CHAPTER VIII
CHAPTER VIII

RIGHT AGAINST DOMESTIC VIOLENCE

8.1 The Problem of Domestic Violence

Women constitute about one half of the global population, but they are placed at various disadvantageous positions due to gender the male dominated society all over the world. Violence against women is not a new one and evidence of such violence can be found throughout historical records of any culture.

The nations of the world have become so disturbed at the prevalence of violence against women that a number of steps have been taken to combat it. One such step is the Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW), 1981, a Declaration adopted by the United Nations General Assembly, wherein 'Violence against women' is defined as 'any acts of gender based violence that results in or is likely to result in physical, sexual or psychological harm to women including threats of such acts, coercion or arbitrary deprivations of liberty whether occurring in public or in private life'.

In January 1992, the U.N. Committee on CEDAW adopted that: 'Gender-based violence is a form discrimination which seriously inhibits women's ability to enjoy rights and freedom on the basis of

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equality with men', and further adopted that Violence against women encompasses;

1. Violence occurring in the family: viz., battering, sexual abuse of female children in the household, dowry related violence, marital rape, non-spousal violence and the like.

2. Violence occurring within the general community, viz., rape, sexual abuse, sexual harassment and intimidations at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

3. Violence perpetrated or condoned by the state: viz., custodial torture and rape of similar excesses by police or armed forces to suppress any political or social movement in disturbed areas or anywhere else, etc.

The definition provided is wide and encompasses all types of violence including psychological. Violence committed against women may take various forms, such as 1) physical violence – leading to injury 2) sexual violence – robbing women of their dignity not only by indecent behaviour but also raping; 3) verbal violence – use of abusive and filthy language against a women or her near and dear ones; 4) social violence – demeaning, disparaging and humiliating a woman; 5) emotional violence – deprivation of love and affection, concern, sympathy and care; 6) intellectual violence – denial of rights to take part in decision making exercises; 7) other form of violence include not providing women educational opportunities, denial of reproductive rights, denial of access to health facilities or opportunities to use political rights or committing
atrocities like forcing women to enter into professions like trafficking and prostitution.

In India, women are subjected to various forms of violence. Though forms and degree vary according to class region and culture, violence occurs across all strata of Indian society. Violence against women includes not only physical violence, but also sexual, psychological and emotional abuse. Physical violence includes murder, sometimes in the guise of honour-killing, sati, (self-immolation of women on the death of her husband) bride-burning, female infanticide and foeticide, female genital mutilation (FGM), torture and acid throwing. Sexual violence includes rape, incest, public stripping, sexual harassment through language, body language or touch (eve teasing), and forced trafficking and forced prostitution. Women also face some less overt forms of violence such as child marriage, forced confinement, overwork, restriction on mobility, verbal threats, humiliation and other forms of violence.

According to the figures published by the National Crime Bureau (Government of India), the number of crimes against women under the Indian Penal Code increased from 82,818 in 1994 to over 1,13,000 in 1998. In 1998 there were 13,910 registered cases of rape. The actual incidence of rape is considered to be 4 to 5 times as high as these figures.

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indicate, since most cases go unreported due to the social stigma involved with rape\textsuperscript{5}.

In the recent data given by the Ministry of Women and Child Development, there is one rape every 54 minutes, one molestation every 26 minutes, one act of eve teasing every 51 minutes, one dowry-death every 1 hour 42 minutes, one act of cruelty every 33 minutes and one criminal offence against women every 7 minutes. Roughly, 5,000 women are killed in India every year in dowry-related violence\textsuperscript{6}.

According to Nara Duvary of ICRW, their research in India reveal how pervasive the problem of domestic violence is in the country. She says ‘their data show that 45 percent of women reported experiencing at least one form of domestic violence in their married life’. The study shows that domestic violence is prevalent in all classes. Despite its pervasiveness, domestic violence is invariably treated as a private matter\textsuperscript{7}.

### 8.1.1 Towards Theorisation of Violence Against Women

Sociologists, Criminologists, jurists and others have tried to understand as to why men cause to be violent, abusive and cruel to women. As answer, various theories have been propounded and there are no less than fourteen. Sociologists Ram Ahuja\textsuperscript{8} classify them into three basic

\textsuperscript{5} Ibid.
\textsuperscript{6} Gouri Sen, ‘Crime Against Women’ The Hindustan Times, New Delhi, 02.12.1998, p. 11.
\textsuperscript{7} Adapted from, Times of India, New Delhi, Dec. 1, 2001.
levels; 1) psycho-pathological 2) socio-psychological and 3) socio-cultural analysis, which are briefly as under;

Psycho-pathological – According to this theory the causes of violence against women arise from the offencers psychological problems.\(^9\)

Socio-psychological theories – High frustration in the family\(^{10}\), where frustration is linked to aggression. Inborn drives of person or pathological experiences in infancy or early childhood can cause person to be violent\(^{11}\). Persons of low-esteem may seek to bolster their image by carrying out violent acts\(^{12}\). Sometimes actions of other individuals sets into motion an escalating cycle of resentment and aggression\(^{13}\).

Socio-cultural theories – Man tries to meet situations he cannot cope with, which leads to ‘stress’. As reaction to stress, energy is mobilised and produces tension, which disturbs and seek to take action which are violent\(^{14}\).

Socially learned needs, goals and aspirations and restricted structural access or institutionalized means to their attainment also causes

\(^{10}\) Frustration Aggressive theory, in Ahuja, supra note 8, p. 167.
\(^{13}\) Motivation Attribution Theory – Ahuja, supra note 8, p. 171.
\(^{14}\) System Tension and Feed Back Theory proposed by Strauss, in Ahuja supra note 8, p. 168.
persons to be violent. Violence is a response to the norms and values a person holds in the subculture he lives. Violence is used as resources within social system, usually when other resources are exhausted – A husband who wants to be the dominant family member but has little education, job prestige or income may resort to violence to be the dominant person.

Experience with or exposure to violence serves as a learning which teaches that violence can and should be used towards the other particularly the weak. Self image as 'violent', a meaning shared by society also makes a man violent. That is, the awareness of others' 'view and attitudes as violent' makes a person to behave violently. Growth of resentment, anger, hostility when the principle of distributive justice is violated ie. people use violence if the cost of being violent do not outweigh the rewards, ex. dowry death.

8.1.2 Male Violence: Feminist Theory

The early writings of the feminist movement, in 1970’s, ‘did not give ‘male violence’ a central place in theories’. They adopted the

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19 Symbolic Interaction Theory, See Geroge Mead, ‘Mind Self and Society From The Stand Point of a Social Behaviour’ in Ahuja, *supra* note 8, p.158.
position that 'force is no longer a technique for patriarchal control over
women'. Male dominance was 'seen to rest on variety of social, economic,
political and ideological institutions and practices, all of which are
regarded as more or less 'normal' and natural by both male and female
members of the society. Their writings reflect women's oppression is attributed to
society, not biology; to male dominated institutions, not individual men; to
the social structures of production and reproduction, not to the
physiological differences between men and women; to the cultural
construction of masculinity and femininity as a polarity or dichotomy.

Millet tried to establish the link between cruelty and sexuality
and the 'variety of cruelties and brutalities' to women that have occurred in
the 'history of patriarchy'. She mentions specifically suttee, foot binding,
clitoridectomy, child marriage and other practices, pointing out that all of
these have cultural 'rationales' to justify the injury and injustice incurred.

Mary Daly and Brownmiller, though wrote separately
shared common ideas. Both share the basic assumption that men and
women are fundamentally very different types of beings; both believe that
men fear and despise women while at the same time desiring and using

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21 Anne Edwards, Male Violence in Feminist Theory: an Analysis of the Changing
Conceptions of Sex/Gender Violence and Male Dominance, in Jalna Hanmer (Ed),
22 Ibid., p. 16.
25 Brownmiller, S. Against Our Will; Women and Rape, Simon and Schuster, New
York, 1975, quoted in Anne Edward, supra note 21, p. 16.
them to meet their own various needs; and both describe how male aggressive sexuality and propensity to violence dictates the pattern of relationships between men and women. Since then many writers have linked sexuality to violence.

In the later feminist theories there was a significant development. The feminists started to formulate a perspective which can encompass several or all of the various forms of male violence, abuse and exploitation of women and to link them all to the underlying struggle by men to retain and reinforce their dominant position as a group over women in society. Patriarchy or the sex/gender order as a social system concerned with the control of women has at its disposal a whole range of technique and mechanisms of control. Among these are force and physical violence.

MacKinnon developed a general theory about the role of physical and sexual violence and coercion in male dominance, which she sees as applicable to all kinds of male abuse of women (rape, incest, sexual harassment, pornography, prostitution domestic battery, and so on). For her ‘sexuality’ is primary social sphere of male power. ‘Sexuality cannot be separated from power, but the power dimension must be seen as fundamental one’.

For MacKinnon sexuality is a form of power, because investigations reveal rape, incest, sexual harassment, pornography, and

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26 Brownmiller, S., supra note 25, pp. 24-25.
27 MacKinnon, Feminism Marxism, Method and the State: Signs, vol 7, No. 3.
28 Ibid.
29 Ibid., p. 533.
prostitution as not primarily abuses of physical force, violence, authority, or economics. They are abuses of sex .... They are sexual because they express the relations, values, feelings, norms and behaviours of the culture's sexuality, in which considering things like rape, pornography, incest or lesbianism deviant, perverse or blasphemous is a part of their excitement potential. Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse30.

Today there is convergence of views about feminists particularly whose interests are rape, wife battering pornography or one or the other manifestations of male violence and abuse of women. Violence has come to be seen as a socially-produced and often socially-legitimated cultural phenomenon, rather than the 'natural' expression of biological drives or an innate male characteristic. Masculinity and feminity, 'men' and 'women', male and female sexuality are all socially constructed. Therefore cultural practices involving sexual aggression, violence, abuse and exploitation of women by men must be the result of social and historical conditions, not primarily of human (male) biology31.

8.1.3 Domestic Violence

Every single atrocity on women is bad, the worst is when they are victimised within the four walls of their own house, not by strangers but by persons whom they call them their own. In Sydney Brandon's words 'statistically it is safer to be on the street after dark with a stranger than at

30 Ibid.
home in the bosom of one's family, for it is there that the accidents, murder and violence are likely to occur\[32\].

Violence in the family is a world wide phenomenon and not a new one. Awareness about the extent and nature of these issues came to the forefront during 1970's in USA as a result of National Family Violence Survey\[33\], and the battered wives (BW) movements started simultaneously in USA and UK in the same decade\[34\].

Data from the second National Family Violence Survey conducted in United States in 1986, show that in 16 per cent of the homes, some kind of violence between spouses had occurred in the year prior to 1986\[35\]. In US 40 per cent of female murder victims are killed by family members or boy friends. Every 15 seconds a man Batters a woman in her home 50% of women are subjected to some form of domestic violence\[36\].

Anthropologist David Levinson\[37\], comes to the conclusion that wife beating is the most common form of family violence around the world. In study of 90 societies, he finds that wife beating occurs occasionally in

74.5 per cent of the societies and it never occurs or very rarely occurs in 15.5 per cent.

In India there is no nationwide study to find out the extent of problem. However, a number of studies relating to dowry and reasons for divorce reveal that 88 percent of women in lower classes were victims of physical and verbal violence in contrast to 43 per cent from middle class and 35 per cent from high income class, 17.5 percent of cases filed for divorce were because of physical assaults on them by their husbands.


Terms like 'marital violence' and conjugal violence are used to connote violence between spouses while other terms like 'domestic violence' and 'intra family violence' are used broadly enough to include not only violence between spouses but also violence exhibited by a parent against a child, violence between siblings, and generally, violence between persons who share a mutual residence and live in close relationship.

That is in one sense, domestic violence can cover any violence where the victim and perpetrator have some form of relationship of personal nature within the family. Scholars like Bakshi opine that the term 'violence' should really cover not merely physical violence but also

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38 Madhurima, supra note 35, p. 23.
40 Madhurima, supra note 35, p. 22.
psychological or mental oppression. Mental cruelty may encompass, *interalia*, the following types of ill treatment. a) confinement within the house, b) deprivation of contact with friends or with members of the family, c) deprivation of food or clothing or medicine, d) deprivation of other necessities, comforts and luxuries, e) deprivation of other facilities, f) harassment in any other form, and g) verbal abuse\(^43\).

In the Domestic Violence to Women (Prevention) Bill 1994, drafted by the Committee of Experts, constituted by the National Commission for Women, define domestic violence as, ‘any of the following acts committed on a woman by her husband or any of his or her relatives, namely;

i. any willful conduct which a) is to such a nature as is likely to drive the women out of the house or commit suicide or injure herself, or b) causes injury or danger to the life, limb or health (whether mental or physical) of the woman, or

ii. harassments which causes distress to a woman; or

iii. any act which compels the woman to have sexual intercourse against her will with the husband or any of his relatives or with any other person; or

iv. any act which is unbecoming of the dignity of the women or;

\(^43\) P.M. Bakshi, *supra* note 42, p. 13.
v. any other act of omission or commission which is likely to cause mental torture or mental agony to the woman.  

In the Draft Bill of 2001, which was represented in 2002, Domestic Violence:

1) For the purposes of this Act, any conduct of the respondent shall constitute domestic violence if he, -

a. habitually assaults or makes the life of the aggrieved person miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or

b. forces the aggrieved person to lead an immoral life; or

c. otherwise injures or harms the aggrieved person.

2) Nothing contained in clause (c) of sub-section (1) shall amount to domestic violence if the pursuit of course of conduct by the respondent was reasonable for his own protection or for the protection of his or another's property.

This definition is dangerous. It gives too little to the aggrieved and leaves too much to the judges. While the definition does includes both physical and mental violence, it includes under domestic violence only acts that amount to "habitual" assault and those that make the life of a woman "miserable". The usage of such words as "miserable" also renders the law very subjective.  

The 'plea of self defence' in real terms, the perpetrator can use this to undo the main provision – the definition of domestic violence. A man can always say he was trying to get out of a fight between himself and his wife or between his wife and his mother, and that he caused the injury complained of, not intentionally, but in order to protect himself46.

Domestic violence has been generally defined as “the infliction of any bodily injury or harmful physical contact or the destruction of property or threat thereof as a method of coercion, control, revenge or punishment upon a person with whom the actor is involved in an ongoing intimate relationship”47.

Domestic violence does not only mean harassment or cruelty at the hands of the husband or the in-laws, it includes offences like incest, mutilation of private organs, rape, abortion of female foetus, molestation, unnatural sex, assault or battery and the like48.

The definition addressed by the Draft Bill 1999, drafted by the Lawyers Collective includes physical, sexual, economic, emotional verbal and psychological abuses. It includes intimidation, harassment, destruction to property, demands for dowry, appropriating property belonging to women, driving women to insanity, administering dangerous drugs. It includes 'cruelty' in matrimonial laws. Offences under *IPC*, *Dowry*

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Prohibition Act, Commission of Sati Act, and Immoral Traffic Act are also considered to be acts of domestic violence⁴⁹.

Thus, the tenor of the whole exercise is to bring under the gambit of domestic violence, those acts and omissions which constitute offences under ordinary criminal law and related preventive Acts. The only object being 'to stop violence, provide support and place of safety'⁵⁰ and 'to ensure amiable and peaceful life'⁵¹. If this is so it means our existing criminal laws in relation to violence against women have failed.

For the purpose of this study the following are considered to fall within the realm of Domestic Violence.

1. Wife battering
2. Martial rape
3. Dowry related violence
4. Sexual abuse of girl child
5. Female infanticide

8.2 Wife Battering

For the purpose of this study, 'wife battering' is narrowly defined as 'wilfully striking wife by a husband with or without injury'. It is

⁵⁰ Akshay Khana, supra note 49, p. 11.
limited to the acts of physical violence directed towards the spouse. The definition thus does not include sexual abuse and marital rape\textsuperscript{52}.

In the northern parts of Karnataka, there are sayings relevant to the issue, one, "there can be no home without a quarrel between husband and wife" and "a quarrel between husband and wife lasts only till they retire to bed". Quarrels between husbands and wives over various issues and matters may be common, which may be 'personal' or 'private' as in the popular private/public debate. That is, in one sense conflict is normal in familial relationship. When the conflicts assume 'out of control' proportion and assume violent characteristics, causing injury/hurt/death to the other it no more remains 'personal' or 'private', it becomes the realm of public, where interests of the State has to be looked into.

There are scholars who take the view that no violence is to be tolerated within the family (e.g., those who would argue against the spanking of children even with a view to discipline them) and there are others who point out that some degree of physical aggression is socially accepted by wives, children, siblings, etc., themselves as a means of bringing them around to their senses or making them conform to expected standards of behaviour\textsuperscript{53}. The problem, however, lies in drawing the line between permissible limits of such violence and that which may be regarded as excessive.

\textsuperscript{52} Ram Ahuja, \textit{supra} note 8, p. 123.
\textsuperscript{53} M.V. Sankaran, \textit{supra} note 41, p. 91.
One of the important criminal law principles, 'De minimis non curat lex' (the Law does not concern itself with trifles) is embodied in Section 95 of the Indian Penal Code which states “Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if the harm is so slight that no person of ordinary sense and temper would complain of such harm”.

Therefore, whether an act which technically amounts to an offence is trivial or not, would depend upon the nature of the injury, position of the parties, the knowledge or intention with which it is done, etc. In other words, there can be no absolute standard to measure whether the injury is enough to constitute an offence.

Cultural traditions the world over have historically granted men permission to beat their wives. In India, the code of Manu directed that a wife should be considered of no more importance than a chattel of her husband. ‘Whether a drunkard, leper, sadist or wife beater, a husband is to be worshipped as God’. Ancient Hindu Law permitted husband to correct his wife by beating her with a rope or split bamboo ensuring that no bones broke54. For William Blackstone wife beating is ‘the husbands right to physically chastise’ an errant wife, provided the stick was no bigger than his thumb55, which became the ‘rule of the thumb’.

Thus, husbands thought 'to chastise' their wives was matter of their right, after all she is their property. Moreover in patriarchal Indian Society, sexual division of labour provided the husbands role as provider and wife is responsible to keep household. In this sexual division of labour the husband becomes the dominant which he would not give up. Ancient Indian literature supports the view that wives were meant to be beaten occasionally and it was normal behaviour pattern. It was seen by husband, often as a manifestation of power over his wife, a right which most husbands did not omit to exercise.

A battered wife can have recourse to various remedies – both civil and criminal. She can initiate and prosecution against her husband for assault (Sec. 352 IPC), use of criminal force (Sec. 354 IPC), hurt (Sec. 323 IPC) and grievous hurt (Sec. 325 IPC) as the case may be.

56 Madhurima, supra note 35, p. 19.
58 Section 352: Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that Person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.
Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or if the provocation is given by anything done in the lawful exercise of the right of private defence.
Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.
59 Section 354: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
She can bring a claim for damages in tort (for assault, battery and trespass to person) against her husband. However, tort actions between spouses are not popular in India, because the suit may have untoward consequences which the wives fear. She can also seek decree of judicial separation or divorce from her husband on the ground of persistent cruelty.

8.3 Marital Rape

Rape *perse* is an offence against women violating her dignity and self respect. When it occurs within the four walls of her home, it reduces the woman to status of an object used merely for sexual gratification. It challenges the very existence of 'woman' in her own home, by her own husband. Therefore the contemporary thinking is to criminalize 'marital rape'. The argument is sexual intercourse without the consent of woman is equivalent to rape even if the man is the husband of the woman.\(^6^2\)

A study carried out by the Centre for Operations Research and Training (CORT) on the decision making process involved in seeking abortion\(^6^3\) reveals that there is frequent sexual coercion within marriage. Husbands take it as their 'right' to have complete control over the body and sexuality of their wives. The prevailing social structure and value system

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\(6^0\) Section 323: Whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

\(6^1\) Section 325: Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.


supports and perpetuates this assumed 'right' and is well reflected in the comments of the informants, who feel that their role as wife is one of resignation.

The study shows it is insiders – their own husbands – who are the main perpetrators of sexual coercion and abuse, which certainly works as a mechanism to keep women submissive to their husband.

8.3.1 Legal Position in India

In India, Chapter XVI of Indian Penal Code deals with the 'Offences Against Human Body' and contains Sections 375 to 376A, 376B, 376C, 376D, which exclusively deal with the offences of rape.

The provisions wherein marital rape can be inferred are the exceptions under Sec. 375, Sec. 376(1) and Sec. 376A, which can be classified as:

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64 Ibid., p. 35.
65 Section 375 Rape,—A man is laid to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First—Against her will.
Secondly—Without her consent.
Thirdly—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death, or of hurt.
Fourthly—with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly—With or without her consent, when she is under sixteen years of age.

Explanation:—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception:—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.
a. When the wife is between 12-15 years of age the sentence may go up to two years imprisonment.

b. Rape of judicially or customarily separated wife is punishable with up to two years of imprisonment.

c. Rape of a wife above 15 years is not punishable.

Relevant here to note is Section 5 of Hindu Marriage Act, 1955 which lays down conditions to constitute a valid marriage Sec. 5(iii) lays down, ‘that the bridegroom must be of 21 years of age’ and ‘the bride
18 years of age'. If this Section is contravened the marriage would not be a void marriage, but the bridegroom is punishable under section 1869 of Act.

In the light of above Sections, if a person marries a girl below 15 years of ages, commits sexual intercourse on his wife, he will attract exception to Sec. 375 IPC. Consequently he is liable for offence of rape. In other words though there is consensual sexual intercourse between spouses, still intercourse amounts to rape.

Forced sexual intercourse by husband can be marital rape under Section 376A, when a husband has sexual intercourse with his wife, without consent, when she is living separately from husband under a decree of separation or custom or any usage. Looking into the said provisions doubt arises to say the husband has absolute right over his wife to have sexual intercourse regardless of her consent or will.

**8.3.2 'Consent' in Sexual Relationship**

The concept of marital rape revolves round the 'consent' in sexual relationship between husband and wife. It presumes 'consent' which is "assertion of power and it denies women the right to intimate and pleasurable sexual activity especially within marriage"70.

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69 Section 18: Punishment for contravention of certain other conditions for a Hindu marriage- Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses [(iii), (iv) and (v)] of Section 5 shall be punishable-(a) in the case of contravention of the conditions specified in clause (iii) of Section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend, to one thousand rupees or with both, (b) in the case of contravention of the conditions specified in clause (iv) or clause (v) of Section 5, with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees or with both.

70 Abhinav Ashwin, *supra* note 62, p. 79.
For men, their sexuality and pleasure are defined in terms of the power of an erection, an aggression. For a woman, this becomes an assault, until and unless there is consent on her part\textsuperscript{71}.

The contemporary view is in sexual relationship between man and woman, ‘consent’ is taken as a means to distinguish between human existences from that of animals. ‘Sexual expression is so integral to one’s personality that it is impossible to conceive of sexuality on any basis except the basis of consensual participation of the opposite sexes. No relationship between man and women is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship\textsuperscript{72}. Nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person ... to a positive sex act”\textsuperscript{73}.

Researches in the realm of psychology also conclude ‘mind and body are inseparable’, “therefore sex act cannot be treated as mere act of body” and therefore imposed sex must be regarded as constraint and torture imposed on the mind of the unwilling party\textsuperscript{74}.

In the context of restitution of conjugal rights\textsuperscript{75}, that is forcing an unwilling party to cohabit the Court said it “violates the right to privacy and human dignity guaranteed by Art. 21 of the Constitution\textsuperscript{76}.

\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid., the Court cites the research of Dr. George Salomon, University of California.
\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
Exclusion of 'consent' in sexual relationship can be traced back to Roman Law, where wife was held to be property of the husband, and who had absolute right to conjugal relations. Exclusion of marital rape from criminal law is based on a compilation of law prepared by Matthew Hale, C.J. in 1736, entitled Pleas of the Crown:

'The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself this kind unto her husband which she cannot retract.'

Freeman critically analyses the philosophy in Hale's statement to mean that 'sexual intercourse is an incident of the status of being a married woman. Therefore a married woman was really a part of her husband's property, so that forced sexual intercourse was merely a way, the husband was making use of his property.'

This position, held for centuries, was substantially changed in 1991. The House of Lords in *R v. R* held that there is no 'marital exemption' to the law of rape and accordingly the husband may be convicted of the rape of his wife, if she does not consent to intercourse regardless of whether he is living with or apart from his wife.

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76 Though this was overruled by the Supreme Court in *Sarof Rani v. Sudarshan Chada*, 1984 (4) SCC, 90.
78 Ratna Kapur and Brinda Cossman, *Subversive Sites, Feminists Engagements with Law In India*, Sage Pubs., New Delhi, 1996, p. 120.
80 [1991] 1 All ER 747.
In United States of America, the exemption is given up in the recent revision of rapes Laws of South Dakota, Delaware, Oregon and Nebraska. Oregon Law has created a new offence called 'spousal rape', one that could be committed only by husband against his wife. Nebraska has also adopted a law allowing a wife to charge her live-in-husband with rape.

The Courts in Australia have reinstated the position that the marital rape exemption is unconstitutional. Thus it can be seen that the idea of criminalizing marital rape has been widely accepted. The opinion is the time is right for the Indian society to acknowledge that marital rape committed against the wife injuries women's dignity.

There is need to acknowledge the dignity and the right to privacy of woman. Marriage as a license to sex should be put to an end. Like other offences, marital rape should be treated as 'domestic-violence', and should be made as a civil wrong.

Till 'domestic-violence' law comes into operation S. 375 of IPC should be repealed to the effect, that husband should be held guilty of raping his own wife if he has sexual intercourse with her against her will or without her consent. Since marital rape is torture both mental and physical,

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82 Abhinav Ashwin, supra note 62, p. 78.
Cruelty under Sec. 498A\textsuperscript{83} of IPC should be broadly interpreted to include it.

\textbf{8.4 Dowry Related Violence}

Dowry is an ancient practice associated with the institution of marriage in India. It has its origin in the agricultural societies where, the family survival was dependent on the piece of lands. Since women joined the husband’s family after marriage, they were not given formal share in the land mainly to avoid the fragmentation of land\textsuperscript{84}. However, as a compensation, the system of dowry was placed which meant giving the daughter money or goods in lieu of the share in the property, as a means of ensuring her future financial security\textsuperscript{85}. Since then, practice of dowry has been raising its ugly head every now and then but the evil has been flourishing beyond imaginable proportions\textsuperscript{86}. Along with this the custom of ‘Kanyadan’ followed by the ritual ‘Vardakshina’, it is still a part of the institution of marriage. Dowry as it exists today, vary according to caste or religion. Nevertheless it exists cutting across lines of caste, class and

\begin{itemize}
\item Section 498A- Husband or relative of husband of a woman subjecting her to cruelty:- Whoever, being the husband or the relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
\item Explanation:- For the purposes of this section, ‘cruelty’ means
\begin{itemize}
\item (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman or
\item (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to met any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand.
\end{itemize}
\end{itemize}

\begin{itemize}
\item See, Ram Mohan Das, \textit{Women in Manu and Seven Commentators}, especially Chapter IV, Kanchan Pubs., Bodh Gaya, 1962, pp. 43-49.
\item \textit{Ibid.}, p. 46.
\end{itemize}
community. The Committee on the Status of Women in India (1974) states 'it indicates a loss of status for the girl in her father's family where she becomes a liability and has expressed deep concern'. The Joint Select Committee of Parliament (1983 have voiced their concern over the rapid spread of dowry among different socio-economic groups, religious and regions in the country.

Whatever be the concept of dowry, whatever be the mode of practice, the unspoken weapon behind the dowry is harassment of the bride after the marriage. The harassment, the beating, the humiliation and oppressive conduct of the in-laws, resulting in the brides' commitment of suicide or death may be termed as dowry related violence. It is a 'factor around which the ill-treatment of the bride hinges and most of the dowry deaths, suicides, bride burnings and harassment take place', and this arises 'from the dissatisfaction of the in-laws over the inadequate dowry brought by the daughter-in-law.'

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89 Under Dowry Prohibition Act, Section 2, Dowry means: Any property or valuable security given or agreed to be given either directly or indirectly- (a) by one party to a marriage to the other party to the marriage or (b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person at or before (or any time after the marriage) (in connection with the marriage of the said parties, but does not include) dower or mahr in the case of persons to whom the Muslim Personal Law (shariat) applies.
The means adopted to harass or murder the bride are also diverse. If the mode of death is either through burns, poisoning or drowning, the nature of harassment of the bride may take different forms. Physical and mental torture, causing humiliation and confining her to a lonely place without food, have been reported as some of the methods. Administering electrical shocks nagging and beating have also been reported as methods employed to torture the bride. The methods adopted for the committing of suicide by the bride are burning, hanging, drowning or the taking of poison.

The important factual components identified by the Law Commission in relation to dowry are,

1. The person who died is always a woman, usually in her twenties
2. Status-wise, she is married, totally dependent on her husband or on his relatives, and in many cases she is either pregnant or already a mother
3. In a majority of the cases the mode of death is through burns, and in others it is caused by injuries or poisoning
4. The condition of the woman is extreme unhappiness resulting from or connected with, the demands for dowry
5. Usually the death is presented as one of a kitchen accident or suicide

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The violence or death takes place within closed doors and the persons perpetuating the crime are members of the groom's family.

**8.4.1 Protecting Provisions Relating to Death/Murders**

Recognising that deaths or suicides by married women are often the result of being subjected to cruelty, the Govt. brought amendments to Indian Penal Code, 1860 and Indian Evidence 1872, by adding Sections 498A and 304B.

Section 498A of the IPC says “whoever being the husband or relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall be liable to fine”.

Cruelty has been defined as ‘any wilful conduct which drives the woman to commit suicide or grave mental or physical injury to her, or harassment of the woman with a view to coerce her for dowry. According to law if a woman commits suicide within seven years of her marriage and there is evidence of cruelty, the court may presume, having regarded other circumstances of the case, that the husband or his relatives have abetted the suicide’.

Likewise under Section 304B IPC, which provides for punishment for dowry deaths, where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment for dowry, the presumption is that the husband or his relatives caused the death. The
punishment for the offence is imprisonment for not less than 7 years extendable to life.

Also a new section 113-A has been added to the Indian Evidence Act 1872. According to section 113A of the Evidence Act, when a woman who has been married for less than seven years commits suicide and it is shown that she had been subjected to cruelty by her husband or some other relative, the court will presume that the husband or other relative abetted the suicide. The accused person then has to prove that the harassment or cruelty was not the cause of the suicide, to escape from punishment.

8.4.2 Judicial Responses

The Indian judiciary has been sensitive in dealing with dowry cases. Husband suspecting wife and mudslinging,94 malicious and vexatious institution of litigation against wife95 demands in conformity with custom or usage,96 misconduct soon after marriage97 have been held to be 'cruelty' under section 498-A.

In cases of torture and maltreatment,98 failure of prosecution to prove motive,99 absence of motive when murdered by weapon100 etc. the
Courts have taken liberal view and have punished the guilty. Similarly, in host of cases the courts have punished the guilty.  

8.4.3 Abetment to Suicide

In many cases of dowry death, a defence is often pleaded that the married woman died by committing suicide. 'Husband and relatives usually attempt to paint the dowry death with colour of suicide.'

Section 306 IPC reads 'If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'. This Section was enacted to curb the social evil whereby persons aided, abetted or instigated in committing sati and suicides of women due to mental torture for deficient dowry. Section 306 punishes the person who abets the commission by another person of suicide.

Section 107 IPC reads, 'A person abets the doing of a thing, Who – First- Instigates any person to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of

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that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing, lays down as to what is abetment of thing'.

Briefly a person is said to ‘instigate’ another when he actively suggests or stimulates, provokes, incites, encourages, insinuates another to act in particular manner (to commit an offence) by means of language, direct or indirect. Nonetheless, the act of abetment must be so potent that direct result of which is the commission of suicide. The ‘abetment’ necessarily means some active suggestions to the commission of offence.

Both sections 306 and 107 must be read together, which means;

1. When a person instigates the other to commit suicide, and
2. as a result of such instigation the other person commits suicide,
3. then the person causing such instigation commits the offence and is liable to be punished under section 306.

Our Judiciary has been quite sensitive to hold, procuring poison, scoldings by mother in law constant demand of money by

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104 Meena Rao, supra note 102, p. 325.
husband\textsuperscript{108} ill-treatment and beating\textsuperscript{109}, cruelty\textsuperscript{110}, repeated demands made not only to girls but also parents\textsuperscript{111} as abetment to suicide.

Distinction between 306 IPC and 498A, is under section 498A, to the extent, it deals with suicide, cruelty committed by the husband or his relatives pushing the woman to suicide, under section 306 suicides is abetted and intended\textsuperscript{112}.

\textbf{8.4.4 Dowry Legislation}

The \textit{Dowry Prohibition (Amendment) Act, 1984}, made the offence cognizable and widened the definition of the term dowry, Dowry is any property or other valuable items given or agreed to be given in connection with the marriage 1) to the bridegroom or bride 2) or any other person. Any payments or even gifts made in connection with the marriage can be termed dowry\textsuperscript{113}.

However, it should be noted that, \textit{Dowry prohibition Act, 1961} prohibits dowry but authorizes the wedding presents of customary nature by parent's friends, relatives or acquaintances given at or about the time of marriage. It says that value of these gifts should not be excessive, having regard to the financial status of the person by whom or on whose behalf such presents are given. This provision is a major loophole that permits

\begin{itemize}
  \item \textsuperscript{108} Brijlal v. Prem Chand, AIR 1989 SC 1661.
  \item \textsuperscript{109} State of Punjab v. Iqbal Singh, 1991 Cri LJ 1897.
  \item \textsuperscript{110} Krishna lal v. Union of India, 1994 Cri. LJ 3472.
  \item \textsuperscript{111} Pawan Kumar v. State of Haryana, 1998 (1) SC 565.
  \item \textsuperscript{112} Girjashankar v. State of Madya Pradesh 1989 Cri.LJ 242.
  \item \textsuperscript{113} Nilima Datta, 'Crimes Against Women', \textit{The Lawyers}, July 1992, p. 45.
\end{itemize}
perpetuation of dowry or perceived as lack of will on the part of legislature to deal with the problem of dowry. This provision is often misused by both the parties to marriage.114

The 1984 amendment to the Dowry prohibition Act 1961 also provides for the listing of presents made to the bride or bridegroom, at the time of their marriage. Items which are not entered in the list will come under the definition of dowry under the Act.

Sec. 6 of the Act provides that the dowry (as defined), when taken by any person other than the woman in whose marriage it is given, has to be transferred to her within a period of one year from the date it was given. Pending such transfer, the dowry forms, a trust in the hands of the person holding it and he or she would be answerable as a trustee.

In the amended (1984) Act, Sec 7(b) now lays down that the either on the Court’s own cognizance, or on a police report, or on a complaint made by the person aggrieved or by any recognised welfare institution can constitute a complaint in this regard. There is no time limit for the filing of such a complaint.

Thus it may be said, that in spite of strong legislation to combat the dowry, the practice still exists. This is because there are certain factors which have remained unchanged, which perpetuates the practice of dowry. They are ‘strong moral and religious obligation of parents to marry and religious obligation of parents to marry off daughters’ ‘lack of economic

independence through employment', 'their preference not to claim their share in father's property', 'lack of social security system by state', 'treating dowry as a status symbol', and 'waiving of shares in favour of their brothers'\textsuperscript{115}. Moreover it is to be borne in mind that studies reveal 'that socio-economic status' has no relation to dowry. To a 'large extent' it seems to be conventional bound by customs and traditions\textsuperscript{116}.

The nature of dowry related problems also vary. In some cases recourse to formal legal system may be essential. But Indian women do not easily take shelter of law. It is because of their psycho 'they always make an effort to manage and go on'\textsuperscript{117}, and 'a feeling that they will have to undergo added indignities of interrogation, medical examination, court appearance and the possible attack of character\textsuperscript{118}.

There is also difficulty in securing convictions because, i) the facts do not fit in to the pigeon-hole of any known offence, or ii) the peculiarities of the situation make proof of directly incriminating facts difficult\textsuperscript{119}.

Added to this is the incompetence and indifference of the investigative machinery while dealing with dowry deaths. For instance in spite of the central home ministry's instructions that all unnatural deaths

\textsuperscript{115} Subhas Chandra Singh, \textit{supra} note 4, pp. 122-123.
\textsuperscript{119} 91\textsuperscript{st} Law Commission Report, \textit{supra} note 93, p. 1.
should be investigated by a deputy superintendent of police or higher official, it is not unknown for dowry deaths to be investigated by sub-inspectors.¹²

As indicated by Supreme Court, “Laws are not enough to combat the evil. A wider social movement of educating women of their rights, to conquer the menace, is ... needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation."¹²¹

Therefore it is necessary to empower women with rights much before untoward incidents take place. One way is to make dowry related violence a part of ‘domestic violence’ a civil wrong and provide civil remedies such as injunctions, protective orders and exemplary damages.

8.5 Sexual Abuse of Girl child

Sexual abuse of the girl child is another facet of female exploitation. It is a global phenomenon, common to both developed and developing countries though degree and intensity may vary. Finkelhor’s study reveals that 20 per cent of the female and 10 per cent of male students had been sexually abused children.¹²² Survey conducted by International Statistics on Child Sexual Abuse, reveals ‘at least two out of four girls and one out of six boys are victims of sexual abuse.¹²³ In India,

survey conducted by Samvad among girl students reveals, 83 per cent of respondents had experienced physical eve teasing, 47 per cent had been molested/experienced sexual overtures, 15 per cent had experienced serious forms of abuse including rape\textsuperscript{124}.

Surveys conducted by NGO's reveal that girls are often raped sodomised and sexually exploited in other ways. Though both men and women can sexually abuse a child, most abuses are by the males because of the dominant position held by them.

Many social scientists once believed that only people with adverse emotional problems abuse children. However, studies indicate that most of the people who abuse children do not suffer from psychiatric illnesses\textsuperscript{125}. Apart from Socio-economical handicaps, personal incapacities and deficiencies, frustrations, conflict between spouses, and marital problems are also the reasons for child abuse\textsuperscript{126}. Family breakdown, pressures of urban life, socio-cultural discrepancies like preference to boys, cultural practices like leaving girls to the service of goddesses, superstitions like sex with virgin cures venereal diseases, etc are also the reasons for sexual abuse of children.

Child sexual abuse is physical and mental violation of a child coupled with sexual intent, usually by an older person who is in some

\textsuperscript{124} \textit{Ibid.}


It may be defined as infliction of serious physical harm or sexual molestation of a child. The term sexual abuse has been defined as 'the involvement of dependent, developmentally immature children and adolescents in activities they do not truly comprehend to which they are unable to give informed consent or that violate the social taboo of family roles'.

8.5.1 Indian Legal Position

Indian law with respect to child abuse is yet to develop. Child sexual abuse is treated as rape. Several new sections have been introduced to Indian Penal Code, Criminal Procedure Code and Indian Evidence Act. Sections dealing with child abuse are Section 375, 376, 228 (A) of IPC, Section 164, 327 Cr.P.C. and Section 114A IEA.

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127 Surekha Raman, supra note 123, p. 4.
130 See, supra note 65.
131 See, supra note 66.
132 Section 228A: (1) Whoever prints or publishes the name of any matter which may make known the identity of any person against whom an offence under Sec. 376, Sec. 376A, Sec. 376B, Sec. 376C or Sec. 376D is alleged or found to have been committed (hereinafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of (the victim if such printing or publication is—

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:
Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation.—For the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.—The printing or publication of the judgment of any High Courts the Supreme Court does not amount to an offence within the meaning of this section.

Section 164: Recording of confessions and statements—(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial.

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Section 327: Court to be open:—(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them.

Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 37AA, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera:

Provided that the Presiding Judge may, if he thinks fit, or on an application made by
Section 375 defines rape and section 376 IPC provides punishment for rape. Offender is liable to be punished for a term which may extend to 10 years if the woman raped is under 12 years of age. Section 228 (A) of IPC protects the honour of sexually victimised women.

Section 327 (2) allows proceedings to be held in camera.

The pertinent observation is, all these sections address rape in general. There is no specific reference to child sexual abuse. Because most of the child sexual abuses occur behind the closed doors of so called 'home' by the family members, there is an urgent need for a law to address the problem. The National Commission for Women has recognised the unique character of the offences and has said, 'the existing law does not address the increasingly visible offence of child sexual abuse and contains serious contradictions that inhibit women as well as children from reporting crimes of sexual abuse. The existing definitions of 'rape' 'molestation' and the like do not adequately address the various types of sexual assaults in terms of women's experience nor, do they sufficiently recognise the gender specific nature of such crime.'

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Section 114A: Presumption as to absence of consent in certain prosecutions for rape:— In a prosecution for rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of subsection (2) of Section 376 of the Indian Penal Code, (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Surekha Raman, supra note 123, p. 6.
They have also prepared a Draft Bill to bring minor children within the purview of law of sexual assault, which is yet to see the light. Like many other intra family violences, this offence too, cannot be prevented by criminal laws. Under reporting is common. Punishing parents do not often solve the problem nor can prevent further offences. It can destroy child’s family relationship. Standard of proof required by criminal laws are too difficult to prove. Therefore the opinion is to make child sexual abuse a civil wrong, where sufficient proof is enough to tilt the scales. Strong legal presumptions can be set up, like once injuries are found on the girl child, to shift the burden of proof to parents to prove that they were not inflicted by them.

It is pertinent to note, that in United States of America, almost all the States have legislations on child Abuse and impose mandatory duty upon medical practitioners to report suspected cases of physical abuse of children. There are criminal sanctions attached for failure to report. Similarly in India too, it can be made mandatory for medical practitioners both public and private to report child abuse cases brought to them for treatment.

8.6 Female Infanticide

India is often called a land of missing girls. According to a recent study by U.N. Children’s Fund (UNICEF) upto 50 million girls and women are missing from India’s population as a result of systematic gender discrimination137 in India. The girls and Women missing in India between

137 Programme Associate, Population Control, New Delhi, www.indiatogther.org.
1981-1991 is calculated to be 1.8 million, of which 61 per cent were children\textsuperscript{138}. The current ratio of female to male per thousand is 927. The accepted reasons for such disparity is practice of female infanticide and female foeticide.

Female infanticide is nothing but killing of female child soon after its birth especially with the mother's consent\textsuperscript{139}. Often 'very crude techniques', 'such as poisoning the child with extracts of oak tree, putting uncooked rice in the month of newborn and choking her to death or simply abandoning her in the fields\textsuperscript{140}. Studies reveal that the custom of female infanticide is prevalent all over India though degree varies. It is very strong in Haryana, Rajasthan and Madya Pradesh, relatively weak in South India States. Preference for male child is comparatively weak, but nonetheless substantial in western and south India\textsuperscript{141}. Because practices occur within the domain of 'home' with connivance of family members, the opinion is female infanticide should fall within the ambit of 'domestic violence'. There are several reasons for the existence of this practice. Important one's are i) male child preference, ii) economic reasons, iii) hypergamous marriages and iv) superstitions.

i) Indian culture gives importance to sons. "The birth of girl, grant it elsewhere, here grant the son" (Atharva veda), 'Daughter is a source of misery while the son is the savour of the family' (Aitreya Brachamana) are deep rooted in the psyche of Indian Society. Vashistha has said "when a father sees the face of his living son on his birth, the debt is transferred to that son and he attains immortality and thus says the Revelation, there are innumerable heavens for a man who has a son but there is no place in heaven for a sonless man". 'Let daughters be born there but sons be born here itself is a sentiment that has been expressed in the Vedas'.

ii) Studies reveal that male preference is to the extent of 55.2 per cent and economic reason is to extent of 44.8 per cent. Poverty, inflated dowry demands, expenses during marriages are reasons for female infanticide. The thought pervading the economic reason is, 'when the girl grows up, the parents find it very difficult to fulfil her needs and conduct the marriage of the girl. They have to spend a lot in the name of dowry and presentations. That does not end there. Even after the marriage, the girl is

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142 See Sudhir Kakkar, 'Feminine Identity in India', in Rehana Ghashially (Ed), Women in Indian Society, Sage, New Delhi, 1988, pp. 45-47.
146 See, K. Kumar and Rani, Offences Against Women, Regency, New Delhi, 1996, pp. 33-34.
forced by her husband and in-laws to bring valuables on and on from her parental home. As such, the parents are driven into debts\textsuperscript{147}.

Case studies reveal because of poverty the parents don’t want to beget a girl child\textsuperscript{148}. ‘I can leave my 13 year old boy out with a loin cloth. But my girl of the same age has to be dressed properly. I just cannot even afford a change of clothes for the two girls, leave alone their marriage expenses\textsuperscript{149}.

Dowry seems to be major reason for this practice. Case studies reveal ‘even a man who collects cow dung has to be given 10 sovereigns (about 80 grams, worth about Rs. 37000 at current rates) of gold; it is enough if one is a male\textsuperscript{150}. “Better five hundred now than five lakhs later”\textsuperscript{151}.

Modern pressures to keep the family small in size also contribute for the practice. In an affluent two-child family, on the other hand, if the first is girl, then the pressure to produce a boy is much more. Result will be, the targeted elimination of all subsequent female foetuses till a male child is finally conceived\textsuperscript{152}. If the first birth is female, the next pregnancy has diminished chances of going to full term if the foetus is

\textsuperscript{147} Jayapalan N. ‘Human Rights’, Atlantic, New Delhi, 2000, pp. 126-127.
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid.
\textsuperscript{151} Kamala Jain, supra note 140, p.10.
\textsuperscript{152} Subramaniam, Vidya, “India’s Missing girls” \url{http://www.datamationindia.com} visited on 20.03.2004.
female. A female baby born under these conditions has reduced chances of survival\textsuperscript{153}.

iii) In some parts of the country, system of hypergamy, the practice of giving away daughters in marriage to grooms belonging to a higher caste, or what amounts to the same, sons bringing in brides of an inferior caste along with dowries also lead parents to regard girls as a liability\textsuperscript{154}.

This practice has led to 'financial burden of marrying off a daughter and a stigma of having unmarried daughter in the house forced people to kill infant girls at birth\textsuperscript{155}.

iv) There are also certain superstitious beliefs like 'if you kill a female child, the next one is male', and 'female children bring ill luck to family', which have led to the practice of infanticide\textsuperscript{156}.

There are no laws specifically governing female infanticide. We have to recourse to homicide provisions under Indian Penal Code, under Sections 302.

Though it is mandatory to report births and deaths to the village administrative officers or panchayats or local bodies, cases of infanticide are not reported. In order to punish the guilty under IPC, formal

\textsuperscript{154} \textit{Ibid.}, p. 1163.
\textsuperscript{155} S. Krishna Swamy, 'Female Infanticide in Contemporary India, A case study', in Rehana Ghadrally, \textit{supra} note 142, p. 187.
\textsuperscript{156} \textit{Ibid.}
complaint has to be lodged. In cases and practices on infanticide no complaints are lodged. Survey of literature of female infanticide do not mention about persons convicted for the crime. Therefore the opinion is female infanticide should be included in the definition of domestic violence, so as to prevent such practice and punish the offenders.

8.7 Criminalisation

The common view is that violence wherever practiced ought to be punished. The stress is on the fact that by punishing the criminals, a social message is sent which acknowledges the need to protect the victims, that arrest and prosecutions themselves serve as deterrents.

But penal action, requires the involvement of entire machinery of criminal justice which includes arrest (wherever the law provides) investigation, prosecution, sentencing and consequential resort to correctional measures. Criminal Justice System has inherent weaknesses. Some of them are i) focussing on punishment and not on rehabilitation; ii) emphasis on past conduct rather than attention to the future; iii) ignoring the needs of the victim; iv) absence of support and treatment for the wife; v) possibility of court congestion; vi) inadequacy of the investigating and prosecuting machinery.\(^{157}\)

The defects of the present system in the words of Supreme Court\(^{158}\) are 'firstly complainants are handled roughly and are not giving such attention as is warranted. The victims more often than one are

\(^{157}\) P.M. Bakshi, supra note 42, p. 13.
humiliated by the police. The victims have invariably found rape trials an experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than rape itself, undoubtedly the court proceedings added to and prolonged the psychological stress they had to suffer as a result of rape itself.

Moreover in relation to women in India, invoking criminal law is poor, because of various reasons; 1) The legal solutions such as ‘fine or imprisonment or both imposed’ do not often solve the problems, 2) reporting may aggravate the situation which may cause brutal attacks 3) may withhold financial/monetary support 4) may increase emotional stress at home 5) the cultural milieu causes the victim to tolerate 6) there is fear of adverse publicity 7) family pressure, especially when the head of the family or close relative is involved 8) social pressure where member involved in an important person in society 9) lack of awareness of rights 10) fear of being rejected 11) lack of faith in law and enforcement agencies 12) fear of further torture by repeated and prolonged interrogation by enforcement agencies 13) delay in getting judicial decisions etc159.

Criminalisation or punishment of the offender do not solve the problem. Marriage being sensitive socio/cultural issue, annulment or dissolution is not the only answer to violence. Moreover violence resulting in deaths/suicides is a grave injustice caused to women which cannot be

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reverted back. Therefore from women perspective, the thrust should be on preventive measures and techniques.

8.8 Preventive Techniques

In response to preventive techniques, some countries have introduced laws which provide for protection orders. In Australia in some jurisdictions the protection orders are sought by the police on behalf of the victims. This device does not rule out resort to criminal prosecution where necessary\textsuperscript{160}.

8.8.1 Civil Protection Orders

Then, there is procedure for obtaining injunctions or interdict orders which prohibit the opposite party from doing something harmful or amounts to nuisance. These types of orders may be linked with substantial litigation filed by the petitioner or may be available independently of any substantive litigation. In many of the commonwealth countries (Australia, Bahamas, some Canadian provinces, England, New Zealand and Hong Kong) and in a few non commonwealth countries (for example Austria) the female can obtain an interdict independently of any other legal action\textsuperscript{161}.

Though legislations differ in general, two sorts of orders are available 1) The first type of order prohibits the perpetrator from \textquoteleft molesting\textquoteleft or \textquoteleft harassing\textquoteleft the victim. 2) The second type of order, referred to as an \textquoteleft exclusion\textquoteleft, \textquoteleft eviction\textquoteleft or \textquoteleft ouster\textquoteleft order, is more severe. The

\textsuperscript{160} P.M. Bakshi, \textit{supra} note 42, p.
\textsuperscript{161} \textit{Ibid.}, pp. 13-14.
perpetrator can be excluded from part or all of the family home or under
certain Statutes from the area in which the home is situated.\textsuperscript{162}

Thus, in United Kingdom under the \textit{Domestic Violence and
Matrimonial Proceeding Act, 1976}, the remedies available are;

1. Non-molestation injunctions – that is an order to the offenders not to
molest, assault, pester or interfere in any way with the spouse.

2. Eviction or ouster injunctions- an order to the offender to leave the
matrimonial home, for a specified period, which may be as long as a
month\textsuperscript{163}. Under the Act, the breach of injunction is considered as
contempt of the court which can be punished with imprisonment\textsuperscript{164}.

Apart from the above orders, in U.K., \textit{Domestic Proceedings
and Magistrates Courts Act 1978}, provide for another type of orders – civil
orders wherein the Magistrate Courts are empowered to pass various orders
imperative and necessary for the protection of the health, physical or
mental, of the complainant and her children, if any. The orders may impose
'reasonable conditions of behaviour' to be observed by the offender\textsuperscript{165}.

In United States of America, many states have established
family courts with jurisdiction over all family matters, including intra-
family assaults, but with the exception of separation annulment and
divorce. Proceedings for intra-family offences in the family court can be

\textsuperscript{162} \textit{Ibid.}, p. 14.
\textsuperscript{163} M.V. Sankaran, \textit{supra} note 41, p. 94.
\textsuperscript{164} \textit{Ibid.}
\textsuperscript{165} \textit{Ibid.}, p. 95.
brought by the victim, authorized agencies, the police or other persons with the permission of the court\textsuperscript{166}. All family offences are brought before the family court and the court itself decides whether proved to a civil protection order or transfer the case to Criminal Court.

The Courts are empowered to issue 'civil protection order' under which it may order to the offender,

- a. to stay away from the home, the other spouse or the child;
- b. to permit a parent to visit the child at stated places;
- c. to abstain from offensive conduct against the child or the other parent or against any person;
- d. to give proper attention to the care of the home;
- e. to refrain from acts of commission or omission that tend to make the home not a proper place for the child;
- f. to co-operate in seeking and accepting medical and/or psychiatric diagnosis and treatment, including family case-work or child guidance for himself, his wife or child\textsuperscript{167}.

For contempt, the Court may impose penalty or imprisonment upto 6 months.

\textsuperscript{166} Ibid.
\textsuperscript{167} M.V. Sankaran, \textit{supra} note 41, p. 95-96.
8.8.2 Compensation/Exemplary Damages

In some countries, compensation is awarded to women who are subjected to violence and suffer pain in consequence. In Canada, for example, there is a growing tendency for provisions in provisional compensation schemes for victims of physical or sexual assault\textsuperscript{168}.

In New Zealand, New Zealand High Court has awarded exemplary damages for assault and battery\textsuperscript{169}. Some Latin American countries too provide for compensation, example; In Argentina, \textit{Family violence Act} has provision for compensation\textsuperscript{170}.

Thus in conclusion it may be said that violence against women is basically social-culturally structured. It is essentially related to power and sexuality. There are various manifestations of violence within family which not only include physical but also psychological.

There are no laws directly addressing the issues of wife battering, marital rape, sexual abuse of girl child and female infanticide. The existing laws are inferred by provisions of criminal laws provided by \textit{IPC} and \textit{Cr.PC}. They are seldom used. In violences related to dowry the \textit{Dowry Prohibition Act 1961} has failed. The new Sections added to IPC are also seldom used.

Resorting to criminal provisions does not solve the problems. Criminalisation or punishing the offender often shakes the foundations of institutions of marriage and family.

\textsuperscript{168} P.M. Bakshi, \textit{supra} note 42, p. 14.
\textsuperscript{170} P.M. Bakshi, \textit{supra} note 42, p. 14.