable both to men and women provide the much needed space for mental and economic empowerment and personality development to women.

The Supreme Court had lamented upon the women folk in the specific Indian cultural context when it opined:

“Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination”.

Human dignity is the quintessence of human rights. Women’s rights as human rights are elusive in the absence of right to live with human dignity. The

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7 Constitution of India, Part III Art. 15(3) is an enabling provision and empowers the state to make any special provision for women and children. The reason forwarded for this positive discrimination to women is that a woman’s physical structure and the performance of maternal functions places her to a disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race. This position was upheld in Muller v. Oregon, 52 L.ed.551. In Gita Hariharan v R.B.I.,(1999) 2S.C.C. 228; Interpretation of the guardianship law in the light of Article 15 of the Constitution of India by the Supreme Court equated the position of mother to that of the father in the matter of guardianship. Other cases on protective discrimination are. Dattatraya Motiram v. State of Bombay, A.I.R. 1953 Bom.842; Cracknell v State of U.P, A.I.R. 1953,All.746; Government of A.P v. P.B. Vijaya Kumar, A.I.R. 1995 S.C. 1648.

8 Numerous laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women in advertisements and films, female child marriage, atrocities, molestation, abduction etc. Egs. The Dowry Prohibition Act,1961;The Maternity Benefit Act,1961;The Equal Remuneration Act,1976;Family Courts Act,1984;The Indecent Representation of women (Prohibition )Act,1986;The Commission of Sati (Prevention) Act,1987; The National Commission for Women Act,1990. All these legislations have served to bring about the changes in the position of women in the existing socio cultural set up of the country.


10 Id., Art. 19(1)(g).

ILO set up in 1919, aiming at social justice and to promote gender equality, states that extensive discrimination against women violates the principle of equality of rights and respect for human dignity. In consonance with the spirit, the Constitution of India guarantees the right to life and personal liberty.\textsuperscript{12} Several judicial interpretations have broadened the scope of right to life and it means not merely an animal existence but includes within itself the right to live with human dignity.\textsuperscript{13} While extending the protection of right to live with human dignity to protect women from suppression and oppression, the offence of rape was held as a crime against the basic human rights and also violative of the fundamental right to life enshrined under Article 21 of the Constitution of India.\textsuperscript{14} It was held to be the crudest and sure mode of entirely destroying her personality, self-confidence and self-respect, and throwing her into deep emotional crisis. Keeping up with the spirit the Constitution of India prohibits traffic in human beings, involuntary forced labour, beggary etc.\textsuperscript{15}

The Supreme Court while upholding the spirit of right to bodily integrity of woman held:

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"Even a woman of easy virtue is entitled to privacy and no one can
invade her privacy as and when he likes. So also it is not open to
any and every person to violate her person as and when he wishes.
She is equally entitled to the protection of law."\textsuperscript{16}
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The Directive Principles of State Policy of the Constitution of India visualizes a society in which everyone will have the place of dignity and recognition of identity. It lay down certain social and economic goals to be

\textsuperscript{12}Constitution of India Part III Art. 21.
\textsuperscript{13} It was so declared under the case of \textit{Francis Corailie Mullin} and \textit{Maneka Gandhi} ‘s case.
\textsuperscript{15}Article 23 of part III of the Constitution of India. The state in pursuance of of the said provision enacted the SITA 1956and now it is known as the PITA. In \textit{Vishal Jeet v. Union of India}, A.I.R. 1990 S.C. 1412; Court held that traffic in human beings includes Devadasi system. Forced labour was absolutely forbidden not only for men but also for women; it was so held in \textit{Neerja Chowdhary v. State of M.P.}, A.I.R. 1984 S.C. 1079.
achieved by the central and state governments in India. These Directives impose certain obligation on the state to take positive action to promote the welfare and betterment of women in the society. Through judicial interpretations the ambit of right to equal pay for equal work has been elevated as a part and parcel of right to live with human dignity under Article 21 of the Constitution of India. The judiciary has also recognized the necessity of the uniformity in the application of civil laws like law of marriage, succession, adoption, maintenance etc which aimed towards the achievement of gender justice. The right of women in India to eliminate gender based discrimination particularly in respect of property so as to attain economic empowerment has been highlighted through the apex court judicial interpretation.

The Constitution of India exhorts that it is the fundamental duty of every citizens to renounce practices derogatory to women’s dignity. It in turn upholds the spirit of right of a woman to live with human dignity. The 73 rd and 74 th Amendments to the Constitution of India effected in 1992 provided for reservation of seats to women in election to the panchayats and municipalities with a view to enhancing the women’s role in the democratic process. Thus social and individual responsibilities are contemplated in the Constitution of India in addition to democratic solutions.

17 Constitution of India, Part IV Art. 38(2) says “the state shall.... Endeavour to eliminate inequalities in status, facilities and opportunities not only against individuals but also as against group of people residing in different areas or engaged in different vocations.” Article 39 (a) provides equally to both men and women the right to adequate means of livelihood; The state has enacted the Equal Remuneration Act,1976, and the Maternity Benefit Act,1961 to give effect to Art. 39(d)and Art. 42 respectively.


21 Constitution of India, Part IV-A, Art.51 A (e).

22 Noor Mohammed v Mohammed Jiauxddin, A.I.R. 1992 M.P.244.
Article 51A(e) in Part IV imposes a fundamental duty to renounce practices derogatory to women.

5.2 Civil Law Responses on Domestic Violence

Indian Civil Law does not recognize domestic violence as an issue in itself. The only specific recognition of domestic violence is the concept of ‘cruelty’ as a ground for divorce or judicial separation under the matrimonial proceedings. Theoretically it is possible to obtain certain injunctions under the Civil Procedure Code, the Specific Relief Act\textsuperscript{23}, the Law of Torts and the Family Courts Act.

5.2.1 Domestic violence under the Law of Torts

Tort law, which is based on the concept of injury / harm, is yet another law that provides remedies to aspects of domestic violence. A tort is any action or inaction that damages or injures another person. It can be towards the person or property of another person. Since acts of domestic violence cause harm, they are considered torts or civil wrongs. Any person can bring a claim for tort action, irrespective of relationship. Some of the common torts that apply in the domestic violence context are trespass\textsuperscript{24}, assault\textsuperscript{25} and battery\textsuperscript{26}, false imprisonment\textsuperscript{27} and negligence\textsuperscript{28}. Granting damages and injunctions are the remedies available in tort cases. Remedies under tort law include monetary compensation / damages and injunctions that direct a person to do or not to do something.

\textsuperscript{23}Injunctions can be obtained by applying under sections 37 to 44 of the Specific Relief Act,1963. Under this provision one can apply for restraining orders from the court restraining her husband from abusing her physically and mentally and also in cases where one fears that he will commit abusive and violent acts against the other.

\textsuperscript{24} Trespass to the person in the broad term is used to denote various forms of physical and psychological injury committed upon a person.

\textsuperscript{25} Any action that causes a person to fear that a battery will be committed upon him is an assault.

\textsuperscript{26} Battery denotes any physical interference with a person.

\textsuperscript{27} False imprisonment is the infliction of any unlawful bodily restraint upon a person.

\textsuperscript{28} The failure to take proper care is termed ‘negligence’. Negligent conduct counts as domestic violence, when a person fails in his /her legal duty to take care. In the domestic violence context, ill treatment and particularly harassment for dowry may cause such a tort.
The main pitfall of civil injunction orders is that there is no effective means for enforcing them. A violation of a civil injunction can only be countered by filing a Contempt of Court case against the violator and at the end the abuser may well get off with a few days imprisonment or fine. The exorbitant litigation costs and complicated procedures involved in the filing and hearing of a court case makes a vulnerable woman more conscious of her powerlessness and helplessness. However there is no precedent in Indian law of women being awarded damages against their husbands for trespass against the person. Other common law jurisdictions have begun to award damages in actions for battery between spouses which can be cited to persuade the judges to similarly develop the law.

5.2.2 Domestic Violence under the Family Courts Act, 1984

The Family Courts Act, 1984 was enacted with an object of promoting conciliation in and secure speedy settlement of disputes relating to marriage and family affairs as it involves serious emotional aspects. The Act makes it possible for a victim of family violence, to seek matrimonial reliefs without delay as family courts follow a less formal and more active investigational and inquisitorial procedure. All family law matters such as marriage, matrimonial causes, maintenance, custody, education and support of children, settlement of property come within the jurisdiction of the family courts.

The main criticism against the object of the Act is that it places primary emphasis on the preservation of family in tune with patriarchal culture. The Act ignores the existing power structure dominating conjugal relation and negates the vulnerable position of women within the family and society. It does not take into account the fact that in most cases of marital dispute women opt for legal recourse when other efforts for conciliation have failed to yield

29 Church v. Church, 1983 N.L.J. 317.
30 Family Courts Act, 1984. Explanation to s. 7.
result\textsuperscript{31}. Intense stress on reconciliation has proved to be counter-productive. The Act refuses to recognize the situation of irretrievable breakdown of marriage. The Act takes resort of conciliation and mediation methods which can become counter-productive in serious instances of domestic violence.

The so-called para-familial matters such as inter-spousal assaults, and other offences of criminal nature between the spouses\textsuperscript{32}, inter-spousal tort and contracts have not been brought under the jurisdiction of family courts. Thus no matter under the Dowry Prohibition Act, 1961 or under the Indian Penal Code, 1860 can be tried by a family court. It follows that disputes relating to violence between spouses will not come under family courts’, jurisdiction unless some matrimonial relief, divorce or judicial separation or maintenance\textsuperscript{33} is sought under the petition. Another argument that has been brought out against the Family Courts is that they tend to place cases of domestic violence within the field of family ‘disputes’. Thus, in the interests of preserving the family, abuse up to a certain limit is tolerated by women, as a part and parcel of wear and tear in marital life.

5.3 Cruelty as a Matrimonial Offence

Marriage is the oldest social institution of the world which influences the moral and social values of man. The dimensions of marital relationship are ever changing resulting in socio-legal problems relating to marriage such as domestic violence, dowry, annulment, child marriage, divorce etc. Under patriarchy, wife came under the control of the husband and he had the right to use force against her in order to ensure that she fulfilled her wifely obligations which included the consummation of marriage, co-habitation and maintenance of conjugal rights, sexual fidelity, general obedience and respect for his wishes.

\textsuperscript{32} Such as offence under s. 498 A of the Indian Penal Code, 1860.
\textsuperscript{33}Family Courts Act, 1984 s. 7 (2) (a). The Family courts have and exercise the jurisdiction exercisable by a Magistrate of first class under Chapter ix relating to order for maintenance of wife, children and parents of the Code of Criminal Procedure Code, 1973.
She was considered a ‘mere chattel’\textsuperscript{34}. The customs and traditions which upheld the womanly obligations later got moulded into the personal laws governing the matrimonial matters of the people in India.

The Hindu Marriage Act 1955 is the first all Indian enactment dealing with matrimonial causes specifically governing Hindus. The Indian Divorce Act 1869, the Special Marriage Act 1954, Hindu Marriage Act, 1955 are the three most important matrimonial causes statutes, in India. Besides these, three important matrimonial statutes there are other matrimonial statutes in force in India, namely, Parsi Marriage and Divorce Act, 1936 applicable to the members of Parsi community, Dissolution of Muslim Marriage Act, 1939, the part of Muslim Personal Law in force in India and permits Muslim wife to seek divorce on certain grounds. An analogous provisions of Hindu Adoptions and Maintenance Act, 1956 also reflects the concern of the legislators as to women treated with cruelty from being deprived of shelter and maintenance\textsuperscript{35}. All these Acts prescribe cruelty as one of the grounds for obtaining matrimonial relief. Cruelty is a ground for divorce as well as judicial separation under all the personal laws in India.\textsuperscript{36}

\textsuperscript{34} Suppression of women’s status in household and society in the Indian context is detailed under Chapter Two of this thesis.

\textsuperscript{35} Hindu Adoptions and Maintenance Act, 1956 s. 18 (2) (b) provides that a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance if he has treated her with such cruelty so as to cause reasonable apprehension in her mind that it will be harmful or injurious to live with her husband. s. 18 (2) (g) of the Act also provides that a Hindu wife is entitled to live separately and claim maintenance if here is any other cause justifying her living separately. In \textit{Subbegowda v. Honnamma}, A.I.R. 1984 Kant. 41; it was held that under this clause wife’s claim for maintenance can be sustained on the grounds of acts of violence which are covered by the ‘cruelty clause’ substantially but not fully.

\textsuperscript{36} Dissolution of Muslim Marriage Act, 1939 s. 2 (viii) states six conditions that constitute cruelty to wife. Namely, Habitually assaulting the wife or making her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; Associating with woman of ill-repute or leading infamous life; Attempting to force the wife to lead an immoral life; Disposing of the wife’s property or preventing her from exercising her legal rights over it; Obstructing the wife in the observance of her religion; Ill-treatment, not in accordance with the Quranic injunctions, if the man has more than one wife. S. 13 (1) (ia) of the Hindu Marriage Act, 1955 provide, ‘the other party has, after solemnization of marriage, treated the petitioner with cruelty; The Hindu Marriage Act, 1955, as originally enacted prescribed cruelty as a ground for judicial separation only i.e. s. 10 (1)\textsuperscript{b}) of the Hindu Marriage Act, 1955. Later in 1976, Marriage Laws (Amendment) Act 1976 has been inserted and prescribed cruelty to be a ground for divorce as well as judicial separation under all the personal laws in India.
Under the Dissolution of Muslim Marriage Act, 1939, cruelty has been included as a ground on which a man can obtain divorce under the six conditions stipulated. It is the only personal law which enables a woman to divorce if her husband attempts to dispose of her legal property or prevent her from exercising rights over her property. It also expressly recognizes physical violence as cruelty, and as a ground for divorce. The negative aspect relating to the Muslim law is that a man can divorce his wife without resorting to the grounds stipulated through the practice of ‘talaq’, whereas a Muslim woman can only secure divorce only through the above grounds of the Act. Some of the grounds as to the definition of cruelty are considerably progressive than other personal laws.37

The limitations recognized while defining cruelty by the personal laws is that it addresses only the spousal abuse within a matrimonial set up which forms only a portion of the larger framework of the problem of domestic violence. Human rights violations of other family members occurring within a family has been discarded with. And hence matrimonial laws in India have also proved to be unsuitable in addressing domestic violence as they deal mainly with issues surrounding marriage and its dissolution.

5.4 Judicial Approach on Matrimonial Cruelty

The concept of ‘cruelty’ in matrimonial law essentially captures the concept and elements of domestic violence. Cruelty is a common ground of divorce under all matrimonial laws, though it is worded differently and its legal

requirements differ from law to law. Cruelty has been interpreted in a variety of forms and could be infinite in its species. It could be physical or mental, direct or indirect, intended or unintended. A reference may be made of some cases which are indicative of how the concept of cruelty is interpreted, as also how it was evolved over a period of years so as to keep in tune with changing times.

Black Stone dictionary defines ‘cruelty’ as the “intentional and malicious infliction of physical suffering upon living creatures and particularly human beings or as applied to the latter, the wanton malicious and unnecessary infliction of pain upon the body or the feelings and emotions.” The cruelty as interpreted by the Courts are of two kinds, namely physical and mental cruelty. Some of the classic cases relating to cruelty are as follows:

In *Birch v. Birch*\(^{38}\) cruelty was equated with a character that is dangerous to life health or limb. In the leading case of *Russel v. Russel*\(^{39}\), it was held that cruelty between spouses is behaviour which must be shown to be detrimental to body or mind, or both, either in fact or in justifiable anticipation of the particular injured spouse actually complaining. The dictum laid therein has consistently been followed and continues to be a leading case for the test and definition of “matrimonial cruelty” both in England and India.

*Britt v. Britt*\(^{40}\) is one of the very early English case which recognized physical violence as cruelty which is a part of domestic violence. *Munshee Buzloor Rehman v. Shamsoonisa Begum case*\(^{41}\) of Privy Council can be said to have laid the foundation of the rule that cruelty as a ground for judicial separation and later it became the guide and precedent that the High Courts followed. The case of *N. Sripadchandra v. Vasanta*\(^{42}\) provides a very good

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\(^{39}\)L.R (1897) A.C. 395.  
\(^{40}\)(1953) 3 All E.R. 769.  
\(^{41}\)(1867)11 M.I.A. 551.  
illustration of mental cruelty. It was held that wilful, unjustifiable interference by one spouse in the sphere of the life of the other constitutes a species of cruelty.

As early in 1971, in *KashinathSahu v. Smt. Devi*\(^{43}\), the Orissa High Court held that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. In *Kanna v. Krishna Swamy*\(^{44}\), describing upon the dignity to be bestowed on a wife within the four walls of a home, the High Court of Madras has upheld that a woman of modern times is entitled to insist that her husband should treat her with dignity and self respect befitting the status of a wife and that her life with the husband will be peaceful and happy. Keeping in pace with the changing norms of the society, the judiciary have over the years widened the scope of matrimonial cruelty.

*Dastane v. Dastane*\(^{45}\) was a high watermark case on mental cruelty. Supreme Court had clarified that the burden of proof lies on the petitioner to prove the fact of cruelty and the degree of proof required is preponderance of probabilities. The court differentiated the Indian and English requirements\(^{46}\) as to prove the nature of cruelty. The court observed:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."\(^{47}\)

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43 A.I.R. 1971 Ori 296.
44 A.I.R. 1972 Mad. 247 at p.249.
45(1975) 2 S.C.C. 326, p. 337, para 30
46 English Law requires to constitute cruelty such a character as to cause danger to life, limb or health so as to give rise to a reasonable apprehension of such a danger.
47 Emphasis added. Indian court’s concern is to enquire whether the burden of proof is discharged by the petitioner alleging cruelty as to cause a reasonable apprehension in the mind of the respondent that it will be harmful or injurious to live together, keeping into consideration the resultant possibilities of harm or injury to health, reputation, the working career etc.
In *Shobha Rani v. Madhukar Reddy* 48, a new dimension has been given to the concept of cruelty and it was held by the Supreme Court that the demand of dowry by husband or his parents amount to cruelty. In our society, where dowry demand is increasing day by day, this judgment reveals a positive step. A new thinking was developed about the concept of cruelty by the introduction of matters of sexual dissatisfaction of the spouses. 49 Various causes related to sex such as sexual weakness, impotency and persistent refusal to consummate the marriage, incapability to bear a child, abortion without the knowledge of the husband, sex perversion and unnatural offences were some of the causes held to be cruelty by the judiciary.

Under the Hindu Marriage Act, 1955 intention or motive is not held as an essential element of cruelty. 53 It was upheld by the court that to punish a spouse for the past is not the duty of the court but to protect her for the future. Therefore cruelty need not be proved beyond all reasonable doubts and that it may be proved on balance of probabilities. 54 This judgment shows the necessity to view the cases of matrimonial cruelty beyond technical and mechanical application of evidence and mind.

The Karnataka High Court took a practical and broad view in conformity with the recent trend and development of matrimonial law as it observed that the failure to comply with one of the essential obligations of marital life or any conduct of either spouse which causes disgrace to the other or subjects him or her to annoyance and indignity, amounts to legal cruelty. 55

54 Dastane v. Dastane, A.I.R. 1975 S.C. 1534 p.1540. It was held that “satisfied” means “satisfied on preponderance of probabilities” and not satisfied under “beyond reasonable doubt” particularly where in adultery, desertion and cruelty direct evidence may not be possible as to the alleged cruel conduct.
55 Supra n. 49.
In Keshaorao v. Nisha,56 it was held by the Court that the broad test to determine cruelty is whether the conduct of the respondent is of such type that the petitioner cannot be reasonably be expected to live with the respondent or living together of the spouses has become incompatible. The acts of violence against wife, however minimal, will, therefore amount to cruelty in case the acts cause distress, humiliation or indignity to wife or the acts affect her mental or bodily health. This decision holds well as to the concern over the right to human dignity and identity of a woman within the marital ties.

In Rajani v. Subramaniam57 the Kerala High Court remarked that judged by the standards of modern civilization wives are not expected to endure harassment in domestic life whether mental or physical like women in older days.

“Her sentiments have to be respected and her aspirations and ambitions are to be taken into account in making adjustments according to the life the wife is accustomed to lead.”

The acts and behaviour of human beings are diverse and infinite and so it was held by the court that the interpretation and definition of the concept of cruelty depends upon the character, way of life of the parties, their social and economic conditions, their status, customs and traditions.58 The non limitation of the definition of ‘cruelty’ within a straight jacket formula holds good in the present globalised world where human values and culture are getting eroded.

Where out of a sense of vindictiveness, the husband instituted vexatious litigations against his wife and she was feeling humiliated and tortured by reason of execution of such warrants and seizure of property, it was held that the section was wide enough to encompass a cruelty committed through an abuse of the litigative process.59

56 A.I.R. 1984 Bom. 413.
57 A.I.R. 1990 Ker. 57.
58 Sukumar Mukherjee v. Tripti Mukherjee, A.I.R 1992 Pat 32.
The case of *V. Bhagat v. D. Bhagat*\(^{60}\) related to a husband filing petition against the wife for divorce on the ground of adultery\(^{61}\). The court held that extreme allegations of wife against itself was in the nature constituting mental cruelty. The Court observed:\(^{62}\)

“Mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. *While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively.* What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

During the period of 2000, the difficulty in proving mental cruelty as against physical cruelty in domestic violence or matrimonial discord was emphasized to be looked into in relation with the circumstances of each case. Coming to *Chetan Dass v. Kamla Devi*\(^{63}\) the court acknowledged that the matrimonial matters includes delicate human and emotional relationship that

\(^{60}\) A.I.R.1994 S.C. 710 ; 1994(1) S.C.C. 337  
\(^{61}\) Wife had filed a written statement alleging that her husband suffered from mental hallucination, paranoid disorder etc. that required psychiatric treatment.  
\(^{62}\) *Supra* .47, p. 347 at para 16. Emphasis added  
demands trust, regard, respect, love and affection with sufficient space for mutual adjustments between the spouses. Such a relationship is required to be accepted within the social norms. The court clearly recognized the role of law in matrimonial relationships as to control matrimonial relationship in a healthy perspective promoting peace in the society. The court stressed on the role of marriage as an institution and observed:

“The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In *R.Prakash v. Sneh Lata* 64 the court emphasized the concept of complete equality of the spouses. The remarks of the court are pertinent as to uphold the rights of woman to equality, and to live with human dignity. “…The orthodox concept of wife and expectations from her to subject herself to husband’s wishes has undergone a revolutionary change with education and high literacy in women and with recognition of equal rights to women in the Constitution and abolition of sex distinction in all walks of life. She is a partner in marriage with equal status and equal rights with the husband.” Here in this case, the wife’s insistence on her continuing with her employment and refusal to leave the job was held not to constitute cruelty.

In *Savitri Pandey v. Prem Chandra Pandey*, the Supreme Court confirmed the nature of mental cruelty test laid down in Bhagat’s Case: The Court has said that cruelty as a ground for divorce under matrimonial law requires the “treatment of the petitioner with such cruelty as to cause a

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64 A.I.R. 2001 Raj. 269.
reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.”

In *Parveen Mehta v. Inderjit Mehta* the Supreme Court held:

“Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse, caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be the correct approach to take an instance of misbehaviour in isolation and then pose the question of whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.”

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66 (2002) 5 S.C.C. 706 at pp.716-17 para 21 per D.B. Mohapatra. J. What is the meaning and import of the expression 'cruelty' as a matrimonial offence was the core question coming up under this case. It was a case of cruelty alleged against the wife who was suffering from some ailment at the time of marriage. Allegations made by the husband were that right from the day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically she refused. As the condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations and even abused him. The court referred to the case of *Dastane v. Dastane* to clarify on the concept of cruelty. 'Cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause an apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status environments and social values, as also the customs and traditions governing them.
A welcoming approach was taken into account in the approach taken towards inferring mental cruelty in *Mohd Hoshan v. State of Andhra Pradesh* wherein the Supreme Court held:67

“The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. (emphasis added) In other words, each case has to be decided on its own facts, to decide whether mental cruelty was established or not.”

False or unfounded allegations of adultery have been held to be cruelty giving the offended spouse the right to divorce.68In *Vijay Kumar Bhave v. Neela Bhave*69 the Supreme Court clarified that disgusting accusation of unchaste and indecent familiarity with a person outside wedlock and allegation of extra marital relationship was a grave assault on the character, honour, reputation, status and health of the wife. And this accusation by itself amount to cruelty. Another notable point clarified by the court was that the section on cruelty does not stipulate any particular period or duration to be necessary to constitute cruelty and that the intensity, gravity and stigmatic impact of it on the mental attitude, necessary for maintaining a conducive matrimonial home was to be considered in such cases. Here the mental torture and pain caused by undue allegations on the conducive matrimonial setting has been recognized by the court.

67 (2002) 7 S.C.C. 414,418, *per* S.V.Patil, J. It was a case relating to cruelty and abetment of suicide against a young lady within 11 months of her marriage.
69A.I.R. 2003 S.C. 2462, *per* D.Raju,J.
Supreme Court in *Vinita Saxena v. Pankaj Pandit*\(^{70}\) has emphasized that in enquiring into what constitutes mental cruelty the numerical count of such incidence or need for perpetration of mental cruelty in a series is immaterial and irrelevant\(^{71}\). The real test will be to go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. This decision is a welcoming advance in the stages of understanding the concept of mental cruelty in specific cases of domestic violence wherein violence is perpetrated by someone in intimate relationships.

The Supreme Court’s decision in *Samar Ghosh v. Jaya Ghosh*\(^{72}\) has put forth a view contrary to the prevailing notion of saving a marriage at all costs, in the context of mental cruelty. It reads:

> “Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

Applying the factors enumerated to the present case\(^{73}\), the Supreme Court held the decision of the high court that mental cruelty had not been established was wrong.


\(^{71}\) The same view is endorsed in the new Act of 2005 in India.

\(^{72}\)2007 (5) SCALE 1, para 79. Emphasis added. It was a case of matrimonial dispute that lead to the destruction of 22 year old marital bond between two IAS Officers. The case attempts to summarize and put down the law with regard to mental cruelty as grounds for divorce in matrimonial law. The Supreme Court examined earlier judgments with regard to mental cruelty by the Indian courts. It also scrutinized English, American, Canadian and Australian judgments with respect to the issue of mental cruelty. The Court referred to legal texts like *Halsbury’s Laws of England* and *Black’s Law Dictionary*.

\(^{73}\) The Court in the instant case has codified a long list of illustrative cases as to adjudging mental cruelty\(^{73}\). A husband undergoing sterilisation without medical reasons and without the
In the backdrop of the changing scenario of the world certain notable judicial interpretations has upheld the right of women to human dignity within the marital relationship. Starting from the Munshee Buzloor Raheem’s case ending up with Samar Ghosh clearly shows the conceptual development of cruelty. Stage by stage the development is towards the liberal ideas of autonomy and rights. The concept of cruelty has undergone various interpretations as to inculcate its impact in the deprivation of identity in women’s life. The development of concept of Cruelty started as a ground for judicial separation and divorce proceedings under matrimonial laws in the Indian context. Now the concept of cruelty has transformed itself into as violation of human rights and dignity of human beings and has acquired a formidable status of discussion in the human rights jurisprudence. ‘Cruelty’, no matter whether perpetrated by the husband or the wife seems to be recognized consent or knowledge of his wife may lead to mental cruelty: A wife undergoing sterilisation or abortion without medical reasons or without the consent or knowledge of the husband may lead to mental cruelty, unilateral decision of refusal to have intercourse for a considerable period without any physical incapacity or valid reason may amount to mental cruelty, acute mental pain, agony and suffering to a degree that would not make it possible for the parties to stay with each other, on a comprehensive appraisal of the entire matrimonial life, if it becomes clear that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party, mere coldness of manner or lack of affection cannot amount to mental cruelty, however, frequent rudeness of language, petulance, indifference and neglect could reach a degree that makes married life for the other person intolerable, feeling of deep anguish, disappointment, frustration in a spouse caused by the conduct of the other over a long time may amount to mental cruelty, sustained abusive and humiliating treatment calculated to torture or render miserable the life of the spouse could amount to mental cruelty, sustained unjustifiable conduct affecting the physical and mental health of the spouse. However, the treatment complained about and resultant apprehension must be very grave, substantial and weighty, sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure could amount to mental cruelty, jealousy, selfishness, possessiveness which causes unhappiness, dissatisfaction and emotional upset may not be grounds for divorce on account of mental cruelty, trivial irritations, quarrels, normal wear-and-tear of married life would not be adequate for grant of divorce on grounds of mental cruelty, few isolated instances over a period of years would not amount to mental cruelty. Persistent ill conduct for a lengthy period, where the relationship has deteriorated to an extent that the wronged party finds it difficult to live with the other party may amount to mental cruelty, long period of continuous separation indicating that the matrimonial bond is beyond repair may lead to mental cruelty, etc.
by the judicial responses.74 And thereby men alone have not been stigmatized as
the perpetrator of violence within the marital bond. The Samar Ghosh case has
tried to bring in certain conditions and definitions to constitute mental cruelty.
But the question still remains as to how to make it applicable in the Indian
cultural context given the higher levels of gender inequity and overarching
patriarchal culture.

5.5 The General Criminal Law Responses on Domestic Violence

In any country, authorities could combat domestic violence by using
longstanding, broad criminal laws, which prohibit the behaviour for anyone
who engages in the behaviour regardless of his relationship with the victim.
Among such laws are those that make it a crime to threaten, beat, assault,
kidnap, rape, or murder another human being. In theory, these laws can be used
to prosecute husbands who beat or otherwise abuse their wives. In reality, there
is a longstanding tradition that police and prosecutors do not use these laws
when the behaviour occurs in the home, except in the most extreme cases such
as murder. Women are subject to a great many forms of violence outside the
family setting by strangers and acquaintances, but that is a far broader subject
beyond the scope of the proposed study.

The Criminal law in India comprising of the substantive and procedural
law does not specifically recognize domestic violence as an offence. The
Indian Penal Code enacted in 1980 has afforded special provisions which give
protection to a woman who might become a victim of offence relating to her
sexual identity.75 These special provisions relating to women have been

74 Leading case on wife’s cruelty towards husband is Dastane v. Dastane,(1975)2 S.C.C.
cruelty towards wife.
75 The Indian Penal Code, 1860 has recognized certain specific offences against women such as
offences affecting human body consisting of dowry death, causing miscarriage, outraging
the modesty of a woman, kidnapping and abduction, sexual offence against woman; offences
relating to marriage consisting of cohabitation by deceitful means, bigamy, adultery, enticing
or taking away a married woman; cruelty by husbands or his relatives for dowry, insulting the
modesty of women etc.
incorporated as not exceptions but to guard women against special offences which they might face both in her public and private life because of her womanhood and her social position.76 All forms of physical violence and some forms of emotional abuse, such as threats of physical violence and demands for dowry falls within the definition of criminal conduct which could be attributed to the offence of domestic violence faced by women within four walls of the home.77 They range from grave offences such as dowry death and suicide, to comparatively milder offences such as assault.

5.5.1 Hurt78 and Grievous Hurt79

Physical violence in every form is an offence. Any male or female member harassing a woman physically can be punished. Criminal Law in India recognizes two types of physical hurt i.e. simple and grievous hurt. Causing of simple bodily injury, or disease, or infirmity is considered under the former offence and the latter80 is of causing offences of serious nature. The person inflicting the hurt need to have done it intentionally. Severe punishment is provided in the law to offence of hurt with the use of dangerous weapons or means which is of serious in nature.

76 Nomita Aggarwal, Women And Law in India, Women’s Studies and Development Centre, University of Delhi, New Century Publications, Delhi (2002), p.25.
77 They are covered under various section of the Indian Penal Code; s. 323 (hurt); s. 324 (hurt by dangerous weapons; s. 325 (grievous hurt);s. 326 (grievous hurt by dangerous weapons; being a non bail able offence);s. 352 (assault);s. 337 (assault in order to confine a person);ss. 342 and 346 (wrongful confinement); s. 506 (criminal intimidation). All others except s. 326 are bail able offences.
78 Id., ss.319, 321, 323 and 324.
79 Id., ss.320, 322, 325 and 326.
80 Id., s.405. It includes causing of emasculation, loss of sight in one or both eyes; loss of hearing in one or both ears; destruction or permanent impairment of the powers of any member or joint; permanent disfiguration of the head or the face; fracture or dislocation of a bone or tooth; any hurt which puts one’s life in danger; any hurt that causes severe bodily pain for 20 days or more; any hurt because of which one cannot carry on with one’s normal work or lifestyle for 20 days or more.
5.5.2 Criminal Breach of Trust\textsuperscript{81}

Another law that has been applied to situations of dowry harassment through judicial intervention is the concept of criminal breach of trust. Criminal breach of trust is an offence under the Indian Penal Code, and is intended to cover situations where a person entrusts a property in another, and that other person betrays the trust and misappropriates it. Though this provision is not specifically intended for dowry-related harassment, in \textit{Pratibha Rani v. Suraj Kumar},\textsuperscript{82} the Supreme Court applied this general provision of law to a situation of dowry harassment. The Court said that such property was meant for the exclusive use of the wife and was only entrusted to the husband or his relatives for safekeeping. They were duty-bound to return the property to her if she asked for their return, failing which they could be prosecuted for the offence of criminal breach of trust.

\textit{Stridhan} refers to any property that is gifted to the woman during and around the time of her marriage, or has been left to her will. It includes property that has been gifted to her by parents, siblings and in-laws. It has been upheld by the court that she is the absolute owner of that property and can deal with it in any way she likes and her husband has no ownership rights over the property\textsuperscript{83} and therefore the husband is morally bound to restore the property or its value and the refusal to return it renders him guilty.\textsuperscript{84} A wife deciding to move out of the matrimonial house can resort to the provisions dealing with

\textsuperscript{81}Id., s. 406.

\textsuperscript{82}A.I.R. 1985 S.C. 628 More than a decade after the judgment in Pratibha Rani’s case, a three-judge Bench of the Supreme Court took a fresh look at the judgment in \textit{Rashmi Kumar v. Mahesh Kumar Bhada},(1997) 2 S.C.C. 397, 1996, and said that the judgment requires no reconsideration.


\textsuperscript{84}\textit{Pratibha Rani v. Saroj Kumar}, (1985) 2S.C.C. 370.The Supreme Court held that dowry given by the parents, articles given to woman by her in-laws and husband such as jewellery and clothes, which can be said to be for her exclusive use woman’s personal property can all be said to be the woman’s exclusive property and her \textit{stridhana} and she is entitled to the same. The court further held that withholding a woman’s \textit{stridhana} and refusal to return the same on demand amounts to the offence of criminal breach of trust and is punishable under S.406 of the Indian Penal Code.
Criminal breach of trust in cases of misappropriation of the same by the husband or his relatives. The wife does not have to show any special agreement to prove that the property was entrusted. The ingredients of the offence require that the property was entrusted with a third party and there was refusal by them to return it. In such circumstances another remedy would be to file a suit for recovery of *stridhana* articles either independently or if any other matrimonial proceedings are pending, as an ancillary relief in the same.

### 5.5.3 Wrongful Restraint and Wrongful Confinement

Wrongful restraint or confinement leading to the curtailment of the freedom and liberty of a person is considered as an offence under the Code. This offence in turn impairs the freedom of movement which is implicit under the right to live with human dignity guaranteed under the Constitution of India.

### 5.5.4 Outraging the Modesty of a Woman

The Indian Penal Code punishes an assault or criminal force on woman with intention to outrage her modesty and is punishable with imprisonment up to two years. No specific protection to woman who faces violence from other family members within a family has been provided under the section but rather it offers a general protection to woman from indecency meted out to them by the public.

### 5.5.5 Insulting the modesty of a woman

A man intending to outrage the modesty of a woman, if he exposes his person indecently to her or uses obscene words with the intention that she

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85 *Supra* n.83.
86 Such a decree can be passed under s. 27 of the Hindu Marriage Act,1955; s. 3(1)(d) of the Muslim Women (Protection of Rights on Divorce) Act,1986; s. 42 of the Parsi Marriage and Divorce Act,1936; s. 27 of the Indian Divorce Act,1869; and s. 7 (1)(c) of the Family Courts Act,1984. Balkrishna Ramachandra Kadam v. Sangeeta Balkrishna Kadam, (1997) 7 S.C.C. 500; Rameshchand Daga v. Rameshwari Daga, (2005) 4 S.C.C. 772.
87 Indian Penal Code s.339
88 *Id.,* s. 340.
89 *Id.,* s. 354.
90 *Id.,* s. 509.
should hear them or exhibiting to her obscene drawings is an offence punishable under the Code. It is held to be an intrusion into the privacy of the woman.

5.5.6 Causing Miscarriage and Other Offences

The Indian Penal Code deals with offences of causing of miscarriage, injuries to unborn children and exposure of infants etc. The causing of miscarriage also called as abortion with the consent of the woman is an offence punishable up to a sentence of three years of imprisonment or with fine or both. The termination of pregnancy done by a registered medical practitioner for the purpose of saving the life of the woman and in good faith is not attracted by the above section. Causing of miscarriage to a woman who is quick with child that is who experience the peculiar sensation about the fourth or fifth month of pregnancy amounts to an aggravated form of the offence punishable with a maximum of ten years of imprisonment. The offender is punishable with imprisonment of life or for ten years for the miscarriage caused without the consent of the woman irrespective of the state of pregnancy. Causing death of a woman with child by any act done with the intent to cause miscarriage is also made punishable under the Code. The Code prescribes a maximum punishment of ten years for any act done with the intention of preventing a child being born alive or to cause it die after the birth. The Code also punishes an offender causing death of a quick unborn child by an act amounting to culpable homicide. This has been made a specific offence on the principle that a foetus gets life after twelve weeks of

91 Id., s. 312
92 Id., s.313.
93 Id., s. 314.
94 Id., s. 315.
95 Id., s. 316. This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where death is caused after the quickening and before the birth of the child.
Exposure and abandonment of a child under twelve years by parents or persons having care of the child with the intention of wholly abandoning it is held punishable under the Code. The Indian Parliament has passed the Medical Termination of Pregnancy Act, 1971 and the Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 to deal with the unlawful miscarriages and also the infanticide as well as the foeticide.

### 5.5.7 Bigamy

The law against bigamy is designed to safeguard one of the basic institutions of society, marriage. With the exception of Muslims, bigamous marriages under personal laws of all other communities is void. In India, in order to prove the charge of bigamy, the validity of the second marriage must be established, in the sense that the essential ceremonies prescribed by the relevant personal law have been performed. Under the Criminal Procedure Code, only the person whose spouse has committed the offence must make a complaint for the court to take cognizance of the offence.

### 5.5.8 Adultery

Adultery is an offence against marriage punishable under the Code. Adultery is also a ground for divorce under the Hindu Marriage Act, 1955,

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97 *Indian Penal Code*, s. 317,

98 *Id.*, ss. 494 and 495,

99 ‘Bigamy’ meaning marrying again while one’s spouse is still alive.

100 *S. 5 (i) of the Hindu Marriage Act, 1955 prohibits bigamy. S. 11 makes a bigamous marriage void and s. 17 makes it a penal offence under ss. 494 and 495 of the Indian Penal Code; s. 19 (d) of the Indian Divorce Act, 1872; S. 5 of the Parsi Marriage and Divorce Act, 1936. In the case of *Lily Thomas v Union of India*, (2000) 6S.C.C 224, it was held that since bigamous marriage is prohibited under *The Hindu Marriage Act*, 1955 and is an offence under s. 17, any marriage solemnized by the husband during the subsistence of his Hindu marriage, would be void under s. 11 and offence triable under s. 17 read with ss. 494 and 495 of the Indian Penal Code, regardless of such husband’s conversion to another religion permitting polygamy. The same view was upheld in the case of *Sarla Mudgal* and President, *Kalyani v. Union of India*, (1995) 3S.C.C 635.


102 *Criminal Procedure Cod*, s. 198.

103 *Indian Penal Code*, s. 497
Special Marriage Act, 1954, Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936. Under the Dissolution of Muslim Marriage Act, 1939, husband’s association with women of evil repute or leading an infamous life is a ground though it is considered as amounting to cruelty under the Act-it is akin to living in adultery. Extra Marital sexual intercourse is an essential element of adultery. It presupposes carnal union between a man and a woman.

The validity of section 497 of the Indian Penal Code has been challenged number of times and the courts have held that this position is valid and constitutional. A division bench of Supreme Court has held that section 497 of the Indian Penal Code is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her.

The offence of adultery reflects discrimination. It rests in larger part on the idea that a woman is the property of the male. An analysis of Sec 497 along with the various observations by the Supreme court and High courts brings us to the conclusion that only a man can commit adultery. The married woman who is involved in the conduct is not punishable as the adulteress because she is treated as a ‘victim’ not as the ‘author of the crime’. Woman is looked upon as an object, an inanimate property having no legal existence.

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104 Yousuf Abdul Aziz v. State of Bombay, A.I.R. 1954 S.C. 321. In the case of Soumitri Vishnu v. Union of India, A.I.R. 1985 S.C. 1618:1985 Cri L.J.1302 (S.C.) Supreme court has upheld the constitutional validity of S. 497 of the Indian Penal Code. The Supreme court justified its stand on the ground that in contemplation of the law the wife who is involved in illicit relationship with another man is victim and not the author of the crime. The court further held that definition of adultery does not discriminate between man and woman by conferring the right to prosecute only the husband and that Sec 497 of the Indian Penal Code is not violative of Articles 14 and 15 of the Constitution of India.


106 Complaint for adultery can only be made by the aggrieved person and that person is none other than the husband of the woman according to s.198 of the Criminal Procedure Code. In exceptional cases, in the absence of the husband, some person who had the care of the woman on his behalf at the time when the offence was committed, may with the leave of the court, initiate prosecution on his behalf.
Moreover, if a married man has sexual intercourse with an unmarried woman it is no adultery because an unmarried woman does not belong to anybody as property and is not owned by anybody, not even by her parents or siblings because they hold her in trust and have no ownership rights to prosecute the person. And if a married wife is forced into adulterous intercourse by her husband, then she has no locus standi or status to prosecute either her husband or the other person involved in committing the offence of adultery. The law is thus blatantly biased against the woman and has put the man in a privileged position by treating the relationship between husband and wife as one of the owner and owned.

**5.5.9 Defamation**

Defamation involves oral or written words, gesture or signs or visible representation made to a third person intending to harm or believing that this imputation will harm the reputation of the person before a third person. Lowering the reputation of the person by lowering the character of the person or credit of the person or making physical imputations against a person to a third person would amount to defamation. In a criminal trial defence can be forwarded that the imputation was made in good faith and not out of malice or bad faith to protect the interest of the person making the imputation or for public good. A woman being harassed in such a way either within the natal family or the matrimonial house can take recourse of this provision of the code.

**5.5.10 Death**

When the death of a person is caused by acts of domestic violence, provisions on murder and culpable homicide comes into play. Attempts to
murder\textsuperscript{111} and to commit culpable homicide\textsuperscript{112} are also punishable under the Code.

5.5.11 Rape\textsuperscript{113}

The Indian Penal Code deals with various sexual offences against women\textsuperscript{114}. Of these offences; rape is the most brutal, which violates not only the bodily integrity of woman but amounts to mental torture also. A minimum and mandatory punishment with imprisonment of not less than seven years extending to either ten years or even life imprisonment has been imposed by the Code.\textsuperscript{115} The presumption of rape under the Indian Evidence Act, 1872 falls in favour of the victim alleging rape.\textsuperscript{116} The reason for such presumption is that a rapist not only violates the victim’s personal integrity but also degrades the very soul of the helpless female. The Criminal Procedural Code provides protection to the rape victim to the effect that the inquiry and trial of rape should be conducted in camera.\textsuperscript{117} Granting of interim compensation to rape victims during the pendency of a criminal case if a prima-facie case is made out against the accused and the need to deal such cases with ‘utmost sensitivity’\textsuperscript{118} has been upheld by the Apex Court of the country.\textsuperscript{119}

\textsuperscript{111}Id., s. 307.
\textsuperscript{112} Id., s. 308.
\textsuperscript{113} Id., s. 375. It denotes the sexual intercourse with a woman first, against her will; secondly, without her consent; thirdly, with her consent obtained by putting her in fear of death or hurt ;fourthly, with her consent when man knows that he is not her husband and if consent is given under her misconception of his identity as her husband; fifthly, with her consent when at the time of giving consent she is under the influence of unsoundness of mind or administration of some substance to make her give consent; sixthly, with or without consent when she is under sixteen years of age.
\textsuperscript{114}Id., ss.375 to 376 D,377 and 509.
\textsuperscript{115}Id., s. 376
\textsuperscript{116} Under s. 114 A of the Indian Evidence Act,1872, in a prosecution of rape under Sec 376 of the Indian penal Code, if the alleged victim states that she was raped, the court shall always presume that she did not consent.
5.5.12 Marital Rape

The law in India does not recognize ‘marital rape’ as an offence. In certain countries like United States of America, U.K., Denmark, Australia and Sweden, marital rape has been made an offence. Sexual intercourse by a man with his own wife if she is not under the age of fifteen years does not amount to Rape. Forced sexual intercourse with a wife who is living separately under an order of judicial separation has been held to be an offence under the Indian Penal Code.

Marital rape exemption in the criminal justice system really reflects a challenge to the fundamental right of women to live with human dignity under the Constitution of India. The abolition of immunity for husbands would emphasize the society’s condemnation of sexual violence within the family. By permitting marital rape, the law unconstitutionally forces all women to surrender their right to bodily integrity, reproductive freedom and personal liberty on marriage. And as aftermath of marriage wives suffer legally sanctioned sexual violence in violation of their cherished right to life and are denied equality and equal protection of laws.

While all the general criminal laws except the prohibition on rape could normally be used to prosecute husbands for domestic violence, the recent enactment of special domestic-violence criminal laws indicates that India has the same problem of non-enforcement of general criminal law by police and

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120 Indian Penal Code, s. 376A.
121 Id., Exception to s. 375.
122 The most frequently cited basis for marital rape exemption is the doctrine of irrevocable implied consent that originated in the seventeenth century declaration by Sir Mathew Hale. Hale’s implied consent theory led to the belief that because a woman gave her consent to sexual relations with her husband at the time they were married, he could forever assume that the original consent still applied. This notion still undeniably undergrid the marital rape exemption in the Indian Penal Code.
prosecutors in the domestic violence setting that other countries have confronted.

5.6 Specific Criminal Law Responses in the Context of Domestic Violence

It was only as late as 1983, following the public outrage against ‘dowry deaths’ coupled with strong lobbying from women’s organizations demanding legal reforms that domestic violence in India came to be recognized as a criminal act. Prior to 1983 only the general provisions of the Indian Penal Code could be invoked to book and penalize the offenders. Those general offences whose nature were attributable to the offence of domestic violence proved to be insufficient in facing the special circumstances of a woman facing violence in patri-local set up of the family. And hence it could be rarely made applicable against the husband or his relatives. A limited recognition of the criminal nature of domestic violence was reflected in Sections 498A and 304B of the Indian Penal Code which were introduced by the Criminal (Amendment) Acts of 1983 and 1986 respectively.

The Criminal Law Amendment Act of 1983 and the enactment of Section 498A in the Indian Penal Code emerged as of special significance. This new provision for the first time criminalized domestic violence. Physical or mental violence inflicted on a woman by her husband and relatives was recognized as a cognizable and punishable act. As the two vital arms of the state the Police and the Judiciary are responsible for the successful implementation of these laws. A spate of other amendments also followed in the criminal justice system of India all of which reflected certain recognition of the seriousness of the problem of domestic violence in India namely:
a) Under the Criminal Law (Second Amendment) Act, 1983, section 174 Criminal Procedure Code was suitably amended.\textsuperscript{125}

b) Under the Criminal Law (Second Amendment) Act, 1983, a new section namely 113 A, was inserted in the Indian Evidence Act.\textsuperscript{126}


d) A new section, 113 B was inserted in the Indian Evidence Act through the Dowry Prohibition (Amendment) Act, 1986.\textsuperscript{127}

e) Section 8A in the Dowry Prohibition Act, 1961, was introduced by the Dowry Prohibition (Amendment) Act, 1986.\textsuperscript{128}

\textbf{5.6.1 Implication of ‘dowry death’ as a form of domestic violence.}

In 1986, there was another amendment to the Indian Penal Code in the form of 304-B\textsuperscript{B} by which an entirely new offence, which had until then been unknown to criminal jurisprudence was recognized “dowry death”. Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of marriage, and if it is established that the wife had been subject to cruelty for dowry by her husband or his relatives soon before her death, that death is termed as a ‘dowry

\textsuperscript{125}It provided for investigation by the police, of cases of suicide committed by women within seven years of marriage or where their death occurs under suspicious circumstances within seven years of marriage.

\textsuperscript{126} Under this section when a woman commits suicide within a period of seven years from the date of her marriage, due to ‘cruelty’ by her husband or his relatives, the court may presume that such suicide has been abetted by her husband or by his relatives.

\textsuperscript{127} Under the provision of this section, when a person has been responsible for the dowry death of a woman and it is established, that such a woman had been subjected by such person to cruelty or harassment prior to her death. The Court shall presume such person had caused the dowry death.

\textsuperscript{128} The new section lays down that where any person is prosecuted for taking or abetting the taking of any dowry or demanding of dowry, the burden of proving that he had not committed such offence, shall be on him.
The dowry death provision applies only to married woman. This offence was made cognizable and non-bailable. The term dowry used in the Code has the same meaning as defined in the Dowry Prohibition Act and is not confined to only that given at the time of marriage. The Supreme Court has in a series of judgments held that ‘soon before her death’ is a relative term and that no time limit can be fixed for the same. The court looks at the proximate live link between the effect of cruelty based on dowry demand and the death concerned as the event should not be remote in time. The burden of proof gets shifted to the accused to prove his innocence. After the ingredients of the offence gets established charges can be framed for offences under murder, abetment of suicide, dowry death and for cruelty to married woman by husband or by his relatives in the alternative. Since the introduction of dowry death law the judgments pronounced by the courts clearly reveal that maximum punishment should always be awarded.

To invoke the legal presumption of the Indian Evidence Act, 1872 it is necessary to prove that the deceased was subjected to cruelty or harassment. The presumptions apply only if the offence takes place within seven years of marriage. These sections, 113 B of the Indian Evidence Act and 304B of the Indian Penal Code read in conjunction shift the burden of proof from the prosecution to the husband or his relatives accused of the offence. This is a departure from the normal rule of evidence and has been introduced to strengthen women’s position in vulnerable situations. But while dealing with such dowry death cases Courts have resorted to mixed interpretations of the

129 Indian Penal Code, s. 304B.


132 Indian Evidence Act,1872 s. 113B and Indian Penal Code.304B
provisions resulting in both negative\textsuperscript{133} and positive judgments\textsuperscript{134}. The ingredient of the lofty and much applauded offence of dowry death (section.304B) has made it impossible to prove the offence. Earlier a case of wife murder would be registered under section302. The prosecution needed to prove the accused in terms of his proximity to the scene of offence and motive for the murder. But after the amendment, a wife murder ceased to be a murder

\textsuperscript{133} In the case of \textit{Appasaheb v. State of Maharashtra}, (2007) 9 S.C.C.721. the Supreme Court overruled the conviction of the appellants (husband and in-law) under Sec 304 B of the Indian Penal Code combined with Sec 34 of the Code, and held that demand for money by the husband and his family was on account of some financial stringency or for meeting some urgent domestic expenses and that it cannot be termed as a demand for dowry as the word is normally understood. The Court observed that a strict interpretation must be given to the word “dowry” as defined in the Dowry Prohibition Act, 1961 and be necessarily be connected with the marriage. This judgment fails to take into account the reality of the way in which demand for dowry takes various forms even after the actual marriage ceremonies are completed, and how women continue to be harassed for dowry long after the initial demand at the time of marriage. In \textit{Saro Ram v. State}, (2005) Cri. L.J. 457 A.P; where the demand of money for house construction was not held to be a dowry demand for the applicability of S. 304 B of the Indian Penal Code.

\textsuperscript{134} \textit{State of West Bengal v. Orilal and another}, (1994) 1S.C.C. 73. \textit{Pawan Kumar v. State of Haryana},(1998) 3S.C.C. 309. Supreme Court interpreted the circumstances where section 304B can be admissible, to include mental cruelty even in the absence of physical cruelty sufficient for charge under s.304B In this case the couple was married in 1985. There was demand of dowry right from the day of marriage. The wife was mentally tortured by various means. Two years later, the wife mentioned to her sister and brother in law that she was being ill-treated by her husband because of dowry. The following day, she committed suicide. The question that arose for consideration was that when there was no clear evidence of physical torture prior to her death, could the husband be held guilty for causing a dowry death. The Supreme Court held that mental cruelty is cruelty too and that ground was sufficient to meet the requirements of section 304B of the Indian Penal Code. It further held that dowry demands need not be related to the wedding. Persistent demands made thereafter would also amount to dowry demands.; \textit{Beena Agarwal v. Anupam}, A.I.R. 2004 S.C.141. In \textit{Smt Shanti and another v. State of Haryana}, A.I.R. 1991 S.C. 1226; Supreme Court held that even a case of suicide would be within the expression ‘death occurred otherwise than in normal circumstances’ and would attract the provision of Sec. 304 B of the Indian Penal Code if other ingredients of the section are proved. In \textit{Hem Chand v. State of Haryana India}, 1994 (6) S.C.C. 727. Supreme Court interpreted the circumstances where S.304B, IPC can be admissible, to include suicide In this case, the wife stayed for two months in her matrimonial home and thereafter returned to her parents’ home. She complained that her husband was demanding more dowry. This demand of dowry continued for quite some time and after two years, the wife died of strangulation. The question that arose for determination in this case was whether S.304B2 of the Indian Penal Code which relates to dowry death, could be applied. The Supreme Court of India where the matter was heard eventually, reached the conclusion that it was indeed a case where S.304B was attracted, even if it was not conclusively proved, whether the strangulation had been caused by the husband, or was suicidal. It was held that the key test in these cases was to understand whether the death was a result of harassment for dowry or not.
and was relegated to ‘dowry death’. A presumption of the occurrence of a dowry death may be raised under section 113-B, if the following conditions of section 304-B are proved:

1) the death of the woman has been caused by burns or bodily injury or otherwise than under normal circumstances;
2) the death of the woman has occurred within 7 years of her marriage;
3) she has been subjected to cruelty or harassment by her husband or his relative;
4) such cruelty or harassment was for or in connection with a demand of dowry;
5) and finally, that such cruelty or harassment was meted out to the woman soon before her death.

Only once these ingredients were proved the onus would shift on to the husband to prove that he did not commit the offence in order to seek acquittal.

While resorting to negative interpretations by the courts, there is constant erosion of the basic human values of tolerance and the spirit of ‘live and let live’.

It is to be noted that section 304B is used only in the cases when there is a death within seven years of marriage. Section 304B loses its applicability after that. In *State of Punjab v. Iqbal Singh and others*, it was observed that period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. The section only deals with the situation that the where there is a death which clearly brings in the limited application of section 304 B.

**5.6.2 Implication of Abetment of Suicide in Domestic Violence**

The bodily and mental violence unleashed at the time of domestic violence against woman can drive her to suicide. In such cases, abuser cannot

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be made responsible for the death of the woman under the provision of dowry death. It is at this juncture that punishment for abetment of suicide comes into play. Cruelty meted out in such cases holds the same meaning as in the Section 498 A of the Indian Penal Code. Prosecution need only to prove the cruelty and that it in turn forced the woman to commit suicide and thereby shifts the burden of proof to the husband or his relatives. In cases where woman committed suicide after seven years had elapsed since the marriage, the prosecution will have to prove beyond reasonable doubt that the cruelty was of such nature that it drove the woman to commit suicide. This ‘seven year limit’ clause has proved to be a major impediment in prosecuting cases of dowry death. The provisions of abetment to suicide, with its positive rules of evidence, have failed to bring redressal as the court interprets the newer provisions in the most technical manner. Some important judgments would substantiate the above premise.

In the case of abetment to suicide under Section.306 of the Indian Penal Code, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abetment to suicide is available only if husband is proved guilty of cruelty towards the wife. In certain cases of cruelty in which the death of the wife was suicidal or homicidal, the prosecution has been launched only under S. 498 A of the Indian Penal Code and the husband had escaped prosecution under S.304 B.

Madhya Pradesh High Court set aside the conviction of three years and acquitted the mother in law. The Court held that since the deceased ended her life by self immolation when none of the in- laws were present in the house at

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136 Indian Penal Code. ss. 306 and 107.
the time of suicide it was committed in all probability out of frustration and pessimism due to her own sensitiveness.139

5.6.3 Cruelty by Husband or his Relatives for Dowry as a Form of Domestic Violence

Section 498A140 is a bold and progressive legal provision, in that it gives legal recognition to the torture, suffered by woman within the household in a patriarchal set up specific to Indian culture, meted out by the family members in the marital home and such conduct being condemned by the society as a crime. Any woman facing violence in the home can technically register a case in a police station without having to produce any proof. The onus lies on the man and his relatives to prove that they are not guilty so as to avoid arrest. Offences committed under this section are cognizable and non-bailable.

Keeping in view the misuse of this particular provision its constitutional validity was challenged as violative of Articles 14 and 20(2) of the Constitution of India in *Indraj Malik v. Sunita Malik*141 and ultimately it was decided positively and constitutionality was upheld.142 In *Sushil Kumar Sharma v. Union of India*,143 it was held by the Supreme Court that section 498-A is

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140 The law states: Whoever being the husband or the relative of the husband of a woman, subjects such a woman to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. This section defines cruelty as: a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical ) of the woman or b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

141 1986 Cri.L.J 1510 Delhi.

142 The contention was that the provision was violative of A.14 in as much as it gave an arbitrary power to the police as well as to the courts, that the word ‘harassment’ used in part (b) of the explanation was vague and thus any person can be arbitrarily arrested for harassment and this section violates the principles against Double Jeopardy guaranteed by Art.20(2) of the Constitution in view of the fact that the demand of dowry or any property was punishable under this section as well as Section 4 of the Dowry Prohibition Act,1961.

143 2005(3)RCR(Criminal)745 S.C.
constitutionally valid and the object of this Section is to combat the menace of dowry deaths and cruelty.

The cumulative effect of sections 498A and 304B of the Code is that the offences under these sections have discriminatory protective clauses against the inhuman, barbaric treatment of women at the hands of unscrupulous husbands and relatives. Such offences are not only held as against the woman victims but also against the society and humanity.

Certain judicial responses to the offence have been disheartening to the victims resulting in high incidences of acquittal of the accused for want of evidence and strict interpretation of the provisions. The immense scope of discretion provided to law enforcing authorities for defining ‘grave injury’ has further circumscribed the position of the victim. Only cases involving grievous physical injury are interpreted as grave enough to be prosecuted under the section. Patterns of systematic abuse and continual violation of her physical and mental self often precede the cruelty which is often overlooked. Difficulty to prove mental cruelty also exists. The evidentiary standards for penal laws, such as general assault and battery provisions, fail to recognize particular circumstances of domestic violence. It often takes place in seclusion over an extended period of time. More empathetic perspective towards such victims is highly felt while dealing with cases of mental cruelty.

Section 498A was introduced in response to the popular outrage and protest against the torture and killing of innocent brides for dowry, and hence there is a tendency to identify section 498A to be a dowry related legislation. The above provision meant for curbing domestic violence, having been saddled

144 Courts has taken a view that every kind of harassment are not included under 498A and that the complainant has to conclusively establish that beating and harassment in question was with a view to compel her to commit suicide or to satisfy the dowry demand. Sarla Prabhakar Waghmare v. State of Maharashtra, 1990 Cri. L.J. 407 (Bom); Shanti v. State of Haryana, (1991) 1S.C.C. 371; Benumadhab Padhi Mohapatra v. State, 2004 Cri.LJ.505 Orissa at p.508.
with the dowry premise has proved to be inadequate to meet the real life situations of victims. By placing the dowry violence on a special pedestal, the routine violence faced by women is denied recognition and legitimacy. In order to access the criminal justice system, violence faced by women within homes need to be superficially and falsely attributed to dowry. The provisions of the section 498A for its applicability requires a valid and subsisting marriage between the parties and in its absence, no case could be made out. Moreover, every aspect of crime or harassment does not come under its ambit. The prosecution has to establish that the cruelty or harassment was persistent, grave and unbearable in nature and the same was with the intention to force woman to commit suicide or to fulfill illegal demand of dowry by the husband or the in-laws. The law on the problem completely de links itself from other forms of familial violence like child abuse and elder abuse. It addresses only spousal abuse and it is high time to amend and enlarge its scope to include the problems of women victims of fake marriages, divorced or widowed women, elder abuse etc.

Section 498A is vehemently criticized as being largely misused by women to seek revenge on their in- laws. In this context, observations made by Malimath Committee in the report on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003 is significant:

“For the Indian women marriage is a sacred bond and she tries her best not to break it. As this offence is made non-bailable and non-compoundable it makes reconciliation and returning to marital home impossible…Less tolerant impulsive wife may lodge even on a trivial act. The result is that the husband and his family may be

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145 This view is also supported by Save family Organization a collective of males fighting against draconian anti cruelty legislations in India. See more details, Rukmini Sen, “Women’s Subjectivities of Suffering and Legal Rhetoric on Domestic Violence: Fissures in the Two Discourses”, 17(3) Indian Journal of Gender Studies 388 (2010).
immediately arrested and there may be a suspension or loss of job…The husband may realize the mistakes committed and come forward … for a cordial relationship. The women may like to seek reconciliation. But this may not be possible due to the legal obstacles…Heartless provisions that make the offence non-bailable and non compoundable operate against reconciliation. It is therefore necessary to make this offence bailable and compoundable to give a chance to the spouses to come together.”

This view projected by the Committee brings in a conservative perspective about cruelty within marriage. In contradiction to this position, the National Commission for Women in 2005 proposed stricter punishment in cases of dowry deaths to bring in a deterrent effect. The different entities in the law making process project contradictory opinion and perspective and this shows the inherent flaws in law making by legislature. Women have been portrayed as having fabricated stories of torture and falsely implicating the entire household members. There are numerous examples and judicial trends which show this provision have been misused by registration of false cases against the husband and family members.146 It is often referred to as being responsible for the break-up of families. The extremely low incidence of convictions, the high incidence of acquittals and the inability of the cases to withstand the investigation and scrutiny in a court of law is seen as signifying the frivolousness of the charges.

Though criminal law is considered to be gender-neutral, yet, there are provisions which when implemented undermine women’s interests. Family

146Judicial responses as to women held as abusing beneficial provision of s. 498-A are Amisha Bhandari v State of Haryana, 2005(2)R.CR (Criminal) 429(P&H); HarmohanKaur v. State of Punjab, 2006(3) R.C.R. (Criminal) 932(P&H); Ramesh v. State of Tamilnadu, 2005(1) Apex Criminal 537 S.C. etc.
ideology underpins the operation of law. Operationalisation of law in a social structure driven by patriarchy is yet another factor that construes women’s subordinate position in a conjugal relationship. Frequently, secondary status relegated to women in both social and legal aspects impedes the process of asserting their rights as citizens of a democratic society. This is well exemplified when one looks at the manner in which section 498-A IPC is enforced within the given socio-legal context.

In spite of the legal misconceptions and criticisms waived against 498A of the Indian Penal Code there has been a broad consensus that as a deterrent measure, the section, has realized what was expected of it namely, of preventing widespread violence against young newly married women.

All though these severe provisions embodied in sections 498-A, 304-B, 113-A and 113-B were enacted to deal effectively with dowry deaths as well as cruel treatment of married woman, they eventually became despite their commendable intentions, tools of harassment in the hands of unscrupulous wives to pressurize the family of the husband. This in turn aggravated the strains in family ties and made amicable settlement of issues almost impossible. This resulted in the widespread criticism that these aforesaid provisions were not only discriminatory in nature but also detrimental to the institution of marriage and the social fabric of India. However, Supreme Court of India reiterated that the mere possibility of abuse of a provision of law does not per se invalidate legislation. By way of caution it was specified by the Apex Court that the legislature must introduce remedial measures to curb the filing of frivolous complaints, for which the provisions leave ample scope, so

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147 Family ideology construe women as loyal, self-sacrificing and dependent wives. It operates to regulate women through moral and economic regulation.

as to prevent their misuse, which has the potential to unleash new legal terrorism\textsuperscript{149}.

5.7 Specific Legislations in the Context of Domestic Violence

The Constitutional provisions although symbolic of the then revolutionary thought process of the intelligentsia, were not indicative of the socio-economic realities of the country. Hence the need was felt to enact specific legislations on different socio-inequities perpetrated against women in the society. Some of the specific legislations that touch upon different forms of domestic violence enacted by the Indian parliament is discussed below.

5.7.1 The Child Marriage Restraint Act, 1929\textsuperscript{150}

Child marriages are a form of domestic violence which often takes the form of child abuse within the family. Child marriages have been made a criminal offence in India by the enactment of Child Marriage Restraint Act; 1929. It is applicable to all marriages performed in India including Hindus, Muslim, Christian and Parsi marriages. The Act does not purport to prohibit

\textsuperscript{149} Id., p.19

\textsuperscript{150} Prohibition of child marriage Act, 2006 has emerged to replace the older law on Child Marriage Restraint Act of 1929. This explanation as to the earlier law is only to enlighten the readers as to what was the law at that point of time on child marriage. The Act aimed only at restraining solemnisation of child marriages in the country and not its prevention or prohibition. The procedures laid down under this law to act against solemnisation of child marriages were very cumbersome and time consuming. It did not identify authorities responsible for preventing child marriages. To overcome the shortcomings of Child Marriage Restraint Act, the Government of India enacted the Prohibition of Child Marriages Act, 2006 (PCMA), which received the assent of the President of India on 10 January, 2007. The Act came into effect from 1 November, 2007. The basic premise of the law is: To make a child go through a marriage is an offence and child or minor is a person up to 18 years in the case of girls and 21 years in the case of boys. A Preventive perspective- The solemnisation of child marriages is a cognisable and non-bailable offence. Child Marriage Provision Officers (CMPOs) are to be appointed in every state to prevent child marriages, ensure protection of the victims as well as prosecution of the offenders. The Courts have the power to issue injunction for prohibiting child marriages from taking place. From protective perspective- The law makes child marriages voidable by giving choice to the children in the marriage to seek annulment of marriage. It provides for maintenance and residence of the female contracting party. It gives a legal status to all children born from child marriages and makes provisions for their custody and maintenance. The law provides for all support and aid including medical aid, legal aid, counselling and rehabilitation support to children once they are rescued. For more details refer to http://www.unicef.org/india/ChildMarriagehandbook.pdf. Last visited on 23rd July 2013
child marriage but it merely seeks to restrain them. The court has held that it
does not purport to render child marriage as void. Instead it prescribes
penalties for persons responsible for child marriages. This Act keeps a check
on the guardians of minors from exploiting them for money. The Act makes it
an offence for a girl below eighteen years and a boy below twenty one years to
marry. It make the parents and if the husband is over eighteen years of age
offenders. The civil court under its jurisdiction and under the above Act, in
the interest of the child, has the power to issue an injunction to prohibit a child
marriage from being performed. Failure to abide by the injunction is
punishable with a sentence of simple imprisonment up to three months or with
a fine upto Rupees thousand or with both.

5.7.2 The Dowry Prohibition Act, 1961

Dowry-related harassment, abetment to suicide and killings are
components of the larger gamut of domestic violence, and are punishable under
criminal law. The Dowry Prohibition Act 1961 applies to all communities and
to all persons residing in India. The dominant ways in which domestic violence
is manifested is society specific. Social mores impact the type of violence
perpetrated on the spouse. The dowry system is a distinctive feature of the sub-
continent. The Dowry Prohibition Act, 1961 marks the first attempt by the
Government of India to recognize dowry as a social evil and to curb its
practice. Offences under the provisions of the Act are to be investigated, tried
etc. under the provisions of the Criminal Procedure Code. The Act
contemplates the term dowry as a demand for property or valuable security
having an inextricable nexus with marriage. In recognition of the fact that
this dowry is the genesis of domestic violence in the matrimonial home, the

152 Child Marriage Restraint Act, 1929. s. 12
153 Dowry Prohibition Act,1961 s. 2 defines dowry as any property or valuable security given
or agreed to be given either directly or indirectly by one party to a marriage or their parents or
any other person to the other party to the marriage or to any other person before, at or after
marriage which is given in connection with the marriage but it does not include mahr or dower.
Act criminalizes the giving and taking of dowry. The Act prescribes punishment for demanding dowry and for receiving or taking dowry or aiding or abetting the giving or receiving of dowry. This formulation ignores the reality in which dowry transactions are made. In the specific Indian cultural set up the woman’s family feels compelled to give dowry, even in the absence of overt demands, to secure the happiness and well-being of their daughter in her matrimonial home. Further, parents and other relatives may feel also compelled to give dowry due to social and cultural pressures as there is high social acceptance for this practice. This culture specific setting of India has further aggravated the practice making the laws redundant. The Dowry Prohibition Officers have been appointed and vested with the power of implementation of the provisions of the Act, viz., to prevent the taking and giving of dowry and collect evidence for the prosecution of the offenders under the Act.

Some of the judicial interpretations on the subject have been really welcoming in condemning the crime of dowry. Demand for dowry per se constitutes cruelty and additional demand for dowry has also been held to be covered under the scope of the Act. The Apex Court has made it clear that the dowry death occur not only when the husband or her in-laws put the bride to death but also when she is made to die by abetment to commit suicide. The need for sensitization of the law and the need for connecting the object of

154 Dowry Prohibition Act, 1961 s. 3.
155 Id., s. 4 provides a minimum imprisonment of six months upto two years and fine upto Rs.10,000/-.
156 Id., s. 3 provides minimum imprisonment of five years, except for reasons to be recorded in writing the court may award less punishment along with a fine of Rs.15,000/- or the dowry amount whichever is more.
158 Dowry Prohibition Act, 1961, s 8 B
the Act and role of the judiciary has been stressed by the court.\textsuperscript{162} The Apex Court has upheld that even in cases of lack of valid marriage, the husband could not be allowed to take shelter behind a smoke screen that there was no valid marriage. Persons who contract marriages ostensibly and co-habit with women in the purported exercise of their role and status as husband would come under the purview of the law.\textsuperscript{163}

The Act has been substantially amended by the amending Acts in 1984 and 1986. Yet the amended legislation has failed to prevent harassment and torture of women for dowry due to ineffective law and law enforcing machinery. In defining dowry, the phrase ‘in consideration of marriage’ was replaced by ‘in connection with marriage’ which has widened the definition but does not cover the wide range of cruelties meted out to the women after the marriage in the name of dowry. Demands of dowry made after a couple of years after the marriage cannot be or becomes difficult to be implicated as connected with the marriage. Moreover the distinction between ‘dowry’ and ‘voluntary gifts’ remains unclear. The lack of setting a ceiling on the value of goods also has proved to be another hurdle in the effectiveness of the Act. The amendment provided that the gift should be of ‘customary nature’ and not of ‘excessive value’ with regard to the financial status of the giver. Ascertainment of ‘customary and excessive value’ also proved to be a difficult clause in the Act.

\textsuperscript{162} In \textit{State of Karnataka v. M.V. Manjunathegowda}, (2003)2 S.C.C. 188 commenting upon the objects of the Dowry Prohibition Act and the role of judiciary, the Supreme Court observed that: the practice of giving and demanding dowry is a social evil having deleterious effect on the entire civilized society and has to be condemned by the strong hands of the judiciary. Despite various Amendments providing deterrent punishments with a view to curb the increasing menace of dowry, death remains unabated. Every court must be sensitized to the enactment of the law and purpose for which it is made by the legislature. It must be given a meaningful interpretation and no leniency is warranted to the perpetrators of crime against the society.

The newly inserted sections of the Indian Penal Code and the Indian Evidence Act have improved but not cured the disease. This is mainly because of the fact that social conditioning is a strong restraint to legal changes. Lack of direct circumstantial evidence often results in dowry murders being passed off as voluntary suicide. The Supreme Court has lamented the manner in which the government machinery has functioned in the implementation of the Act and the Court directed the Central and State Governments to take more effective steps to implement its provisions especially sections three and four and the rules under the Act and also directed the state governments to activate the dowry prohibition officers. The inefficiency of the law to deal with this social problem has been made manifest by the Apex Court in the above case. The fact that an increasing number of cases of homicide caused as a result of the inability of the woman’s family to pay dowry were being reported, paved the way for a more stringent and comprehensive legislation.

5.7.3 The Commission of Sati Prevention Act, 1987

The practice of Sati is another manifestation of domestic violence against women practiced in our country. The above Act was enacted by the Parliament after the incident of the commission of sati in the village of Deorala in Rajasthan, its subsequent glorification and the various attempts made by the protagonists of this practice to justify its continuance on religious grounds. The offence of attempt to commit suicide is included under the Indian Penal Code and it had been held by various High courts to include the commission

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164 Indian Penal Code ss.304 B and 498A and Indian Evidence Act 1872 s. 113 B .See for details of for dowry related case laws in the foot note and the accompanying text under the title judicial decisions on matrimonial cruelty.

165 The In re Enforcement and Implementation of the Dowry Prohibition Act,1961,(2005) 4 S.C.C. 565:A.I.R 2005 S. C. 2375. The Supreme Court has also directed the government to take steps to spread anti dowry literacy among people through LokAdalats and the media.

166 According to s. 2 (c) of the Commission of Sati Prevention Act,1987, ‘Sati’ means the burning or burying alive of widow along with the body of her deceased husband or any other relative, or with any article, object or things associated with the husband or relative.

167 Indian Penal Code. s. 309.
of sati punishable under the provision. But the sentence provided in that section was not deterrent enough to prevent the commission of such practice. Further that section also did not provide for the glorification of sati subsequent to the commission of sati.168

The Act criminalizes glorification of sati which includes observance, support, justification, or propagation of sati.169 Abetment of sati either directly or indirectly is made punishable with death or imprisonment for life and fine. Abetment includes obstructing the woman or police from prevention of commission of sati and being an active participant in the ceremony connected with it.170 The attempt to commit sati is also punishable with one year imprisonment.171 The Act also contemplates that the special courts trying an offence under the above section, shall before conviction, take into consideration the circumstances leading to the offence, the act committed, the state of mind of the person charged and all other relevant factors. The above Act has been a milestone in condemning the offence of sati in the society.

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

With the advent of the most modern scientific techniques, it is possible to ascertain the sex of the child in the womb even in the early stages of pregnancy. The technique used to diagnose the condition and sex of the foetus is medically termed as ‘amniocenteses. In most of the cases, once it was determined that the foetus was female, it was miscarried deliberately as to prevent the death of a female child. These advanced medical techniques are largely being abused to serve the purpose of female foeticide. The Parliament having realized the grave implications arising out of the abuse of such

169 Commission of Sati Prevention Act, 1987 s. 5 makes it punishable with imprisonment between one year and seven years and also with fine.
170 Id., s. 4.
171 Id., s. 3.
techniques has recognized it as discriminatory against the female section and also adversely affecting the dignity and status of women. Thus recognizing that domestic violence is also perpetrated in the form of forced termination of female foetuses, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994 regulates the use of such pre-natal diagnosis\textsuperscript{172}. The Act was amended in 2002. The Constitution of a Central Supervising Authority\textsuperscript{173}, the mandatory registration stipulated for the genetic counseling centres\textsuperscript{174}, the prohibition of advertisement regarding sex determination\textsuperscript{175} etc provided under the Act are some of the regulatory measures adopted to do away with the social evil of female foeticide. Contravention of the provisions of the Act attracts penal provisions\textsuperscript{176} to the guilty individual and the punishment depends on the nature of contravention.

5.7.5 Maintenance Laws

The purpose of maintenance is to prevent destitution and provide economic security to those who are unable to maintain themselves\textsuperscript{177}. Criminal law and matrimonial laws have provision for maintenance, both during a pending litigation (interim maintenance) and at the conclusion of legal proceedings (permanent maintenance / alimony). The law of maintenance in India is dealt with by the following laws / legal provisions:

\textsuperscript{172} According to s. 4 of the Act it provides for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide.

\textsuperscript{173} Ss. 7 and 16 of the Act empowers and directs the Central government to constitute an authority called Central Supervisory Board consisting of the minister for Family Welfare, the Secretary of such ministry/department and 21 other members including eminent geneticists, gynecologists, social scientists and women parliament members etc for a period of three years.

\textsuperscript{174} Id., ss. 18-21.

\textsuperscript{175} Id., s. 22.

\textsuperscript{176} Id., ss. 22-28.

\textsuperscript{177} The quantum will be determined by factors including financial position and status of the respondent, the reasonable wants of the claimant, the standard of life of the claimant, any source of income of the claimant.

Hindu women may choose to use provisions of Hindu Marriage Act or Hindu Adoption and Maintenance Act. Section 125 of the Criminal Procedure Code is available to all religious communities. Maintenance and Welfare of Parents & Senior Citizens Act is applicable to parents and senior citizens who are neglected / abandoned. In all other cases, parties are governed by the law under which their marriage was performed.

5.7.6 Laws Relating to Custody of Children

As in the case of maintenance, there are multiple laws that have provisions on permanent (at the conclusion of legal proceedings) and interim custody (pending proceedings) of children. These include: The Hindu Minority and Guardianship Act 1956, Guardians and Wards Act 1890, Family Courts Act 1984, Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Adoption and Maintenance Act 1956, Indian Divorce Act 1869, Parsi Marriage and Divorce Act 1936, Uncodified Muslim law etc.

5.8 Domestic Violence –The National Policy Scenario

In India, the National Policy for the Empowerment of Women (2001) prescribed that the legal and judicial system should be made more responsive and gender sensitive to women’s needs, especially in cases of domestic violence. The policy laid down the following safeguards—

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“All forms of violence against women, physical and mental, whether at domestic or societal levels, including those arising from customs, traditions or accepted practices shall be dealt with effectively with a view to eliminate its incidence. Institutions and mechanisms/schemes for assistance will be created and strengthened for prevention of such violence, including sexual harassment at workplace and customs like dowry; for the rehabilitation of the victims of violence and for taking effective action against the perpetrators of such violence.”

The Policy asserted the need for strengthening institutional mechanisms in order to promote the advancement of women as well as make available resources – financial, human and market – for the implementation of the policy. This commitment has been reaffirmed in the Eleventh Five Year Plan which proposed for the plan period a fivefold agenda for gender equity. These are economic empowerment; social empowerment; political empowerment; strengthening mechanisms for effective implementation of women-related legislations; and augmenting delivery mechanisms for mainstreaming gender.

The Eleventh Plan that rightly identified the issue when it asserted that “violence is a public health issue and its call for the “training of medical personnel at all levels of the health care system to recognize and report violence against women and children”.

The Plan recognizes that any approach towards ensuring gender equity has to be multipronged and should (amongst other things), “ensure an environment free from all forms of violence against women)—physical, economic, social, psychological etc., strengthen existing institutional
mechanisms and create new ones for gender main-streaming and effective policy implementation”\textsuperscript{179}.

The need for training and sensitizing medical students has also been spelt out by the Plan given that medical and health establishments are often the first point of contact for women experiencing domestic violence. The Eleventh Five-year Plan provided for budgetary allocations for the implementation of all such acts that promote and protect the rights of women. The strategies laid down by the Planning Commission and in The National Policy for the Empowerment of Women (2001) are undoubtedly the way forward.

5.9 Limitations of the Pre-2005 Legal Regime

The drawbacks and shortcomings of the laws whether be civil or criminal to deal with domestic violence in India could be summarized as follows.

Firstly, there was no definition of the term ‘domestic violence’ that comprehensively reflected a woman’s experience of violence in intimate relationships\textsuperscript{180}. Secondly, most of the provisions could only be used by women who are in legally valid marriages\textsuperscript{181}. Legal relief for violence could only be availed by women in matrimonial relationships. A major shortcoming of earlier laws against domestic violence was that they assumed women are abused only in their roles as wives and daughters-in-law. All the other categories of women facing violence in domestic relationships which were not in marital nature were not included under the earlier law\textsuperscript{182}. This refers to daughters, sisters, widows, mothers and those who were in relationships in the


\textsuperscript{180} None of the legislations in India had a specific definition on Domestic violence till 2005.

\textsuperscript{181} This is in the context of S.498A specifically. See supra n. 144 at p.393

\textsuperscript{182} Till 2005 there existed no understanding of domestic relationships and the different ways in which the females at their different stages of life could possibly be abused or harassed.
nature of marriages though their relationships did not meet the requirements of a legally valid marriage.

Thirdly, there reflected an inherent limitation in the criminal and civil way of approaching the problem. i.e. The criminal law which was primarily used to address violence, was geared towards prosecuting and convicting offenders and did not offer reliefs in terms of shelter, maintenance or compensation for mental trauma suffered by the victims. The need for documentation or evidence of what happened in a conjugal space was rather difficult to be obtained. However, given the nature of the complex social economic and personal relationships involved in this issue of domestic violence, it was felt that ordinary criminal law instruments were not sufficient to effectively curb the problem. The use of civil law (matrimonial law) on the other hand involved protracted legal proceedings of judicial separation and divorce during the course of which a woman victim has little recourse or access to reliefs.

Fourthly, the breakdown of a marriage in Indian society with its attendant discrimination means a virtual civil death for a woman. The only two options open to a victim of domestic violence was to resort to either the civil remedy of divorce or the criminal remedy available under Section 498A. There was no via-media available to a woman who sought protection from domestic violence and that was one of the factors that contributed to the gross misuse of the provisions of 498A IPC. Most remedial measures on domestic violence were considered ‘ancillary reliefs’ in matrimonial proceedings, and domestic violence was not treated independently as a situation warranting immediate legal intervention. Women had to approach

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183 Reference is to criminal law remedies under IPC.
184 As domestic violence was private matter. Documentation or reports on the issue were negligible.
185 A divorced woman from a patriarchal perspective was treated as a stigma in the social fabric.
186 Maintenance and custody proceedings.
different courts for different remedies (family courts / district courts / criminal courts), leading to multiple litigations in multiple courts, causing considerable hardship to women and criminal laws do not allow space for any negotiations.

Fifthly, there was no law to recognize a woman’s right to residence or her right to civil remedies. The most significant lacunae in the law were the recognition of the right to reside. The male members of the family who are in possession of the premises could easily dispossess a dependent female. This played a significant role in increasing the vulnerability of women, who constituted to remain in violent relationships for fear of dispossession and destitution. Therefore, there was an urgent need for a law, which could address this phenomenon of depriving women of their right to reside in the shared household. There was no recourse available to a woman who was rendered homeless due to violence within the family. In the context of the lack of familial support or state funded shelter or support services, such victims of domestic violence had to heed to unfair settlements or take on expensive protracted legal battles.

In the midst of alarming number of cases of domestic violence being reported even among educated classes\textsuperscript{187} there was a growing concern for realization of specific legislation to curb the evil. The concept of domestic violence by then had gained international recognition as human rights violation of women by the pressure exerted by the feminist movements in the western liberal democracies.

To put in a brief manner, criminal law remedies provided in the Indian Penal Code are enforceable after the commission of the offence. So need was felt for civil law remedies in the form of preventive measures and interim relief’s to check harassment of women through domestic violence. The need

\textsuperscript{187}In 2000-2004 the total number of domestic violence cases registered were 711,778 According to Lok Sabha Debates, 23rd August 2005. In 2005 the total number of dowry deaths was 6,787 and total number of cases of cruelty was 58,319,750 cases of rape by parents/family members were registered. Sixty one percent of educated men in the highest income groups resorted to sexual violence. XIV Lok Sabha Debates 465, 23 rd August, 2005.
for a better understanding of domestic violence and specific legislation on the same had been extensively debated in India, much before the Act was passed. Hence, the need was felt for a more concerted legal strategy to combat domestic violence consisting of a judicious mix of both civil and criminal law remedies.