Domestic violence erodes confidence in the rule of law, the very foundation of civil society. The law essentially performs a normative function, where it indicates what behavior is unacceptable. The Protection of Women from Domestic Violence Act, 2005 has put in place the norm that violence against women is unacceptable and the norm is backed by state sanctions. Violence within the home is a phenomenon that has achieved recognition as socially unacceptable behavior, whether as crime, pathology or violation of human rights. The international developments that led to the passing of the Act in India are quite applaudable. But the fact remains that the international human rights law fails to guarantee and enforce rights of women as family members because its procedural focus is on the rights of individuals. Coming to India our approach towards gender and sexuality is circled around the family and cohesiveness of familial relationships. Even the best of laws become infructuous if they go against popularly held beliefs of right and wrong. A law that addresses violence in the home raises a number of questions, implicitly or explicitly challenging received ideas about the family as social structure and ideological system in India.
After analyzing the pros and cons of the Act and the judicial interpretations three important questions are posed in this chapter. An attempt is made to answer these specific questions.

1. Does the Indian society tolerate the legal intervention into the so called sacrosanct “familial space”?
2. Does the Act integrate or does it disintegrate the family relationships?
3. Does the Act provide restorative justice to the women victims?

An ideal law on domestic violence, according to the International mandates, ought to be based on three principles of intervention: victim safety, offender accountability, and changing community attitudes to achieve zero tolerance. Laws reflecting this principle identify the system - not the victim - as the problem and the focus of change. A country like India that prioritizes the preservation of the culture and the values within the familial relationships ought to look up at the issue of domestic violence in a totally different manner. Any legal system can survive only in a social, political and economic context, and not in a vacuum, which brings a perplexing range of cultural and ideological factors to bear on the analysis of and exposition of legal concepts. In India we give priority to the sanctity and permanence of marriage as a social institution. Preservation of family is the core content of cultural ethos in India. At the same time domestic violence is acknowledged as a social evil and stems from the idea that women in India have been historically subjugated and are victims of violence. The challenge therefore sets in as to how to harmoniously reconcile the idea of family preservation and the zero tolerance to violence within familial relationships in the Indian cultural scenario.

8.1 Conceptual Dichotomies and Disarrays in the Act

The reconciliation process is to address the conceptual dichotomies in the legislation. The main dichotomies analysed are mainly in five areas.
8.1.1 The Concept of Sexual Abuse *Versus* Marital Rape Immunity in India

Marriage as a social institution in India is best conceptualized and understood as union of husband and wife which lasts long. The institution implies to have consented sexual intercourse between the persons contracting a lawful marriage and hence there is no traditional concept of rape in marriage. The doctrine of marital rape was incorporated into the Indian legal system by virtue of the exception to section 375 of the Indian Penal Code which says that ‘sexual intercourse by a man with his wife (the wife not being under fifteen years of age) is not rape’. Section 376(1) of IPC provides a nominal punishment if the wife is between twelve to fifteen years of age or is living under a decree of judicial separation. The only two categories of married woman covered by the legislation is firstly those being under 15 years of age and secondly those living separately from their husbands under a decree of judicial separation. Other than these two categories, all other married woman are denied protection under section 375 of IPC\(^1\). Offences relating to the above crimes are non-cognizable and bailable sending out the message that they are lighter offences. The problem of marital rape goes much beyond the issue of domestic violence and the Act does not deal with this. By providing civil remedies to a woman subject to domestic violence, the Act undermines the serious nature of the problem of marital rape. The concept of ‘sexual abuse’ in the Act perpetrated within the marital ties relates to the concept of bodily privacy, which is an alien concept to Indian marital culture. A woman hardly takes a stand against the sexual desire or aggressive characters of her husband. A sensitization on this issue can lead to criticisms from different quarters as trying to destroy the marital relationship/unit in India.

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A bare reading of the Act gives the impression that when a woman is sexually abused against her will, the offence of sexual abuse is committed. To raise an argument against the husband or to do a job independently against the wishes of the husband in Indian family are uncomfortable discussions and are socially construed as offences. To counter argue this criticism one need to have a strong culture of tolerance and respect for the status of women which is completely lacking in India. But how far an Indian woman who doesn’t want to sever her marital bond for the sake of her children will come forward with the complaint of sexual abuse perpetrated by her husband is perplexing. The way in which the concepts of autonomy and privacy are construed by the west cannot be made applicable to Indian context. Indian cultural traditions attach an extremely high value to decisional autonomy for males. As Robin West has rightly remarked- ‘the marital rape exemption creates, fosters and encourages not marital intimacy, harmony, or reconciliation, but a separate state of sovereignty ungoverned by law and insulated from state interference’2. The Act rightly leaves that space of bodily privacy of the married woman vacant.

8.1.2 The Concept of Right to Residence Versus Status of Matrimonial Property to Women in India

Marriage in India has never been conceived as an economic partnership. There exists no concept of joint property or ownership over the properties acquired after the ceremony of marriage unlike to that what it exists in the western liberal democracies. Indian patriarchal culture has always been reluctant to recognize the economic contributions of the woman within a familial set up3. The idea of woman surviving under the strength of temporary civil protection orders as envisaged in the Act in the atmosphere of hostility perpetrated by the man and his relatives with no recourse to safety and security

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is unimaginable and seems to be impossible in the Indian cultural context. The civil protection order to be granted by Magistrate’s court in India which is already pre-occupied with petty criminal offences appears to be a paradox. The utmost care and sensitivity required in dealing with delicate familial issues having long term implications in the familial relationships are casually disposed through the court that is ill-equipped and least sensitized on the matter. The existing realities and ideals conceived by the Indian society acts as a stark contradiction for the easy assimilation of the concept of right to residence to a woman who is a victim of domestic violence4. The need of the hour is the thorough review and amendment, where necessary, of all other relevant laws to ensure that women’s human rights and the elimination of violence against women are consistently incorporated.

8.1.3 The Concept of Relationship in the Nature of Marriage Versus Rule of Monogamy

The Indian Penal Code makes bigamy punishable5 and the over-enthusiasm shown in the legislation to imbibe the concept of relationships in the nature of marriage seems to be contradictory. The invalidity of marriage can no longer be used as defence by the man to dispossess or deny maintenance to the vulnerable women. The argument posed by the promoters of the Act that the law takes care of the limited remedies of women who have fallen prey to unscrupulous males by entering into bigamous marriages does not appear to be reasonable. The western concept of live-in-relationships/civil partnerships are often equated and understood as the basis of the provision of relationships in the nature of marriage under the Act. The law can never play the role of

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44 Amartya Sen’s Capability enhancement and approach as to women’s economic status supports this view. Ownership of property by women or promotion of employment opportunities can reduce her tolerance to violence. Researcher is referring to the discussions in Bina Agarwal and Pradeep Panda, “Toward Freedom from Domestic Violence :The Neglected Obvious”, 8(3) Journal of Human Development 364-378 (2007).

5Indian Penal Code, s.494
cultural conscience in the Indian context and the same idea is conveyed when Elizabeth Schneider remarked that:

“Law is made, and operates, in many sites and in many different ways; it does not exist outside culture but is reflected in popular consciousness, where it takes on a wide range of cultural forms and produces cultural meanings.”\(^6\)

The western concept appears to be completely incongruous to the Indian cultural setting. The lack of clarity in judicial interpretations also supports this point\(^7\). The debate over the topic pertains to the effect that whether the Act will open up flood gates of ‘sexual promiscuity’ or redeem the Hindu marriages from the yoke of monogamy\(^8\). Another emerging challenge is how to reconcile the conflict between the interests of the legally married woman and the woman claiming under the relationships in the nature of marriage in the Indian cultural setting. In this context, the Indian social and cultural notions of sexual morality raise much uncomfortable questions.

### 8.1.4 The Complaint System Versus Restorative Justice to the Victims

The complaint system envisaged by the Act\(^9\) defeats the very purpose of the Act. Easy accessibility to law or making the law against domestic violence ‘user friendly’ through the complaint procedure becomes antithesis and a threat to her peaceful survival in the matrimonial home and her marital relationship. A woman who sets the process in motion as envisaged by the Act is likely to suffer the consequent evil of rupture in marital ties. The rights guaranteed

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\(^7\) Supra, Ch.7.


\(^9\) Protection of Women from Domestic Violence Act, 2005, ss.9,14.
under the Act thus become inimical to the safest survival of woman in the family.

The field of matrimonial discord or familial disputes are areas covered under the so-called ‘decision making by the individuals’. It is an aspect of right to privacy or the ‘right to be let alone’. But when violence surpasses a threshold limit affecting the developmental process of the country the State claims its authority to intervene in such familial space. The threshold limit of violence is a construct of the societal attitudes to the issue concerned. This again raises the debate as to the level of threshold limit in violence in a familial space. The level of threshold limit gets interpreted by the judicial decisions. A woman claiming reliefs under the Act such as protection order, restraining orders etc., will be discouraged and dominant relationships within the familial space makes the decisions in such an environment leading to the ostracisation of the victim from her matrimonial home.

8.1.5 Libertarian Ideals Versus Utilitarian Goals

One of the key challenges in the area relating to legislation on domestic violence is reconciliation between the human need and the social need. An optimum balance is to be struck between individual autonomy within the familial relationships and on the other side preserving accountability to the ‘rule of law’. Libertarianism\(^\text{10}\)(often viewed as a progressive view) and utilitarianism\(^\text{11}\) have emerged as two dominant schools of thought in response to this dilemma.

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\(^{10}\) It propagates the theory of live and let live and advocates maximizing individual rights and minimizing the role of the state. The key assumption behind libertarian thought is that formal institutions such as governments, formal religions and social organizations are not only poor managers of resources, but are also fundamentally inimical to the autonomy of the individual, the most fundamental libertarian value. The best-known economic, literary, and philosophical exponents of American libertarianism are Murray Rothbard, Ayn Rand and Robert Nozick.

\(^{11}\) Utilitarianism propagates the theory that an action is right in so far as it promotes happiness, and that the greatest happiness of the greatest number should be the guiding principle of conduct. The most famous exponents of utilitarianism were Jeremy Bentham and J. S. Mill. In An Introduction to the Principles of Morals and Legislation (1789), Bentham introduced his "utilitarian" doctrine: mankind has two masters, pleasure and pain; nothing is good except
Keeping in tune with the traditional concept of undisturbed privacy and sanctity of family life, the induction of law into family relationships has been opined by the judiciary thus:

"Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art.21 nor Art.14 have any place. In a sensitive sphere which is at once intimate and delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond\footnotemark."

According to the libertarian philosophy, personal autonomy cannot be restricted by the State i.e., the state control or action over the extent of freedom of the individuals are to be kept at a minimum level except to the extent that an exercise thereof limits the liberty of other individuals. The legal intervention into the private territory of family is viewed with skepticism. On the other hand, Utilitarianism is founded on the principle that any State action ought to be for the “greatest good of the greatest number” and therefore gives primacy to the interests of the society/community at large. It justifies the legal intervention in the familial space to an extent. The conflict between these two theories forms one of the basis of the debate surrounding domestic violence.

Mere enactment of a law in the nature of Protection of Women from Domestic Violence Act, 2005 cannot or is not likely to change the mindset and attitudes of the people in a country. How the law has been acknowledged and assimilated into the national social fabric of the society is the root concern. The domestic violence debates in the developed countries like United States and

\footnotetext{Harvinder Kaur v. Harmander Singh Choudhary, A.I.R. 1984 Delhi 66.}
United Kingdom for instance has reflected in the community co-ordinated crisis intervention and safety nets strategies to help the survivors from the menace. The egalitarian ideas of personal autonomy and freedoms rule the legal regime in such jurisdictions. The limits imposed by the state are viewed as violation of the right to personal autonomy. The criminal mandatory arrests and ‘no-drop’ prosecution policies are the methods relied by such developed countries to tackle the problem of domestic violence. These methods stand as stark contradictions to the specific cultural set up in our country.

Indian society is hierarchically organized. According to Amartya Sen\textsuperscript{13}, the India born Nobel Laureate in Economics, in his book \textit{The Argumentative Indian: Writings on Indian History, Culture and Identity} has described the culture of modern India as a complex blend of its historical traditions, influences from the effects of colonialism over centuries and current Western culture---both collaterally and dialectically. Community gender norms tacitly sanctioning domestic violence creates a culture of silence. It is a strongly held belief in India that the family honour and marriage as a social institution should be preserved at any cost. This in turn compels women to remain silent on the issue and live tolerating abuse. Indians lean towards the relational world view and harmony and balance within the system. Sanctity attached to marriage and family as inviolable institutions of Indian society appears to be contradictory when stay away orders are guaranteed through the Act. The restraining orders passed by the court in the eventuality of violence, leads to counterproductive results. The perpetrator/abuser is removed from intimate settings and thereby the victim is emotionally displaced and is deprived of important linkage to herself. In short the Indian society does not accept/tolerate the legal intervention into the familial space as it deviates from its culture and ideology of family as an integral unit of society. There exists a wide gap between the

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disease to be treated and the remedy forwarded by the legislation. Instead of integration of family units, disintegration is the outcome.

8.1.6 Reliefs Envisaged Versus Restorative Justice to Victims

Domestic violence is one of the most difficult types of crimes to investigate and prosecute due to its peculiar nature\textsuperscript{14}. A strict adherence to criminal strategies are harmful in dealing with the issue. Criminalization of domestic violence was an important step in changing societal views towards violence in relationships. The special bondage and dependency she shares with the perpetrator is a unique feature. These facts are not fully incorporated into a criminal justice policy. Minor children of the couple may present significant issues with regard to their protection and often the victim's desire for an intact family structure. Financial ties that make some victims critically dependent on abuser's financial support for minor children, a factor at odds with strict punishment models\textsuperscript{15}. The civil protection orders also play a limited role due to the specific nature of violence unleashed between the once loved ones. They could neither guarantee any reduction in the extent of such violence, nor could they expedite the justice delivery system in India. The existing criminal and civil remedies cater to the physical and economic harm to victims but fails to account for psychological harm from intimate members which may last long after physical injuries have healed\textsuperscript{16}.

Counseling, under the Act, continues to be a grey area. Counseling, as approached by the Act again takes the cases back to the fate of what is being reiterated in the form of counseling in family courts earlier constituted. The whole objective of counseling as envisaged in the Act is to get the abusive partner to give an undertaking/assurance that there will be no further domestic violence being perpetrated from his/her side. The need for this form of counseling would involve the re-establishment of the basic trust and the sense

\textsuperscript{14} Supra Ch.1.
\textsuperscript{16} Supra n.6, p.969.
of safety to be given to the women who faces violence. A victim cannot be assured safety within the domestic space after the restraining or protective order is passed by the courts. Most victims in Indian context, face further traumatization both through the system of restitution and justice as also from family members and society at large. The qualifications required of a counselor to deal with such delicate issue are not prescribed by the Rules. The Rules talk about certain persons who are not eligible to be appointed as counselors\textsuperscript{17}. Such a negative connotation cannot serve the purpose here in this context.

Patrilineal and patrilocal nature of marriages that is prevalent in Indian society make the position of women more vulnerable. Hence the option to come out of a violent relationship is threatening as the victim with no marketable skill has no way to earn a living. It is in this context the injustice of quick-fix compromises negotiated by gender insensitive mediators has to be taken into consideration\textsuperscript{18}.

The lack of trained counselors to deal with such types of delicate familial issues ought to be ensured or else there is likelihood of women victims falling prey to the pressure and disempowerment process. The counselors require a multi-faceted approach/skills to deal with the issue. A total absence of set qualifications in the Rules required of a counselor clearly brings out the hollowness of the purpose of the Act. The counseling provision as envisaged in the Act provides skepticism as to whether it is provided for integration or for disintegration of a family unit. Hence to decide as to endure with abusive familial relationship or proceed to break up from an abusive relationship again falls into the field of right to privacy or individual autonomy. Both situations

\textsuperscript{17} Protection of Women From Domestic Violence Rules , 2006,R,13 (2): The following persons shall not be eligible to be appointed as Counselors in any proceedings, namely:-
(i) any person who 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.

appear to be traumatic to a woman living in remote villages of Indian society when compared to a woman who is accustomed to the metro-living. The woman survivor in both the situations stands devoid of restorative/restitutive justice. Then the challenge comes in as to who is the one that the Act is trying to assist and in what way?

The methods of dialogues, conferencing and mediation which are a component of the restorative justice paradigm, fail to address the nuances of the offence of domestic violence and therefore, stand impotent to impart the infinitive benefit which they do so while dealing with other categories of crimes. Resorting to alternate dispute resolution in cases of domestic violence in a way is accepting the failure of justice delivery system. Compromises arrived are negotiated solutions and it can never mean propagation of human rights culture.

The adversarial system that relates to notion of justice and understandings of power fails in this front and counseling as a form of alternate resolution mechanism that promise equal participation never provides a level playing ground between the players in the Indian context. The major focus of counseling or mediation on future rather than past behavior and tendency to avoid blame denies the victim’s experiences of violence and de-legitimizes her right to talk about it. The nature of remedies provided under this law is temporary in nature. The permanent solution still remains within the framework of matrimonial laws under which a woman would have to decide on whether or not to continue in the relationship. Re-focusing legal policy away from mediation and towards strategies that truly promote victim empowerment would assist in returning to domestic violence victims what is rightfully theirs, control over their activities, their bodies and their ability to count in the familial set up in India.

8.2 Procedural Dichotomies and Deficiencies in the Act

One of the major deficiencies apparent within the legislation is the conflict of jurisdictions between different courts. The new Act seeks to bring domestic
violence within the ambit of civil law with objectives markedly different from those of a family court. The purpose and significance of a civil law on domestic violence, the first of its kind in the country, lies in its attempted circumvention of personal law regime. Personal laws most closely regulate women’s status and entitlements within the family and since they are dictated by religious law, they have been extremely resistant to reform. The new law is envisaged as a way to conceptualize how restraint and restitution can be achieved. The objective of the Act specifically projects the need for more effective protection to Indian women from domestic violence. This very objective of the Act differentiates itself from the predominant concept of the Family Courts Act, 1984 which is meant for the preservation of the family. Taking cue from the ‘Model legislation’ as envisaged by the UN Rapporteur on Violence Against Women, the ideal legislation globally acceptable to combat the issue of domestic violence projected is the legislation that combines both criminal and civil remedies. Reflecting the international consensus about the nature of legal intervention into domestic violence, the Government of India has also incorporated the new Act on domestic violence that provides for a blend of civil and criminal remedies. The cases on domestic violence under the Act are reverted to the Magistrate’s court thereby overburdening the criminal court proceedings and in a way it implicitly acknowledges failure of the Family Court’s working.

The reliefs provided under sections 18, 19, 20, 21 and 22 of the Act can also be simultaneously be sought in any pending legal proceedings before a civil, family or criminal court. A High Court judge may be called upon to adjudicate proceedings for maintenance under the Hindu Maintenance and Adoption Act. A Family Court is presided over by a District Judge. The only provision of appeal provided in the statute is under section 29 of the Act which says that an appeal will lie in the Court of Sessions only with the orders of the

19 The proposal for a Uniform Civil Code, as advocated in the Indian Constitution’s Directive Principles of State Policy has therefore had to be almost indefinitely deferred.

20 Supra n.6, s.26.
Magistrate. The Act is totally silent as to where an appeal will lie against orders passed by any other court, under the Hindu Maintenance and Adoption Act or a District Judge under the Guardian and Wards Act or under the Hindu Marriage Act wherein such an application is made in a pending case.

The Act has non-obstante provision in several sections. The section 21 contains a non-obstante clause which enables the magistrate to exercise jurisdiction and pass orders which could result in conflict with the orders passed by any other court. So far as procedure is concerned, it is a civil legislation but at the same time the Code of Civil Procedure is not applicable to proceedings under this Statue. It says that procedure under criminal procedure will apply at several places. Therefore there is grave possibility of conflict of jurisdiction and judgment in the event that a Civil Court is seized of the matter or has decided a matter relating to issues which are also raised in parallel proceedings before a Magistrate under the Act.21

Offences under the Act are cognizable. The Act contains no provisions for compounding. This was the prime argument against section 498A that it should be made cognizable and compoundable22. This issue went up to the Supreme Court repeatedly and courts have devised the methods whereby 498A offences are being compounded. It is extreme injustice if the woman is willing and wants to go back despite her making a complaint and her-in laws are

21For instance a case of custody under the Guardianship Act and a similar petition filed before the magistrate, there is no provision as to which proceedings the litigants is required to adopt, whether she will proceed with the application under this Act or she has a right to continue in the earlier proceedings. This Act has a non-obstante clause that says not withstanding any Act in force, the provision of the Act will take force.

22 In this context, the observation made by Malimath Committee in the Report on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003 is significant: It reads: “For the Indian women marriage is a sacred bond and she tries her best not to break it. As this offence is made non-bailable and non-compoundable it makes reconciliation and returning to marital home impossible…Less tolerant impulsive wife may lodge even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job…The husband may realize the mistakes committed and come forward … for a cordial relationship. The women may like to seek reconciliation. But this may not be possible due to the legal obstacles. …Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliation. It is therefore necessary to make this offence bailable and compoundable to give a chance to the spouses to come together.” Emphasis added.
willing to take her back. Women are deprived of a very important statutory benefit. Rapprochement and compromise which is the need of matter, is not permitted by this legislation. This very aspect disrupts the restorative justice to a woman inclined to a matrimonial set up. All these aspects are pertinent in a patriarchal set up where marriage and family is viewed as inviolable institutions. Mere enactment is not enough to deal with the issue of domestic violence but conceptual and procedural clarity and enforceability becomes crucial for its success.

Protection Officer is the first point of contact for the aggrieved person. The protection of Women from Domestic Violence, Rules, 2006 provides for the qualifications and experience of Protection Officers. Another ground of legal debate is that there is no statutory provision or rule which provides the procedure which is to be followed by the Protection Officer or the Welfare Officers. The Protection Officers appointed by the State Government may be of the Government or members of non-governmental organizations, provided that preference shall be given to women. Every person appointed as Protection Officer under the Act shall have at least three years’ experience in social sector. No stipulation as to the legal knowledge or background for a protection officer is provided under the Rules. The work of a Protection Officer needs more legal knowledge to understand the court procedures. In India, Women and Child Development Department appoints the Protection Officer who is already handling another important duty as a programme officer. Therefore discharging duties as a protection officer becomes less important to them. In practice, District Probation officer is the person who is appointed as Protection Officer in the states. One Protection Officer for entire district is not enough and is unrealistic to attend to victims from different corners. The overburdening of

23 The protection of Women from Domestic Violence, Rules, 2006, r. 3(1)&(2)
Protection Officers with little infrastructural facilities creates hurdles for effective implementation of the Act\textsuperscript{24}.

Service Providers refer to organizations and institutions working for women’s rights. They must be registered with the state government to record the Domestic Incident Report and to help the aggrieved person in medical examination. The intention behind this is to save distressed women from legal complicacy, vagrancy and health hazards. There is a huge delay in notifying the service providers. Similarly there is a wide gap between black and white lines of the Act and reality. Shortage of medical supplies and women doctors is another reason for victims not seeking recourse to medical facilities. Shelter homes, are in deplorable conditions so much so that the victims refused to go there.

The Act suggests a new role of police as the ‘savior’ of victim. Yet, the perceived notion of police as the ‘power to punish’ clashes with this new role. Moreover the stakeholders seem to be confused about their duty and obligation in ‘protecting’ a victim of domestic violence. This in turn creates hurdles for the effective implementation of the Act.

The statute is also silent as to the evidentiary value which is to be attached to the reports given by such officer or the mode of their proof. The evidentiary value of the report of the Protection Officer is important when the judge has to access the material at the end of the trial and give an order of final relief. This issue may not be important for interim orders when the judge is only arriving at a prima facie view. Lack of clarity in rules creates difficulties in the effective implementation of the Act.

8.3 The Act - A Western Apism

The \textit{one-size-fits-all} approach to the problem of domestic violence does not keep in tune with the preservation of cultural values in India. No law which

\textsuperscript{24} This argument by the researcher is based on her own interactions with the Protection officers Attended and participated in a workshop conducted at Govt. Law College, Kozhikode, Kerala, on The Protection of Women from Domestic Violence Act, 2005.
is unrelated or unconnected with the cultural and social ethos/realities of the country is bound to be successful. The Act appears problematic with its apparently uncritical subscription to and reliance on international norms of gendered justice. They conflict with the local cultural standards and perspectives of indigenous system of patriarchy prevailing in India. The Act becomes a mere western duplication unrelated to cultural specificities of the country.25

Victims of domestic violence, unlike other victims of crime, share a special relationship with the perpetrator. For these and other reasons, domestic violence cases present complex legal, psychological, and sociological challenges to our communities. Therapeutic jurisprudence and the problem-solving approach in the U.S.A and U.K strategies envisages and treat victims and survivors as people (not ‘cases’) given the background of complex realities of their daily lives. Here lies the difficulty in following the western model. This may mean acknowledging the potential of the legal system to address domestic violence, while equally acknowledging (from the victim’s perspective) the problems which beset its operation in practice. We need to recognize the limits of criminal justice initiatives as it fail to provide to victims of domestic violence the protection, safety and ‘justice’ they need. The law is just one element of a necessarily wider social response to domestic violence. It must necessarily include community-based and preventative strategies.

Specialized arrangements to deal with domestic violence cases in the form of specialized domestic violence courts26 taking cue from the western countries alone cannot achieve enhanced satisfaction and sense of ‘justice’ for victims of domestic violence— this requires a range of allied community-based support initiatives. While specialized courts like the family courts in India provide a very positive focus for these activities, their long term success

25 The critics of this view advocate that respect for a largely imagined and idealized version of the Indian family system is likely to hamper the feminist initiatives in the Indian context.
26 See Ch. 4 of the thesis for more discussion on specialized domestic violence courts.
depends on the effective coordination and delivery of a range of policies which are likely to lie outside the scope of the criminal justice system.

8.4 An Attempt to Make Man Moral by Legislation

The Act plays the role of moral policing. State acts as omnipotent savior bringing in canned solutions to the victims of domestic violence. The situation reflects the tragedy that abused is pitted against the state driven legal mechanism. The victim feels emotionally displaced from her cultural and social settings and is deprived of her linkage to herself. The legal option to punish an offender for repeating domestic violence following ‘protection order’ is limited because victims mostly abandon their matrimonial home before filing a case as it happens so in the Indian matrimonial set up. Persuading the victim to reach a compromise and start conjugal relation even though her husband did not comply with the protection order fully appears to be contradictory with the restorative reliefs envisaged by the Act. This vindicates the position that the Act attempts to settle domestic violence within the existing familial structure and may not help those who lost all hope of reunion. The instances of court trying to moralise the litigants through the judgment are also not rare in the present scenario\(^27\). The legislation is simple an attempt to make man moral by legislation.

\(^{27}\) T. Vineed v. Manju S. Nair, 2008 (1) K.L.J., 525 para.3. The parties were involved in eleven litigations against each other before different fora, in view of the worsening relations between the parties, the court appointed a conciliator to enable the parties to settle the disputes between them. Upon arriving at a settlement, the court said:“In the light of the discussions the court and the conciliator had between the parties and thanks to the cooperation extended by the learned counsel appearing on both sides, it is heartening to note that peace could be purchased not only between the parties to the marriage, but also between the families of both parties. True, they have agreed to disagree. But we could convince them that on disagreement also, the parties to the marriage can still be friends. For the only reason that the matrimonial bond is terminated and the marriage is dissolved, the parties to the marriage need not be strangers and enemies; they can still continue to be friends, and they have to continue as good friends in this case for the additional reason that they have a child. In cases of domestic violence in grave forms, prioritizing conciliation could have the effect of compromising the safety, security and dignity of the aggrieved woman and forcing her back into the violent home. The good intention of the court in this judgment was to prevent further hostilities between the parties, avoiding multiplicity of litigations and arriving at an amicable settlement of all pending issues between the parties. It appears to be a good ideal. While this is desirable, conciliation may not be the
## 8.5 Apathy of the Society at Large

Domestic violence which is the so called personal matters of the neighborhood attracts little intervention and care from the society at large. The apathy of the society at large to stand by the sufferings of a victim of domestic violence is a major hurdle for resolving any dispute. In the absence of NGOs providing the needed support to the victims, the role of neighbors and other secondary groups becomes pertinent. This forces the victims, in the Indian scenario to leave matrimonial home and take shelter in parental home. In the Indian condition, if a victim fails to garner such support in view of the poor economic conditions of the parents or other relatives, she is left to the mercy of the abusive husband to continue a painful life. It is in this context that the Act has failed to rescue the victims by implementing court orders or providing quick justice to the victim. Lack of civil society actions should also be seen in the wider context of prevailing social structure in India.

### 8.6 Abuse of the Act

Filing of false cases out of vested interests thereby belittling the status of the legislation is another menace to the effective implementation of law in the country. No proper screening methods to filter out vexatious claims are envisaged under the Act to make the system fool proof. The Act is found to target male relatives even though the offender is female. Yet, they are a testimony to the fact that provisions of the Act may be potent weapon in the hands of unscrupulous female partners/members of the family.
Articulating the language of rights for women (and children and the elderly i.e., the dependents) within the home and thereby seeking to alter the power relations of the patriarchal house-hold through the mantra of constitutional rights is a major and radical intervention\textsuperscript{29}. This law is envisaged to create division within the family, counters violence by a legal protection order\textsuperscript{30} and checks patriarchal privilege by imposing the law as limit.

Conclusion

The questions raised in the first part of this chapter stands analysed in the context of the Act’s new emerging issues and challenges. Although this issue has been deliberated for long whether law should succeed a change or should prove to be as one of its principal cause, the latter seems to have a beneficial and concerned approach to the issue. Consciousness of rights should per se be asserted first in a socio-political construct, much before a law or a policy comes into existence so that the concerned law or policy proves to be meaningful in the associated context. As to the practical value and the wider educational function of legislation, Jawaharlal Nehru has rightly said:

“Legislation cannot by itself normally solve deep-rooted, social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it”.

The Act is meant to operate in a patriarchal set up which is very much clear from the definition of domestic violence adopted as per the Act. But the problem of effective implementation lies in difficulty in reconciling the familial values in India with the rights culture propagated by the Act. To be useful in an Indian context, they need to be adapted to a world view and idea of

\textsuperscript{29}Rajeswari Sunder Rajan, “Rethinking Law and Violence: the Domestic Violence (Prevention) Bill in India”, 16 (3) Gender and History 35 (2002), Blackwell Publishing Ltd.USA, (2004), p.785

\textsuperscript{30}A threat of arrest , a form of surveillance
self that is based on the integration of the individual with the family group. These constructs need to be modified to take into account the multiple, complex and hierarchically ordered boundaries, the centrality of the intergenerational dyad and the lifelong independence between generations. Without modification, the use of these constructs as per the Act in the treatment of problem of domestic violence within familial space may cause disintegration or dysfunctional result in the family relationships and thereby strain the social fabric ties. In such a context, to draw experiences from the West and emulate them in the Indian cultural set up appears to be incongruous.

The whole of the Act is structured for the purpose of effective protection to women from violence within familial relationships. The patriarchal family is much more demanding on human nature. It requires chastity and self-sacrifice on the part of the wife and obedience and discipline on the part of the children, while even the father himself has to assume a heavy burden of responsibility and submit his personal feelings to the interests of the family tradition. But for these very reasons the patriarchal family is a much more efficient organ of cultural life. It is no longer limited to its primary sexual and reproductive functions. It becomes the dynamic principle of society and the source of social continuity. To this cultural tradition law is to be moulded to suit the idea of violence free society. The adversarial procedure adopted by the Act purportedly to protect the women in familial relations from violence does more harm than good, when viewed practically. The very complaint procedure envisaged leads to disintegration of the long cherished familial bonds in the Indian family. Once the women adopt the remedial procedure envisaged by the Act she is out of the matrimonial house. No restorative or preventive remedy is ensured by the whole process of empowerment as guaranteed by the Act. It appears like posting a policeman inside the family to check the behaviours of the inmates, which is rather impossible. It is both dangerous and futile to emulate western models with a single colour and brush. Concepts like right to

residence in matrimonial home, rights of live in partners on par with legally wedded wife etc., though adopted in the legislation, are yet to be indigenized in terms of cultural determinants, location and history. So the need exists to find out other alternative methods that are culturally and socially feasible in the Indian context.

The magnitude and severity of the problem requires the laws to be viewed in a fresher sociological perspective. The legislators need to assimilate the gravity of the problem while enacting laws. Laws are the expressions of social needs and aspirations. Only a change in the mindset could bring about gender sensitivity in the administration of justice. Infusing gender sensitivity in the society, laws and functionaries of law enforcement machinery in this globalised world is one of the biggest challenges before us.

What remains outside the ambit of law is the sensitivity over handling the issue and the subjectivities of suffering of the victim. Law in its attempt to correct something immoral or something wrong intends to end disorder within the familial space. Legal system tries to assert its presence like any other institutionalized hierarchical structure, emerging as a moral guardian, rather than a neutral arbiter. Creative approaches are needed in order to move a private matter into the sphere of public concern and to translate that public concern into a widespread social consensus for action. A one size fits all approach is dangerous and self-destructive in emulating western models. The Act demonstrates a half-baked solution without any understanding of the cultural fabric of the Indian society. People’s conceptions of moral rights and wrongs is shaped not by the present law, but by their assumption about what one is socially and (may be morally) entitled to do. Based on the above discussions the questions raised in the first portion stands answered in the negative.

The big challenge before us is to figure out ways to strengthen and reinvigorate civil society and family as an institution in a way that individual rights remain inviolable and also contribute to the protection of vulnerable individuals through communitarian efforts and vigilance.

1. How can we make people respect the rights of others not simply out of fear of being locked up in jail but because they do not feel good hurting the interests of others?

2. How do we make laws that are taken seriously by the people and have the capacity to protect the legitimate rights and claims of women?

The future of democracy in India is dependent on whether we can evolve a legal framework that creates egalitarian and workable norms for the rights of men and women in the family and commands universal respect for its ability to maintain a healthy balance between allowing a good deal of autonomy to the individuals relying upon the sanctity of family and marriage.

Acknowledging the costs of domestic violence in a society is positively performed by the Act. The complexities inherent in protecting the rights and responsibilities of women as a family member and home maker require sensitive decision making and monitoring mechanisms within the system. The Act in itself effects major theoretical shifts in thinking about gendered violence in relation to a women’s space of privacy or safety. To introduce the politics of rights within the home is itself a major challenge to deal with. But the Act fails to take into account the socio-cultural set up in which the domestic violence is to be acknowledged. This creates a wide gap between the black letters of law and its effective implementation.

According to Yehezkel Dror, “basic institutions rooted in tradition and values, such as the family, seem to be extremely resistant to change, imposed by the law”33. There is danger in over-stressing the social importance of law,

33. Id., p.125
particularly when a country is concerned with institutions with a special place in our culture, such as family, popular moral evaluations as patriarchy etc. are unlikely to be altered by the mere existence of a law. It conveys the idea that a *sui generis model* is to be carved out to deal with the problem of domestic violence in India.