CHAPTER 6

COMBATING DOMESTIC VIOLENCE

*Can man be free if woman be a slave?*

*P.B.Shelly*

I. INTERNATIONAL STANDARDS AND THE GOVERNMENT OF INDIA’S RESPONSIBILITIES AND COMMITMENTS.

Domestic violence, whether it is perpetrated by private or state actors, constitutes a violation of human rights. Hence, according to Radhika Coomaraswamy¹, it is the duty of the state to ensure that there is no impunity for the perpetrators of such violence. Often state policies and inaction perpetuate or condone such violence within the domestic sphere. States have a double duty under international human rights law. They are not only required not to commit human rights violations, but also to prevent and respond to human rights abuses”. Keeping this in mind, the United Nations Commission of Human Rights appointed the Special Rapportuer on Violence Against Women in 1994 “with a mandate to receive information from governments, organisations and individuals on violence against women; recommend measures to eliminate such violence and remedy its consequences; and carry out field visits.”
In the past, human rights protection was interpreted narrowly- state inaction to prevent and punish violations was not viewed as a failure in its duty to protect human rights. The concept of state responsibility has now developed to recognise that states also have an obligation to take preventive and punitive steps where rights violations by private actors occur.

INTERNATIONAL LEGAL STANDARDS

Three doctrines, developed by human rights scholars and activists, should be taken into account when dealing with the issue of violence against women by private actors. The first is that states have a responsibility to exercise due diligence to prevent, investigate and punish international law violations and pay just compensation.” Second is that the states have to ensure equal treatment in the eyes of law as well as equal protection of law to all its subjects. The last is to treat domestic violence as a form of torture punishable by law. The author goes on to elaborate each of the three doctrines separately:

Due diligence

In 1992, the committee on the Elimination of Discrimination Against Women (CEDAW) adopted General Recommendation 19, in which it confirmed that violence against women constitutes a violation of human rights and emphasizes that “States may also be responsible for
private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. The Committee made recommendations on measures states should take to provide effective protection of women against violence, including:

(1) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including violence and abuse in the family, sexual assault and sexual harassment in the workplace.

(2) preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.

(3) Protective measures, including refuges, counselling, rehabilitation action and support services for women who are experiencing violence or who are at risk of violence.

The United Nations Declaration on the Elimination of Violence Against Women also calls on States to “pursue by all appropriate means and without delay a policy of eliminating violence against women” and further to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”.

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The concept of due diligence has been taken forward by the judgement of the Inter-American Court of Human Rights in the case of Velasquez Rodriguez. The Court required the government to “take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within this jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”

Thus, the existence of a legal system criminalizing and providing sanctions for domestic assault would have to perform its functions to “effectively ensure” that incidents of family violence are actually investigated and punished.”

**Equal protection of the law**

Coomaraswamy says “This doctrine is related to the concept of equality and equal protection. If it can be shown that law enforcement discriminates against the victims in cases involving violence against women, then the State may be held liable for violating international human rights standards of equality.

The Convention on the Elimination of All Forms of Discrimination Against Women, in Article 2, requires State parties to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women”, which includes the duty to “refrain from
engaging in any act or practice that public authorities and institutions shall act in conformity with this obligation” and “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

**Domestic violence as torture**

This School of thought argues that domestic violence is a form of torture and should be dealt with accordingly. The argument is that, depending on the severity and the circumstances giving rise to the state responsibility, domestic violence can constitute torture or cruel, inhuman and degrading treatment or punishment under the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It is argued that domestic violence involves the very four critical elements that constitute torture (a) it causes severe physical and or mental pain, it is (b) intentionally inflicted, (c) for specified purposes and (d) with some form of official involvement, whether active or passive.

Proponents of this argument call for domestic violence to be understood as a form of torture and, when less severe, ill-treatment. This argument deserves consideration by the rapporteurs and treaty bodies that investigate these violations, together perhaps with appropriate NGO experts and jurists.” ²
Today, many States recognize the importance of protecting women from abuse and punishing the perpetrators of the crime. One of the major questions facing the law reformers is whether to ‘criminalize’ wife battery. There is a sense that domestic violence is a crime between those who are linked by bonds of intimacy i.e. whether wife-battering should be treated as an ordinary crime or whether there should be an emphasis on counselling and mediation, poses a major dilemma on policy makers.

**Criminalization**

Advocates of the criminal justice approach point to the symbolic power of the law and argue that arrest, prosecution and conviction, with punishment, is a process that carries clear condemnation of society for the conduct of the abuser and acknowledges his personal responsibility for the activity. Research conducted by the Minneapolis Police Department has shown that 19 per cent of those involved in mediation and 24 per cent of those ordered to leave their matrimonial homes repeated assault, but only 10 per cent of those who were arrested indulged in further violence. It is however, critical that those involved in policy making in this area take into account the cultural, economic and political realities of their countries. Any policy which fails to acknowledge the singular nature of these crimes and which is unaccompanied by attempts to provide support to the victim-survivor and help for the abuser is doomed to fail.
Legislation

Legislation with regard to domestic violence is a modern phenomenon. There is an increasing belief that special laws should be drafted, having special remedies and procedures. The first problem that arises with regard to legislation is to allow for prosecution of men who beat their spouses even if the latter, under pressure, want to withdraw their claims. In response some countries have instructed police and prosecutors to proceed with cases even in situations where women indicated that they would rather not proceed. In addition, since the spouse will be the main witness, some jurisdictions have introduced legislation making the woman a “compellable witness” except in certain situations. Other countries, such as the United States, are moving towards advocacy support.

Quasi-criminal remedies are also being utilized by several countries. The most important of these are the “protection” or “bound over” orders. These are procedures by which a person can complain to a magistrate or a justice that violence has taken place and the violent party is then “bound over” to keep the peace or be of good behaviour. The standard of proof is lower than with strictly criminal proceedings and this may provide some women with appropriate relief, with a court order obtainable on the balance of probabilities. Breach of the order is a
criminal offence and the police may arrest, without a warrant, a person who has contravened a protection order.

Civil law remedies, such as an injunction which is used to support a primary cause of action such as divorce, nullity or judicial separation, can also be utilized. Some jurisdictions have enacted legislation removing the requirement of applying for principle relief and allowing the woman to apply for injunctive relief independently of any other legal action. Another, civil remedy which is available in certain states in the USA is an action in tort claiming damages from the marital partner.

**Police action**

In most jurisdictions the power of the police to enter private premises is limited. In the context of domestic violence this can protect the violent man at the expense of the woman. Some legislations allow the police to enter if requested to do so by a person who apparently resides on the premises or where the officer has reason to believe that a person on the premises is under attack or imminent attack. In many cases of domestic violence, immediate release of the offender on bail may be dangerous for the woman and, certainly, release without prior warning may have serious consequences for her. A number of Australian jurisdictions attempt to strike a balance between the interests of the offender and the woman by specifying conditions designed to protect her
to be attached to the release of the offender.

**Training and community support services**

Most police, prosecutors, magistrates, judges and doctors adhere to traditional values that support the family as an institution and the dominance of the male party within it. It is therefore necessary to train law enforcers and medical and legal professionals who come in contact with those experiencing violence to understand gender violence, to appreciate the trauma of those suffering and to take proper evidence for criminal proceedings. Professionals in law and medicine are often resistant to this type of training and to learning from anyone outside their speciality. It would therefore be more effective to involve other professionals in the training programme.

The nature of the crime of domestic violence requires the intervention of the community to assist and support victim-survivors. Community workers should be trained to give them information on the law and law enforcement, available financial and other support offered by the State, the procedures of obtaining such assistance, etc. Community workers can also play an important role in identifying violence, raising awareness about such issues and directing survivors to the correct procedures for seeking redress.

Any relief given to domestic violence victims should also include
counselling for both the battered and the batterers. These programmes can even serve as alternative sentencing options especially in cases where women prefer that their partners “get help” rather than be punished. In order to be effective, all these approaches should utilize formal and informal methods of education and dissemination of information.

**Cooperation at all levels**

Overwhelmingly, governments lack the necessary expertise to develop and implement policy relating to violence against women. Therefore, a more cooperative relationship between governments and civil society should be built to combat violence against women.

An integrated, multidisciplinary approach with lawyers, psychologist, social workers, doctors and others working together to gain a holistic understanding of each particular case and the needs of the individual is the best option. Giving attention to the real-life context of the battered woman, her hopelessness, dependency, restricted options, and her consequent need for empowerment should underpin every approach. The goal is to work with her to develop her capacity to decide her own future.³

**THE GOVERNMENT OF INDIA’S RESPONSIBILITIES AND COMMITMENTS.**

Amnesty International’s article⁴ on impact of violence states “the
responsibility of states for acts which impair the rights of women is sometimes mistakenly perceived as applying only when state agents or officials are the actual perpetrators of acts which violate human rights. The protection afforded by human rights law is far greater. There is a clear responsibility on states under international law which extends beyond violations by those acting on behalf of the state and its organs. Human rights treaties spell out the obligations of the State, including: to promote those rights; to secure those rights for all and translate them into policies and strategies; to prevent violations of the rights under the Conventions and to provide remedies to the victims should their rights be violated. The Declaration on the Elimination of Violence against Women, adopted by the UN General Assembly in 1993, affirms that states must "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons".

Applying international human rights law without understanding the responsibility of the state for abuses of women's rights by private actors -- including employers, partners, husbands, family members or neighbours - simply robs women of protection and of remedies for the majority of abuses against them. Human rights law is not silent on these abuses. It clearly points to a positive responsibility on the part of the state.
Commenting on the Government of India’s obligation, responsibility and commitment towards eradication of domestic violence, the article states, “As a party to the Convention on the Elimination of All Forms of Racial Discrimination since 1968 and the International Covenant on Civil and Political Rights since 1979, India has been committed for many years to ensuring civil and political rights to all its citizens without discrimination of any kind. This commitment was reinforced with its ratification of the Convention of the Elimination of All Forms of Discrimination against Women (Women's Convention) in July 1993. India's Constitution sets out fundamental rights made available to all its citizens which it explicitly states are to be realised without discrimination. The Constitution upholds the right to equality before the law (Article 14) and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Various laws reinforce safeguards against discrimination and provide for positive discrimination for certain groups identified as vulnerable within society. These include scheduled castes and scheduled tribes and women.”

As a vast democracy with many regional variations and a "developing" economy, India has an enormous amount to achieve and an enormous amount of commitments to fulfil to all its citizens, including women. Recognizing its international commitments towards the rights of
women and urged on by a dynamic women's movement, successive
governments have unveiled policies of empowerment for women which
have sought to address the full range of women's human rights. As a
result, there are many positive aspects of women's empowerment which
have taken place in recent years in India. This includes political
representation of women at the lowest levels of government, increases in
life expectancy amongst women and education. There have been several
government initiatives to empower women economically and politically,
many of which are operational in Uttar Pradesh and Rajasthan. In Uttar
Pradesh the government-backed *Mahila Samakya* development scheme
has contributed to the increased empowerment of thousands of
marginalised women through education and other programs. Amnesty
International delegates were told by officials of the Government of Uttar
Pradesh of schemes which provide financial support to widows who often
find themselves ostracised socially and economically, pension schemes
and self-help schemes running in 20% of the districts of the state for
women to mobilise savings and run rural banks. In Rajasthan, the state-
sponsored women's development programme posed a challenge to feudal
patriarchal values by empowering women at the local level to question
and oppose feudal practices such as child marriage. Amnesty
International delegates were told of the establishment of self-help groups
in rural areas in Rajasthan encouraging economic empowerment through
thrift groups and how training programs presented opportunities for women to have their complaints heard by local officials.

Political representation of women has increased at the local level. The 73rd Constitutional Amendment Act, 1992 (Panchayati Raj), included a provision for statutory minimum reservation of 33% seats for women in Panchayati Raj Institutions (this Amendment came into force on 24 April 1993). This has allowed a number of women to participate in community decision-making processes, including those from marginalised communities given that there are also reservations for scheduled caste, scheduled tribe and backward caste categories. The involvement of women in *Panchayats* [village councils] was noted by Amnesty International delegates in both Uttar Pradesh and Rajasthan -- there are reported to be around 3,000 women *Sarpanches* [village heads] and 33,000 elected women representatives on *Panchayats* in Rajasthan -- although there are continuing problems associated with womens' participation. Political reservation for women at the central level has however proved more problematic and successive parliamentary sessions have failed to reach a consensus on the Constitutional (85th Amendment) Bill 1999 which would provide 33% reservation for women in the national parliament and state legislatures.

Following the Fourth UN World Conference on Women in Beijing
in 1995, the Government of India promised several measures to ensure
the advancement of women's rights in India. The Department of Women
and Child Development began work on a National Policy on Women
which would seek to bridge the gap between the equal de-jure status and
unequal de-facto position of women in the country. In January 2000,
while hearing India's first periodic report, the Committee on the
Elimination of Discrimination Against Women (CEDAW) recommended
that a national plan of action be developed to address in a holistic manner
the issue of gender-based violence, in line with the Committee's general
recommendation 19. In January 2001 the Prime Minister of India
announced that 2001 would be the year of Women's Empowerment and
that a National Policy on Women's Empowerment would soon be
unveiled. The policy (Amnesty International has so far been unable to
obtain a copy) reportedly included a plan to ensure that all laws deemed
discriminatory to women be reviewed and suitably amended by 2003. It
also included plans to establish an effective machinery to monitor the
delivery of justice to women in a context of rising crimes against women
and suggested requesting State Governments to set up District
Committees to monitor and expedite disposal of cases of atrocities against
women. On 22 March 2001 it was announced that the Cabinet had cleared
the policy.
Amnesty International delegates were interested to see the Rajasthan government's Women's Policy which was launched in March 2000 and to obtain a copy of the Uttar Pradesh government's draft Women's Policy. Both refer in part to measures to ensure justice to women victims of violence although the majority of these policies relate to economic empowerment of women.

Amnesty International welcomes these indications that the Government of India and state governments wish to address continuing problems of violence against women throughout the country. However, it is concerned that these policies should be more than just further rhetoric and should firmly address ongoing problems of non-implementation and/or discriminatory implementation of safeguards and impunity for perpetrators of violence against women. By highlighting some of the problems it identified in the course of its research in two states in India and by suggesting remedies, Amnesty International hopes to contribute to discussions about how to change this situation.

The reality of the situation on the ground for women and members of vulnerable groups continues to be extremely harsh despite the Constitutional, legislative and administrative framework in place in India. The failure to implement protective provisions and continuing gender, caste and class biases within society ensures that Constitutional and legal
safeguards are rendered meaningless to many. In January 2000, CEDAW, hearing India's first periodic report made a series of recommendations on the basis of a broad range of concerns about implementation of the Women's Convention. These included the establishment of a comprehensive and compulsory system of registration of births and marriages and implementation of laws. The Committee expressed concern at the failure of the Government of India to provide adequate information relating to the general issue of violence against women.

Amnesty International acknowledges that at the highest levels of government the directives are clear that the fundamental rights set out in the Constitution should be granted without discrimination. It also acknowledges that numerous policies for the empowerment of women are in place around the country. However, Amnesty International is concerned that its research in Uttar Pradesh and Rajasthan indicates that despite this, at the level of implementation there is sufficient discrimination and inaction in bestowing rights which shows that the Government of India is failing to exercise due diligence in preventing abuses.

Amnesty International is well aware of the Government of India's argument that changing discriminatory attitudes and practices, which are
so deeply ingrained within society is something which cannot be done
overnight, and that they are making progress in particular in bestowing
economic and political rights on women throughout the country
regardless of caste, religion or other identity. The organization recognizes
the challenges presented to the state given the size and complexity of the
country, and the continuing need for women to be provided with state
help to access the most basic amenities such as food and water. Amnesty
International is publishing this report to highlight the continuing
problems of violence against marginalised women in Uttar Pradesh and
Rajasthan which occur in the context of many other abuses of women's
rights -- many of them social and economic -- because it believes that
women cannot enjoy the full range of rights while being repressed
through violence and while sections of the administration and the
criminal justice system reflect and perpetuate discriminatory practices
prevalent in society. Violence against women does not only have a
physical impact but also an impact on their ability to enjoy the full range
of rights including social, economic and political: the right of women to
enjoy the full range of rights is indivisible.\textsuperscript{5}

\textbf{India ranks a poor 114th in gender equality}

The country ranks in the bottom half, among 134 countries, in
terms of gender equality in the latest ranking that assesses the distribution
of resources and opportunities among males and females around the world.

Slipping one place from last year, India has cornered the 114th position in the World Economic Forum's (WEF) 'The Global Gender Gap Index 2009' ranking. India ranked 114th in 2007 too; it cornered 98th place in 2006.

The WEF's annual ranking, released on October 28, 2009, attempts to assess "how well countries are dividing their resources and opportunities among their male and female populations, regardless of the overall levels of these resources and opportunities".

Along with India, other Asian countries like Korea (115), Iran (128) and Pakistan (132) continue to hold some of the lowest positions in the rankings that are led by Iceland and three more Nordic nations -- Finland (2), Norway (3) and Sweden (4) -- at the top, and New Zealand in fifth spot. Other countries in the top ten include South Africa (6), Denmark (7), Ireland (8), the Philippines (9), and Lesotho (10).

The United Kingdom ranks 15th while the United States is in 31st spot -- three spots lower than it was last year. Though placed way ahead of India, neighbouring China has dropped to 60th position from 57 last year. Among other BRIC nations, Russia ranks 51st while Brazil is in 82nd spot.
"While India, Iran and Pakistan perform very poorly on the economic, education and health sub-indexes, their overall scores are partially bolstered by relatively good performances on political empowerment," the WEF said.

Stressing that certain religions and cultural norms around the world prevent women from attaining equal status in society, a top UN official cited India as an example saying that the government was making tremendous efforts to uplift the better half of its population.

"You find countries like India where there are traditional practices and yet the state in its approach towards women has always held equality as a basis," Asma Jahangir, UN special rapporteur on religious freedom, said.

The WEF says the index scores are meant to indicate the percentage of gender gap that has been closed. Women entering senior official, managerial and legislator roles, gains for women in parliament, and women ministers in the new government helped close the gender gap in the country. That means a higher score on the index represents a more gender-equal society, at least according to this methodology.

"Girls and women make up one half of the world's population, and without their engagement, empowerment and contribution we cannot hope to achieve a rapid economic recovery nor effectively tackle global
challenges such as climate change, food security and conflict," Klaus Schwab, founder and executive chairman, WEF, said.

"The Forum works year-round with leaders on ways to close gender gaps through its Women Leaders and Gender Parity Programme, and this report underpins their work."

The Global Gender Parity Group, a community of highly influential leaders from business, politics, academia, media and civil society -- 50% women and 50% men -- seeks to share best practices and identify strategies to optimise the use of talent.

"Out of the 115 countries covered in the report since 2006, more than two-thirds have posted gains in overall index scores, indicating that the world in general has made progress towards equality between men and women, although there are countries that continue to lose ground. We have included a section on the dynamics of the gender gap and found that progress is achieved when countries find ways to make marriage and motherhood compatible with the economic participation of women," said co-author Ricardo Hausmann, director of the Centre for International Development at Harvard University, USA.

The Forum continues to expand geographic coverage in the report. Featuring a total of 134 countries, this year's report provides insights into the gaps between women and men in over 93% of the world's population.
Thirteen out of the 14 variables used to create the index are from publicly available hard data indicators from international organisations such as the International Labour Organisation, the United Nations Development Programme and the World Health Organisation.

Some notable facts:

Among the 134 countries covered in this report, Ireland has the lowest maternal mortality rate (1 death among 100,000 live births) while Chad has the highest maternal mortality rate (1,500 deaths among 100,000 live births).

Twenty-four countries have a maternal mortality rate of greater than 500 deaths per 100,000 live births.

Annually, more than half-a-million women and girls die during pregnancy and childbirth; 3.7 million newborns die within their first 28 days. 99% of maternal deaths occur in developing countries. Half of these occur in sub-Saharan Africa and another third in South Asia.

A woman in a least developed country is 300 times more likely to die from causes related to pregnancy and childbirth than a woman in an industrialised country, in her lifetime.

Maternal and newborn health are intimately linked. Children who have lost their mothers are four times more likely to die prematurely than those who have not.
It is estimated that for every woman who dies, another 20 suffer from illness or disability as a result of pregnancy or childbirth -- around 10 million women a year. Many of these women not only face discomfort and emotional distress but are shunned by their families.

Every year, about 1 million children are left motherless and vulnerable. They are less likely to attend school, which, in turn, means that they risk a life living in poverty as adults.

Approximately 80% of maternal deaths could be averted if women had access to essential maternity and basic healthcare services.

The five major direct causes of maternal death in developing countries are severe bleeding, infection, hypertension, complications from unsafe abortions, and prolonged/obstructed labour.

About 20% of maternal deaths have indirect causes that complicate pregnancy or childbirth, such as malaria, anaemia, hepatitis and HIV/AIDS.

Another serious factor is insufficient access for women and girls to nutritious food. Weak healthcare systems often do not prioritise women's health.

Lack of skilled health workers to support a woman through pregnancy, childbirth and post-natal care. There is evidence that worker numbers and quality are positively associated with maternal survival.6
International, regional and national legal frameworks are critical to addressing violence against women.

It is well established under international law that violence against women is a form of discrimination against women and a violation of human rights. States’ obligations to respect, protect, fulfill and promote human rights include the responsibility to act with due diligence to prevent, investigate and punish all forms of violence against women and provide effective remedies to victims. Accurate and comprehensive data and other documentation are crucial in monitoring and enhancing State accountability for acting against violence against women and for devising effective responses. Therefore, ensuring adequate data collection is part of every State’s obligation to address violence against women. This must include efforts to collect data systematically on the most common forms of violence, as well as to strengthen data collection and knowledge on forms of violence that may affect relatively few women and on new and emerging forms of violence. In addition, the requirement to enact, implement and monitor legislation covering all forms of violence against women is set out in international and regional instruments and jurisprudence.
At the international level, human rights treaties set out a series of rights that are critical in the protection of women from violence. The treaty bodies established to monitor implementation of the human rights treaties, and in particular the Committee on the Elimination of Discrimination against Women, have addressed States’ obligations to prevent, investigate and punish all forms of violence against women and address the structural causes of violence against women in general recommendations, concluding observations/comments and work under individual complaints and inquiry procedures. In addition, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and provisions of the Rome Statute of the International Criminal Court address specific forms of violence against women.

The international treaties outlined above are complemented by policy instruments that provide detailed guidance for action to address violence against women, including declarations and resolutions adopted by United Nations bodies and documents emanating from United Nations conferences and summit meetings. Moreover, the ad hoc international criminal tribunals have set important precedents on the applicability of international law to State and individual responsibility for violence
against women.

At the regional level, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women is directed solely at eliminating violence against women and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa addresses violence against women within many of its provisions. In South Asia, States have agreed to the South Asian Association for Regional Cooperation Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution and the Dhaka Declaration for Eliminating Violence against Women in South Asia. The Council of Europe Committee of Ministers has adopted Recommendation Rec (2002)5 on the protection of women against violence. Cases heard by the European Court of Human Rights and the Inter-American Commission on Human Rights have directed States to create appropriate criminal legislation; to review and revise existing laws and policies; and to monitor the manner in which legislation is enforced.

At the national level, a growing number of States have enacted laws addressing specific forms of violence against women, including domestic violence (which may, or may not cover marital rape), sexual offences, sexual harassment, trafficking and female genital mutilation. States have also enacted comprehensive laws specific to violence against
women that provide multiple remedies. Specialized courts and mechanisms to ensure application of such laws, as well as to monitor and evaluate their effective application have also been put in place.\textsuperscript{8}

A) DOMESTIC VIOLENCE LAWS IN UNITED STATES OF AMERICA

The Violence Against Women Act of 1994 (VAWA) is a United States federal law. It was passed as Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, and signed as Pub.L. 103-322 by President Bill Clinton on September 13, 1994. It provided $1.6 billion to enhance investigation and prosecution of violent crimes perpetrated against women, imposed automatic and mandatory restitution on those convicted, and allowed civil redress in cases prosecutors chose to leave unprosecuted.

VAWA was drafted by then-U.S. Senator Joseph R. Biden's office with support from a number of advocacy organizations including the National Network to End Domestic Violence, the Texas Council on Family Violence, National Coalition Against Sexual Assault, National Coalition Against Domestic Violence, Legal Momentum and The National Organization for Women, which described the bill as "the greatest breakthrough in civil rights for women in nearly two decades."

VAWA was reauthorized by Congress in 2000, and again in December 2005.
The Office on Violence Against Women was statutorily established within the United States Department of Justice following the passage of the reauthorization of VAWA in 2000. It has the authority to administer some of the grants authorized under VAWA, as well as develop federal policy around issues relating to domestic violence, dating violence, sexual assault, and stalking. The Office is led by a Director whose appointment has been confirmed by the U.S. Senate. VAWA also increased funding for direct services for victims of domestic violence through the U.S. Department of Health and Human Services. VAWA will be up for reauthorization in 2011.

The World Conference on Human Rights, held in Vienna in 1993, and the Declaration on the Elimination of Violence Against Women in the same year, concluded that civil society and governments have acknowledged that domestic violence is a public health policy and human rights concern.

The Violence Against Women Act was developed and passed as a result of extensive grassroots efforts in the late 80's and early 1990s, with advocates and professionals from the battered women's movement, sexual assault advocates, victim services field, law enforcement agencies, prosecutors’ offices, the courts, and the private bar urging Congress to adopt significant legislation to address domestic and sexual violence.
Since its original passage in 1994, VAWA's focus has expanded from domestic violence and sexual assault to also include dating violence and stalking. It funds services to protect adult, teen, and child victims of these crimes, and supports training on these issues, to ensure consistent responses across the country. One of the greatest successes of VAWA is its emphasis on a coordinated community response to domestic violence, dating violence, sexual assault, and stalking; courts, law enforcement, prosecutors, victim services, and the private bar currently work together in a coordinated effort that had not heretofore existed on the state and local levels. VAWA also supports the work of community-based organizations that are engaged in work to end domestic violence, dating violence, sexual assault, and stalking, particularly those groups that provide culturally and linguistically specific services. Additionally, VAWA provides specific support for work with tribes and tribal organizations to end domestic violence, dating violence, sexual assault, and stalking against Indian women.

Many grant programs authorized in VAWA have been funded by the U.S. Congress. The following grant programs, which are administered primarily through the Office on Violence Against Women in the U.S. Department of Justice have received appropriations from Congress:

STOP Grants (State Formula Grants); Transitional Housing Grants;
Grants to Encourage Arrest and Enforce Protection Orders; Court Training and Improvement Grants; Research on Violence Against Indian Women; National Tribal Sex Offender Registry; Stalker Reduction Database; Federal Victim Assistants; Sexual Assault Services Program; Services for Rural Victims; Civil Legal Assistance for Victims; Elder Abuse Grant Program; Protections and Services for Disabled Victims; Combating Abuse in Public Housing; National Resource Center on Workplace Responses; Violence on College Campuses Grants; Safe Havens Project; Services for Children and Youth Exposed to Violence; Engaging Men and Youth in Prevention.

The American Civil Liberties Union had originally expressed concerns about the Act, saying that the increased penalties were rash, the increased pretrial detention was "repugnant" to the US Constitution, the mandatory HIV testing of those only charged but not convicted is an infringement of a citizen’s right to privacy and the edict for automatic payment of full restitution was non-judicious (see their paper: "Analysis of Major Civil Liberties Abuses in the Crime Bill Conference Report as Passed by the House and the Senate", dated September 29, 1994). However, the ACLU has supported reauthorization of VAWA on the condition that the "unconstitutional DNA provision" be removed.

The ACLU, in their July 27, 2005 'Letter to the Senate Judiciary
Committee Regarding the Violence Against Women Act of 2005, S. 1197' stated that "VAWA is one of the most effective pieces of legislation enacted to end domestic violence, dating violence, sexual assault, and stalking. It has dramatically improved the law enforcement response to violence against women and has provided critical services necessary to support women and children in their struggle to overcome abusive situations."

In 2000, in a controversial 5–4 vote, the Supreme Court of the United States held part of VAWA unconstitutional in United States v. Morrison on federalism grounds. Only the civil rights remedy of VAWA was struck down. The provisions providing program funding were unaffected.  

B) DOMESTIC VIOLENCE LAWS IN UNITED KINGDOM

The Domestic Violence, Crime and Victims Act 2004 came into force in July 2007 and introduced new powers for the police and courts to deal with offenders in domestic violence cases. It also aimed to improve the support, protection and advice that victims of such violence receive.

When the Act was introduced the Home Secretary described it as “the biggest overhaul of domestic violence legislation for thirty years”. Some of its key provisions include:
• Making common assault an arrestable offence

• Making it a criminal offence to breach a non-molestation order punishable by up to five years in prison. Previously breach of an order was treated as a civil contempt of court punishable by imprisonment or fine.

• Strengthening the civil law to extend protection from domestic violence to same sex couples and to couples who have never lived together.

• Recognition of a new offence of causing or allowing the death of a child or vulnerable adult – for which all members of a household, aged 16 and over, may be liable and which carries a maximum penalty of 14 years.

• Giving the Criminal Injuries Compensation Authority the right to recover from offenders the money it has paid to their victims in compensation.¹⁰

C) DOMESTIC VIOLENCE LAWS IN CANADA

In Canada, the Government of Canada has the constitutional authority to make laws in relation to criminal law and procedure. As a result, the Criminal Code applies to all Canadians. The provinces, however, prosecute most Criminal Code offences, but Justice Canada carries out prosecutions under all other federal laws, including drug
offences. In the territories, Justice Canada conducts all criminal prosecutions, including those under the *Criminal Code*.

- Federal Legislation

- Provincial and Territorial Legislation

**What Federal Legislation Addresses Family Violence in Canada?**

Most forms of family violence are crimes in Canada. Although the *Criminal Code* does not refer to any specific "family violence offence," an abuser can be charged with an applicable offence. Criminal charges could include:

- sexual offences against children and youth (ss. 151, 152, 153, 155 and 170-172)

- trespassing at night (s. 177)

- child pornography (s. 163.1)

- failure to provide necessaries of life and abandoning child (ss. 215 and 218)

- criminal negligence (including negligence causing bodily harm and death) (ss.219-221)

- homicide - murder, attempted murder, infanticide and manslaughter (ss. 229-231 and 235)

- criminal harassment (sometimes called "stalking") (s. 264)
• uttering threats (s. 264.1)

• assault (causing bodily harm, with a weapon and aggravated assault) (ss. 265-268)

• sexual assault (causing bodily harm, with a weapon & aggravated sexual assault) (ss. 271-273)

• kidnapping & forcible confinement (ss. 279 and 279.1)

• abduction of a young person (ss. 280-283)

• making indecent & harassing phone calls (s. 372)

• mischief (s. 430)

• intimidation (s. 423)

• breach of a court order, recognizance (peace bond), & probation order (ss.145(3),127, 811, and 733.1)

The sentencing provisions of the Criminal Code provide that where an offender, in committing the offence, abuses his spouse or child or any position of trust or authority, this shall be considered an aggravating factor for sentencing purposes (s.718.2).

Recent substantive and procedural changes to the Criminal Code have increased the safety of victims of family violence, including:

• strengthening the peace bond provisions concerning those previously convicted of sexual offences against children (May
• ending the use of "house arrest" for offences involving serious personal injury (December 2007);

• increasing mandatory minimum penalties for serious offences where a firearm is used (May 2008); and

• improving availability of testimonial aids for vulnerable adult victims/witnesses, including victims of family violence (January 2006).

**Provincial and Territorial Legislation**

Provincial and territorial governments make laws in areas of their own jurisdiction, including providing victims' services. To date, six provinces (Alberta, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland and Labrador and Saskatchewan) and three territories (Northwest Territories, Yukon and Nunavut) have proclaimed specific legislation on family violence:

• Alberta: *Protection Against Family Violence Act* (in force since 1999)

  Note: information about the *Protection Against Family Violence Act*

• Manitoba: *Domestic Violence and Stalking Act* (in force since
These civil statutes are designed to complement protections in the *Criminal Code*. They offer further protection to victims of family violence. Civil measures provided include emergency intervention orders, which may grant exclusive victim occupation of the home and family vehicle. They may also restrain the abuser from communicating with or contacting the victim or members of the victim's family. Some statutes
also provide for victims' assistance orders, which may include monetary compensation from the abuser.\textsuperscript{11}

D) DOMESTIC VIOLENCE LAWS IN AUSTRALIA

Over the past several decades, governments at the Commonwealth, State and Territory levels have taken steps in response to domestic violence through legislative and non-legislative measures. The law can do much to discourage domestic violence – by making it a crime and attaching penalties intended both to punish and to deter offenders and would-be offenders, and by establishing mechanisms (such as protection orders) designed to protect and assist the persons against whom domestic violence is perpetrated or threatened. The law can also seek to change behaviours by, for example, encouraging or even mandating perpetrators’ participation in counselling programs. By conferring strong powers on the authorities of the state to deal with domestic violence, lawmakers can send a clear message to the community about what is acceptable and unacceptable behaviour in homes and families.\textsuperscript{12}

State, Territory and New Zealand domestic violence protection orders legislation

There is legislation in force in all Australian States and Territories, and in New Zealand, that empowers courts to make apprehended violence orders specifically to protect victims of domestic violence, or persons at
risk of domestic violence.

The precise provision made by the legislation in these jurisdictions differs in myriad ways. Further, there is variation across jurisdictions in the basic approach taken to some important issues.

However, in very broad terms, from our examination of the legislation it appears ……… that the provision made in all jurisdictions is of largely similar effect in terms of almost all central features of the legislative schemes. Broadly, it can be said that, in the majority of jurisdictions, the domestic violence-specific legislation is of similar scope in terms of the relationships covered.13

In all jurisdictions, the domestic violence-specific legislation only applies where the victim of violence or threatened violence is or has been in a particular kind of relationship with the perpetrator. In most jurisdictions, a wide range of relationships is comprehended by the legislation including, at least, spouses and de facto partners (including same sex partners), children and step-children, the child of a person’s de facto partner and other persons who are generally regarded as ‘relatives’.14

**Exclusion orders**

Domestic violence-related legislation in every State and Territory allows courts to include in a domestic violence protection order a
condition excluding the person against whom the order is made from a residence shared with the protected person. In New Zealand, a court can make an exclusion order independently of a protection order. In some jurisdictions, a court considering the imposition of an exclusion condition must take into account certain special considerations (for example, in Victoria, a court must consider the desirability of minimising disruption to the protected person and any child living with that person). In other jurisdictions, no such special considerations are specified in the legislation.

**Portability of orders**

The capacity for protection orders to be enforced across jurisdictions is an important issue for victims of domestic violence. The domestic violence related legislation across Australia recognises the need for such ‘portability’ of orders. A person protected by a domestic violence protection order made in one State or Territory (or New Zealand) may apply, in any of the other States and Territories, for the order to be registered. Such registration is essentially an administrative process. Upon registration, in effect the order has the same legal status and becomes enforceable in the registering jurisdiction as if it were an order made under that jurisdiction’s legislation.\(^\text{15}\)
Stalking offences

Legislation in every State and Territory, and in New Zealand, makes stalking an offence.

Although there is some variation between jurisdictions as to what constitutes stalking, in all jurisdictions the act in question must be intended to arouse apprehension or fear in the person being stalked, or to cause that person physical or mental harm. Under the legislation in jurisdictions other than New South Wales and Victoria, the act must occur on more than one occasion.

In all jurisdictions, stalking includes following a person or loitering near a person’s house, place of work or any other place frequented by the person. In most jurisdictions, it also includes communicating with a person (whether by mail, telephone or over the internet), interfering with a person’s property, giving a person offensive material or keeping a person under surveillance. There is significant variation across jurisdictions in relation to penalties.16

A cursory look at the laws of the above mentioned countries indicate that crimes like child pornography as well a stalking etc. are also covered in the laws relating to violence against women. Infact, these laws are all inclusive and in addition to any domestic violence law that may be in existence. In India, the law on domestic violence is in nascent stage
and has come to be associated mostly with violence between a man and a woman who are either married or having a relationship in the nature of marriage. The law still requires to be brought to its full potential by utilizing it for all categories and all purposes it is meant for. In the following section we will know the benefits and the lacunae of the law on domestic violence in India. Although it must be remembered, that despite all the shortcomings, this law is not just a piece of legislation but also an instrument of social change.

II THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

An article tracing gender justice in India since the advent of Britishers in India says that “a look at the status of women in India today is a cause for concern. Right from female foeticide, infanticide, child marriage, domestic violence, sexual violence, sexual harassment at the work place to the treatment meted out to elderly women makes any thinking person to wonder at the nature of the society. Participation of women in the decision making bodies be they within the home, workplace or community is marginal, never reaching even 25% of the total population of women in India. At the same time women are seen as the bearers of Indian tradition and culture. Without enabling women to exist as citizens with political and economic power is it possible for them
to safeguard the tradition and culture of this country?”

The author says that the “status of women in British India and the princely States was worse and the various practices like sati, widowhood, child marriage, female infanticide were all seen as reflective of the backwardness of Indian society and were therefore targeted for change. The role of women in the National Movement and the rise of the women’s movement during the pre - independence days ensured that the Constitution of India and Independent India would see a change for the better in the status of women. India attained Independence on 15th August 1947 but it was not till the Constitution came into force on 26th January 1950 that the picture became clear regarding the structure of government and the rights of the citizens of India. The fact is that a parliamentary democracy in a republic has prescribed guarantees for protection of the rights and status of the citizens of India irrespective of their social status. The makers of the Indian Constitution were very realistic in their expectations and that explains the various safeguards that they built into the Constitution to protect the rights of the marginalized and vulnerable groups in society. The national movement had been characterized by the demand for equality irrespective of birth and status. Questions regarding untouchability, rights of the religious and linguistic minorities and women had gripped the minds of the freedom fighters.
They realized that one cannot demand freedom from colonial rule without ending the exploitative practices and unequal treatment of various sections of the society in the name of culture, history and tradition. This explains the protection that they have guaranteed these groups in the Constitution. The Fundamental Rights enumerated in Part III of the Constitution are the bedrock on which the democratic and Republican character of the Indian State and society are based.” ……… “The objective of the Constitution as spelt out in the preamble is to ensure that justice, equality and liberty are achieved. How this is to be achieved has been spelt out in Part III dealing with Fundamental Rights and also in Part IV dealing with the Directive Principles of State Policy. While the Fundamental Rights are justiciable, i.e., enforceable through the judicial system the Directive Principles are non-justiciable.”

“However, their importance lies in the fact that they are directory in nature and their sanction is political. There are six groups of fundamental rights which are available to every citizen of India irrespective of caste, class, race, religion and gender.” However since we are concerned only with the gender aspect at present, only relevant articles shall be considered. “Articles 14-18 deal with the Right to Equality. Article 14 expressly states that there shall be equal protection of the law and equality before the law. That is to say that when ever a
woman approaches a law enforcement officer or the judicial court then she should receive the same protection as any man.” ……… “When the Constitution guarantees equal protection of the law it simply means that when she approaches a police station to register her complaint the officer on duty has to record it as he would if a wealthy man from the upper caste were to come to the police station to register a first information report (FIR) against a stranger who had caused him physical harm or injury…….. There cannot be a different standard of justice or even denial of justice on the basis of the gender of the complainant.”

“This right to equality is the touchstone against which all the laws and practices in India have to be tested. Any law or practice which is not in consonance with this provision of the Constitution can be challenged in a court of law as it would be unconstitutional and violative of a Fundamental Right guaranteed by the Constitution of India. Article 15 guarantees the right against discrimination. Reading the Right to Equality with this right will necessitate the striking down of any law or practice that is discriminatory in character. This is the context in which the Vishaka and Others v. the State of Rajasthan and Others (1987) case is noteworthy. The Supreme Court declared the offence of sexual harassment at the workplace as violative of the Right to Equality and Right Against Discrimination. However, notwithstanding the right to
equality and the right against discrimination the members of the
c constituent assembly thought it necessary to provide for special
protection for women in Article 15(3) of the Constitution. They realized
that a mere formal equality and right against discrimination guaranteed in
the Constitution would not safeguard the women from being exploited
and treated unequally. The members were sagacious enough to realize
that thousands of years of discrimination and subordination of women
will not be ended by the mere guaranteeing of equality in the Constitution
and therefore they inserted this article so that the State would be given the
space to make laws, policies and programmes for the enhancement of the
status of women and enable them to access their rights under the
Constitution. It is in this context that the 74th amendment which provided
for reservation for women in the panchayats was made possible. Such a
special provision takes into consideration the practical reality of the
inability of women to participate in the electoral process on an equal
footing with the men. The prejudices and biases against women and their
abilities hinders the election of women to the local bodies or the state and
central legislatures. Which means that though women are guaranteed
equality under the Constitution they are unable to access this right by
virtue of their actual position in society. By such a protection it enables
women who desire to stand for elections and participate in the decision
making processes to do so.
This was made possible by a Constitutional provision itself. The Right for equality of opportunity in matters of public employment is guaranteed in Article 16 of the Constitution. The second category of Fundamental Rights deals with Right to Freedom i.e., from Articles 19-22. Article 19 guarantees the freedom of speech and expression, to assemble peaceably and without arms, to form associations and unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to practice any profession, or to carry on any occupation, trade or business. This civil right is essential for functioning as a human being in a democratic society. It has been considered as one of the most essential rights along with the Right to Equality. In the context of domestic violence and sexual harassment at the workplace this Fundamental Right of women is most often than not violated. Women are forced to change their jobs or seek transfers on account of Sexual Harassment. Married women subjected to domestic violence find that while the Constitution guarantees them the right to freely move throughout the territory of India their husbands and families don’t recognize this right. Article 21 guarantees the Right to Life. The Supreme Court has in its interpretation widened the scope of this right by stating that the Right to Life means the right to live with dignity in the Bandhua Mukti Morcha v. Union of India (1984) case. The Right Against Exploitation is guaranteed in Article 23. This expressly prohibits the
trafficking of human beings. The other categories of rights deal with more specific issues like religious freedom and cultural and educational rights. However, the most important of all the Fundamental Rights is the Right to Constitutional Remedies in Article 32. This right guarantees the enforcement of the Rights enumerated in Part III of the Constitution as Fundamental Rights by providing for the right to move the Supreme Court or the High Court through a Writ Petition for enforcement of any one of the Fundamental Rights. The Supreme Court has further strengthened this right through the Bandhu Mukti Morcha v. Union of India case by stating that the Court can allow any member of the public acting bona fide to espouse the cause of persons who on account of their poverty or disability are unable to do so.

Thus it is not only that the Constitution has guaranteed various rights to women as citizens of India so as to protect their interests as human beings and individuals but the Judiciary in the course of its functioning as another wing of our Government has interpreted the Constitutional provisions so as to enable the implementation of the rights and also to facilitate the access to these rights in various cases that have come before it in the form of writ petitions filed by individual s or groups. In addition to the Fundamental Rights various other provisions of the Constitution in Part IV that deals with the Directive Principles
provide directions to the State in formulating policies and programmes in the interest of women. Some of these would be useful to consider here. Article 38 requires the State to secure a social order in which justice - social, economic and political - for the promotion of welfare of the people. It requires the State to strive to eliminate inequalities in status, facilities and opportunities. Clearly the intention of the makers of the Constitution was to ensure that equality would not be only of opportunity but in reality. Article 39 puts down the principles of policy to be followed by the State which include that the State should direct its policy toward securing the right to an adequate means of livelihood, that there is equal pay for equal work, that the health and strength of workers men and women, are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 42 requires the State to make provision for securing just and humane conditions of work and for maternity relief. Article 46 requires the State to promote with special care the education and economic interests of the weaker sections of the citizens. Clearly then the objective is to strive towards a gender just society. The various special programmes and policies that have been formulated by the State since independence have had this objective. The fact that we are still very far from achieving this objective is not due to the lack of vision for an equal society as much as due to the absence of political will due to the failure to change society
and the values that are deeply entrenched and which cannot be altered without changes in the processes of socialization which includes education, family and the media. In addition to these responsibilities that have been put on the State to safeguard the interests of the citizens, through an amendment made in 1976 Part IVA was included in the Constitution which deals with Fundamental Duties and article 51A(e) very specifically requires that the citizens of India renounce practices derogatory to the dignity of women. Thus even a cursory glance of Parts III, IV and IVA of the Indian Constitution will make it abundantly clear that the makers of our Constitution, the Legislature and the Judiciary have provided a fundamental law that takes into consideration the fact there can be no distinction made on the basis of the sex of a citizen which ensures that women will be treated equally under the law and are entitled to every single right as citizens of India. In addition taking into consideration the historical situation which reveals the discrimination that has been practiced on the basis of sex which has resulted in the subordinate status given to women in society special provision has been made to ensure that women will be able to access these rights.”

“The Constitution makers took into consideration the special needs of women as well thus requiring the State to protect the maternity of women as well even while providing them the right to pursue any employment or
profession at par with a man. However, it must be remembered that guaranteeing a right in law does not ensure the ability to access the right in reality. The fact that the historical subjection of women has not been ended is constantly before us in the form of the reducing number of women in each census. It is falling at an alarming rate which is a matter of concern. Similarly crimes against women have been on the increase. Incidents of rape, sexual assault, sexual harassment, domestic violence, cheating etc have been growing not only in numbers but also in intensity and brutality. The statistics provided by the Crime Bureau of India brings this before us every year. These statistics only reveal the numbers of reported cases. One can easily imagine how much bigger the numbers would be if one were to take into account the numerous unreported cases. In addition, in the context of an expanding market economy, there has been the increasing objectification of women in the advertisements and the media. Parliament has from time to time either made amendments to the existing law or enacted new laws to address these various concerns. Women have huge responsibilities in relation to their families as the carers and nurturers but have low negotiating power at the same time. This results in neglect of their health and nutrition and access to health care is also restricted as women are most often unable to go to the primary health centres and hospitals leaving their responsibilities at home. It is, however, very important to realize that gender justice can not
be secured merely through laws and the legal system. Enacting gender
just laws will not mean an end to the exploitation of and discrimination
against women. Using law and the legal system can only be one of the
many remedies to be used to change the unequal status of women. Law is
one of the means of empowerment of women but it is very essential that
we realize the limitations of law and not just hope that since we have a
Constitution that guarantees equality and various laws to address the
different kinds of atrocities against women that women now are enjoying
equality. Society has to be changed; attitudes of people in society have to
be altered before equality can become real for women. Central
Legislations dealing with matters relating to women’s interests have been
enacted right from the 1950’s”........ “To deal with the problems arising
from the practice of giving and receiving dowry the Dowry Prohibition
Act was passed in 1961 and amendments were made to it subsequently in
1983. Further amendments were made to the Indian Penal Code in 1986
by incorporating Section 304 B by which a new offence of dowry death
was created. Anyone who commits dowry death would now be punished
with imprisonment for a term which shall not be less than seven years but
which may extend to imprisonment for life. Changes were also made in
the Indian Evidence Act in 1983 and 1986 by which the rules relating to
evidence in the context of death of a married woman within a period of
seven years of her marriage were formulated through sections 113 A and
113 B. Essentially the sections refer to the presumption of cruelty or harassment before the death of a woman or in connection with any demand for dowry the Court shall presume that such person has abetted her suicide (S. 113 A) or caused the dowry death (S. 113 B). Further in 1983 Chapter XX A was added by an amendment which includes Section 498 A which basically deals with the crime of cruelty by husband or relatives of husband. The word cruelty has been defined. Two explanations are given one which defines cruelty in general and another cruelty in the context of unlawful demand for any property or valuable security. This is the first time that law has taken into consideration the problem of domestic violence. While till now the provisions of the Indian Penal Code that deal with injury, harm, wrongful confinement could have been used to address the problem the law enforcement officials, lawyers and judiciary could not reconcile themselves to the fact that a husband who commits any of these offences on his wife is committing a crime and therefore punishable. The prejudice in society against a wife seeking such remedy was clearly reflected in the attitudes of these law enforcement officers and as a consequence it became imperative to specifically address the issue of domestic violence which is so widely prevalent in society in order to secure to women justice and equality. The women’s movement in India during the 1970s and 1980s forced the Government to take cognizance of these problems and to provide a remedy in law.”
“That is precisely what was attempted through these amendments. However, in reality there has been little change in the attitude of the law enforcement officials as there has hardly been any perceivable change in the status of women in society. Thus women continue to face the problem of domestic violence. One perceptible change is the recognition that domestic violence cannot be brushed aside as a problem between a husband and wife. If only the Government would use the media more effectively in driving home the message that wives are not the property of husbands to do what they please with them and that women are valued members of the nation we might see a reduction in the crime of domestic violence. There are enactments like the Indecent Representation of Women (prohibition) Act 1986 and provisions in the Indian Penal Code to deal with obscenity like Sections 294 and 509. These try to address the question of objectification of women and sexual harassment of women. Then there is the Commission of Sati (Prevention) Act of 1987, the Immoral Traffic (Prevention) Act of 1986 etc which have tried to end some of the traditional practices which have resulted from the subordinate status of women in society and which are exploitative in character. To specifically address the question of female foeticide the Parliament enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention) Act in 1994. This Act basically criminalizes the use of techniques like ultrasound to determine the sex of the foetus. This Act used together with
the Medical Termination of Pregnancy Act 1971 effectively could lead to the ending of the practice of killing female foetuses. However, due to the negligent attitude of society and government towards the female in India there has hardly been any arrest even under this act leave alone any conviction. To protect working women the Maternity Benefit Act was passed in 1961. This is to enable women who are employed to be able to safeguard the health of the foetus and their own before and after childbirth. This is to ensure that employed women will not face any disadvantages in comparison with their male colleagues of the need for hospitalization and post natal care in the context of pregnancy while also ensuring that the new born baby will also not miss out on maternal care during this period. The Equal Remuneration Act of 1976 aims to provide for the payment of equal wages to men and women workers and for the prevention of discrimination against women when the work is the same or of a similar nature. The Factories Act of 1948 provides through Sections 19 and 42 for proper toilet facilities for women employees while Section 48 provides for crèches so that women may be able to look after their young children. Section 66 provides that no woman is to work between 7 p.m. and 6 a.m. unless the State Government specifically makes rules otherwise in certain specific contexts. The last section has not always worked to the advantage of women when it comes to the question of perks, increment and promotions as men are able to put in that extra work.
especially in certain industries like the Information Technology industry. That is the context in which the State Government of Karnataka wanted to exempt women in the IT industry from this provision of the Factories Act. With reference to inheritance, succession, laws relating to marriage and divorce, guardianship, custody, adoption etc since independence the State has been endeavouring to make the laws gender just. However, since the laws relating to these subject matters are considered to be derived from the religious beliefs and practices it has not been possible to completely ensure equality in these areas.”

“The Hindu Succession Act of 1956 gives male and female heirs equal rights of inheritance in acquired property while with reference to ancestral property daughters have no share except in a few states in Southern India like Karnataka and Andhra Pradesh wherein through amendment the State has guaranteed in law share for the female heirs even in the co-parcenary or inherited property. Under the Indian Succession Act which governs Christians, sons and daughters get equal share in the property of their father after giving the wife one-third of the property. In Muslim law women generally inherit half of what their male counterparts do whether it is ancestral or acquired property. Muslim men and women can bequeath through a will only one-third of their property. The father is considered to be the natural guardian of the child and only if
the father has no objection during his lifetime can the mother act as the natural guardian. This too was provided through the interpretation of the Supreme Court in the Githa Hariharan case. Through amendments to the personal laws efforts have been made to ensure equal rights in marriage and divorce for men and women. However there are still a few provisions which continue to deal unequally with men and women.”

“The legislative framework provided in the Constitution provides for equality in society between men and women. In order to fulfil this constitutional mandate the Parliament and the Judiciary have from time to time made laws and interpreted the existing ones that would guarantee gender justice. However since law, the legal system and society are closely interlinked it is not possible to enforce the rights provided in law without changes in social institutions, values and attitudes. Social change cannot be brought about through law. It is only through the process of sensitizing various branches of the government and more importantly the members of society to the rights and concerns of women can gender justice become a reality. Law is only one method by which the various problems of women can be resolved. While law can empower women at one level it is not possible to remove completely the subordination of women or the discriminatory practices merely through the legal system. If it had been otherwise we should not have to worry about the falling
numbers of women in the year 2004. After all we have the Constitution that guarantees various rights to women and enactments since then which have attempted to address various crimes against women. We have to recognize the limitation of law in bringing about change in society and in ending oppression of women.”

A specific legislative initiative, “The Protection of Women from Domestic Violence Act 2005 was brought into force by the Indian government from October 26, 2006. The Act was passed by the Parliament in August 2005 and assented to by the President on 13 September, 2005. As of November 2007, it has been ratified by four of twenty-eight state governments in India; namely Andhra Pradesh, Tamil Nadu, Uttar Pradesh and Orissa.”

Prior to 2005, there was neither a clear legal definition of domestic violence nor any law in India that specifically addressed it. In order to create a framework from within which the concept of domestic violence could easily be recognised to prevent its occurrence, there was a need for a comprehensive description of what constituted domestic violence. Although remedies were available in the form of civil laws such as those dealing with divorce and criminal laws such as Section 498A Indian Penal Code, 18602 (IPC), which acknowledged cruelty within marriages, these were limited in their approach and did not address the need for
immediate relief and support — a prime requirement of women facing domestic violence.

Due to embedded cultural values, even the limited legal remedies available in cases of VAW, such as Section 498A IPC, were restricted to married women. There was no relief available to women in other domestic relationships such as mothers, daughters, women in live-in relationships and others facing domestic violence. It is also important to note that registration of marriage was, and still is, not compulsory and that many marriages were contracted under personal/customary laws. Therefore, prior to the enactment of a specific legislation that dealt with domestic violence, women were often unable to prove existence of marriage and avail necessary remedies.

In India, one of the most commonly occurring problems in cases of domestic violence is the dispossession of the dependent female from the shared household. In a patriarchal society such as ours, usually only male family members are given possession of the premises and it therefore, becomes easier to dispossess the dependent wife, daughter, mother and so on, as the case may be. This is specially so because the Indian matrimonial regime does not confer property rights on a woman upon marriage. Often, the natal family of the dispossessed woman is unwilling or unable to help her. As a result, the woman continues to remain in a
violent relationship for fear of becoming homeless. Thus, the non-recognition of a woman’s right to reside was a huge lacuna in Indian Law.

It was in this context that LCWRI, together with other women’s groups and Non-Governmental Organisations (NGOs), lobbied with the Government for a law on domestic violence. LCWRI played a key role in the drafting of and campaigning for the Law. This resulted in the enactment of the PWDVA on 26 October 2006 and is one of our key achievements to date in our mission to empower women through the law.

**Why Gender Specific?**

In its preamble, the UN Declaration on the Elimination of Violence Against Women recognises that VAW is a “manifestation of historically unequal power relations between men and women” and a social tool whereby women have been forced to accept a subordinate position to men. It is this ‘socially imposed’ inequality that extends to and is reflected within the home, and makes women particularly vulnerable to violence.

Articles 2 and 5 of the CEDAW require governments to take positive measures to end legal, social and economic inequality. The Indian Constitution makes a unique provision of positive discrimination in favour of women and children in Article 15 (3)4 that allows the State
to take special measures for women and children, in order to achieve the goal of substantive equality.

It is an accepted fact that in majority of the cases of domestic violence, the victims are women. Thus, the main intention behind the gender-specific nature of the PWDVA is to facilitate a woman’s access to justice, in order to correct the historical disadvantage of unequal power relations and bring women onto a level playing field. Therefore, not only was a special legislation required to address the issue of domestic violence, but there was also a clear need for this legislation to be specifically for women.

Key Features of the PWDVA

The International Human Rights regime recognises an individual’s right to life and the right to live that life with dignity. This is reflected in various provisions contained in International legislation such as “All human beings are born free and equal in dignity and rights,” “Everyone has the right to life, liberty and security of person” and the recognition of “the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.” Indian law also recognises the right to life in Article 21 of the Constitution. Although it appears to be limited in scope, judicial interpretation has given this right positive effect and extended it.
For instance, in the landmark judgment of *Visakha v. State of Rajasthan*, the court held that sexual harassment in the workplace is a violation of Articles 15, 19 (1) (g) and 21 of the Indian Constitution.

Unfortunately, efforts made by the Indian Constitution to guarantee women an equal status in society have not been able to fully address the extent of indignity suffered by women as a result of domestic violence. The PWDVA therefore, attempts to address this gap in the Indian legal system by unambiguously recognising a woman’s right to a violence-free life by classing domestic violence as a Human Rights issue and a deterrent to development.

One of the most unique features of the PWDVA is that whilst it is primarily a civil law, an element of criminal law is incorporated within it to ensure more effective implementation. Both civil and criminal laws have their inherent limitations, such as protracted proceedings in the case of civil law and punitive focus in criminal law. The PWDVA seeks to rectify the same. Reliefs granted under the PWDVA are civil in nature, however, upon breach of civil orders by the perpetrator, criminal aspects come into effect, resulting in imprisonment and/or fine.

**Definition of Domestic Violence**

This Act also goes on to provide, for the first time, a comprehensive definition of domestic violence11 that encapsulates the
diverse forms in which it occurs. The drafters of the PWDVA have been very careful to follow internationally accepted legal principles so as to leave no doubt as to its validity. For instance, it incorporates definitions such as “Violence against women shall be understood to encompass...physical, sexual and psychological violence occurring in the family, including... dowry-related violence, marital rape... non-spousal violence...” and “All acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating, verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence... shall be termed “domestic violence.” It is also important to note that in the absence of a legal recognition of marital rape in India, the inclusion of sexual abuse within the definition of domestic violence in the PWDVA has categorised sexual abuse within marriage as a form of violence.

**Right to Reside**

The PWDVA seeks to address the non-recognition of a woman’s right to residence in the shared household. Whilst the right to reside is not a new concept in Indian Law, previously, this right has never been clearly defined. Section 17 of the PWDVA grants this right to the Aggrieved
Person (AP). However, it is vital to understand that the right to reside granted to the aggrieved woman does not confer on her a right of ownership over the property. It is merely a procedural safeguard against dispossession.

**Relationships in the Nature of Marriage**

The recognition of ‘relationships in the nature of marriage’ as a type of domestic relationship under the PWDVA is also a hitherto unprecedented legal step forward.

This provision affords protection against domestic violence to women in live-in relationships, legally void/voidable marriages and common law marriages. Thus, it enables women who are in bigamous or fraudulent marriages, who would otherwise have no remedy, to seek reliefs. Whilst this provision has invited much criticism and controversy, it is important to note that it does not make an invalid marriage valid or provide legal recognition to bigamous marriages. In a recent case where the constitutionality of the PWDVA was challenged on the ground that it jeopardises the rights of the legal wife, the court held that there was no reason why equal treatment could not be meted out to a legal wife, common law wife, or mistress “*like treatment to both does not, in any manner, derogate from the sanctity of marriage ...*” This provision merely seeks to denounce domestic violence in any quarter. It is not a
judgment call on the morality of the choice to cohabit outside of marriage.

**Mechanism under the Law**

This Law also attempts to provide women facing domestic violence easier access to court. It imposes an obligation on state governments to put in place support structures to help the women by introducing new authorities under the Law such as the Protection Officer (PO) as the key implementing agency of this Law. Despite the civil nature of the PWDVA, the Police are also expected to play a very important role under the Act. The Law also puts into place Service Providers (SPs) registered under the Act, notified Shelter Homes and Medical Facilities, and Counsellors to conduct counselling on the direction of the court, and Welfare Experts to assist the court.

**Single Window Clearance**

Not only does the PWDVA hope to provide women easier access to justice, but in recognising the urgent need for reliefs sought, it also ensures speedier access. It puts into place a single window clearance system for women facing domestic violence. Previously, a woman had to seek different reliefs from different courts and this was both time consuming as well as dangerous given the threat to life encountered in most cases of domestic violence.
Reliefs

The PWDVA grants a woman a number of reliefs and she is thus, able to avail support as per her requirements.

• Protection Order is an injunctive order granted to prevent domestic violence or the threat of domestic violence.

• Residence Order protects against dispossession from the shared household, prevents any act that impacts upon peaceful occupation of the same and where the need arises, makes provision for alternate accommodation.

• Custody Order is a temporary order granted until such time as the parties’ parental rights are resolved in a separate civil proceedings.

• Monetary relief and Compensation Order are both remedies which are financial in nature. However, the main difference is that the former is intended to meet expenses actually incurred whilst the latter is meant to compensate for injuries caused above and beyond actual monetary loss or expenditure such as depression suffered as a result of being subject to domestic violence.

• Interim and ex-parte orders can be granted prior to final orders on proof of a prima facie case.

The provision of immediate reliefs allows the woman the much
needed violence-free environment to help her make an informed and well thought out decision on how to proceed.

**Multi-Agency Coordination**

The PWDVA also imposes a duty on key players such as Police, POs, SPs and Magistrates to inform the woman facing domestic violence of her rights upon receipt of Complaint. Thus, she is made aware of her right to make an application for relief under this Act, availability of services of POs and SPs, her right to free legal aid and right to file a complaint separately/simultaneously under Section 498A IPC as the PWDVA exists in addition to and not to the exclusion of other laws.

Sadly, violence is a fact of most women’s lives, especially within the domestic sphere. The enactment of the PWDVA was indeed a giant step forward for all women in India.

However, a Law is only an instrument of social change. It is in the hands of those implementing this tool to do so effectively and in the spirit in which it was envisioned, thereby contributing to its efficacy.¹⁹

The Report further states that “a crucial step towards ensuring the success of any new law is through monitoring its implementation. This is essential in order to put in place systems, at the outset, to guard against non-implementation in the coming years. It also helps identify the strengths and limitations of the law and gauge, over a period of time,
whether the law serves the purpose for which it was originally created. It must be remembered that no matter how well conceptualised and painstakingly drafted, no legislation is perfect and therefore, the success of a law lies in its ability to prove effective and benefit its users.”

**PWD** In order to assess the impact of any legislation, and particularly a social legislation, it is necessary to understand and evaluate whether the beneficiaries of the legislation are able to access and obtain the reliefs that the Law promises to provide. The PWDVA, as detailed in the preceding chapters of this Report, establishes a multiagency response system to ensure that women facing domestic violence are able to effectively access the Law. Since the coming into force of the Law, there has been a concerted effort by various stakeholders to facilitate women’s access by establishing this multi-agency response system and monitoring its functioning. However, the answer to the concomitant question of whether the courts are granting the reliefs as provided under the Act, can be found only through an analysis of the orders and the reliefs that are fashioned by the trial courts as evidenced from a reading of these orders. To take this argument further, while it is true that a number of external factors do play a role in enabling access and to an extent, fashioning of reliefs, finally, it is the Judge who determines the nature of reliefs granted and the efficaciousness of such reliefs. This determination is however, not
made in a vacuum but is affected by a number of factors such as, the letter of the Law, legal principles, existing precedents, facts and circumstances of the case, and the individual attitudes, perceptions and understanding of the Judges.

It is in this context that an analysis of orders passed by the courts under any law assumes significance, as this is a fairly and perhaps the only single comprehensive method of answering the aforementioned issues, in evaluating the impact of a legislation.\textsuperscript{21}

In chapter 10 of the Report, an analysis of the judgments passed under the PWDVA by the higher Judiciary, i.e. the High Courts and the Supreme Court, is undertaken. This is a continuation of the endeavour in the Second M&E Report and we hope that with this continuing effort, a better picture of the development of the Law in the hands of the higher judiciary will emerge.

Between November 2008 and August 2009, approximately 19 judgments under the PWDVA were passed by various High Courts. There were no judgments passed by the Supreme Court under the Act during this period.

These 19 judgments have been categorised in the following manner:

- Challenge to constitutionality of the PWDVA
• Substantive law – definitions, coverage, rights under the Act

• Right to reside and interpretation of “shared household” under the PWDVA

• Procedures, mechanisms established, and enforcement of the Act

As with the analysis of the Trial Court orders, the judgments of the High Courts are being analysed keeping in view the equality norms within the Indian Constitution and a human rights perspective. The ultimate purpose of the analysis is to understand whether the objectives of the PWDVA are being furthered by the higher judiciary, as evidenced in the judgments discussed here.

The indicators for this analysis are drawn from the gender specific nature of the Law and the intent as expressed in the Statement of Objects and Reasons of the Act. It must be noted, that the objective of the PWDVA is to ensure and uphold the right of every woman to live a life free of violence, and towards this, the Act provides various reliefs of a civil nature and envisages an elaborate mechanism to ensure that the reliefs can be accessed by women. At the same time, there is an implicit assumption in the Law that the procedures must not be allowed to defeat the substantive right to be free from domestic violence. Hence, the deliberate incorporation of the provision in Section 28 (2) of the PWDVA that allows the courts to follow their own procedure. This analysis of
judgments seeks to examine whether the higher Judiciary interprets the PWDVA keeping in mind this gender sensitive understanding of the Act.

Challenge to Constitutionality of the PWDVA

In the Second M&E Report, reference was made to the fact that 6 petitions challenging the constitutionality of the Act had been filed before various High Courts, with judgment being rendered in one case. This year, the High Court of Madras rendered its judgment in the second of these petitions.

1. *Dennison Paulraj and Ors v. Union of India, rep. by Secretary, Ministry of Law and Justice and Ors*[^22] (Decided by K. Ventakataraman, J.)

This writ petition challenged the constitutionality of Sections 12, 18, 19 and 23 of the PWDVA. The main ground for this challenge was:

- It is biased as a wife can file an application alleging domestic violence whereas the husband cannot file an application under the Act. Hence the law discriminates in favour of the wife and affects the right to life and liberty of the husband and his family members under Articles 19 and 21 of the Constitution.

The Court dismissed this challenge and held that “giving certain preferential treatment to the wife and treating them as a special category cannot be termed as violative of either Article 14 or Article 16 of the
Constitution of India.” The Court referred to Article 15(3) which allows the State to discriminate in favour of women and children.

Several landmark judgments of the Apex Court were cited in order to conclude that “sex” constitutes a sound basis for classification, and although there cannot be any discrimination on that ground alone, the specific mandate of Article 15(3) allows for such preferential treatment. Finally, the Court relied upon the judgment of the Delhi High Court on the same issue last year, in Aruna Parmod Shah v. UOI.23

With this judgment of the Madras High Court, it appears that the issue of challenge to constitutionality of the law on the ground that it is gender specific has been conclusively decided. The Court in this case, did not hesitate to reiterate the established principles for examining the constitutionality of gender specific laws. However, there are still a few pending challenges regarding the Act in other courts on other issues and the interpretation of some of the specific provisions. It is crucial that the High Courts deal with the challenge to the issues in a sensitive manner, in order to bring the debate on the constitutionality of the Act to an end.

Substantive Law

Coverage: Definition of Respondent

2. Al fzalunnisa Begum v. The State of A.P. rep. by its Public Prosecutor, High Court of A.P. and Nuzhathunissa Begum; and

The above mentioned criminal revision petitions under Section 482 of CrPC against the decisions of the lower Court orders were combined and taken up by the Division Bench of the Andhra Pradesh High Court. The question that arose in both the petitions was whether ‘Respondent’ as defined under Section 2 (q) of the PWDVA includes a female person/relative of the husband or male partner. The petitions were originally before a single Judge bench, who after hearing the arguments of the parties, and in light of the earlier decisions of the High Court of Madhya Pradesh as well as that of its own High Court, held that female members cannot be made Respondents under the Act.

In both cases, the application under the PWDVA before the Trial Court was filed by the daughter-in-law against the husband and in-laws, including the mother-in-law. The afore-mentioned contention was raised in both cases, citing the judgments of the Delhi High Court in *Ajay Kant v. Alka Sharma*25 and the unreported judgment of the AP High Court, Smt. *Menakuru Renuka and Ors. v. Smt. Menakuru Mona Reddy and Ors.*26
The Court examined the definitions of “Respondent,” “Domestic Relationship” and other relevant provisions under the Act, and in seeking to arrive at a conclusion referred to the Statement of Objects and Reasons. It was held that the definition of ‘Respondent’ makes it clear that it can only be an adult male person. However, the proviso, which has an expanded meaning, says that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner. The Court went on to state that “The proviso deals with complaint against two categories of persons i.e., (1) a relative of the husband or (2) the male partner. If we restrict the meaning only to male persons, a relative of the husband will become redundant.” The Court further observed that except in case of Residence Orders under Section 19 (1) (b), the Magistrate can pass any other order against the relatives of the husband including a female person.

The Court then went on to refer to Section 31 (3) which authorises the Magistrate, while framing charges under Section 31(1) to also frame charges under Section 498A IPC or any other provision of IPC or the Dowry Prohibition Act 1961 (DPA), as the case may be, if the facts disclose the commission of such an offence. The High Court interpreted this gender neutral provision to clearly show that the Magistrate can always frame charges against the female relatives of the Respondent who
have committed an offence under Section 498A or any other provision of IPC or the Dowry Prohibition Act. It was on this rationale, that the Court arrived at a finding that women are not excluded from the coverage of “Respondent” in a proceeding initiated under the PWDVA.

This judgment is a clear vindication of the intent of the Act to not exclude relatives of the husband, who are very often the perpetrators of violence within the home. Furthermore, the High Court of Andhra Pradesh accurately arrived at the conclusion that because the provisions under the Act are in addition to criminal provisions like Section 498A IPC and the DPA, it is essential to interpret its definitions in consonance with those of the existing law. Finally, the clear and unambiguous broadening of the definition of “Respondent” through the proviso was correctly understood and pointed out by the Court in this judgment.

4. **Archana Hemant Naik v. Urmilaben Naik and Anr.**

In this criminal revision petition before the High Court of Bombay, a similar contention as to the inclusion of female relatives within the definition of “Respondent” under Section 2(q) was raised.

The Court upheld the maintainability of action under the PWDVA against female relatives of the husband or the male partner. The Court based its decision on the argument that the proviso to Section 2(q) carves...
out an exception to the general provision that a Respondent can be only an adult male person. It provides that an aggrieved wife or female living in relationship in the nature of marriage may also file a complaint against any relative of the husband or the male partner. The Court observed, “It is important to note that the proviso refers to a relative and not to a male relative.”

The Court went on to state the difference in applicability of the proviso by explaining that “a wife or a woman to whom the proviso is applicable is compelled to seek Residence Order in respect of a shared household only as against the male relatives of her husband or male partner, as the case may be, the order under Section 19 of the said Act will be completely ineffective in as much as the female relatives of the husband or the male partner occupying the shared household will continue to disturb possession of such wife or such female of the shared household, or may continue to prevent entry of such aggrieved wife or female to the shared household. On plain reading of the proviso to section 2(q) it is clear that a relative referred to in the proviso is not only a male relative. The main section specifically uses the word male. Even the proviso refers to male partner. Therefore, whenever the legislature intended, the word male has been used in the main section and its proviso. In case of two domestic relationships covered by proviso to
section 2(q) viz; (i) relationship between wife and husband and (ii) a relationship in the nature of marriage between a female and her male partner, the Respondent can be any relative of the husband or male partner. It cannot be the intention of the legislature that the relative in the proviso can only be a male relative.”

The Court further interpreted the intent of the Legislature from a reading of the proviso to Section 19 (1), and held that this very fact shows that an order under other clauses of section 19 (1) can be passed against a woman. The Court specifically held that “If a narrow interpretation is put to proviso to Section 2 (q) to the effect that the relative referred to therein is only a male relative, the aforesaid proviso to sub-section (1) of Section 19 becomes meaningless.”

Therefore, on this basis the Bombay High Court reiterated the position that the definition of “Respondent” under the Act includes female relatives of the husband or male partner. This judgment assumes significance in light of the fact that the Court looks to the intention of the legislature as well as attendant provisions of the Act in order to reach a conclusion, instead of using a narrow interpretation of the main provision of Section 2(q).

5. Rema Devi v. State of Kerala\textsuperscript{28}

In this revision petition filed against the order of the Sessions Court
deleting the name of the female relative as a Respondent, the Madras High Court reiterated the position taken by the High Courts in the aforementioned judgments. The Court clearly held that the proviso to Section 2 (q) enables an aggrieved woman to file a “complaint against a relative of the husband or the male partner”, and such a relative of the husband or the male partner need not necessarily be a male relative.

The Court also referred to the proviso to Section 19(1), providing an exception to women Respondents in relation to a Residence Order passed under Section 19(1) (b) of the PWDVA. The Court held that the only embargo against the passing of a Residence Order while disposing of an application under Section 12(1) of the Act is that if the Respondent is a woman, the Magistrate shall not direct such woman to remove herself from the shared household. The High Court clearly stated that “A different interpretation may render the provisions of the Act as meaningless and unworkable.”

Hence, with the decisions of the various High Courts, it appears that the issue of whether female relatives of the husband or male partner can be included as Respondents ought to be settled. However, in the absence of a conclusive judgment from the Apex Court, it is likely that the issue will be raised by the Respondents before other High Courts as well; it is however expected that any such Court will rely upon the
overwhelming number of decisions in favour of this interpretation in future cases.


In this petition before the High Court of Chhattisgarh, the legality and propriety of the judgment passed by the Sessions Judge, partly modifying the amount of maintenance awarded under the Section 20 (1) (d) of the PWDVA has been challenged by the Appellant-Respondent. The contention of the Respondent was that although, while granting Maintenance Orders under the PWDVA, the Courts are required to apply the principles under Section 125 CrPC, the Trial Court in failing to do so, has committed an illegality.

The High Court after going through the contentions of both parties as well as the order of the lower Courts held that the Trial Court did not commit any illegality in granting maintenance to the AP.

The Court used the rule of interpretation that the words of a statute must prima facie be given their ordinary meaning. Accordingly, the words used under Section 20 must be considered to be clear and unambiguous in providing that Maintenance Order is an independent remedy under the PWDVA, and is in addition to any other remedy available to the AP under a legal proceeding before any other Court. In fact, the Court went on to note that the provisions under the Act are not
dependent upon Section 125 CrPC. Hence, it was held that “…the Court is competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of Section 20 of the Act, and the aggrieved person is not required to establish his case in terms of Section 125 of the Code.”

In this case, the High Court of Chhattisgarh adopted an extremely significant approach in distinguishing the scope of awarding maintenance under Section 125 CrPC from that of Maintenance Orders under Section 20(d) of the PWDVA. Although it is true that the principles used in granting maintenance under Section 125 CrPC may be used by the Courts as a guidance in passing Maintenance Orders under Section 20(d) of the Act, it is also necessary to reiterate that it is not necessary for the AP to meet all the requirements of Section 125 CrPC in order to succeed in her claims under the PWDVA. This very subtle differentiation which may in certain cases have the effect of denying a woman her entitlement under the PWDVA was aptly pointed out by the Court in this case.

7. *Mrs. Mary Cedric Pinto v. Mr. Cedric Francis Pinto & Anr,*\(^{30}\)

(Decided by A.S. Oka, J.)

This writ petition before the Bombay High Court was decided based on the facts of the case. The petitioner is the wife, who had filed for interim custody of their three children under the PWDVA. The Trial
Court granted interim custody to the petitioner-wife which was however, altered by the Sessions Court to the effect that the custody was to be shared between the parties every alternate month on the ground that the children had expressed a desire to stay together with both parents. It was on this decision that the wife appealed to the High Court.

The High Court in the course of arriving at a decision directed the parties to explore the possibility of reconciliation and also obtained the opinion of the children. On failure of the parties to come to an agreement, the Court examined the facts of the case and the grounds on which the Sessions Court had altered the Trial Court order. The High Court upheld the order of the Trial Court, based on the fact that the act of disturbing the custody of the children every alternate month in accordance with the Sessions’ Court order will only “cause mental trauma to the minor children.” It was observed that “in a case where there is a dispute between the parents over the custody of minor children, the custody has to be retained with one of the parents with visitation rights and/or right to have temporary custody for few days reserved in favour of the other parent.”

On this basis, the Court set aside the order of the Sessions Court. However, the Court did not uphold the order of the Trial Court granting temporary custody to the wife either; the Court observed, that because the children were already in the husband’s custody before the initiation of
proceedings under the PWDVA, the status quo should be maintained with
the wife being able to meet them at regular intervals. However, the Trial
Court was directed to dispose of the application for custody under the
PWDVA, preferably within a period of three months.

This judgment of the High Court can be considered to have both a
positive and negative impact on custody issues brought under the
PWDVA. While on the one hand, the High Court appropriately observed
that it is the welfare of the children which is of utmost importance, and
hence, alternating their custody between the parents every alternate
month will unsettle them. However, on the other hand, this judgment
directing status quo by the Court may have adverse implications on future
cases, where reliefs under the Act may actually be allowed in favour of
the Respondent i.e. the husband in this case. It would have been
appropriate for the Court to clearly state that this is not a general principle
to be applied to all cases, and should be based on the facts and
circumstances of each case.

Right to Reside under the PWDVA

8. *Neetu Mittal v. Kanta Mittal and Ors.*\(^{31}\) (Decided by Shiv Narayan
Dingra, J)

This appeal before the High Court of Delhi was fi led by the
daughter-in-law against the decision of the appellate Court that allowed
an appeal by the in-laws. The appeal was against the order of civil judge
that refused to grant a permanent injunction under order 31 CPC in favour
of the in-laws, against their son and daughter-in-law. The applicants had
been living separately from their son and daughter-in-law. The AP and
her husband had agreed to shift to a different house under a compromise
arrived at the police station but refused to do so by asserting that she had
a right to stay in her matrimonial home and that the other house was not
habitable. The Respondents in response filed a civil suit to restrain the
woman and her husband from forcibly entering and disturbing the
peaceful possession of the Respondents. In the instant case, the in-laws
also cited the Supreme Court judgment in S.R. Batra v. Taruna Batra to
support the contention that their house could not be considered as the
shared household of the daughter-in-law.

Upholding the contentions of the in-laws, the Court demonstrated
sensitivity and understanding of the reality of the situation to hold that the
son can live in the house of parents as a matter of right only if the house
is an ancestral house, in which he has a share that can be enforced
through partition. However, “when the property is self-acquired, the son
has no legal right to live in the house, irrespective of his marital status.
Merely because the parents have allowed him to live in the house so long
as his relations with the parents were cordial, does not mean that the
It was further observed that there is no legal liability on the parents to continue to support a disobedient son or a son who becomes liability on them or a son who disrespects or disregards them or becomes a source of nuisance for them. This was an acknowledgment by the Court of a common issue that has received very little attention in the public domain; that of harassment caused to the aged parents at the instance of the son for a share in the property, and not solely by or at the instance of the daughter in-law as is commonly understood. Although this was a case of permanent injunction under the CPC and not directly under the PWDVA, the parties did rely on arguments of right to reside as well as interpretation of the Supreme Court in the Batra judgment. This judgment may be considered to be a good example where the Court was able to undertake a balanced examination of the facts and circumstances of the case, and given that the son had already taken a separate residence, and the relations between the parties were admittedly not in a state in which they could be expected to stay together, decide the case in favour of the in-laws. Also, it must be noted that there were no allegations of violence or cruelty made against either the son or the in-laws by the daughter-in-law.
Procedures, Mechanisms Established and Enforcement of the Act

Procedures under the Act

9. Anilkumar & Ors v. Sindhu & Ors\(^{32}\) (Decided by V. Ramkumar, J)

Two issues were discussed by the Kerala High Court in this revision petition:

- Whether the Chief Judicial Magistrate court can be said to be a Judicial Magistrate of the first class within the meaning of Section 27 of the PWDVA?

- Is it permissible for any Magistrate to exercise judicial powers of inquiry or trial under the PWDVA, in respect of a cause of action occurring outside such local jurisdiction?

On the first jurisdictional issue, it was held that in a non-metropolitan area, the Court of the Chief Judicial Magistrate is not a separate class of Court but is only a Court of JMFC in accordance with Section 12(1) r/w Section 6 of the CrPC. Hence, the Court concluded that the CJM has the territorial jurisdiction to entertain and decide applications filed under Section 12 of the PWDVA.

On the second issue however, the Court answered in the negative. This was based on the fact that Section 28(1) of the Act clearly mandates that all proceedings and an offence under Section 31 shall be governed by
the provisions of the CrPC. Hence, it follows that the provisions in the CrPC relating to jurisdiction for enquiry of offences are also applicable to the cases under the Act. It was also observed that the power to define the territorial jurisdiction of the CJM lies with the High Court, a condition of jurisdictional requirement that was not met in the instant case. In fact, the Court distinguished between the unrestricted power of a CJM to take cognisance of a matter irrespective of territorial limits with that of conducting of “Trial or enquiry.” The Court held that as “Chapter XIII CrPC dealing with the jurisdiction of the criminal Courts with regard to enquiries and trials is applicable to the proceedings under Act, therefore, accordingly, the CJM has no jurisdiction to conduct any inquiry or pass or grant any protection or other order under the Act.” On this basis, the High Court set aside the order of the Sessions Court, and directed that the case be presented before the appropriate Court.

This decision of the Kerala High Court is based on sound reasoning and understanding of the procedural requirements. The PWDVA extends the scope of jurisdiction of domestic violence cases to allow ease of access to justice for women. But given the fact that the trial procedures are regulated by the CrPC, certain general rules and limitations about territorial jurisdiction of criminal courts that do not necessarily have an adverse impact on women’s access may apply to cases under the
In this appeal before the High Court of Bombay (Nagpur Bench), the question before the Court was whether the report of the PO has to be looked into before passing an interim order.

In this instance, the wife of the applicant had filed an application under Section 23 of PWDVA in the Court of learned Chief Judicial Magistrate, Amravati. The Trial Court passed an order directing the applicant to pay maintenance of a sum of INR 1200 to the wife and INR 600 to the son, i.e. the non–applicant number 2. This order was challenged by the applicant stating that the report of the PO was not called for in the Sessions Court, which dismissed the said appeal. Hence the appeal was filed in the High Court of Bombay. It was argued by the applicant that the Trial Court passed the Maintenance Order without calling for a report either from the PO or the SP as required under Section 12 of the Act.

The High Court dismissed the appeal, stating that no report from the PO is required to pass an interim order. The Court relied upon the pervious Judgment of the Bombay High Court in Vishal Damodar Patil v. Vishakha Vishal Patil, wherein it was observed that there is no need to file separate application for interim relief under Section 23 of the
PWDVA (discussed in detail below). In the instant case, the Court held that it is not necessary in each and every case to obtain report from the PO or SP to decide application for interim relief. If on the basis of record before the Court, the Court is in a position to arrive at a just and proper conclusion, it will be open for the Court to do so and decide the matter accordingly. In the present case, the applicant had filed a reply to the application filed by non-applicants and, therefore, necessary material was before the learned Trial Judge to decide the question whether the interim relief should be granted.

The judgment of the Bombay High Court reiterates that procedural technicalities must not be allowed to act as a barrier to access to justice, particularly where the facts of the case prima facie establish the rights of the AP. The Court emphasised the fact that an order will not suffer from infirmity where “the Court is in a position to arrive at a just and proper conclusion”, which is essential as the intent of this law is not to punish the perpetrator, but to ensure efficacious and effective remedy to women facing violence.


In this case the issue raised was whether interim relief can be granted to any AP without a separate application or prayer for the grant of
such a relief under Section 23 of the PWDVA. This appeal was filed by the husband-Respondent before the High Court of Bombay, against the order of the Sessions Court dismissing his appeal and affirming the Trial Court order granting maintenance and Residence Order to the wife under the Act.

The main contentions of the husband were as follows:

- The application under Section 12 filed by his wife (AP) did not contain any specific prayer for interim relief, and there was no separate application filed under Section 23(1) for interim relief, along with the main application.

- It was further contended that the Residence Order is more in the nature of final order and that cannot be granted without giving the Respondent an opportunity to be heard.

The Court examined in detail Sections 12 and 23 of the Act, in addition to the different provisions for reliefs, in order to arrive at a conclusion on the afore-mentioned issues. The Court held that in view of Section 23, pending the final disposal of the application under Section 12, the Magistrate is provided the jurisdiction to pass an order of interim relief in terms of Sections 18, 19, 20, 21 or 22 of the PWDVA. Hence, it can be concluded that every relief provided under the Act, including Residence Orders under Section 19 can be awarded as part of interim
reliefs in accordance with Section 23. The Court went on to refer to Section 28(2) of the Act which empowers every Magistrate to lay down its own procedure for disposal of an application under Sections 12 or 23(2).

Based on this power granted to the Courts by the PWDVA, the High Court came to the conclusion that there is no requirement of filing a separate application for grant of interim relief under Section 23 of the Act. The Court further proceeded to state that the Magistrate should consider the nature of reliefs sought in the main application under Section 12 (1) of the Act while considering the grant of ex parte ad interim or interim relief. It was observed that the Magistrates can grant ex - parte ad interim relief based on an affidavit in Form III as prescribed by the Rules. However, it was reiterated by the Court that before granting any interim relief, Respondent should be provided with an opportunity of being heard.

Hence, this judgment of the Bombay High Court decidedly addressed a contention that has been raised before other Courts on the procedural issue of whether an interim order can be passed without filing a separate application under Section 23 of the Act. In fact, an analysis of the Trial Court orders in the first two years act as witness to the fact that at the ground level, a number of prayers for interim reliefs were being denied by Courts on the ground that the technical requirement of a
separate application under Section 23 was not filed. Although this year’s order analysis appears to demonstrate that the Magistrates are becoming more sensitive and granting interim orders without a separate application, this judgment puts to rest this contention.

12. *Smt. Leelavathi S. v. Shri. Murugesh and Ors.*\(^3\)⁶ (Decided by Jawad Rahim, J.)

In this appeal before the High Court of Karnataka, the decision of the Sessions Court setting aside the order passed by the Trial Court, granting maintenance and separate residence to the wife (appellant) and restraining the husband and his relatives from committing any act of domestic violence, has been challenged.

The Sessions Court set aside the Trial Court order in favour of the appellant on the basis that the procedure prescribed in the CrPC to conduct the trial under Section 12 of the PWDVA was not followed. It has been contended by the appellant that the learned Magistrate followed his own procedure to conduct the enquiry in accordance with

Section 28 (2) of the PWDVA, by giving sufficient opportunity to the Respondents to present their case and perusing the materials submitted by both parties in detail. The appellant also contended that the Sessions Court failed to pass any order with regard to the interim maintenance that was awarded by the Trial Court.
While deciding the issue of whether the Trial Court followed the appropriate procedure, the High Court in this case, sought to examine Sections 28 (1) and (2). According to the Court, it is clear that under Section 28 (1) of the PWDVA, the Courts must examine the procedure “prescribed under CrPC while conducting the enquiry for the offences punishable under sections 12, 19, 20, 21, 22 and 23.” At the same time, it was noted that the Court is not prevented from laying down its own procedure under sub-section (2). The words "laying down its own procedure" was explained by the High Court to mean that the Court has to lay down clearly, its own procedure to be adopted for such proceedings. On this basis, it was held that in the instant case, it is not disputed “that no such procedure has been laid down by the Court and hence in such instance the Code of Criminal Procedure becomes applicable and the accused becomes entitled to all relief that is available under the Code of Criminal Procedure applicable for Trial Summons case under the Summary trial.” Therefore, the Court came to the conclusion that as the Trial Court did not grant any relief in accordance with the CrPC to the Respondents who were treated as accused, and hence there is no illegality or infirmity in the order of Sessions Court, setting aside the grant of reliefs under the PWDVA by the Trial Court.

This judgment poses a major concern for women litigants as well
as Courts themselves because of the manner in which Sections 28(1) and (2) of the Act have been interpreted. The Court appears to have ignored the formulation of Section 28(2), which provides that “Nothing in sub-section (1) shall prevent the Court from laying down its own procedure….” Hence, the PWDVA clearly provides a choice to the Courts to either adopt the procedure under Section 125 CrPC, as provided under Section 28(1) read with Rule 6(5) of the PWDVA, or “lay down its own procedure.” The object behind allowing the Court to lay down its own procedure is to enable easier access and efficacious reliefs to women facing domestic violence, in recognition of the fact that given the civil nature of the reliefs provided under the Act, it may not be feasible to adopt the CrPC procedure in all cases.

Hence, the Act sought to provide some flexibility to the Court in use of procedures, given the intent and object of the law. The Court has interpreted “its own procedure” to mean that the Magistrate in such instances must in a sense, invent a new procedure and lay it down clearly. However, it must be noted that the scope of Section 28(2) procedure is more in the nature of allowing the Courts to use procedures other than that of Section 125 CrPC, if the need arises. This includes using procedures under the CPC as well as practices such as giving an opportunity to be heard to both parties, and arriving at a decision based
on the material on record and prima facie proof of domestic violence.

It is submitted that in the instant case, the Trial Court did fulfil these requirements and granted the interim relief based on a prima facie finding, as required by Section 23 of the Act. Also, the Court in referring to the fact that the accused are entitled to all reliefs under the CrPC seem to have not taken into consideration the civil nature of this Act.


The main contention in this appeal before the High Court of Karnataka was whether the PWDVA allowed for the passing of *ex parte* interim orders. However, before the Court was able to take this issue up for consideration, it was submitted by both parties that the case had reached its final stage before the Trial Court, and was posted for arguments. The Court therefore, refused to interfere with the order passed by the Magistrate, considering that the trial had already come to an end and was expected to be disposed of within a short period.


This appeal before the Bombay High Court discussed the question of maintainability of an application filed under Section 26 by the AP seeking a Residence Order. The Court, after examining the contentions of
the parties, held that Section 26 provides that any relief available under Sections 18, 19, 20, 21 and 22 can also be sought in any legal proceeding, before any other Court that affects the AP and the Respondent, whether such proceeding was initiated before or after the commencement of this Act. Hence, it was concluded that a relief available under Section 19 of the PWDVA can also be claimed under Section 26 of the Act.

This judgment reiterates a clearly settled issue with regard to the use of the provision under Section 26 of the Act.

15.  *J. Thilagavati v. M. Rajkumar*\(^3^9\) (Decided by M. Jaichandren, J)

This petition was filed before the Madras High Court (Madurai Bench) by the AP to transfer the case to her place of residence and the Court allowed the same. The AP, living at her natal home, apprehended physical danger to herself if she travelled outside, and hence made the prayer for transfer of the case.

Hence, this judgment dealt with a routine procedural matter, which was favourably decided upon by the High Court.

**Mechanisms established under the Act**


This judgment of the Bombay High Court is a landmark in the
implementation of the PWDVA because of the proactive approach adopted by the Court in addressing the ineffective enforcement of the law.

In this appeal, taking note of the issue of increasing instances of bride burning and offences against women, the High Court of Bombay provided a number of directions to the Government of Maharashtra for effective implementation of PWDVA in the state, as one of the crucial legislations to address violence against women. The following directions were given by the Court, which in arriving at its decision examined the various statistics and resources available and also engaged two eminent persons as amicus curiae:

- One of the social workers that have earlier been appointed in each of the 20 Counselling Centres (or Special Cell) for Women and Children shall be notified by the Government of Maharashtra as a Protection Officer under the PWDVA, and the other social worker shall be registered as Service Provider under the Act within four weeks of the passing of this order.

- The Government of Maharashtra shall further establish at the district level, within the jurisdiction of each Police Headquarter, a Special Cell for Women and Children as per the provisions contained in the relevant Government Resolutions within 12 weeks
of the passing of this order. One of the social workers to be appointed in each of the newly established Special Cells shall be notified as a Protection Officer and the other social worker shall be registered as Service Provider under the Act within eight weeks of their appointment.

- The Home Department, Government of Maharashtra and the Superintendent or Commissioner of Police, as the case may be, shall provide for each Special Cell the following for its smooth functioning:

  i) An independent room with some space as waiting area for clients

  ii) Postal help to reach letters to clients, and access to wireless and control rooms

  iii) Adequate furniture and stationery.

  iv) Facility for a telephone line and vehicles as required for home visits.

  v) Every social worker to be provided with an Identity Card /authority letter so that they can visit the police station, access records, jails, lock-ups without any difficulty.

  vi) At least one police personnel to be deputed or appointed to assist the social worker in implementing the PWDVA
• The State Government shall appoint full-time Protection Officers at all levels, including the taluka levels, under the Act by creation of a cadre for the state, as far as possible within two years.

• A Steering Committee that had been previously constituted by the state Women and Child Development Department was given the responsibility to monitor and make recommendations to ensure comprehensive implementation of the Act, including decisions as to financial management of the implementation process, review of programmes of the implementing agencies, multi-agency coordination within the government and periodic monitoring of implementation of the Act.

• The High Court Division Bench directed the state Judicial Officer's Training Institute to introduce in its curriculum topics related to violence against women. Similar directions were also issued by the Court to the state Police Training Academy.

• The Government of Maharashtra was also directed to create more Counselling Centres (Special Cell) for Women and Children at the taluka (sub-district) level in a phased manner.

These directions were based on the understanding that if the PWDVA is effectively implemented, the incidence of offences against
women will be reduced in the state to a significant degree. The Court clearly observed it is due to the absence of full time POs and SPs at district levels and taluka levels that there is no effective implementation of the Act. It disagreed with the additional charge given to existing government functionaries for implementing the law, and reiterated the need for creation of a full-time cadre dedicated to ensure its effective implementation. These directions provided by the Bombay High Court therefore, have set an important precedent by taking cognisance of the failure of states to create the infrastructure for implementation of laws that play a crucial role in women’s lives. This judgment assumes additional significance as it is the first time that the higher judiciary has taken an active interest and steps to ensure effective implementation of the Act. This judgment might also act as an example for other High Courts as well as state governments to take appropriate steps in this regard rather than setting up an infrastructure that remains largely ineffective.

**Enforcement of the Act**


In this appeal filed before the Bombay High Court by the husband against the decision of the Sessions Court partly allowing the appeal preferred by the wife with regard to the Trial Court granting a limited
relief of interim Protection Order but refusing to grant an interim Residence Order, the following issues were raised:

- Whether an order passed on an application made under Section 23 of the PWDVA is subject to appeal?
- Whether an appeal will lie under Section 29 of the Act against every order passed by the learned Magistrate in proceedings initiated on the basis of application made under Section 12 of the Act?
- What is the scope of appeal under Section 29 of the Act?

The husband contended that no appeal lies against an interlocutory order the appeal preferred was not maintainable.

The High Court after examining the contentions of the parties concluded that an appeal under Section 29 of the Act lies against the final order passed by the Magistrate under Section 12(1) of the PWDVA. It was further held by the Court that an appeal under Section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

Explaining the scope of orders under Section 23 of the Act, the High Court observed that as per sub-section (2), the Magistrate is empowered to grant an ex parte ad interim relief in terms of Sections 18
to 22 of the Act while under Sub-section (1), interim reliefs in terms of Sections 18 to 22 can be granted. However, the Court also clarified that an opportunity to be heard is required to be granted to the Respondent before passing any order under Section 28(1).

On the issue of whether appeals lie from orders passed under Section 23, the High Court answered in the positive, but observed that while dealing with an appeal against orders passed under Section 23, the appellate Court cannot however, interfere with the exercise of discretion by the Magistrate. The Magistrate’s order will be interfered with, only if it is found that such discretion has been exercised arbitrarily, capriciously, perversely or if it is found that the Court has ignored settled principles of law regulating grant or refusal of interim relief.

This judgment sets a good precedent with the Court clarifying the scope of appeals under both Sections 29 and 23 of the Act. Although it may be argued that appeals against interim orders ought not to be allowed at all in view of the fact that it may be used as a tool by the Respondent to protract the proceedings but without an amendment in the law to this effect, the approach adopted by the Bombay High Court can be said to be progressive and sensitive in that it attempts to minimise the adverse impact of such appeals. The Court emphasises the fact that any order of the Magistrate should only be interfered with in case it is found to be
arbitrary or where the Trial Court has ignored settled legal principles. Hence, in cases where the order, interim or final, is passed on the basis of the facts of the case, appeals should not be entertained by the Courts.


This writ petition before the Delhi High Court was filed by the appellant to seek a writ or mandamus to direct the Police authorities to provide her full security of life, liberty and property. She also sought a writ of mandamus to restrain the Police authorities from preventing her from using the residential premises. Although the Court did not make any observations in this case as the appellant had filed a separate application under PWDVA, it directed the Magistrate to decide the application for interim maintenance as expeditiously as possible.

The appellant had also filed a previous writ petition under Article 32 before the Supreme Court, where the Court considered it appropriate to send it to the High Court of Delhi\(^4^3\), to be treated as a petition under Article 226 of the Indian Constitution, without expressing any opinion on merits of the case. The High Court in the instant case similarly held that the Magistrate would be in a better position to deal with the petition which raises issues of fact rather than the law. The Court therefore, dismissed the writ petition without expressing any opinion as to its merits.
19. *Sonia Mann v. State and Anr. AND Gaurav Mann v. Sonia Mann*

(Decided by S. Muralidhar, J.)

In this order, the Delhi High Court disposed 3 petitions arising out of a common set of facts in a single order. In the first petition, the wife challenged the modification made by the Session Court to the interim Maintenance Order granted by the Trial Court. In the second, the husband challenged the orders of maintenance and restoration to the shared household granted by the Trial Court as well as the order of the Sessions Court affirming the Residence Order on the ground that the impugned property was situated outside the jurisdiction of the Magistrate, which the Sessions Court also failed to notice. The third petition was filed by the in-laws of the woman against the Residence Order of the Trial Court.

The wife had prayed for Protection Order, monetary relief and compensation for damages in addition to interim Residence Order restraining her husband and his relatives from alienating any portion of the property and disturbing her possession in any manner. During the proceedings, the husband had admitted to the right of the wife to reside in the matrimonial house, and accordingly, the Trial Court passed a restraining order in addition to maintenance of INR 10,000 per month. However, the Sessions Court altered this order to include the maintenance amount already granted to her under Section 24 HAMA in a civil proceeding.
The High Court in this judgment, upheld the Sessions Court order on the basis that the Trial Court had not computed the maintenance amount granted to her as temporary alimony under Section 24 HAMA while arriving at the figure of maintenance under the PWDVA. Hence, this figure has to be taken into account as per Section 20(d) of the Act. Further, the Court while deciding on the Residence Order also directed that a Court Commissioner should be appointed at the time of final disposal of the petition by the Magistrate. The High Court also allotted a specific part of the shared household for exclusive use of the petitioner, till the final disposal. The High Court finally directed the Magistrate to dispose the main application under the Act within six months.

Hence, through this judgment, the Court sought to resolve the disputes raised by all the parties in multiple appeals on the same issue in a sensitive manner, while leaving the decision on the facts of the case to the Trial Court. The Court in upholding the modification order of the Sessions Court under Section 25(2) accurately interpreted the provisions of the Act, taking into account the fact that certain reliefs under the Act may have already been granted in proceedings before other Courts. In such cases, the ends of justice may require the Courts to pass orders under the Act taking into account existing reliefs. At the same time however, the High Court resisted from laying it down as a general principle,
recognising that whether such principle ought to be adopted may depend on the particular facts and circumstances of the case.45

The Report ends with important conclusions and recommendations with regard to the PWDV Act. In addition to finding continuing evidence of the need for effective and adequate infrastructure, the data analysed this year also points to the need to review certain aspects of the substantive and procedural law. Specific suggestions with regard to effective capacity-building of implementing agencies, towards ensuring adequate infrastructure, and creating a system of accountability for all the stakeholders have also been put forth.

Although a definitive conclusion as to the nature of amendments required in the PWDVA cannot be made at this nascent stage, recommendations highlighting the areas that require in-depth evaluation in the coming years have been provided in this chapter. In the next two years, LCWRI and ICRW seek to track these issues through data collection and analysis in order to suggest specific amendments to the PWDVA. The recommendations in this chapter have been provided with the understanding that the Law in order to be effective, ought to be responsive to the needs of its users and practices of the stakeholders.
Definitions and Coverage

Definitions

There is a clear gap in the understanding of domestic violence as defined by the Law. While most stakeholders recognise emotional and verbal abuse as forms of violence under the Law, physical violence, which is visible in nature, appears to takes precedence over other forms. Sexual violence within marriage is clearly not recognised as a form of violence. This selective interpretation of domestic violence will and does influence the subsequent implementation of the Law by various stakeholders.

Trainings with stakeholders should be undertaken to clarify that domestic violence can take various forms and is not restricted to physical violence alone. The trainings must focus on sexual, emotional and verbal abuse as key components of the definition of domestic violence and undertake an in depth examination of these aspects so that women facing sexual, emotional or verbal violence receive as much attention from stakeholders as women facing physical domestic violence.

Analysis of orders indicates that a combination of various forms of abuse are experienced and reported by the AP. This is consistent with our experience with women who say that they face multiple forms of domestic violence, and is reiterated by the POs who say that domestic
violence co-occurs. The most common forms of abuse seem to be economic and physical (either singly or in combination with others). The predominant form of economic abuse reported is dispossession or the threat of dispossession of the AP from the shared household and refusal to provide maintenance.

This trend strengthens the case for equitable distribution of matrimonial property and underscores the continuing relevance of the issue of dowry and the need to strengthen the Dowry Prohibition Act, 1961.

The right to reside remains an area of major concern for women. There is much confusion amongst the implementing agencies as to the scope of the definition of right to reside. Many POs and Police officials were unable to distinguish between the right to reside and the right to share in the property. Many felt that the Act gives the AP a right of ownership over property, which it does not. The right to reside is most affected by the Supreme Court judgment in *Batra v Batra*. The analysis of orders show that this judgment has been used to deny Residence Orders to married women and widows by providing the reasoning that since the premises belong to the mother-in-law and father in-law, and not the husband the home is not a *shared household*.

However, what is encouraging is that in both Delhi and
Maharashtra, the courts have distinguished the facts of the cases before them from that of *Batra*. They have upheld the AP’s right to reside, on the ground that in *Batra v Batra*, the husband’s claim to have left the house of his parents was false and done with the intention of denying the right of the wife.

*There appears to be a clear need to further explain the scope of “shared household” under the Act and the right to reside as providing a right of residence, irrespective of ownership, title, or interest in the premises.*

**Coverage: Aggrieved Person and Respondent**

As recorded in the previous M&E Reports, married women continue to remain the primary users of the PWDVA followed by widows. While the information gathered from order analysis shows that applications by daughters were limited, mothers have used the Law in a number of instances. However, by and large there appears to be a perception that the Act is predominantly a matrimonial law.

A fair level of misunderstanding exists with regard to key concepts such as the definition of AP and of Respondent. In the case of the AP, it arises mainly in the case of a mother-in-law wanting to file a complaint against her daughter-in-law. With regard to the Respondent, there seems to be general clarity that it is ‘any adult male person;’ the husband is
shown to be the sole Respondent in a majority of orders examined.

However, the confusion arises with regard to female relatives of the ‘adult male’ and is prevalent amongst the Judiciary as well.

Whilst trainings and awareness creation can help reduce the confusion with regard to these definitions, there still remains a need to revisit these definitions in the PWDVA. Perhaps a clarification is needed, that, female relatives of the husband/male partner come within the purview of the Act

**Practices and Procedures**

**Pre-Litigation**

Counselling at the pre-litigation and litigation stage of proceedings have completely different objectives and requirements, which are rarely understood by all the relevant stakeholders. At the pre-litigation stage, counselling should be provided to the AP to restore her self-esteem, provide emotional support and assist her in making an informed decision as to whether she wants to initiate legal proceedings.

As far as the Respondent is concerned, the focus should be on helping them acknowledge their past acts of violence and counsel them to stop further violence. The objective of court directed counselling at the litigation stage is mainly to prevent violence, and where the woman so desires, attempt settlement.
It is difficult to gauge who is providing counselling services at the pre-litigation stage. However, findings have made it clear that women need pre-litigation counselling in addition to pre-litigation advice as provided under Section 5 of the Act. The courts appear to continue to rely heavily on counselling and mediation. However, the concern here remains whether the courts are able to distinguish between counselling, mediation and settlement.

Therefore, there is a need to understand counselling as mandated by the Law and its intent, in order to counter practices that might work against that intent. Findings clearly indicate that the meaning and objective of counselling under the Law, by whom and at what stage, need further elaboration. Hence, counselling needs to be defined and its objective at both the pre-litigation and litigation stages needs to be clarified through appropriate amendments to the provisions on counselling under the Act and Rules.

The objective and purpose of the DIR, of serving as a documentary record/evidence of violence and simplifying the procedural requirements in accessing courts, has not translated into practice. Findings have indicated that POs neither fill out a DIR each time a woman approach them, nor do they maintain any other record of the woman’s complaint or visit. This could have negative implications in
case the woman decides to file a case in court at a later stage as no record of the history of violence would be available.

Better understanding with regard to the purpose of the DIR is required. Perhaps practice directions from relevant High Courts clarifying this issue would help achieve uniform interpretation and usage.

Litigation

Findings from order analysis in Delhi lend credence to the fact that in the absence of a DIR to accompany the application filed before the court, it is the woman whose interest gets compromised. In practice, the courts appear to interpret the proviso to Section 12(1) of the Act to mean that a DIR needs to be recorded by the PO or that they must necessarily consider the information contained in the DIR before passing any order under the Act. This problematic interpretation by the courts may therefore make a difference between availability of speedy reliefs and delays in proceedings.

One of the most disturbing observations has been the lack of information/limited reference made to the role played by POs in the process of litigation.

This finding needs to be tracked and verified in the coming years to develop a better understanding about the role of POs within the litigation process.
In most states, the practice of POs seeking assistance from Police in the discharge of specific functions under the PWDVA is gradually emerging. However, usually, it is only upon court direction that such assistance is provided. This can be attributed to the common misconception amongst the Police that as the PWDVA is a civil law; they have a limited or no role to play in its implementation.

*Therefore, clarity on the role of the Police in the implementation of the PWDVA, perhaps by way of trainings or directives is essential to ensure consistency in the nature of assistance provided by them. Both the Police Department and the Judiciary are ideally placed to provide such directions.*

As in the previous M&E Reports, reliefs that are most commonly sought and granted are Maintenance Orders, Protection Orders and Residence Orders, with Maintenance Orders being the most commonly granted, followed by Protections Orders and then Residence Orders. The relief of maintenance sought is primarily on refusal to maintain the wife and children as well as desertion or dispossession from the shared household.

The number of *ex-parte/ad-interim* orders being granted is extremely low. This is a negative trend as it defeats the purpose of granting immediate relief to the woman facing domestic violence and
extricating her from a violent environment.

Hence, it is strongly recommended that the courts do not hesitate to grant *ex-parte* or *ad-interim* orders where there is a prima facie case and where the denial can, and often does, lead to imminent harm or danger.

Interim orders are being granted in Delhi and Maharashtra and Maintenance Orders are the most frequently provided interim relief.

*However, more emphasis needs to be placed on the significance of immediately granting interim orders. They should be granted as a matter of routine whenever the AP can prove a prima facie case in her favour, without going into technicalities of procedure.*

The PWDVA vests the Judiciary with discretionary powers with regard to procedure to be followed when dealing with domestic violence cases. This was done with the intention of allowing the Judiciary space for creative interpretation and initiative. However, in certain instances, it appears that this discretionary power is resulting in a lack of uniformity in procedures being followed.

*Therefore, it may be recommended that there is a need for guidance with regard to procedures. In the absence of amendments to the Act, this could be provided by High Courts in order to address the confusion or delays but at the same time, care must be taken to ensure that the directions provided do not defeat the intention and object of the*
By and large, the procedure being adopted by the court is that at the interim stage, decisions are based on affidavits in Form III while at the final stage, Section 125 CrPC procedure is followed.

A unique but disturbing trend of a large number of compromises or settlements has emerged in Gujarat. Although it was not possible to determine the reasons for this trend, perhaps in many of these cases compromises are imposed on women in the name of maintaining family, which in the process expose her to continued and/or even greater violence.

*In view of the fact that a similar finding emerged in case of Himachal Pradesh in the Second M&E Report, it is essential to undertake a detailed analysis of this development in states where such high rates of settlement and compromise have been observed, over a period of time, to understand the factors that encourage such high rates of settlements.*

Order analysis has revealed a trend where a majority of appeals are being preferred at the interim stage of the proceedings as opposed to being made against final orders. This is of concern as the execution of the interim order passed gets stalled during the appeal proceedings. Thus this practice should not be allowed and encouraged as it defeats the purpose of providing immediate reliefs to the woman in order to extricate her
from the violent environment.

*It is recommended that the Act should be amended to the effect that appeals are disallowed at the interim stage in domestic violence cases and are disposed of within a stipulated time frame so as to prevent prolonged proceedings that defeat the very purpose of immediate reliefs mandated under the Act.*

**Post-Litigation**

Filing complaints for breach under Section 31 the PWDVA remains the predominant method of enforcement of orders. However, one of the problematic aspects that require the immediate attention of the higher Judiciary as well as policy makers is that, in a majority of cases, no direction for enforcement/compliance of orders is included in the orders themselves. This acts as a barrier for the woman who must approach the court separately for such a direction.

*It is recommended that a direction for enforcement be contained in the order and in addition the courts direct the Police to assist the POs in the enforcement of the order should the need arise. Further, a mechanism, to track orders passed by courts and their subsequent execution, needs to be set up.*

Findings indicated that the court is failing to provide updates to the Pos regarding the proceedings of the case and copies of orders from
the court are also not being forwarded to them. This acts as a barrier in the implementation of the PWDVA, as POs are expected to enforce orders.

**Infrastructure**

There has been a gradual increase in the appointment of independent POs on a full-time basis over the past 3 years.

*Whilst it is desirable that a cadre of independent, full-time POs with the requisite qualifications and gendered perspective be appointed, they would not be effective without adequate infrastructure and budget such as allowance for transport, mobile phone, private office space, and official letterheads and so on. Thus, what is needed is not merely infrastructural aid but institutional status as well. There is a need to review and perhaps ensure some uniformity in the qualifications of POs, particularly in view of the need to appoint a full-time cadre of POs to effectively implement the Law. However, a definitive conclusion as to what the qualification and role of the PO ought to be can only be arrived at following a separate study which includes comprehensive data collection and analysis of practices in this regard across the states.*

*Regular and systematic assessments and reviews should be undertaken by states with regard to the type of support being given to POs. This will facilitate an assessment of whether or not sufficient*
support is being given to the POs to enable them to perform the role that is envisioned under the Law. If it is the case that support is lacking, then this can be looked into and rectified. If it is the case that despite the support being given, the PO is still unable to perform his/her duty, then the state can consider what other types of support should and could be made available to the PO.

Ambiguity surrounds the issue of who is to serve notice, the limitations faced by POs when they are required to do so, and the resultant difficulties faced by women litigants.

Hence, there is a clear need to address this issue and provide the requisite personnel/assistance to POs or in the alternative, designate the Police/court process servers to undertake this responsibility. The High Courts of Delhi and Andhra Pradesh have set a good example by bringing clarity and consistency through their practice directions.

The collation of national infrastructure data highlighted the fact that three years after the coming into force of the Act, nodal departments of most states were still unable to provide detailed information about the role of SPs, Shelter Homes and Medical Facilities as it is still not clearly visible.

Hence, there is a need for coordination between stakeholders and the adoption of a uniform practice of reporting to nodal departments...
regarding their structure and functioning, as discussed further in the Monitoring and Accountability section below.

**Budgetary Allocations**

To date, it has been reported that 17 states have made budgetary allocations for the implementation of the PWDVA. However, there is no systematic basis for making these allocations, and much is left to the discretion of the individual states.

*There is a definite need to increase budget for support and for allocation of funds to implement the Act. It is suggested that a scheme should be formulated to ensure a regular annual flow of a specified amount every year with ongoing financial monitoring.*

**Awareness Creation and Capacity Building**

The findings of this Report highlight the fact that knowledge of the Law and attitudes of the stakeholders hold equal importance as an imbalance of either can hinder or frustrate the objective of the Law. Further, it is clear that there are gaps in the understanding of the PWDVA and its coverage amongst Police, POs and Judiciary which need to be addressed. Trainings undertaken by LCWRI have demonstrated that there is a significant level of positive change that can be achieved even through limited (in terms of length and exposure) interventions, if there is comprehensive coverage of the Law and a gendered approach is adopted.
This leads to the assumption that for all stakeholders to be covered and for the impact to be sustained, there is a critical need for systematic and more intensive trainings. In order to achieve this, trainings must be institutionalised and the primary responsibility must vest with nodal departments and training academies. As a first step, states should undertake systematic orientation training on the PWDVA, thereby having a trained and sensitised body of implementers of the Law from the outset. This should particularly be ensured every time a cadre of POs, new batches of Police Officers and Judges are inducted into their respective services. This ought to be followed up with special refresher programmes for in-service officers.

Professionals and persons with expertise in the area of gender and domestic violence should be invited to conduct these training programmes. In fact, the training interventions conducted with the Judiciary, made it clear that Judges respond well to professional experts such as medical professionals, Lawyers etc. At the same time, a specific component of gender sensitisation with a specialist exploring the attitudes of the Judges is crucial.

The LCWRI model of capacity building or Training Interventions to bridge gaps and ensure effective implementation of the Law works effectively, as indicated by our findings.
It is recommended and hoped that the participants trained will take on the responsibility of further training and sharing information and knowledge gained with their colleagues and juniors. However, this is an aspect that would require some time and tracking in the years to come.

There are gaps in awareness and knowledge amongst the POs on specific procedures to be followed in general and with regard to the filling of DIRs, serving of notice and reporting of breach in particular. With regard to the Police, findings are clearly indicative of gendered perceptions. As the Police are often the first to be approached by women facing domestic violence, these gendered perceptions, if not addressed through appropriate training and sensitisation workshops can be impending barriers to women accessing the law.

Hence, training programmes with the POs, Police and other relevant stakeholders need to be conducted to address this issue in a comprehensive manner.

Monitoring and Accountability

The existence of varied practices and lack of adequate infrastructure, budget and trainings across the states reiterates the need to institutionalise the M&E of the implementation of the PWDVA.

The State needs to adopt a comprehensive system for the monitoring and evaluation of the implementation of the Law on an annual
basis as recommended in the First and Second M&E Reports.

To date, there is no system of mandatory reporting to the nodal department by all stakeholders. In fact, the information provided by the nodal departments show that it is only the POs who report to them. Therefore, over a period of time, a misconceived assumption has developed; that it is mainly the PO who is responsible for the implementation of the PWDVA and that other stakeholders do not have much of a role to play.

Hence, there is an urgent need to ensure accountability through developing a robust system of mandatory reporting on specific indicators for all stakeholders, including the Judiciary. As the Judiciary follows a distinct reporting structure, it is recommended that there is regular sharing of information regarding the PWDVA between the higher Judiciary and the nodal departments.

Currently, performance in cases filed under the PWDVA does not form a part of the criteria against which the Judiciary is evaluated. Provision of information as to the exact nature of the cases is left to the discretion of the individual Judge.

The issue of domestic violence should be given the priority and focus it deserves. Therefore, it is recommended that cases filed under the PWDVA should be included as part of the duty performance system of the
Judiciary. A similar approach can also be followed in case of POs, with the development of an incentive-based performance and appraisal system to facilitate accountability and better implementation of the Law.

A major obstacle in the identification of the total number of cases filed before the courts under the PWDVA, arises due to the existing system of registering and labelling cases. In some courts it is a miscellaneous application, while in some, it is registered as a criminal case or a domestic violence case.

Uniformity in the description and registration of the cases under the PWDVA in the Court Registry is a much needed requirement. The First M&E Report identified three models of implementation of the PWDVA. This year’s M&E Report has not been able to track the existence of these models, across all states due to the specific focus on a few states. However, these models continue to exist in the 3 states studied this year, Andhra Pradesh (Public Model), Rajasthan (Private Model) and Delhi (Mixed Model). Tracking these models continue to remain relevant in the years to come.47

The passing of the Domestic Violence Act (DVA) is an important marker in the history of the women’s movement in India, which has confronted the problem of domestic violence for well over two decades. This enactment sets free the movement from the malaise that has long
plagued it, of attributing all categories of violence suffered by women within their families to ‘dowry’ and widening the scope of the term ‘domestic violence’. It acknowledges that domestic violence is a widely prevalent and universal problem of power relationships, more than the culture specific phenomenon called ‘dowry death’. More importantly, it marks a departure from the penal provisions, which hinged on stringent punishments, to positive civil rights of protection and injunction.48

1 Combating Domestic Violence: Obligations of The State, Discussion Site, Domestic Violence Against Women and Girls, Innocenti Digest No. 6-June 2000, Pgs. 10-11.
2 Domestic Violence Against Women and Girls, Innocenti Digest No. 6-June 2000, Pg. 10
5 Ibid Pg. 4
7 Ibid Pg. 4
8 These include the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
10 From Wikipedia, the free encyclopedia
11 The effects of new legislation on domestic violence @ www.family-justice-council.org.uk
12 Department of Justice, Canada, WWW.justice.gc.ca
14 Ibid Pg. 13
15 Ibid Pg. 16
16 Ibid Pg. 17.
17 Ibid Pg. 18
18 From Wikipedia, the free encyclopedia
with The International Center for Research on Women Supported by UN Trust Fund to End Violence against Women, Pg. 4-8.

Ibid Pg. 9

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