The Universal Declaration of Human Rights supports the crusade against domestic violence since it favors protecting the basic right of everyone to live a dignified life. CEDAW (Convention on Elimination of Discrimination Against Women) makes it mandatory for its member nations to make laws prohibiting domestic violence.

Violence as a means to maintain unequal relationships has been resisted by the women’s movement, both nationally and internationally. Particular to the context of domestic violence, the existing laws dealt with the recognition of cruelty as a ground for divorce under various personal laws and procedural laws and thereby providing maintenance to avoid destitution of women victims. With changing societal perceptions and demands, the struggle led to amendments in the criminal law that recognized cruelty within marriage as an

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1Criminal Procedure Code, s.125.
Statutes were made outlawing the practice of giving and taking of dowry, penalized dowry related harassment and recognized “dowry deaths” as a separate offence. Although the new amendments were enacted to deal effectively with dowry deaths as well as cruel treatment of married woman, they eventually became, despite their commendable intentions, tools of harassment in the hands of the unscrupulous women.

The laws that existed considered only married women as the subject of the concern and only legally married women could sue under these laws. The law failed to comply with the definition of ‘violence against women’ in the international treaties like Convention on Elimination of all forms of Discrimination against Women and Universal Declaration of Human Rights, which looks at it as a violation of rights and fundamental freedom of women. To eliminate these loopholes the Protection of Women against Domestic Violence Act, 2005 was enacted.

6.1 The Evolution of Protection of Women from Domestic Violence Act, 2005

The context of subordinated social existence of most women, when seen through a human rights angle, depends on how best a domestic legal order responds to these expectations. Despite a proliferation of laws in this direction, there is a lack of proper law enforcement in case of domestic violence reflected by an international phenomenon cutting across different countries.

Since the popular conception of violence at home did not merit much consideration as a punishable offence, the feminist movement, aimed at attaining substantive equality for women, regarded the domestic violence as one of the chief disabilities for the promotion of women’s rights and their claims to equality. Women’s rights movement of the west struggled hard to

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2India Penal Code, 1860, s.498A.
3Dowry Prohibition Act, 1961.
4Indian Penal Code, 1860, s.304 B.
campaign for the inclusion of various manifestations of domestic violence as a crime within the criminal justice system to get law on the side of the women in their struggle for justice. The feminist movement exerted influence in extending the reach of criminal law within the insulated world of private sphere manifested by family and the home. By 1980s and 1990s, many countries legislated for inclusion of domestic violence within the criminal law while most countries still did not legislate and were slow to respond. Most countries which did not legislate against domestic violence as a distinct crime continue to treat it under its criminal assault laws.

There was growing realisation since late 1980s that domestic violence needs special attention and is closely associated with women’s rights. Due to the growing influence and impact made by the women’s movement between 1970s and 1990s, the issue of domestic violence attained a primacy in at least the formal stance taken in public policy and criminal justice system of many countries. The local women’s movement in many countries, inspired and energized by the international women’s human rights movement greatly contributed in exerting pressure on their respective governments to change their policy stance especially in the criminal justice system to comply with the ongoing international standard setting.

The international developments in this direction gave strength to the demands from the women’s rights groups in India. The recognition of domestic violence as a crime in India was brought about in the early 1980s after a sustained campaign by feminist groups and women activists all over the country. The criminalization of domestic violence in the form of sections 498A and 304B (dowry death) were considered significant developments in law in correcting historical, legal, and moral disparities in the legal protections afforded to abused women. It sought for the first time to bring the issue of domestic or family violence out of the protected private realm of the family and into the public domain in India.
Despite these legal reforms, societal responses to domestic violence still largely exclude legal intervention. The real problems encountered were with regard to access to justice and implementation of these laws. The police often exercised discretion in avoiding arrest while responding to domestic violence incidents and emphasized on mediation and conciliation. In the courts, public prosecutors failed to actively pursue cases of domestic violence under S. 498A, as often women turned hostile during the prosecution and agree to drop the charges. Sentences tend to be less serious for those convicted of domestic violence. The result of these processes led to a higher dismissal rate for domestic violence cases at the prosecution stage, compared to other violence cases, and less serious sentences. There were several attempts from women’s groups to canvass the need for framing a law to deal with domestic violence comprehensively.

Finally the Ministry of Women and Child Development issued a notification to bring it into force from 26th October, 2006. The Act was passed by the Parliament in August 2005 and assented to by the President of India on 13th September, 2005. But implementation was pending as detailed consultations were required with the State and other agencies for framing the rules. The Ministry has simultaneously issued another notification laying down the rules framed for the implementation of the Act. These rules may be called "The Protection of Women from Domestic Violence Rules, 2005".

With the passing of the Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') the Indian legal system has stepped into asocial space that has hitherto remained unwilling to lend itself to legislation the home and the family, and the violence faced within the same. The International and National concern over the issue reflected in India manifested itself in the form of the new Act, which for the first time addressed domestic violence as a
distinct human rights issue independent from any offence against women recognized under the Indian Penal Code. The Act stands in conformity with the UN Model Legislation on Domestic Violence, which provides comprehensive guidelines for states in drafting legislations on domestic violence. The enactment was passed by the Parliament with recourse to Article 253 of the Constitution. The law draws its rationale from the rights guaranteed under Articles 14, 15 and 21 of the Part Three of the Indian Constitution.

6.2 The Constitutional Basis of the Act

A constitution is central to a country’s legal system because it defines the principles on which the system is based. It sets up the most important institutions of government, states their principal powers and makes broad rules about how those powers are to be exercised. To date, many laws on violence against women have focused primarily on criminalization. It is important that legal frameworks move beyond this limited approach to make effective use of a range of areas of the law, including civil, criminal, administrative and constitutional law, and address prevention of violence, and protection and support of survivors. The protective discrimination extended to women and children under Fundamental Rights of the Constitution of India supports the rationale behind the protection guaranteed to women victims of domestic violence under the Act. The Statement of Objects and Reasons declares that the Act was being passed keeping in view the fundamental rights guaranteed under Articles 14, 15 and 21. Article 14 prohibits class legislation, but permits

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5 The Protection of Woman From Domestic Violence Act,2005 Statement of Objects and Reasons.
6 This provision confers on the Parliament the power to make laws in pursuance of international treaties, conventions, etc.
7 Right to Equality; Article 14 contains the equal protection clause. It affirms equality before the law and the equal protection of the laws.
8 Article 15 disallows discrimination on the grounds of religion, caste, sex, race, etc., but permits the State to make special provisions for certain classes of persons, including women and children.
9 Art. 21 states: “No person shall be deprived of his life and personal liberty except according to the procedure established by law”.

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classification for legislative purposes. A law does not become unconstitutional simply because it applies to one set of persons and not another.\(^{10}\)

The Act promotes the rights of women guaranteed under Articles 14 and 15. Domestic violence is one among several factors that hinder women in their progress, and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differentia, namely, gender, and also has a rational nexus with the object of the Act.

Article 21 confers the right to life and liberty in negative terms, stating that it must not be taken away except by procedure established by law, which is required, as a result of judicial decisions, to be fair, just and reasonable.\(^{11}\) The Supreme Court by its dynamic interpretation expanded the concept of right to life. The following decisions are relevant in this context and many new rights have been added to it.

In *Francis Coralie Mullin v. Union Territory Delhi, Administrator*\(^ {12}\), the Supreme Court observed that, ‘any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21’. This right is incorporated in the Act through the definition of physical abuse, which constitutes domestic violence and is hence punishable under the Act. Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impair the health or

\(^{10}\)Where a law effects a classification and is challenged as being violative of this Article, the law may be declared valid if it satisfies the following two conditions. 1. The classification must be based on some intelligible differentia, 2. There must be a rational nexus between this differentia and the object sought to be achieved by the law. As a result of the ruling in cases such as *E.P Royappa v. State of Tamilnadu*, (1974) 4.S.C.C. 3, 38, any law that is arbitrary is considered violative of Article 14 as well. This provision is significant in putting a stop to arbitrariness in the exercise of State power and also in ensuring that no citizen is subjected to any discrimination. At the same time, it preserves the State’s power to legislate for a specific category of people.

\(^{11}\) *Maneka Gandhi v. Union of India*, AIR 597, 1978 S.C.R. (2) 621

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development of the aggrieved person. Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. Since a victim of domestic violence is subjected to physical abuse and lives in a state of perpetual fear of violence and fear for her life, she is unable to live a life free of violence or fear of violence. By adoption of such an expansive definition, the Act protects the right of women against violence.

In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*¹³, the Supreme Court emphasized the fact that the right to life included in its ambit the right to live with human dignity, basing its opinion on a host of cases that had been decided in favour of this proposition. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted.

These two facets of the right to life find its manifestation under the definitions of sexual abuse and emotional abuse, respectively in the Act. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable; especially as such sexual abuse is not recognized by the IPC as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.

In *Chameli Singh v. State of U.P*¹⁴ it was held that the right to life would include the right to shelter. Under S.6 of the Act, it is a duty of the Protection Officer to provide the aggrieved party accommodation where the party has no place of accommodation, on request by such party or otherwise. Under Section17, the party’s right to continue staying in the shared household is protected. These provisions thereby enable women to use the various

protections given to them without any fear of being left homeless. In contexts where women are dispossessed from their matrimonial / parental home due to domestic violence, their right to shelter is violated.

A woman’s right to residence is protected under the Constitution of India. Women’s rights are protected by the general principle of equality under Article 14 and Article 15(3) where the state has been given the special right to make provisions for women and children. The Constitution has time and again created stipulation for protective discrimination of socially and economically backward class. The right of shared household is a part of Article 21 where everyone is granted the right to live with dignity.

The Apex Court in *U.P.Avas Evam Vikas Parishad and another v. Friends Co-op Housing Society Ltd. and Another* re-emphasized that, “Right to shelter is a fundamental right, which springs from the right to residence assured in Article 19(1) (e) and right to life under Article 21 of the Constitution.”

In *Vikram Deo Singh Tomar v. State of Bihar*, the Apex Court rightly explained the duty cast on the equality doctrine enshrined in the Constitution where it contemplated special provision for women and children. The Court thus held:

“We live in an age when this court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. And so, in the discharge of its responsibilities to the people, the state recognizes the need for maintaining establishments for the care of those unfortunates, both women and children, who are castaways of an imperfect social order and for

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whom, therefore, of necessary provision must be made for their protection and welfare.”

A woman’s right to livelihood and the fundamental freedom to practice an occupation or profession has been recognized by the courts. In the context of domestic violence, the victim’s work is often affected as she is either unable to report to work or her performance at work is adversely affected if she sustains physical injuries or psychological distress including depression. In extreme situations, it can result in her termination / resignation from work, resulting in her loss of livelihood.

These discussions by the Apex Court reveal the recognition of peculiar nature of Indian society and the unique sociological position that women have held in its intriguing history. Since the inception of Fundamental Rights in the Constitution of India the endeavor of the legislators were to place the needs of women in the public space more justifiably. A comprehensive and multidisciplinary legislation to deal with the different aspects of problem of domestic violence is necessary with the intent of, criminalizing all forms of violence against women, and encompassing issues of prevention, protection, survivor empowerment and support (health, economic, social, psychological), as well as adequate punishment of perpetrators and availability of remedies for survivors. With the new enactment that has come forth addressing the issue of domestic violence, the invisible private space, the relationships and the violence perpetrated within the family is brought to light.

6.3 Aims and Objects of the Act

The Act aims at providing protection to women who are faced with violence within a domestic relationship. In its preamble, the Act mentions the rights of women under the Constitution, and the necessity of ensuring that these rights are recognized even in the private sphere of the home and family.

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The Act envisages comprehensive procedural tools and adequate relief measure to facilitate easy access to justice to any aggrieved party.

The Act clearly identifies the victim groups and what are the processes and reliefs to be made entitled to them in cases of different types of violence. It manifests a combination of civil reliefs backed by criminal sanctions and they are dealt with in a detailed manner. The Act has not attempted to create a new offence with respect to the issue of domestic violence but merely provides a palliative treatment to the victims of domestic violence and to prevent recurrence of the same. The only instance in which the perpetrator of violence can be punished under this Act is when he violates any order of the court, passed under the Act. The intention being clear from this that the Act protects a victim and not punishes the perpetrator.

The Act recognizes the very fact that house is not a safety zone for the women inmates therein and thereby attacks the very strong base of the holding of the traditionalists that women are born to endure all sufferings within the house. Moreover the Act envisages the participation of a wide spectrum of actors, which includes administrators created by the Act, as well as the civil society.

The broader impact that the Act aims to have is multi-fold. It has the potential to become a tool by which women are empowered to move out of circumstances detrimental to their physical and emotional wellbeing; a medium by which hitherto untouched social space can be made more gender sensitive and responsible to women’s concerns. This is an important step in furthering the agenda of female emancipation in the country.

In India, the remedies under the Act have largely been adopted from similar laws in other jurisdictions. However, it has been reinvented in several ways in order to grasp the concerns and peculiarities of Indian society such as dowry deaths. For instance, the Act defines domestic violence in a wide manner so that issues like marital rape – yet to be recognized as a penal offence
under the Indian law – can be dealt with. Quasi civil-criminal remedies enable several different interest groups such as girl children and live-in couples to obtain effective remedies that circumvent societal compulsions. The following analyses of the Act will evaluate these innovative legislative tools adopted under the new Act within a theoretical and practical framework.

6.4 The Act: An Analysis of its Provisions and its Implications

The Act is the first substantial step in the direction of vanquishing the questionable public/private distinction traditionally maintained in the law. It is a comprehensive and gender sensitive legislation that introduced many new features and thereby raised various controversial issues and questions. Along with certain explanations on the new concepts in the Act, comparative provisions on the same under different jurisdictions are also compiled. The Rules that define the institutional framework for the new Act which came into force with effect from 26th October 2006\(^\text{18}\) are also examined. An analysis of the Protection of Women from Domestic Violence Act, 2005 involves six aspects:

1. What is the scope and extent of the applicability of the Act?
2. What is the definition and scope of the term ‘domestic violence’ under the Act?
3. What is the machinery for implementation of the Act?
4. What are the reliefs available to a victim of domestic violence under the Act, and its effectiveness when compared to the existing system of law?
5. What are the procedures involved under the Act? and
6. What are the consequences of breaching the judicial orders passed under the Act?

\(^{18}\) The Rules specify the rights of the victim and the duties of the authorities under the Act. It specifies the procedure for exercise of powers under the Act including eligibility and appointment of authorities, manner of counseling, disposal of applications, service of summons etc.
6.4.1 The Scope of Domestic Violence Expanded

The first aspect from which the Act is to be viewed is the extent of its applicability. The Act allows institution of proceedings by an “aggrieved person”. An aggrieved person has been defined as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

A woman in her capacity as sister, widow, mother, daughter, women in relationships of cohabitation, single women etc., are envisaged thereby to come under the purview of aggrieved person. The mentioning of definition of “child” under the concept of aggrieved woman in the Act definitely extends the application of this Act to the benefit of a vulnerable child within a family. The Act thus envisages the vulnerability of woman and child whether he/she be an adopted, step or foster child equally. However under this law, children can also file a case against a parent or parents who are tormenting or torturing them physically, mentally or economically. This provision in the Act keeps itself in tune with the concept of ‘protective discrimination’ and indicates the use of affirmative action to remedy a wrong done towards a child within the family as envisaged by the Constitution of India. Women and children are the primary beneficiaries of this Act.

The Act is an innovation over the conventional understanding of domestic violence, in that it did not limit the protection against violence solely to marital relationships. Respondent under the Act is defined as any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this

19Protection of Women from Domestic Violence Act, 2005 s.2(a)
20Id., s.2 (b) defines a “child” means any person below the age of eighteen years and includes any adopted, step or foster child.
22The Constitution of India, Art.15(2).
The definitions of the aggrieved person and the perpetrator necessarily involves the context in which domestic violence takes place.

6.4.2 The Concept of Domestic Relationship

The Act has defined the concept of domestic relationship as a relationship between two persons who live or have at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. The concept of domestic relationship has been defined in wide terms and has brought out many crucial changes. Under the Act, the domestic relationship is the basis for a woman to take action. The concept of domestic relationship has broadened the scope of who may seek remedies under this law. Previously only a woman who was able to prove her relationship with the other party by blood or marriage (such as wives and mothers) were entitled to remedies related to domestic violence, such as right to residence and maintenance. It has not been restricted to only provide protection to women against abuse by their husbands and in-laws as provided under Sections 304B and 498A of Indian Penal Code, but has also been extended to include within its ambit abuse or violence or ill treatment inflicted by a woman’s father, brother or any male relative of her own family. Until the passing of this Act, no legislation had conferred specific protection against abuse meted out by members of the family into which she was born. As envisaged by the Act, domestic relationships are not restricted to the marital context alone.

The most significant and commendable feature of this definition is that for the first time in India live-in relationships in contrast to a valid marriage that was the sole aspect legally recognized under the existing law on the issue,

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23Supra n. 19, s.2(q).
24Id.,.s.2(f).
have been given legal recognition. In a way it can be summarized as to the concept of *live-in-relationships*, as an inclusion of an idea which is of a western import as it is alien to Indian culture. The short term *live in relationships* are put at par with valid and legal marriages thereby extending the benefits of this beneficial legislation to women in fraudulent or bigamous marriages, or in marriages deemed invalid in law and to prevent destitution of such women at the hands of the unscrupulous men. In the pretext of providing financial assistance to women involved in such relationships the legislature cannot use it as granting legal recognition to such short term relationships characterized by flexibility in relations and the obligations involved in it. This is a concept which, on one hand, allows women whose marriages may be void or invalid in the eyes of law for various reasons to claim remedies under this law. This includes second wives of those marriages that are considered illegal because of the subsistence of the first marriage. On the other hand, it extends protection from domestic violence to women who are in ‘common law marriages’ or in *live-in-relationships*. This is in keeping with existing social realities, where all persons do not necessarily conform to the traditional institution of marriage, as well as earlier judgments of courts, which state that long periods of cohabitation between a man and a woman raise a presumption of marriage.

Another significant advance has been the fact that relief can also be claimed by women against men with whom they have shared a relationship in the past. The Act has not specified how long a couple has to have lived in the shared household (the period of co-habitation) in order for a woman to claim benefit under the Act. A woman who has lived with a man for two or three months without being married to him can at any point of time seek relief under this law, at par with legally wedded wife. This amounts to making mockery of laws against bigamy. The habitation rights of live-in-partners in the same household in case of already married men cannot be protected in this way without serious damage to the rights of legally married wife and her children. It
is perfectly legitimate to protect a woman from violence and punish a man for
inflicting it on her, whether or not she is married to that man. However to give
her right to claim maintenance and get injunctions barring her male partners
entry into his own house are raising too flimsy claims with a view to promoting
harassment and blackmailing the male partners. In the guise of protecting
women victims of bigamous marriages the rights of legally wedded wife and
her children is put at risk which can trigger criticisms and protests against the
Act as a western duplication of law adopted from western culture not at all
advisable for the traditional Indian culture.

The legislature while passing the Act has ignored that having sexual
intercourse with any person other than his/her spouse is aground for
divorce.27 The provisions which provide for maintenance pendent-lite and
permanent alimony respectively do not recognize any relationship except that
of legally wedded husband and wife. The provision through which grant of
maintenance to wife children, father and mother in a broader perspective, does
not recognize persons having illegitimate relationships entitled to claim
maintenance except an illegitimate child. The law accordingly prohibits wife
living in adultery from claiming any maintenance from the husband. It is really
contradictory to understand that while on one hand a married woman indulging
in adultery is not entitled to claim maintenance from the person with whom she
had or is having illegitimate relationship. The legislature has also has not
noticed that adultery is also an offence. Therefore, while on one hand, a man
will be prosecuted for adultery, at the same time he will be compelled to pay
maintenance as well as residency rights to a woman with whom he is alleged to
have maintained illegitimate relationship. This provision is likely to destroy the
matrimonial relationships thereby disturbing the social fabric of the society.

27 Hindu Marriage Act, 1955 s.13 (1) (a).
28 Id., ss.24 and 25.
29 Criminal Procedure Code, 1973 s.125.
30 Id., s.125 (1).
31 Indian Penal Code, 1860 s.497.
Despite all these negative effects, this provision can positively be understood as that all these connotations on the domestic relationship from the standpoint of a beneficial social legislation shows light towards as to who all can be arrayed as respondents in a case involving domestic violence against a woman.

6.4.3 The Concept of Shared Household

Another notable definition in the Act is that of the shared household. It refers to a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in this shared household. Here the Act envisages the space where the woman and the perpetrator of violence have lived together in a domestic relationship irrespective of the pattern of ownership. Often, the violence is directed not only against the woman but is intended to cut off all her support structures, deny access to essential services and to withhold a woman's own property or children in an attempt to blackmail. The most obvious way of achieving this aim is to throw the woman out of the household. The idea of shared household comes to her rescue in this context.

One of the criticisms that are raised against this definition of domestic relationship is that it excludes from its purview the children, especially those who have lost their parents, being the most vulnerable targets of domestic violence. The Act does not make any provision for the protection of domestic servants, which is a significant lacuna, given that the ill treatment of maid

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32 Supra n. 19, s.2(s)
33 XIV Lok Sabha Debates 348, 23 August 2005.
servants is a common phenomenon in the Indian social set-up. The concept of shared household has been understood to include living singly also. It can by no stretch of imagination be understood to be sharing a household.

Comparing the Relationships Covered under Foreign Countries

The definition of domestic relationship as per the Act is not exhaustive when compared with similar legislations in other countries like U.K, U.S.A and Malaysia. In U.S.A the legislation on this issue provides that “domestic violence” may be committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is co-habiting with or has co-habited with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction. Moreover this Act also provides protection, against ‘dating violence’, which may be committed by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim, and ‘sexual assault’, which may be committed by a stranger as well as any person related to the victim by blood or

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35S. 62(3) Family Law Act, 1996, in England and Wales. The definition is similar to that of ‘aggrieved person’ under the Act. i.e. person associated with another person includes those persons who i) are or have been married to each other; ii) are co-habitants or former co-habitants; iii) live or have lived in the same household, otherwise than merely by reason of one of them being the other’s employee, tenant, lodger, or boarder; iv) are relatives; v) have agreed to marry one another (whether or not that agreement has been terminated); vi) are in relation to any child, i.e. is a parent or has had parental responsibility for the child; and vii) are parties to the same family proceedings.
36 Under ss.4 and 5 of the Domestic Violence Act 1994 of Malaysia, a protection order may be available to the complainant who may be a i) spouse, ii) former spouse, iii) child, iv) an incapacitated adult, v) any other member of the family.
37 S.40002(6) of the Violence against Women Act, 1994, of the U.S.A as inserted s.3 of the Violence against Women and Department of Justice Re-authorization Act of 2005
38 Id., s.40002(8).
marriage. In U.K, the Domestic Violence Crime and Victims Act 2004 has extended the definition of ‘co-habitants’ to include ‘same sex couples’ and has extended protection to non-co-habiting couples as well. The only criterion for claiming relief being that the complainant was in an intimate personal relationship with the respondent for a significant duration. And moreover ‘child’ as a victim of domestic violence occupies a specific category under the definition of ‘aggrieved person’.

Women’s experience of violence, and of the justice system, are further shaped by their race, colour, religion, political or other opinion, national or social origin, property, marital status, sexual orientation, HIV/AIDS status, migrant or refugee status, age, or disability. In many societies, women belonging to particular ethnic or racial groups experience gender-based violence as well as violence, based on their ethnic or racial identity. It is important that legislation, or subsidiary legislation, where necessary, make specific provision for the appropriate and sensitive treatment of women complainants/survivors of violence who suffer multiple forms of discrimination. The widest coverage is provided by the Vietnamese law, which does not include any clause defining survivors or coverage and is gender neutral. It is advisable to include all forms of domestic relationships within the ambit of the law.

6.4.5 The Concept of ‘Domestic Violence’ Wide

The second aspect of the Act that lends itself to analysis is the definition and scope of domestic violence under the Act. The Act defines “domestic violence” for the first time in Indian law. It is a comprehensive definition and captures women’s experiences of abuses within the four walls of the home. The

39 Id., s.40002(23.
40 The Family Law Act, 1996, s.62 (1).
41 The Domestic Violence, Crime and Victims Act, 2004, s.3.
42 Id., s.4.
43 Supra n.20.
The definition of ‘domestic violence’ is in consonance with the UN Model Legislation on Domestic Violence. Section 3 of the Act gives an exhaustive definition of the conduct that would amount to domestic violence. It provides that any act, omission, commission, or conduct that harms, injures or endangers or has a tendency to harm, injure, or endanger the health, safety, life, limb, or well-being, whether mental or physical, of the aggrieved person would constitute domestic violence. It has been elaborately mentioned that such conduct might be in the nature of physical abuse, sexual abuse, verbal abuse and emotional abuse, or economic abuse. The definition also specifically includes within its ambit any conduct that harasses, harms, injures or endangers the aggrieved person with a view to coercing her or any other person related to her to meet any unlawful demand for any dowry, property or valuable security. Furthermore, any such conduct that has the effect of threatening the aggrieved person or any person related to her or otherwise injures or causes physical or mental harm to her has been brought within the ambit of domestic violence. Even a single act of commission or omission may constitute domestic violence. Such specification which does not leave room for loopholes to the perpetrator of crime is very much essential from a victim’s point of view. This is because whenever the term ‘cruelty’ was used prior to the enactment of this Act it specifically required a proof of subsistence of cruelty for a long period of time within the marital life. Or else single instances of violence were taken lightly and were called as ‘regular wear and tear of a family life’ which enabled the perpetrators to go scot free.

On a combined reading of the section and explanation given to each of the terms of abuse envisaged in the Act and also Domestic Violence Rules, 2006, the sense in which they are interpreted becomes evident. Physical abuse includes any act or conduct that causes bodily pain, harm or danger to life, limb

44 Id., s.3(a).
45 Id., s.3(b).
46 Id., s.3(c).
47 Id., s.3(d).
or health or impairs the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force. This includes within its ambit any physical abuse meted out to the children of the aggrieved person.

Sexual abuse has been defined to include any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of women. It includes forced sexual intercourse, forcing the watching of pornographic material and forcing the aggrieved person to entertain others sexually. The recognition of marital rape as a form of violence, is the other vital improvement that has been introduced by the Act. It is significant that under Indian criminal law, marital rape is not a crime unless the wife is under 15 years of age. However, by including sexual abuse as a form of domestic violence, protection is provided to a wife against sexual abuse under this law. Moreover, the law does not consider only habitual assault to be domestic violence. Even a single act may amount to domestic violence if it falls within any of the categories listed in the law.

Verbal and emotional abuse covers a wide range of conduct that includes insults, ridicule, humiliation, name calling for not bringing dowry or for not having a child or a male child, ridicule, humiliation, accusations of unchastity, repeated threats to cause physical pain to any person in whom the aggrieved person is interested, threatening to commit suicide, attempts to commit suicide, forcing the aggrieved person to marry any particular person, forcing her not to attend any educational institution, or preventing her from leaving the house, meeting any particular person, taking up a job of her choice, or marrying a person of her choice etc.

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48 Id., s.3, Explanation I, Clause (i).
49 The protection of Women from Domestic Violence Rules, 2006 Form V.
50 Supra n. 19 s.3, Explanation I, Clause (ii).
51 Supra n. 49 Form I.
52 Supra n. 19 s.3 Explanation I, Clause (iii), (a).
53 Id., s.3, Explanation I, Clause (iii), (b).
One of the novel concepts envisaged under the Act is the use of the term economic abuse which is not seen in any of the laws that existed prior to passing of this Act. Nor were such terms discussed because it was considered to be a concept influenced by western feminism. The term economic abuse in the Act includes a wide range of acts and omissions such as the deprivation of all or any economic or financial resources to which the aggrieved person is entitled under law or custom or which she requires out of necessity including inter alia household necessities for her and her children, her *stridhan* and property either jointly or separately owned by her, payment of rent or the shared household, maintenance etc. It also includes the disposal of household effects, the alienation of assets, valuables, shares, securities, bonds etc., in which she has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by her or her children; and the disposal or alienation of her *stridhan* or any other property jointly or separately held by her etc. A prohibition or restriction on her continued access to resources or facilities, which she is entitled to use or enjoy, including access to the shared household, would amount to economic abuse.

Though the concept of claiming damages for the injuries suffered by a woman, inflicted by a husband or partner in an intimate relationship, is borrowed from Western laws, such laws to “protect women” from violence are mainly envisaged for women as productive members of a society. Hence, this ideology presumes that if women cannot function due to being affected by violence, there will be a loss in production and profit - be it in workplace or the home. Thus economic losses occur due to medical bills, abstention, or loss of employment, etc.

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54 *Id.*, s.3, Explanation I, Clause (iv) (a).
55 *Id.*, s.3, Explanation I, Clause (iv) (b).
56 *Id.*, s.3, Explanation I, Clause (iv) (c).
The introduction of economic abuse as a human rights violation can go a long way in reaping the fruit of development of recognizing rights over property within the shared household. The inclusion of economics abuse as an act of domestic violence has raised criticisms from many quarters. It has also led to an argument that the legal rights of a women, which are enforceable through a civil court are sought to be protected by bringing it within the definition of the term domestic violence. It is not permissible to do so under a criminal law/statute as a criminal court cannot direct enforcement of civil legal rights. Even under previous laws, a woman was entitled to seek maintenance for herself and her children from her husband though the legal procedures were cumbersome and poorly enforced.

Indian Constitution’s guarantee of equal protection of the law, the right of all citizens to equality in matters relating to employment opportunities, and the duty to renounce practices derogatory to the dignity of women, all suggest that Indian domestic law entitles women to the financial resources to which men are entitled and denial of women’s control over their finances amounts to a constitutional violation. Furthermore, the provisions of international covenants like the CEDAW and the ICESCR mandate India’s affirmative duty to correct inequalities that women face inside and outside of the marital home including those concerning their economic survival, to eliminate social and cultural practices oppressive to women, support women’s right to work and independently choose their employment, and to advance their fundamental right of self-determination. Consequently, international law also supports the proposition that economic abuse be viewed broadly, and thus both domestic and international law, in promoting the expansion of this term in the Act, may provide a greater remedy for victims of domestic violence, granting women the right to control their economic resources will empower women and punishing

59Articles 11 and 16 in particular.
men for exerting control over their spouses will contribute to changing men’s attitudes concerning gender equality and domestic violence in the future.

In practice, however, definitions of domestic violence that include psychological and economic violence may be problematic. Experience has shown that violent offenders may attempt to take advantage of such provisions by applying for protection orders claiming that their partner psychologically abuses them. Further, many women may not expect a strong justice system response to so-called acts of psychological or economic violence against them. In addition, psychological violence is very difficult to prove. It is therefore essential that any definition of domestic violence that includes psychological and/or economic violence is enforced in a gender sensitive and appropriate manner. The expertise of relevant professionals, including psychologists and counselors, advocates and service providers for complainants/survivors of violence, and academics should be utilized to determine whether behaviour constitutes violence.

However the new Act leaves as much scope for misuse as the previous laws whose faults it was supposed to remedy, especially since it puts short term live-in-relationships at par with legal marriages. The common criticism raised in the context is as to whether the Act promotes Bigamy which is punishable under the criminal law and is promoting the western concept of live in relationships. If the rights of a wife and a live-in partner become equivalent it would promote bigamy and there would arise a conflict between the interests of the wife and the live-in-partner. The Act in effect is acknowledging the reality of violence and destitution that is common in such relationships which is unleashed against the helpless women. The legal sanction for live-in-relationships is meant to work to the advantage of women who become victims of their circumstances, even if it was a matter of choice, it is based on the assumption that the relationship is not between equals and therefore women need protection by the courts from the patriarchal definition of marriage and such relationships too.
Comparing the Concept of Domestic Violence Under Foreign Countries

The definition of domestic violence is expansive as it involves the concepts of emotional, verbal and economic abuse when compared to legislations of other jurisdictions. In U.K, both the Family Law Act, 1996 and the Domestic Violence, Crime and Victims Act, 2004 have not clearly defined the term domestic violence although there are provisions for occupation orders\textsuperscript{60} and non-molestation orders\textsuperscript{61}. The law there has not taken note of all these novel concepts. In USA, the Violence against Women Act 1994, has defined domestic violence to include felony or misdemeanor crimes of violence\textsuperscript{62} and does not extend to emotional abuse by the family. In Malaysia, Domestic Violence Act 1994 provides that domestic violence includes willfully or knowingly placing, or attempting to place, the victim in fear of physical injury, causing physical injury to the victim by an act that is known or ought to have been known would result in physical injury, compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain, confining or detaining the victim against his or her will or causing mischief, destruction or damage to property with intent to cause, or knowing that it is likely to cause distress or annoyance to the victim\textsuperscript{63}. This definition of domestic violence in Malaysia is confined to physical injury, threats, force and confinement and does not include emotional, verbal or economic abuse. The Act is therefore novel in this respect.

A gender-sensitive approach to legislation on violence against women acknowledges that women’s and men’s experiences of violence differ and that violence against women is a manifestation of historically unequal power

\textsuperscript{60}The Family Law Act,1996 s.33
\textsuperscript{61}Id., s.42,The Family Law Act,1996
\textsuperscript{62}Violence Against Women Act, 1994, as inserted by s.3 of the Violence against Women and Department of Justice Reauthorisation Act,2005.s.40002 (6)
\textsuperscript{63}The Domestic Violence Act,1994 s.2
relations between men and women and discrimination against women. The legislation ought to be gender sensitive and not gender blind.

6.4.6 The Novel Machinery for Implementation: Role of Protection Officers and Service Providers

The Act is an example of interplay between NGO’s and Central /State Governmental organizations. It recognizes NGOs and other private organisations and makes them equal stakeholders in the enforcement of the Act. The Act has put in place comprehensive machinery to ensure the implementation of its provisions and has contemplated the appointment of a number of functionaries to assist the victims of domestic violence in availing of the relief provided for under the Act.

Role of Protection Officer

To ensure effective implementation, the Act contains provisions creating special machinery and creates posts of the Protection Officer. Preference is given to women in appointing as Protection Officers. The Protection Officers act as a link between the judicial machinery and the society and shall perform a variety of important tasks necessary to bring the relief available under the Act to women victims of domestic violence. The role to be played by the Protection Officer is elaborately discussed in the concerned Rules.

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64 For example, The Austrian Code of Criminal Procedure, since 2006, provides specific procedures and rights for women complainants/survivors of violence in the criminal justice process in order to avoid their secondary victimization.

65 Supra n.19 s.2 (n) read with s.8 of the Act provides for the appointment of protection officers by the state government, which will appoint for any district, as many protection officers as are required for each district.

66 Protection of Women from Domestic Violence Rules, 2006, r.3(1), proviso.

67 S.8. Duties and functions of Protection Officers.- (1) It shall be the duty of the Protection Officer -
(i) to assist the aggrieved person in making a complaint under the Act, if the aggrieved person so desires;
(ii) to provide her information on the rights of aggrieved persons under the Act as given in Form IV which shall be in English or in a vernacular local language;
The Protection Officer may assist the Magistrate in the discharge of his functions under the Act, make a ‘domestic incident report’ to the Magistrate, make an application to the Magistrate if the aggrieved person so desires praying for issuance of a protection order, ensure legal aid to the aggrieved person under the Legal Services Authority Act, 1987, maintain a list of ‘service providers’, make available a shelter home if the aggrieved person so

(iii) to assist the person in making any application under section 12, or sub-section (2) of section 23 or any other provision of the Act or the rules made there under;
(iv) to prepare a "Safety Plan" including measures to prevent further domestic violence to the aggrieved person, in consultation with the aggrieved person in Form V, after making an assessment of the dangers involved in the situation and on an application being moved under section 12;
(v) to provide legal aid to the aggrieved person, through the State Legal Aid Services Authority;
(vi) to assist the aggrieved person and any child in obtaining medical aid at a medical facility including providing transportation to get the medical facility;
(vii) to assist in obtaining transportation for the aggrieved person and any child to the shelter;
(viii) to inform the service providers registered under the Act that their services may be required in the proceedings under the Act and to invite applications from service providers seeking particulars of their members to be appointed as Counselors in proceedings under the Act under sub-section (1) of section 14 or Welfare Experts under section 15;
(ix) to scrutinize the applications for appointment as Counselors and forward a list of available Counselors to the Magistrate;
(x) to revise once in three years the list of available Counselors by inviting fresh applications and forward a revised list of Counselors on the basis thereof to the concerned Magistrate;
(xii) to provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incidence of domestic violence;
(xiii) to liaise between the aggrieved person or persons, police and service provider in the manner provided under the Act and these rules;
(xiv) to maintain proper records of the service providers, medical facility and shelter homes in the area of his jurisdiction.

(2) In addition to the duties and functions assigned to a Protection officer under clauses (a) to (h) of sub-section 9, it shall be the duty of every Protection Officer-
(a) to protect the aggrieved persons from domestic violence, in accordance with the provisions of the Act and these rules;
(b) to take all reasonable measures to prevent recurrence of domestic violence against the aggrieved person, in accordance with the provisions of the Act and these rules.

68.Id., s.9(i)b
69.Id., s.18
70.Id., s.2(r) read with s.10(1). It provides that any voluntary association registered under the Societies Registration Act, 1860, or a company registered under the Companies Act, 1956 whose objective is the protection of women and is involved in the provision of legal aid, medical or financial assistance to women and is to get registered itself with the state government as a ‘service provider’.
The Protection of Women from Domestic Violence Act, 2005 – An Appraisal

requires\textsuperscript{71}, get the aggrieved person medically examined if she has sustained bodily injuries\textsuperscript{72}, ensure that the order for monetary relief\textsuperscript{73} of the Act is complied with and executed in accordance with the provisions of Code of Criminal Procedure, 1973 and perform such other duties as may be laid down by the Central Government by Rules\textsuperscript{74}. The domestic incident report of the Protection Officer will be very significant in the decision making process under the Act as it will disclose the genuineness of the allegations made in the complaint. The Protection Officer in emergency cases will have to resort to prompt actions and are empowered to respond to the emergency calls of the victim in consonance with delivering justice to the victim\textsuperscript{75}. The Protection Officer as per the Rules have to undertake certain enquiries for the passing of orders in interim orders under the direction of the Magistrate concerned to the effect that order passed is not prejudicial and is genuine\textsuperscript{76}. In fact the Protection Officer...

\textsuperscript{71} Id., s.2(t) defines the concept of shelter home and the duties are enumerated under s.6.
\textsuperscript{72} Id., s.7 enumerates the duties of medical facilities.
\textsuperscript{73} Id., s.20.
\textsuperscript{74} Id., s.9.
\textsuperscript{75} The Protection of Women from Domestic Violence Rules, 2006, r 9. Action to be taken in cases of emergency- If the Protection Officer or a service provider receives reliable information through e-mail or a telephone call or the like either from the aggrieved person or from any person who has reason to believe that an act of domestic violence is being or is likely to be committed and in such an emergency situation, the Protection Officer or the service provider, as the case may be, shall seek immediate assistance of the police who shall accompany the Protection Officer or the service provider, as the case may be, to the place of occurrence and record the domestic incident report and present the same to the Magistrate without any delay for seeking appropriate orders under the Act.
\textsuperscript{76} Id., r.10. Certain other duties of the Protection Officers—(1) The Protection Officer, if directed to do so in writing, by the Magistrate shall—

(a) conduct a home visit of the shared household premises and make preliminary enquiry if the court requires clarification, in regard to granting ex-parte interim relief to the aggrieved person under the Act and pass an order for such home visit;
(b) after making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents as may be directed by the court;
(c) restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person;
(d) assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision as may be directed by the court.
(e) assist the court in enforcement of orders in the proceedings under the Act in the manner directed by the Magistrate, including orders under section 12, section 18, section 19, section 20, section 21 or section 23 in such manner as may be directed by the court.
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Officer is envisaged to assist and aid the Magistrate in reaching effective orders for the proper enforcement of the Act.

**Role of Service Provider**

The law recognizes that legal remedies alone would be inadequate to help the victim of domestic violence live her life with dignity. Hence, multiple support structures have been created, to holistically address women’s need for shelter, counseling and medical support. The nomenclature *Service Provider* has been used as additional machinery to aid and assist the Protection Officer who can act as the service provider. Necessary qualifications required Service Provider them are clearly enunciated in the Rules. They are generally NGOs working for women’s rights. Service Providers are made responsible for recording and forwarding domestic incident reports to Magistrates and Protection Officers; getting the victim medically examined and forwarding the medical report to the protection officer and the police station within the local limits of which the incident occurred and also ensuring that the victim is provided shelter in a shelter home. The role envisaged by the Service

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

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

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

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77 *Id.*, S.2(r) read with S.10(1)
78 *Id.*, Rule.11. Registration of service providers-(1) Any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860) or a company registered under the Companies Act, 1956 (1 of 1956) or any other law for time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance and desirous of providing service as a service provider under the Act shall make an application under sub-section (1) of section 10 for registration as service provider in Form VI to the State Government.

(2) The State Government shall, after making such enquiry as it may consider necessary and after satisfying itself about the suitability of the applicant, register it as a service provider and issue a certificate of such registration:

79 *Id.*, S.10
Providers as per the Rules clearly prescribe the need for the experience of such agencies or companies in the field of medical care and shelter service. Medical facilities and shelter homes envisaged under the Act are the support facilities to be availed off by women victims. The rules are laid down as to the facilities to be accorded to the aggrieved person to that effect. Such ‘medical facilities’ and ‘shelter homes’ have to be approved and notified by

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80Id., Rule 11(3) : Every association or company seeking registration under sub-section (1) of section 10 shall possess the following eligibility criteria, namely:-

(a) It should have been rendering the kind of services it is offering under the Act for at least three years before the date of application for registration under the Act and these rules as a service provider.

(b) In case an applicant for registration is running a medical facility, or a psychiatric counseling centre, or a vocational training institution, the State Government shall ensure that the applicant fulfills the requirements for running such a facility or institution laid down by the respective regulatory authorities regulating the respective professions or institutions.

(c) In case an applicant for registration is running a shelter home, the State Government shall, through an officer or any authority or agency authorized by it, inspect the shelter home, prepare a report and record its finding on the report, detailing that-

(i) the maximum capacity of such shelter home for intake of persons seeking shelter;

(ii) the place is secure for running a shelter home for women and that adequate security arrangements can be put in place for the shelter home;

(iii) the shelter home has a record of maintaining a functional telephone connection or other communication media for the use of the inmates;

(3) The State Government shall provide a list of service providers in the various localities to the concerned Protection Officers and also publish such list of newspapers or on its website.

(4) The Protection Officer shall maintain proper records by way of maintenance of registers duly indexed, containing the details of the service providers.

81Id., R.17. Medical Facility to the aggrieved person-(1) The aggrieved person or the Protection Officer or the service provider may make a request under section 7 to a person in charge of a medical facility in writing, clearly stating that the application is being made under.

(2) When a Protection Officer makes such a request, it shall be accompanied by a copy of the domestic incident report.

Provided that the medical facility shall not refuse medical assistance to an aggrieved person under the Act, for her not having lodged a domestic incident report, prior to making a request for medical assistance or examination to the medical facility.

(3) If no domestic incident report has been made, the person-in-charge of the medical facility shall fill in form I and forward the same to the local Protection Officer.

(4) The medical facility shall supply a copy of the medical examination report to the aggrieved person free of cost.

82Id., R.16. Shelter to the aggrieved person-(1) On a request being made by the aggrieved person, the Protection Officer or a service provider may make a request under section 6 to the person in charge of a shelter home in writing, clearly stating that the application is being made under section 6.

(2) When a Protection Officer makes a request referred to in sub-rule (1), it shall be accompanied by a copy of the domestic incident report registered, under section 9 or under...
the concerned state governments. If the aggrieved party of desirous of not revealing her identity the same is taken care of in the Act through the Rules83. The state government is also tasked with ensuring that the service providers meet applicable criteria under the Act and rules framed there under. These rules are to be strictly complied with so as to ensure that private participation, though wide, must be of the specialized standards to further the objectives of protecting the victims of domestic violence. The Protection Officer is subject to the control and supervision of the Magistrate84. By envisaging the duties of protection officer, the Act goes a way forward in contemplating the protection and rehabilitation of victims by providing them with shelter homes and makes it necessary for the shelter home to protect the identity of the victim if she so desires85.

Any women whom has been the victim of domestic violence may initiate proceedings before a Magistrate, or such proceedings may be initiated by the Protection Officer86 who may be informed of such domestic violence by any person who has reason to believe that it has occurred87. This provision makes it crystal clear that a woman victim need not necessarily set the proceedings in motion and that the locus standi of the person giving information as to the instance of domestic violence happening/happened is not restricted in any sense. Any bonafide person acting in good faith can inform the happenings to the Protection Officer or the service provider as the case may be. Section 4 therefore creates a social responsibility on members of the community at large who have knowledge of an impending or already

section 10: Provided that shelter home shall not refuse shelter to an aggrieved person under the Act, for her not having lodged a domestic incident report, prior to the making of request for shelter in the shelter home.

83Id., R.16 (3) If the aggrieved person so desires, the shelter home shall not disclose the identity of the aggrieved person in the shelter home or communicate the same to the person complained against.
84Supra note 19S.9(2)
85The Protection of Women from Domestic Violence Rules, 2006 r. 16
86Supra n.19 s.12(1); Milan kumar Singh v. State of Uttar Pradesh 2007 Cri.L.J. 4742
87Id., s.4(1)
committed act of domestic violence, to come forward to file complaint on behalf of the victim, this implies that even an individual has an obligation to react against violence.

On the receipt of such complaint the Protection Officer shall prepare a Domestic incident report which resembles the First Information Report under the Criminal proceeding sand shall be forwarded to the police officer of the concerned area and the service providers in such area and a copy of it shall be sent to the Magistrate taking cognizance of the matter. The Act makes it obligatory for the Protection Officer, Service Provider, Magistrate, or Police Officer concerned to make the victim aware of the services and relief available to her under the Act. Most important of all, the protection officer can be penalized for failing/refusing to discharge his/her duty provided that prior sanction is obtained for the purpose. The Act also provides for the medical examination of the victim, the report of which will be forwarded by the protection officer to the Magistrate and police officer having jurisdiction. The Act focuses on the speedy remedy for the victim and ensures a violence free environment for her in the domestic space where she is supposed to move about. In addition, Magistrates who are to hear cases under the Act are empowered to appoint counselors who are to assist the petitioner and report to the Magistrate’s court.

Role of NGOs

This new law has effectively recognized the role of voluntary organizations in addressing the issue of domestic violence and enables NGOs

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88 *Id.,* s.5 vests the responsibility upon the Protection officer, Service provider, Police officer, or Magistrate to disclose to the victim as to her right to make an application for obtaining reliefs enumerated under s.17 of the Act; as to the availability of services of service providers; the availability of protection officers; right to free legal aid; right to file a complaint under s.498A of Indian Penal Code 1860.
89 It invites a penalty of Rs.20,000/- and/or a prison term of upto one year for failing to do their job.
90 *Supra* n. 19 s.9(g)
91 *Id.,* s.14(1)
working for women’s rights to register as service providers under the Act. The Act is a unique experiment in Indian legislative history as it creates an interface between the Government and the NGO sector and utilizes the experience and resources of both to provide effective machinery for its implementation92.

The protection officers and members of the service providers are deemed to be public servants and have all the rights, benefits and duties that accrue with such a status93. Enshrining their services in law grants their actions important legitimacy; according them the status of public servants protects them from frivolous persecution. The Act envisages to make it mandatory for the Magistrate to fix the date for hearing the matter within a period of three days94 from the date on which an application is presented by the victim or by a protection officer or any other person on her behalf95 and makes it necessary to dispose of the application within a period of sixty days from the date of first hearing96. The Act takes steps protect the identity and privacy of the victims by providing for the proceedings before the Magistrate to be carried on in camera at his discretion or at the request of either party97. The Act also provides that Magistrates may appoint Welfare Experts98, preferably woman who will assist them in the discharge of their functions99 and may direct the victim to undergo counseling either jointly or singly100.

Under the Act, government organizations have the role of ensuring effective co-ordination between the services provided by concerned ministries and departments dealing with law, home affairs and including law and order,

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93Supra n. 19 S.30.Ie. protection from suits, prosecutions and other legal proceedings for acts done in good faith, etc.
96Id., s.12(5).
97Id., s.16.
98Id., s.15.
99Id., s.15.
100Id., s.14.
health and human resources to address the issues of domestic violence, giving wide publicity to the provisions of the Act and for providing periodic sensitization and awareness training to Central Government and State Government officers on issues addressed by the Act\textsuperscript{101}.

The Act is an improvement over the earlier/prevailing legal mechanism as far as the role of the law-enforcing agencies is concerned. The success of any law is dependent to a large extent upon how effectively the law-enforcing agencies play their role. Earlier the enforcement of law was largely the responsibility of ‘police’ that itself never accepted domestic violence as a crime; rather it always perceived such violence as a part and parcel of Indian culture. But this Act creates two new offices for the purpose of implementing the law, one is Protection Officers and the second is Service Providers.

Despite the lofty aspirations envisaged under the Act there exist the ground realities in India. Criticisms has pooled in enquiring about the resources and capacity of NGOs to provide such wide range of effective medical and shelter facilities. The Government-run shelter homes and medical facilities remain as dens of corruption. There is no provision envisaged under the Act to reimburse the NGOs or budgetary allocation of finance to pay for the expenses incurred for the services offered. There are loopholes by which anti-social elements will manage to get it registered as service providers much faster than the genuine NGOs.

The successful functioning of the Act depends, almost completely on the functioning of protection officer in whom tremendous responsibility is placed which would eventually make the functioning of the machinery under the Act more time consuming and more cumbersome. The qualifications prescribed for a Protection Officer is too vague\textsuperscript{102}. Preference given to women candidates is appreciable. Any member of government or non-governmental

\textsuperscript{101}Id., s.11.\textsuperscript{102}Id., s.3.
organization having three years’ experience in asocial sector is prescribed which in turn projects the fact that he/she need not be neither a trained personnel nor a judicial officer. This leaves scope for ineffectiveness and room for abuse of the machinery in case a protection officer either neglects or his/her responsibility or misuses it. Unless an exclusive body of officers is created, manned preferably by the law, social welfare and other related departments, for the purposes of discharging the functions created therein, any attempt to heap additional responsibilities on existing officers would stifle the very essence of this Act and ensure its failure. The testimony of the District Probationary officer of district of Kozhikode, Kerala who is designated as Protection Officer for the concerned district has brought out the problem of additionally burdening their system, which in turn indicates the failure of effective implementation of the Act103.

The Act does not provide for any penalty to be imposed or prosecution to be launched against a service provider for filing false complaints under the Act. Such unfettered freedom and rights are bad in law and there are chances of abuse or misuse by the service providers for purposes other than those prescribed for them to be performed under the Act.

The concept of ‘any other person’ making application to Magistrate under the Act104 is very vaguely termed. There is no reference to any relationship between the ‘aggrieved person’ and such ‘any other person’ as a condition precedent to enable such ‘any other person’ to file a complaint on behalf of the aggrieved person. No specifications as to the interest of such ‘any other person’ have been included under the Act and it clearly gives room for abuse of the provisions in the Act.

103 This is in reference to a Seminar related to Domestic Violence Act, 2005 held at Government Law College, Kozhikode, Kerala in the year 2012 attended by the researcher.

104 Supra n. 19 s.12(1).
The concept of counseling envisaged in the Act is necessary in a legislation of this nature. As per the corresponding rules of the Act\textsuperscript{105}, only disqualifications of a counselor is provided and it leaves room for widest chance of entry of counselors who are not at all sensitized towards the issue of domestic violence. During the course of counseling the respondent shall not be allowed to plead any counter justification for the violence inflicted\textsuperscript{106} is an applaudable clause which improves the scope of counseling envisaged under the Act. But the training that is necessary for the mediators in this issue, their awareness and sensitivity to the problem, their attitude etc. plays a very leading role in reaching settlements. In a society where the culture is predominantly patriarchal and age old dogmas exist and are deep seated, it is a highly debatable issue as to the effectiveness in counseling and the fruits intended to be reaped. There exists the widest chance of a woman victim surrendering herself to the demands and interests dictated by the male victim which is happening in the Family Courts that are already in existence. Also it is very unclear as to what force a settlement reached during counseling sessions or as to any undertaking signed by the accused to refrain from domestic violence would have and what consequences a breach if such an undertaking might entail. However it is advisable to conduct counseling if required before the matter reaches the court. The problem of domestic violence is very much a social problem and it has to be viewed in that perspective.

Finally it is also ambiguous as to whether the duties imposed on the Central Government are mandatory or directory in nature and if they are mandatory, what liability would be incurred by their breach. Thus although a commendable attempt has been made to put in place a speedy and effective mechanism aimed towards protecting the victim as much as possible, there exist certain ambiguities in the provisions of the Act that might impede its successful implementation.

\textsuperscript{105} Id., s.13.
\textsuperscript{106} Id., s.14(5).
6.4.7 The Reliefs Provided under the Act: Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders

The Act provides a large number of avenues for an abused woman to get relief. The next aspect of the Act that needs to be analyzed is the relief it seeks to provide to the woman victim. A broad overview of the structured reliefs under the Act suggests that they are not punitive in nature. They are restorative in nature providing for protection of a woman victim from any further abuse or compensating her for the abuse already suffered and additionally restoring stability and harmony in the family unit. Applicability and establishment of tortious liability in the cases relating to domestic violence is one of the significant aspects of the Act. It provides new civil remedies for the victims of domestic violence. This law recognizes new set of rights and obligations in the nature of torts remedy, to secure women in their own families. The main thrust of the law is to provide monetary assistance in the shape of damages, compensation, maintenance, exemplary cost and penalties. In the case of domestic violence, tortious liability arises with due intention. Some conditions are required for intention which are totally employed by domestic violence, conditions are: motive, malice, recklessness.

The Act is not exhaustive and is only complimentary in nature as it supplements the existing legislations and the reliefs structured under the Act and it is meant to act as only in addition to and not in derogation to that provided under the other enactments.107 The relief available under the Act may be sought in any other legal proceedings before a civil court, a family court, or a criminal court irrespective of whether such proceedings were initiated before or after the commencement of the Act.108 The law complements existing

107 Id., s.36.
108 Id., s.26(1) There is a single window clearance under this law in supporting women’s access to justice. S.26 lays down that civil relief can be claimed in any pending proceeding, which means if there is a divorce proceeding pending; if there is a partition suit pending; if there is a
matrimonial and criminal laws on domestic violence, so that women have a wider option in legal provisions that can be applied. They would exercise this option by assessing as to which law would most effectively address their specific situation and need. The Act may also be applied retrospectively and empowers the Magistrate to take cognizance of any act of domestic violence alleged to have been committed even prior to the commencement of the Act109.

The different modes of relief envisaged under the Act are: Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders. Each of such orders may be passed by the Magistrate while disposing of the application, depending on the reliefs sought for by the aggrieved person and taking into account the necessities of the victim at that point of time.

**Protection Order**

The Magistrate after giving the aggrieved person and the respondent an opportunity of being heard and on *prima facie* satisfied that domestic violence has taken place or is likely to take place, may pass Protection Order in favour of the aggrieved person110. It may contain an order prohibiting the respondent from committing any act of domestic violence or aiding or abetting therein, entering the place of employment of the aggrieved person or if the person aggrieved is a child its school, or any other place frequented by the aggrieved person or attempting to communicate in any form whatsoever with the aggrieved person without the leave of the Magistrate, alienating any assets, operating bank lockers or bank accounts belonging to both the parties jointly or to the respondent singly, including her stridhan or any other property held jointly or separately by them, causing violence to the dependents, other relatives or any person giving the aggrieved person assistance from domestic custody application pending; if there is a 498A application pending, an application under this law can be made for a protection order or for an injunction restraining dispossession

109 *Id.*, s.26(1).

110 *Id.*, s.18 of the Act.
violence or committing any other act as specified in the Protection Order\textsuperscript{111}. The Protection Orders would be in operation till the aggrieved person applies for a discharge (removal of the order).\textsuperscript{112} The court is duty-bound to study the application and ensure that there is a change in circumstances that warrants the discharge of the Protection Order\textsuperscript{113}, and the aggrieved person has not been subjected to any sort of coercion, before issuing the necessary orders.

These Protection Orders, are in the nature of restraining orders restraining the respondent from indulging in all these activities mentioned and it can only be vacated on an application by the victim\textsuperscript{114}. They are very much in consonance with the non-molestation orders which may be obtained in the U.K. The relief provided by the laws of Malaysia\textsuperscript{115}, also provide for an additional discretionary power of arrest in cases where the court is satisfied that there is likelihood of physical injury being inflicted on the victim by the aggressor. Being in the nature of civil remedy, the relief provided under the Act is much milder when compared to stringent provisions under Section 498A. The Protection Order contemplated under the Act serves the purpose of stopping violence order immediately and is likely to be a significant step towards reducing its repetitive invocation and indiscriminate abuse.

**Residence order**

Another type of relief envisaged under the Act is the Residence orders\textsuperscript{116}. In the Indian patriarchal society, most ownership and lease agreements are made in the names of male members of the family. Hence, women who reside in such

\textsuperscript{111}Id., s.18(a) to (g) of the Act.
\textsuperscript{112}Id., s. 25(1) of the Act.
\textsuperscript{113}Id., s. 25(2) of the Act.
\textsuperscript{114}Id., s.25(1) of the Act.
\textsuperscript{115}s.7(1) Where the court is satisfied that the person against whom a protection order or interim protection order is made is likely to cause actual physical injury to the protected person or persons, the court may attach a power of arrest to such protection order or interim protection order, as the case may be. Available from APWLD 2003: apwld@apwld.org. Last visited on 23\textsuperscript{rd} July,2013.
\textsuperscript{116}Supra n. 19 s.19.
premises, including wives, mothers, daughters and sisters, face the danger of being dispossessed from the same and forced to destitution. Many women are forced to tolerate domestic violence for fear of being on the streets, especially when they do not have support from their parents or government support for shelter. In situations where such women seek the court’s intervention in a situation of domestic violence, women also fear that the respondent would dispossess them from the premises by way of a reprisal/revenge.

Taking into account the vulnerability of a woman victim who faces violence in a domestic relationship she is ensured the right to reside in a shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law\(^\text{117}\). To exercise this right, the Act provides for a residence order that may be obtained by the victim either restraining the respondent from dispossessing, or disturbing the possession of the aggrieved person from the shared household irrespective of whether or not he/she has a legal or equitable interest in it, directing the respondent to remove himself from the shared household, restraining the respondent or his relatives from entering into that portion of the shared household in which victim resides, restraining the respondent from alienating or disposing of or encumbering the shared household, restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate, or directing the respondent to secure alternate accommodation for the aggrieved person of the same level as enjoyed by her in the shared household or to pay rent for the same\(^\text{118}\). However the Act clearly states that no residence order against a woman may be obtained that directs her to remove herself from the shared household\(^\text{119}\). Magistrate is also empowered under the Act to impose any conditions or pass any direction that is necessary to protect the victim or any

\(^{\text{117}}\text{Id., s.17 (1) and (2).}\)
\(^{\text{118}}\text{Id., ss.19 (a) to (f).}\)
\(^{\text{119}}\text{Id., s.19(1), proviso.}\)
child of hers\textsuperscript{120} to require a bond to be executed from the respondent for the prevention of domestic violence\textsuperscript{121}, to impose any obligations relating to the discharge of rent and other payments\textsuperscript{122}; to direct the respondent to return any stridhan, property, or valuable security to which the victim is entitled\textsuperscript{123}; and to empower any officer in charge of the nearest police station or within the jurisdiction of the Magistrate to enable the implementation of such orders\textsuperscript{124}.

It is to be remembered in this context, that the right to residence is different from property rights that include right to own and dispose of a property. This law provides a right to the woman against being illegally dispossessed. She may be dispossessed through the procedure set out in law. The right to residence does not entitle the woman with the right of ownership over the premises.\textsuperscript{125} These provisions of residence orders are much in tune with the relief provided under Malaysian law\textsuperscript{126} and the occupation orders\textsuperscript{127} available under the Family Law Act, 1996 of Britain, which goes a step further and recognizes the right of both spouses to occupy the matrimonial home\textsuperscript{128}.

\textbf{Monetary Reliefs}

The Act envisages Monetary reliefs where by the magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence including any maintenance, loss of earnings, medical expenses, or any loss caused due to destruction, damage or removal of

\begin{footnotesize}
\textsuperscript{120}Id., s.19(2).
\textsuperscript{121}Id., s.19(3).
\textsuperscript{122}Id., s.19(6).
\textsuperscript{123}Id., s.19(8).
\textsuperscript{124}Id., ss.19(5), 19(7).
\textsuperscript{125}For more details, see Address of Chandru J. of the High Court of Chennai, at ‘Staying Alive: National Conference Commemorating 1 Year of the Protection of Women from Domestic Violence Act, 2005’, New Delhi, 26-27 October 2007.
\textsuperscript{126}Domestic Violence Act, 1994 s.6.
\textsuperscript{127}Family Law Act, 1996 s.33.
\textsuperscript{128}Supra n. 19, s.30.
\end{footnotesize}
any property from the control of the victim\textsuperscript{129}, which is consistent with the standard of living she is accustomed to.\textsuperscript{130} In case of breach of such order by the respondent, the Magistrate may direct the employer or a debtor of the aggressor to directly pay the victim or to deposit the same with the court a portion of the wages or salary or debt due to or accrued to the credit of aggressor which may be adjusted towards the monetary relief payable by him\textsuperscript{131}. This type of payment made to the victim out of the debts accrued from the aggressor and adjusting the same from it relates the Garnishee proceedings under the Code of Civil Procedure in India\textsuperscript{132}. No specific criteria has been laid down or fixed by judicial interpretations as to the amount of compensation to be arrived at. So it can very well be deciphered that it depends on each case and its circumstances.

The laws of Malaysia provide similar relief that includes compensation to the victim for all necessary and reasonable expenses incurred in separating from the aggressor, such as lodging expenses required in setting up a separate household, which may include housing loan payments or rental payments in respect of the shared residence or alternative residence\textsuperscript{133}. The Act in a way makes provision for rapid temporary reliefs for the woman pending disposal of the case.

**Custody Orders**

The Act provides for *Custody orders* where by the magistrate may at any stage, grant temporary custody of any child or children to the victim or any person making an application on her behalf and specify the visitation rights of the aggressor, which may be refused if the Magistrate is of the opinion that it

\textsuperscript{129}Id., s.20(1).
\textsuperscript{130}Id., s.20(2) Suresh Khullar v. Vijay Kumar Khullar A.I.R. 2008 Delhi I.
\textsuperscript{131}Id., s.20(6).
\textsuperscript{132}Civil Procedure Code, 1908, o.21, r.46.
\textsuperscript{133}Domestic Violence Act, 1994, s.10.
will be harmful to the child\textsuperscript{134}. Under this law, the aggrieved person cannot file an application for temporary custody alone; such an application has to be coupled with a protection order since the main aim of this law is to prevent domestic violence.\textsuperscript{135} Here by envisaging such reliefs to be ordered the ‘best interest of the child’ principle is revisited. The right of the child to violence free environment thereby ensuring developmental growth of children in a conducive atmosphere is emphasized. This relief is temporary in nature. Permanent custody of children would have to be determined and settled in separate proceedings in the Family Court or other appropriate court. Custody is distinct and separate from guardianship as custody refers to the child’s physical placement, while guardianship refers to all aspects of access, custody and care of the child and his / her property.

**Compensation orders**

The Act also provides for *Compensation orders* that may be additionally granted by the Magistrate to the victim as compensation for any injury, including mental torture and emotional distress, which may have been caused by the aggressor\textsuperscript{136}. The law makes provision for positive entitlements through an interim monetary relief order related to a) maintenance for the victim or her children, b) compensation for physical injury including medical expenses, c) compensation for mental torture/emotional distress, d) compensation for loss of earning, e) compensation for loss due to destruction, damage, removal of any property from her possession or control. Thus, the Act for the first time goes beyond the framework of mere ‘punishment’ to the offenders and tries rather to protect women from violence at home.

The orders passed by the Magistrate may be of interim, final and ex-parte in nature. In addition to the primary relief and remedies granted by the Act, it also confers on the Magistrate the power to grant interim order/relief

\textsuperscript{134}Supra n. 19 S.21.

\textsuperscript{135}Id., s. 21 deals with orders for temporary custody “at the time of granting protection orders”.

\textsuperscript{136}Id., s.22.
whenever he deems just, in any proceedings before him under the Act. Since the final order in a case may take a long time, the court can pass an interim order (when the proceedings are pending) to prevent further violence and provide immediate reliefs to the affected woman, including the right of residence.

In cases where the Magistrate, on the basis of an affidavit filed by the aggrieved, is satisfied that the application before him, prima facie, discloses that the respondent is committing or has committed an act of domestic violence or that there is likelihood that the respondent may commit an act of domestic violence he may grant an ex-parte order against the respondent. An ex parte order is one that is passed in the absence of the other party to the dispute, and without prior notice to the opposite party. Once a petition is lodged with the court, in the normal course, the court would serve a notice to the other party, so that both sides can be heard before an order is passed. This is in accordance with principles of natural justice. However, the Act makes an exception to this rule under limited circumstances, as it is intended to act swiftly in situations where the aggrieved person reasonably fears danger to her physical or mental well-being. Hence, if the court determines, on the face of the aggrieved person’s application, that the respondent is committing / has committed / likely to commit domestic violence, an ex parte order may be passed.

The Act envisages that an appeal may be preferred within 30 days to the Court of Sessions from any order passed by a Magistrate under the Act.

One of the pivotal purpose of the Act being restoring marital harmony, it provides that if the magistrate, on the receipt of an application from the aggrieved person or the respondent and is satisfied that there is a change in the circumstances requiring alteration, modification, or revocation of any order

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138 Id., s.23(2).
139 Id., s.29.
previously made under this Act, he/she may pass such orders as deemed appropriate.

6.4.8 The Procedures of Implementation: A Mix of Civil Remedies and Criminal Procedure

A socially beneficial legislation is good if it is user-friendly from the point of view of the victims. In a nutshell the procedure to be undergone when an application is made is enunciated as follows; As far as the procedures for obtaining the orders and relief are concerned, an aggrieved person or Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking relief under this Act. A woman herself can approach the Court directly and approaching a Protection Officer is purely optional for the woman and is voluntary. Any person who has reason to believe that such an act of domestic violence has taken place or is likely to take place can inform the Protection Officer.

On receipt of a complaint, the Protection Officer shall make a Domestic Incident Report. A copy of it is to be served upon Service Provider of the area, Police officer within the jurisdiction and the Magistrate. As per the Rules, on an application being moved the Protection Officer shall prepare a “safety plan” which shall include measures to prevent further violence after making an assessment of damages involved. Aggrieved woman should be informed of her rights under the law. A Police Officer, Protection Officer, Service Provider or Magistrate who has received a complaint shall inform her of: her right to make an application for obtaining relief by way of protection order, an order for monetary relief, a custody order, a residence order, or a compensation order, the availability of services of the Protection officers, Service providers, including shelter homes and medical facilities; her right to free legal services under the Legal Services authorities Act, 1987; and her right to file a complaint.

\[141\] Supra n. 19 s.12.
under section 498A of the Indian Penal Code, 1860. The Protection Officer makes a Domestic Incident Report to the Magistrate and forwards copies thereof to the Police Officer in charge. She/he must ensure that the aggrieved person gets all the benefits mentioned herein before.

The Court of Judicial Magistrate of First Class or the Metropolitan Magistrate within the local limits of which the person aggrieved permanently or temporarily resides or carries on business or is employed; or the respondent resides or carries on business or is employed or; the cause of action has arisen shall be the competent court to grant the orders envisaged under the Act and to try the offences arising under it. All the proceedings under the Act relating to application and orders for reliefs and offence of breach of protection order or interim protection order by the aggrieved person shall be governed by the provisions of the Code of Criminal Procedure, 1973.

Once the matter is with the Magistrate he/she shall fix the date of the hearing, which shall not ordinarily be beyond three days from the receipt of the application by the court, and shall endeavor to dispose every application within a period of sixty days from the date of first hearing. The means of serving notice and the effects thereof of non-serving etc are clearly enunciated in the Rules laid down for the purpose. A notice of the date of hearing shall be given by the

142 Id., s.27.
143 Id., s.28.
144 Protection of women from Domestic Violence Rules, 2006 r.12 Means of service of notices.- (1) The notice for appearance in respect of the proceedings under the Act shall contain the names of the person alleged to have committed domestic violence, the nature of domestic violence and such details which may facilitate the identification of person concerned. (2) The service of notices shall be made in the following manner, namely:- (a) The notices in respect of the proceedings under the Act shall be served by the Protection Officer or any other person directed by him to serve the notice, on behalf of the Protection Officer, at the address where the respondent is stated to be ordinarily residing in India by the complainant or aggrieved person or where the respondent is stated to be gainfully employed by the complainant or aggrieved person, as the case may be. (b) The notice shall be delivered to any person in charge of such place at the moment and in case of such delivery not being possible it shall be pasted at a conspicuous place on the premises.
Magistrate to the Protection Officer who shall serve it on the respondent and on any other person as directed by the magistrate within a maximum period of two days. Counseling order can be directed only after passing an order for interim relief. As to the intricate details of appointing a counselor and as to the role to be played by a counsellor is set out in the Rules.

Counseling plays an important role in the Act to alleviate the plight of the victim of domestic violence. The counselor is to work under the supervision of Protection Officer or the Court. The Rules bring out the procedure involved in the counseling envisaged as per the Act. The main

(c) For serving the notices under section 13 or any other provision of the Act, the provisions under Order V of the Civil Procedure Code, 1908 (5 of 1908) or the provisions under Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) as far as practicable may be adopted.
(d) any order passed for such service of notices shall entail the same consequences, as an order passed under Order V of the Civil Procedure Code, 1908 or Chapter VI of the Code of Criminal Procedure, 1973, respectively, depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act and in addition to the procedure prescribed under the Order V or Chapter VI, the court may direct any other steps necessary with a view to expediting the proceedings to adhere to the time limit provided in the Act.

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

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

145 Id., R.13. Appointment of Counselors.- (1) A person from the list of available Counsellors forwarded by the Protection Officer, shall be appointed as a Counsellor, under intimation to the aggrieved person.

(2) The following persons shall not be eligible to be appointed as Counselors in any proceedings, namely:- (i) any person who in interested or connected with the subject matter of the dispute or is related to any one of the parties or to those who represent them unless such objection is waived by all the parties in writing.

(ii) any legal practitioner who has appeared for the respondent in the case or any other suit or proceedings connected therewith.

(3) The Counselors shall as far as possible be women.

146 Id., r.14. Procedure to be followed by Counselors.- (1) The Counselor shall work under the general supervision of the court or the Protection Officer or both.

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

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

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

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

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

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

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

(10) The Counselor shall not be bound by the provisions of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973, and his action shall be guided by the principles of fairness and justice and aimed at finding way to bring an end domestic violence to the satisfaction of the aggrieved person and in making such an effort the Counselor shall give due regard to the wishes and sensibilities of the aggrieved person.

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

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

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

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

(15) In cases, where a settlement cannot be arrived at in the counseling proceedings, the Counselor shall report the failure of such proceedings to the Court and the court shall proceed with the case in accordance with the provisions of the Act.
task of the Counselor as per the Rules is to bring out an effective remedy to the parties concerned and to prevent the violence.

Other options with the Magistrate are direct either of the parties, singly or jointly, to undergo counseling; seek assistance of a person, preferably a woman, engaged in promotion of family welfare, for assisting him/her in discharging his/her functions and conduct proceedings in camera. The aggrieved person in the meantime has the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the house and shall not be evicted. In the interim period of disposal of case, the Magistrate, after giving both parties an opportunity of being heard, and satisfied that domestic violence has taken place, can pass a protection order, or a residence order, or direct the respondent to pay the aggrieved person monetary relief and in addition, can pass compensation orders, custody orders and ex-parte orders.

On receipt of an order from a Court, the protection officer can conduct home visits and can make appropriate enquiries regarding the salary assets, bank accounts and emoluments of the respondent liable to pay maintenance. The Court can also direct the Protection Officer or the police officer in charge of nearest police station to assist the aggrieved person in regaining custody of her children and assist the Court in the enforcement of the orders passed. No order can be passed under the Act directing a woman to remove herself from the shared household. The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of hers. The Magistrate shall ensure that a copy of any such order shall be given free-of-cost

(16) The record of proceedings shall not be deemed to be material on record in the case on the basis of which any inference may be drawn or an order may be passed solely based on it.
(17) The Court shall pass an order s. 25, only after being satisfied that the application for such an order is not vitiated by force, fraud or coercion or any other factor and the reasons for such satisfaction shall be recorded in writing in the order, which may include any undertaking or surety given by the respondent.

147 Supra n, 19, s. 10
to the parties. If the protection order has been breached, it shall be punished with either imprisonment or fine or both as earlier narrated.

The Central and State Government shall take measures to ensure that provisions of this Act are given wide publicity through media; Central and State government officials including Police officers, members of judicial service etc., are given periodic sensitization and awareness trainings on issues addressed by this Act; and also to ensure that there is effective coordination between the services provided by concerned Ministries and Departments dealing with law, home affairs, health and human resources, and that there is a periodic review of the same.

One of the main criticisms raised against the enforcement of the provisions of the Act is that it overburdens the Magistrates court with cases that have already been transferred to Family Court. As per the system existing prior to the enactment of this Act all proceedings of like nature relating to maintenance and other ancillary orders were taken over by the Family Courts which were mainly set up with the intention to settle the familial disputes amicably. Now after this Act has come into force, the cases of maintenance and ancillary orders of custody of child etc. is reverted back to the custody of Magistrates courts which are already overburdened. This in turn leads to delay in disposing of cases.

The whole procedures enumerated in the Act are contemplated to create an atmosphere of synergy between institutions of society, all of which are responsible for preventing violence against women. Whereas there has been a challenge to domestic violence over the years from the civil society, there has been no institutional response to that problem. The Police, performing their role under Section.498 A, are not an institution to challenge domestic violence. There were no institutions charged with liaising between different institutions
charged with the duty to combat domestic violence. Therefore the Act to an extent brings out interplay between different institutions\textsuperscript{148}.

6.4.9 The Consequences of Breaching the Judicial Orders

While a range of civil remedies are provided for under the law, which an aggrieved person may choose according to her best interests, criminal sanctions are intended at providing a greater deterrent effect among the perpetrators. The Act provides that in case a protection order is breached it shall amount to a cognizable and non-bailable offence\textsuperscript{149} and the aggressor shall be punishable with imprisonment, which may extend to one year or with a fine, which may extend to Rs.20,000/- or with both\textsuperscript{150}. Any such breach shall be tried by the Magistrate who passed the order\textsuperscript{151}. The Rules prescribe the manner in which a breach of order is to be handled by the Magistrate or by the Protection Officer as the case may be\textsuperscript{152}. Moreover the Court may conclude that

\textsuperscript{148}Annex 4: prepared by Center for World Solidarity as part of the public Awareness Campaign on the Domestic Violence Act, 2005, p.222.
\textsuperscript{149}Supra n. 19, s.32(1).
\textsuperscript{150}Id., s.31(1).
\textsuperscript{151}Id., s.31(2).
\textsuperscript{152}Protection of women from Domestic Violence Rules, 2006 r.15. Breach of Protection Orders.- (1) An aggrieved person may report a breach of protection order or an interim protection order to the Protection Officer.
(2) Every report referred to in sub-rule (1) shall be in writing by the informant and duly signed by her.
(3) The Protection Officer shall forward a copy of such complaint with a copy of the protection order of which a breach is alleged to have taken place to the concerned Magistrate for appropriate orders.
(4) The Aggrieved person may, if she so desires, make a complaint of breach of protection order or interim protection order directly to the Magistrate or the Police, if she so chooses.
(5) If, at any time after a protection order has been breached, the aggrieved person seeks his assistance, the protection officer shall immediately rescue her by seeking help from the local police station and assist the aggrieved person to lodge a report to the local police authorities in appropriate cases.
(6) When charges are framed under section 31 or in respect of offences under section 498A of the Indian Penal Code, 1860 (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of (7) Any resistance to the enforcement of the orders of the Court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.
such an offence has been committed upon the sole testimony of the aggrieved person. This provision has been severely criticized as it would erode the presumption of innocence and it is even more stringent than the English counterpart under which, if the victim considers that the aggressor has failed to comply with an occupation order or a non-molestation order, he may apply for the issue of a warrant of the arrest against the aggressor. However the relevant judicial authority shall not issue a warrant on an application unless it is substantiated on oath and the relevant judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order. The Act also does not make it clear what the penalty would be, in case there was any breach of a residence order, a custody order, or a compensation order by the respondent.

6.5 Analyzing the Merits of the Act

This is a significant advance of the Act that it shows commitment to the cause of ending violence against women. The objective articulated behind the Act is “to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental

(8) A breach of a protection order or an interim protection order shall immediately be reported to the local police station having territorial jurisdiction and shall be dealt with as a cognizable offence as provided under sections 31 and 32.

(9) While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the court, which may include-

(a) an order restraining the accused from threatening to commit or committing an act of domestic violence;
(b) an order preventing the accused from harassing, telephoning or making any contact with the aggrieved person;
(c) an order directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit;
(d) an order prohibiting the possession or use of firearm or any other dangerous weapon;
(e) an order prohibiting the consumption of alcohol or other drugs;
(f) any other order required for protection, safety and adequate relief to the aggrieved person.

153 Supra n. 19, s.32(2).
154 The Family Law Act, 1996 s.47.
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“thereto”. The stress on more effective protection brings within its gamut the need for the country to resort to more stringent measures to combat the problem of domestic violence in India. These words in the Act acknowledges the existence of existing old judicial remedies available in the context of Criminal law like the manifestations like assault, grievous hurt etc. in the India penal Code and the specific remedies provided under section 498A of the same Code. The Act intends to itself to prove itself more serious about the issue and to tackle the same. The protection of women from domestic violence is not the sole goal but a holistic view is adopted in the Preamble to show the eagerness in promoting the rights guaranteed under the Constitution to the women who are victims. The intention behind is not to take cognizance of the criminal act of domestic violence but overall promotion of rights guaranteed to the women in India. This objective legitimately takes care of the different types of acts recognized as domestic violence in the Act\textsuperscript{155}. It takes into account the multifaceted violations of human rights of women victims.

The Act provides a temporary or urgent relief from a violent atmosphere at home. It gives a broad definition of domestic violence as including physical, sexual, verbal, emotional and economic abuse. It addressed domestic violence against all women, including wives, mothers, daughters, sisters, widows, second wives or any women in the home. The law could be used against any male person in the home, including fathers, brothers, sons, husbands, or any relative of the woman. The Act gave women the right to reside in the house, to get protection orders, and to maintenance, custody, compensation, and protection from violence. It provided women with several mechanisms to access the law, including the appointment of Judges, Protection Officers, Service Providers, and Police Officers. It also established the right to a speedy trial and disposal of cases within 60 days.

\textsuperscript{155} Physical, mental or emotional, verbal, sexual and economic abuse.
The very inclusion of a criteria as to the ridicule resulting if a woman does not bear a male child, go on to reinforce the culturally accepted normative pattern of son preference in Indian society thereby emphasizing the patriarchal notions and cultural background of our country. All most all the descriptions that goes on to describe emotional and verbal abuse suffered by a woman victim is indicative and reflective of patriarchal Indian culture.

Recognizing that women need state mandated infrastructure to access the law, the institution of Protection Officers is created to record all reported instances of domestic violence, to enable the woman to access the courts by assisting in drafting applications and to assist the courts in collecting evidence and in enforcing the orders. He is the first port of call to address the concerns of women who will be stigmatized to litigating against one’s own family, difficulties in getting the orders enforced etc. He/she is to assist the victim in accessing the court and other support services (such as legal aid, medical aid, shelter homes etc.) and second to assist the court during the course of the proceedings and in the enforcement of orders. It’s a multiple option law in that a woman can access it herself or else can approach the following to enable her access it: Protection Officer, police, lawyer, Service Providers or can even go directly to the magistrate. A multiple channel of communication has been set up under the law and it is upto the woman to choose which is more suitable to

156 Protection of Women from Domestic Violence Rules, 2006, gives the details of the Domestic Incident Report that needs to be filled up by, or on behalf of, the aggrieved woman. This report makes a list of the categories of verbal and emotional abuse that a woman may face:1. Accusation/aspersion on your character/conduct, and so on. 2. Insult for not bringing dowry. 3. Insult for not having a male child. 4. Demeaning, humiliating remarks/statement. 5. Ridicule. 6. Name calling. 7. Forcing you not to attend school/college or any other educational institution. 8. Preventing you from taking up a job. 9. Preventing you from leaving the house. 10. Preventing you from meeting any particular person. 11. Forcing you to get married again against your will. 12. Preventing you from marrying a person of your choice. 13. Forcing you to marry a person of his/their choice.

157 Before the Act was passed the options open to the women suffering domestic violence were unrealistic. It was difficult to imagine any marriage surviving criminal trial and imprisonment. It was a choice between tolerating the violence or ending the marriage. Now the reliefs under the Act stand in between the extreme measures relating to crime and divorce and help in preserving the matrimonial home to the extent possible.
The duty to prepare a safety plan is an important responsibility vested with the Protection Officer, under Rule 8(1)(iv). The safety plan is a document prepared for the aggrieved woman that identifies ways in which the aggrieved party can protect herself during a violent incident and reduce the risk of serious harm. It must be based on the types of abuses faced by her and the remedies she has asked for in court. It is not an alternative, but in addition to the remedies she seeks through the court. The rules under the Act provide a format for a safety plan in Form V. The provision on safety plans is an example of how the Act works at the preventive level.

Counseling envisaged in the Act, can take place at the pre-litigative and post-litigative stages of proceedings. At the pre-litigative stage, counseling would aim at restoring the aggrieved woman’s self-esteem, dignity, provide psychological support to her and facilitate her to decide whether or not to pursue a legal recourse. At the litigative stage, counseling would be aimed at getting the perpetrator to give an undertaking not to inflict further domestic violence. This form of counseling is important in re-establishing “basic trust and a sense of safety” for the woman facing domestic violence.  

The overall objective of counseling as envisaged under this law is to prevent any further acts of violence from being perpetrated. In cases where joint counseling is ordered, the proceedings take on the complexion of a mediation process. However, Rule 14 specifies that settlements are to be attempted only at the behest of the aggrieved person.

One of the most important remedies visualized under this law is to stop violence, particularly violence of emergency nature, and therefore we have the

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'stop violence order' in the form of protection orders. The intention of course, is to give a woman facing domestic violence a space free from violence where she can evaluate her options and choose her future course of action\textsuperscript{160}. It is meant to be an immediate and emergency law. The Act works in addition to other laws and does not make the existing pre 2005 legal regime redundant.

There is no period of limitation stated in the Act within which the aggrieved party should approach the court. This is because domestic violence is to be viewed like a continuing offence rather than a “one time offence”\textsuperscript{161}. The Supreme Court has repeatedly held that in the absence of an express provision on period of limitation in the statute concerned, a beneficial legislation has no period of limitation.\textsuperscript{162}

The Act is laudable for the recognition of different types of abuses that are likely to be perpetrated to woman in her natal and matrimonial family. The courts have on various occasions interpreted a wife’s right to reside as being part of her right to maintenance. But still to provide for this right through a legislative framework is a laudable leap in ensuring the very right to existence and survival in the society. The right to reside contemplated under the Act is irrespective of the pattern of ownership and is over the space where the woman and the perpetrator of violence have lived together in a domestic relationship. Through judicial interpretations several significant progressive changes are coming forth in the status of victims of domestic violence.

This new law put real power in women's hands in a court system which ought to be committed to using the laws effectively. They provide that women

\textsuperscript{160}In contrast to existing criminal laws, (in particular S.498A) which is dependent on the state, the police and prosecution for enforcement, any civil law is victim driven. It can be put into motion by the aggrieved by direct access to court for relief. A civil law is a far more democratic form of access to justice.

\textsuperscript{161} Supra Ch.4.

\textsuperscript{162} Some examples of Supreme Court judgments which have stated this principle are as follows: Bhagirath Kanoria v. State of Madhya Pradesh, (1984) 2 S.C.C. 222; Mithu Devi v. Siya Chaudhury,MANU/BH/1083/1974 (Patna High Court) and Golla Seetharamalu v. GollaRathanamma,MANU/AP/0096/1990(AP HC).
can go back to court to ask the judge to find the man in contempt of court if he violates such an order. Upon finding him in contempt, the judge can fine the batterer or send him to jail to convince him there are real penalties for disobeying the law. The difference between this and a criminal law remedy is that the woman does not have to convince often recalcitrant police or prosecutors to take action; she has the right to go to court on her own behalf without the officials taking any action at all. In addition, once she has the order she can threaten the batterer, in effect, not to harass her or that she is potent to take steps to have the respondent thrown in jail.

The Act plays a stellar role in protection of women’s rights in the household and in guarding them from domestic violence. In the very first instance, a recognition of domestic violence as something unacceptable, where it has become yet another social practice, is necessary and indeed, commendable in a patriarchal society. Having recognised the rights of women and the violation of these rights, the next step taken is providing innovative and efficacious remedies to enforce the same. The conceptualization of the Act thus far is admirable.

At a purely theoretical level, the Act has been a colossal leap for the women of India because it has, for the first time, recognized the fact that Indian women are not only the victims of individual acts of physical and sexual abuse, as it is prevalent in many societies, but also victims of a well-established oppressive social hierarchy that constantly and systematically stunts their economic growth and perpetuates their dependence on the male members of their family and has attempted to remedy the situation.
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PWDVA, 2005 – A Working Model

Diagram showing the disposal of matters under the Protection of Women from Domestic Violence Act, 2005, with various steps, decisions, and outcomes.

Legend:
- P.O. = Protection Officer
- S.P. = Service Provider
- DIR = Domestic Incident Report
- JMFC = Judicial Magistrate First Class
- N.M. = Metropolitan Magistrate
6.6 The Act- A Critical Analysis

The Act can never be supported under Article 15(1) of the Constitution of India which talks about the policy of non-discrimination based on sex or any other kind. It doesn’t discuss about the instances of domestic violence faced by men. The Act can be defended as a social welfare legislation. The Act can be only defended under the case of Article 15(3) which guarantees protective discrimination in favour of women and children. Section 3(c) of the Act defines “aggrieved person” as any person who is or has been in domestic relationship, and thus includes wives, ex-wives, live-in partners and even former girlfriends and also any person related to her. According to the provisions of the Act all the above women have a right to reside in the house of the accused. Such a provision of the Act may give rise to impractical circumstances within the family- living with a man’s wife, ex-wife/wives, former girlfriends and their relatives, all at the same time. Such a situation will lead to a chaotic unwarranted situation in the Indian cultural milieu.

The issue of counseling mentioned in section 14 of the Act is a very contentious issue. It in turn brings in the alternate dispute resolution mechanism into motion without any sensitivity to the issue. This section itself states that the Magistrates may at any stage of the proceeding direct the respondent or the aggrieved person either to singly or jointly undergo counseling with a service provider who possess qualifications and experience in counseling. The practice reveals that counseling resorted to in family courts are further pressurization of women victims to adjust themselves to the hierarchical set up of the society. This could be problematic provision given that counseling is used as a tool for women to accept violent situation and get back to the marriage. Counseling ought to be for the abuser and not the victim. One must understand, to begin with, that the women and abusers are in an unequal situation and no joint counseling is possible in that situation. It can lead to further disempowerment of the unequal party.
The right of the woman to reside in the shared household was declared by law to exist as a protected right for the first time in Indian legal history. The Act has acknowledged the dangers of a patriarchal set up of matrimonial home and the consequent dangers to women victims associated with it. The fact of providing measures like providing shared residence at the cost of the husband to the women concerned is only a way of making a man moral by policing or legislation. The relationships mentioned under the Act are too sensitive and weak that it cannot withstand any coercion behind it. Law can never make a person behave morally in the society. The sanctions affixed behind the laws in the society have a deterrent effect but never has it qualified to be a preventive or restitutive justice to the victim. A victim undergoing the trauma of domestic violence is to be given a restitutive remedy but the very same remedy in its true sense is denied to the victim herein by the application of the Act.

The right to reside in a shared household and related residence order has provided a less extreme remedy than was previously available to a woman who had to suffer domestic violence and were later thrown away of their matrimonial homes. Domestic violence pertains to the violence inflicted by the family of the victim, in such a case it appears to be highly impractical to implement such residence orders and protection orders as between them. Such order between them may prove to be ineffective or worse or counterproductive, thereby further straining the family relationships in the family. Taking into account the fact that in India concepts like that of matrimonial property, shared property or concept of trust as between the spouses etc. that exist in English legal regime is alien. To implement the concept of shared household has led to many apprehensions.

The provision for a residence order is capable of being gravely misused as a sort of injunction to prevent the alienation of property ostensibly filed as a case of domestic violence. Since the definition of domestic violence is so widely worded, any emotional or verbal abuse that might have been condoned for years might be misused as leverage in what is essentially a civil dispute.
Since the definition of domestic relationship explicitly includes past relationships it is made possible for a divorced wife to be granted a continuing right to reside in the shared household, which would not have been available to her in the earlier legal set up. Moreover, orders seeking monetary compensation by one party without corresponding right to the other party based on ordinary wear and tear of family life are likely to come up on frivolous grounds. This trend is likely to disturb the equilibrium in the marital ties. Apart from the concept of ‘mental cruelty’ which has evolved over many centuries that exist in Family law there is no other test evolved to find out the extent of emotional and verbal abuse within the ‘domestic relationships’ can go a long way forward to ensure the potential misuse of the provisions under the Act.

The Act is civil in nature but criminal in procedure and offence of penalty for breach of protection order by respondent under this Act is made cognisable and non-bailable. No where the Act speak about the crime of domestic violence as non-bailable. Only when the order passed by the court is breached that offence of having committed the breach of order is made non-bailable. This in turn brings in the weakness of the Act through back door. On one side the domestic violence is acknowledged as a Human Rights issue but at the same time only emergency orders can be realized by resorting to this Act. This Act does not provide for a long term solution to the problem. The acknowledgement of the problem and its seriousness as affecting the human rights of women concerned thus becomes only a farce thereby creating a rosy impression that India has ratified and implemented legislations in consonance with the international guidelines and norms.

Another criticism raised is that some of the offences mentioned in the Act cannot be proved. To furnish evidences regarding any ‘sexual violence’ being committed by a husband, be it mental or emotional abuse perpetrated by the respondent against a women in close relationship as mentioned in the Act is difficult to be proved before a court of law. What remains outside the ambit of the law is the sensitivity. The continuous nature of the offence makes
domestic violence intolerable to women. It cannot be expected of a woman to take note of and keep an account of it with dates, all the displeasures and illegalities meted out to her by the respondents at any point of her life with them as per the Act. This itself creates suspicion as to the genuineness of a victim’s complaint. The legal system becomes an extension of the patriarchal family structure, emerging as the moral guardian, rather than a neutral arbiter, although boasting to be the latter.

The new Act seeks to cover the female live-in partner also and thus it gives, though indirectly, legitimacy to the practice of live together. Giving legitimacy to the demands made by live-in-partners akin to the legitimacy of a legal wife may create problems in the society and family being a specific unit in it. The practice of live together does not in itself reflect ‘women’s liberation’ in the Indian context though the fact is that it exists based on the reliable sources. It may rather promote skepticism in the mind of the people of our country that a culture of free sex is being propagated and may make the position of women more vulnerable in a society. The case of famous actress Khusboo163 is an example to justify the skepticism that may arise from different quarters of the society

The negative impact of the Act is that the Act is counterproductive and contradictory to the cultural ethos and norms of the Indian family and society and hence the Act is conceptually flawed. Cultural influences affect not only the content of the law, but also how the law is enforced. If members of society do not respect or understand the law-including those individuals responsible for the law’s enforcement, the objectives set forth by the law will not be achieved. The sensitivities implicit in the ideology of marriage and family as an integrated unit of the society and the provisions of the Act especially in the context of the unique and peculiar form that India’s social structure has acquired over the years, is making its implementation complicated and its

success uncertain. The broad premise in which the Act is envisaged and understood clearly indicates to the patriarchal and hegemonic relationships within family relationships in India. The Act definitely speaks out for itself the protectionist paradigm of the state in any women-related legislation appears to be the ideology in this particular Act also. The Act creates a departure when it moves out of the framework of marriage and looks at domestic relationships which bring within its ambit the specific cultural protest.

The introduction of concepts of individual autonomy, freedom and integrity when induced into a woman’s status and personality typical to India, is likely to damage the social fabric of the society thereby leading to disintegration of family ties. The social fabric of India which is predominantly governed by patriarchal joint family system furthering the subjugation of Indian women is the major challenge to the implementation of this Act in India. Violence is a highly stigmatized issue as society often blames women for the violence that they experience. In applying the Act, there exists a dichotomy as to the existing social spectrum the values cherished and the introduction of new concepts of autonomy and dignity rights of woman. Viewed in this perspective, the Act appears to be a western duplication. These social interpretations add to the difficulties encountered in implementing the Act effectively.

The Universal Declaration of Human Rights has proclaimed that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.” However, the Act presumes that the accused man is guilty until proven innocent, thus violating the presumption of innocence and the principles of fair trial guaranteed under Articles 20 and 21 of the Constitution of India. There can be arrest on mere compliant by the women and there is no investigation which is conducted prior to that and they do not foresee the after effects of such action like arresting and putting a person in jail, even before trial has begun, amounts to prejudging and punishing the accused without due process.
This law does not replace existing criminal, family and tort laws. Instead it works in addition to and complements other laws. The Act recognizes the need for urgent reliefs to be granted to provide women with a violence-free residence. Hence, the nature of remedies provided under this law is temporary in nature; the permanent solution still remains within the framework of matrimonial laws under which a woman would have to decide on whether or not to continue in the relationship.

At a more popular level the Act is being interpreted as a potent weapon in the hands of unscrupulous women against men and leading to disintegration of family unit in the society. The law is based on a totally wrong notion and assumes men as the sole perpetrators of domestic violence. This is altogether creates a wrong impression and only confirms the gender bias in favor of women created by this law. Giving of such sweeping legal powers to women while withholding protection to male victims is tantamount to systematic legal victimization of men. There can be arrest on mere compliant by the women and there is no investigation which is conducted prior to that and they do not foresee the after effects of such action like arresting and putting a person in jail, even before trial has begun, amounts to prejudging and punishing the accused without due process. There are no safety valves in the Act to prevent its misuse. Moreover there is no provision of penalty or punishment in case of a frivolous compliant preferred by a person under the Act. It may prove disastrous not only for an individual in case the complainant has ‘malafide’ intentions.

Viewed from a practical side, the Act provides for Magistrate’s discretion in matters pertaining to monetary relief, monetary compensation, child custody and the contradictory reports of enquiring authorities (as the complaint may simultaneously be filed under section 498A of the IPC as well as the Act of 2005). Similarly there are maintenance provisions within the various personal laws (Hindu, Muslim and Christian) which may stand contrary to the provisions of monetary compensation and relief and even right
to residence within the Act. There are mainly two legal approaches for women who had suffered domestic violence, one is filing for divorce through Family Court, and the other is filing application to Magistrate according to the Act which might go through criminal legal system. Too many laws on one issue create lots of confusion in the large number of already illiterate women who are without any/adequate knowledge of law. It creates confusion for the decision-making authorities also, notably the judiciary. Consequently there is wider scope for judicial discretion—something that appeal to Judge’s wisdom.

The law is wholly gender specific and rules out any possibility of domestic violence against a man. The law confers rights in a woman without imposing any liability, while a man is overburdened with discriminative liabilities with total denial of rights. A counter argument could be raised at this point that it is women who are disproportionately vulnerable to violence due to their position of equality. The Constitution of India allows the state to take special affirmative measures for women and children in furtherance of the goal of substantive equality. The Act nowhere ignores violence that man face in intimate relationships. For them the general laws of the land are available for seeking legal redress. A separate law for women is to correct historical disadvantages by creating means to facilitate a woman’s access to justice as a step to overcome inequalities.

The larger ambit of vulnerability of children associated with domestic violence has not been dealt effectively under the Protection of Women from Domestic Violence Act, 2005. There is no specific law on domestic violence against children in the country. However, in the year 2000 the Juvenile Justice (Care and Protection of Children) Act, recognized cruelty against children by people who have the charge of such children or control over such children as a special offence. Section 23 of this Act provides for punishment for cruelty to a child, which includes assault, abandonment, exposure or willful neglect that is likely to cause mental or physical suffering to the child. There need to be more
effective provisions of child rights and security under the Act to prevent the vulnerability of the children.

The framework for model legislation on domestic violence\textsuperscript{164} acts as the source of framework for the new Act in India. The relationships that are to be regulated within the Act to combat domestic violence includes female household workers. But the category of house maids does not find mention in the Act in India. The acts of domestic violence in the framework include marital rape which does not find mentioning in the Act in India. Instead the ambit of marital rape is confined within the sexual abuse concept included under the definition of domestic violence.

The Act ought to be activated by “vulnerable persons” of either gender that is vulnerable due to old age, mental or physical disability or for any other reason. This is a welcome recognition of the need to protect the disabled and provide remedies for the violence which they face. The same has been included within the Pakistani Law dealing with Domestic Violence that came into force recently in 2012. It explicitly states that an application can be filed against a person of any gender who has caused the violence, meaning thereby that women can also be respondents\textsuperscript{165}. An interesting addition is the creation of the “Protection Committee” a multi agency body consisting of a medical doctor, a psychologist /psycho-social worker and an official appointed by the Court, a female police officer not below the rank of Sub-Inspector and two women members of civil society and the Protection Officer to respond to every case of domestic violence. The Protection officer is a full time government servant. Whereas the Indian Act visualizes a similar structure, this is being done by

\textsuperscript{164} Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. RadhikaCoomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85- http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0a7aa1c3f8de6f9a802566d700530914  Last visited on 31st May,2012

\textsuperscript{165} This is also the law in India now; with the Hon’ble Supreme Court in Sandhya ManojWankhade v. ManojBhimraoWankhade (2011) 3 S.C.C. 650. clarifying that woman can be respondents in an application under the PWDVA. The case is discussed in detail in the seventh chapter of the thesis.
administrative guidelines and there is no compulsion on the State to appoint full time government servants as Protection officers.

This Act should have ideally included stringent penal provisions for curtailing the instances of abuse and mishandling, but herein, instead various opportunities have been made available which can ultimately lead to its grave misuse and can thus act as a catalyst for breaking homes. Thus, this Act does not contain any provisions for creating awareness or for strengthening and preserving family as an institution or even providing chances for reconciliation or even scope for improvement to the husband. There is no mentioning in the Act as to the constitution of an agency which would essentially work to check whether the complaints are frivolous or not. At the same time creation of a new law despite the existing legal provisions on the issue of violence against women, including domestic violence reflects the gravity of the problem. Taking into account this fact the state should have given emphasis to the overall (socio-economic and political) empowerment of women to strengthen their position in society and family. However, one may see the apathy of the government towards the issue of empowerment of women. Law, though very important, is not the complete solution for such problems.

To overcome the problem of socio-economic and cultural hurdles, it is desirable to adopt a human rights approach to women’s problems. Nevertheless, the passing of the new act once again reveals our dependency on the administrative and legal machinery to prevent gender crimes within the prevailing patriarchal social structure. Hence, there remains serious concern about possibility of the new law to make qualitative changes in the life of women within family. It is only through the human rights perspective that one can help safeguard human dignity and create a “violence-free home” leading to a “violence-free society”\(^{166}\).

\(^{166}\)Rachana Kaushal- “Protection of Women from Domestic Violence Act 2005—An Appraisal,” 48(11) Mainstream Weekly 32 (2010), New Delhi. Also see Home page>Mainstream
6.7 Indian Experience Juxtaposed with the U.S.A and U.K Experiences\textsuperscript{167}

The dominant family structure in the western democracies like U.K and U.S.A is the nuclear family with its gendered power structure. Indian culture is reflected in the cohesiveness of family units and familial relationships. The formal relationship between religions, theology and the State is different as well\textsuperscript{168}. Feminism has taken deep roots there in a faster pace unlike the Indian counterpart. Law in the western developed countries like U.K and U.S.A is often manifested as a protective mechanism to redress the lack of citizenship and corresponding lack of power. Indian personal law formally institutionalizes Hindu, Parsi, Muslim and Christian religious doctrine in marriage and divorce law applicable to each group. In India women have equality under the Constitution of India. The two sets of law in India highlight contradictions in women’s status and power\textsuperscript{169}.

There have been experiments in countries like USA and UK where the ultimate decision to prosecute has been put on the law enforcement agencies regardless of the level of the co-operation of the victim, for example the no-drop prosecution policies or mandatory arrests. But such a prescription needs careful attention and consideration before being applied in India\textsuperscript{170}. This could severely strain the already burdened judiciary, making infinite demand as on the human and fiscal resources of the state. The complexities of the situation surrounding the average Indian victimized woman are to be understood in this

\textsuperscript{167}The comparison mentioned herein is with the strategic models as envisaged by U.S.A and U.K that is explained in detail in the fourth chapter of this thesis.

\textsuperscript{168}Religion and family are supposed to be private/personal domains in the western countries. The relationship between state and citizens is not entirely secular.


context. The culture specific attitudes of the country like India and the trends of family courts established in India are inclined towards the prioritization of interests of family over and above interests and security of women.

India has also resorted to alternative justice delivery systems and multi-agency co-ordination and responses in dealing with the problem of domestic violence. The State intervention has been multi-pronged and mediated through executive and judicial agencies that include the Family Courts, Legal Aid Cells\textsuperscript{171}, Women Vigilance Committees, Police Counselling Cells\textsuperscript{172}, Women Police Stations, besides induction of women into the police force at different levels. The experience and studies from the NGOs in India working in the field reveals that state intervention in this sphere has fallen short of expectations due to infrastructural inadequacies and lack of adequate trained staff. The family counseling cells operating within the precincts of police station produces two mutually conflicting opinions as that it invokes fear and itself is counterproductive on one hand and on the other it stresses the inherent positive feature in forcing the recalcitrant man to come to the negotiating table\textsuperscript{173}.

The National Commission for Women has evolved an innovative concept of PMLA Parivarik MahilaLok Adalat (PMLA) for redressal and

\textsuperscript{171} Legal Services Authority Act,1987,s 12 says: The Act provides the criteria for entitlement to legal service as follows(i) A member of schedule cast and schedule tribe.(ii) A victim of trafficking human being or beggar as referred to Article 23 of the Constitution.(iii) A woman or child(iv) A disable person.(v) Victim of mass disaster, ethnic violence, flood, drought, industrial disaster.(vi) Industrial workman.(vii) Person in custody.(viii) person having annual income less than nine thousand or higher as prescribed by the State Govt. A person desires to get legal aid must satisfy any or all of the criteria having a prima-facie case.

\textsuperscript{172}Counselling as a Police Role - Counselling is the first response of the Crimes against Women Cells in domestic matters. Many families in India still continue to live as joint families and counselling often involves other members of the family besides the immediate protagonists. The aim of counseling continues to be to remove irritants in the marriage, to prevent abuse or to ensure that there is no further abuse, and to secure the position of the woman in the marriage. The Crisis Intervention Centres have been set up and associate social workers, doctors, lawyers, psychologists and prosecutors with their functioning. A significant service started by the Crimes against Women Cell is a 24 hour helpline that responds to callers in distress. For details See. http://www.unafei.or.jp/english/pdf/PDFrms/no69/05P77-84.pdf. Last visited on 23 rd February, 2012.

\textsuperscript{173}Nishi Mitra, Domestic Violence As a Public Issue A Review of Responses, Unit for Women’s Studies, Tata Institute of Social Sciences,Mumbai (2000), p.85.
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speedy disposal of cases under Legal Service Authority Act, 1987, which has its roots in the traditional Nyaya Panchayats. The essential features of PMLA are amicable mutual settlement and flexibility in functioning. The NGOs in association with District Legal Aid and Advisory Board, activists, advocates and others, organize Parivarik Mahila LokAdalats with the Commission's financial assistance.174

The Central Social Welfare Board serves as an apex organization at the national level for funding for welfare activities at the state level is channeled to the grass roots level voluntary agencies through a network of state welfare boards. Short stay homes and family counseling centres across the country receive support from this source. The shelter homes in India fall short of good practice due mainly to the lack of holistic treatment of women’s concerns. Safety is often interpreted in manner that restricts individual’s mobility. Moreover the rehabilitation programmes are not structured in a way that it would encourage the evolution of a woman from being a victim to a survivor of domestic violence. The Indian experience makes a sharp contrast of Indian victimized women to the US and UK experience of ‘survivors’ of the crime.

Title VI of Violence Against Women Act175 that relates to public housing scheme is similar to Indian law. The specific provision of “The “right to reside in the shared household”, irrespective of whether the house is owned or tenanted was drafted in the newly enacted Indian law to prevent similar instances of vulnerability and disempowerment for women facing domestic violence. The major difference between the United States policy and the “right to residence” guaranteed under Indian law is that while the former protects the tenancy rights of the survivor to emergency housing services, the latter provides protection to the de jure right of a woman (as Indian law is gender

175See supra Ch.4 for discussions on community intervention strategies in U.S., A and U.K.
specific) to residence based on the nature of relationship that she shares with the perpetrator and/or his family176.

A one-roof system for service providers in India may enable increased monitoring and effectiveness of the Act in the lines of the Family Justice Center Initiative177 which brings together NGOs, victim service providers, law enforcement officers, forensic medical professionals, lawyers, and community-based organizations under one roof.

One of the problems confronting the idea behind the Family courts established in India in 1984 has the set back of promoting the value of integration of family and the institution of marriage. Extreme case of domestic violence inflicted on the partners or individuals often leads to the notion that staying apart or disintegration of a violent family unit is desirable or favourable. Gender sensitive courts can deal with such issues more effectively. The concept of specialized domestic violence courts can be emulated in the Indian context.

Police authorities and prosecutors are of central importance to ensuring that perpetrators of violence are punished, especially with regard to investigating acts of violence against women, preserving evidence, and issuing indictments. The quality of police and prosecutor work is crucial in determining whether court proceedings are instituted or a person is convicted. Specialized units are more responsive and effective in dealing with violence against women. Experience has shown that the establishment of such units may facilitate the development of expertise in this area and may result in an increase in the number of cases investigated and a better quality and more efficient

177 Supra Ch.4.
process for the complainant/survivor\textsuperscript{178}. Other schemes in the United States from which the Act may benefit include the scope of protection orders themselves: in all states, protection orders can be sought by both men and women, in many states can be sought against same-sex partners, and certain states including Massachusetts and Minnesota, cover individuals who have not lived in the same household but have had a substantial intimate or dating relationship.

Public awareness-raising campaigns are critical to expose and convey the unacceptability of violence against women. It plays a significant role in naming and shaming/condemning the practice. It conveys the message of zero tolerance for violence against women, includes the promotion of women’s human rights, and emphasizes societal condemnation of discriminatory attitudes which perpetuate violence against women, and address attitudes that stigmatize complainants/survivors of violence. They are also an important tool for informing women complainants/survivors about their rights and about existing laws and the remedies they contain. The Protection of Women from Domestic Violence Act, 2005\textsuperscript{179} of India directs the Central Government and every State Government to take measures to ensure that the provisions of the Act are given wide publicity through public media, including television, radio and print media, at regular intervals.

As opposed to India the strategic models evolved to deal with the problem of domestic violence in the US.A and U.K revolves around the community intervention models. The funding programmes and partnership alliances are the driving factors behind the cause of prevention and suppression

\textsuperscript{178} Examples from other jurisdictions:-Special investigation services have been organized in many police stations in Italy to respond more adequately to women who report sexual violence. In Jamaica, a sex crimes unit has been established within the police force, with the objective of creating an environment that encourages women complainants/survivors to report incidents of sexual assault and child abuse; effectively investigating complaints of abuse; and offering counseling and therapy services. The National Guidelines for Prosecutors in Sexual Offence Cases (1998) of the Department of Justice in South Africa state that “a specialist prosecutor is the ideal person for this type of case”.

\textsuperscript{179}Protection of Women from Domestic Violence Act, 2005, s.11.
of domestic violence. Specialized domestic violence courts placing special emphasis on therapeutic jurisprudence is yet another contribution by the western model. The sanctions emphasized are both civil and criminal. Mandatory arrests and no drop prosecution policies are the trend reflected.

The culturally specific forms of family and of family state relations provide historically distinct bases for women’s movement mobilization and for the outcomes of that mobilization\textsuperscript{180}. The strategy of the India towards a problem, and particularly that of women, is to rely largely on law and often only on law. The responsibility of the state ends with the drafting of the required laws, whereas the problems relating to women, particularly domestic violence, are socio-economic and cultural problems which demand a multi-faceted approach. Thus the Act fails, on various fronts, the muster of an effective piece of legislation aiming social engineering. The need for community programming and crisis intervention strategies becomes significant and the models from the west ought to be emulated in the Indian context.

\textsuperscript{180}\textit{Supra} n. 168, p.592.