3.1 INTRODUCTION:

"Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."¹

Violence against women is present in every country, cutting across boundaries of culture, class, education, income, ethnicity and age. Since time immemorial India is particularly a male dominated society and prevalence of illiteracy among women has resulted in widespread violence against women. Therefore, Indian women like women world over have suffered from domestic violence like purdah system, satipratha, Female feticide, Female infanticide, different kinds of physical, emotional and mental abuse, dowry death, cruelty, polygamy etc. In India, family is considered to be a sacred institution and it acts as a source of furtherance of mental, social and spiritual well being of its members. Family creates bonds and a sense of belonging and stability of relation among its members which is now weakening because today domestic violence has been identified as a major cause of injuries to women in India. It is a heinous crime for a society that is operating in a severe form of oppression against women and which has

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been increasing with alarming proportion. Today with growing urbanisation and increasing stress and strains in daily life, domestic violence against women has been increasingly recognised as an important social and health problem in India. It is one of the greatest obstacles to (1) gender equality and (2) women’s fundamental rights to equal protection of the laws and (3) right to life and liberty.

The majority of persons aggrieved by domestic violence are women and domestic violence ranges from dowry abuse leading to death, verbal assault, marital rape etc.

Many victims of domestic violence in India are unable to leave this abusive situations due to psychological and socio-economic factors and continue to be victims of such violence, putting their lives and health in jeopardy. Still domestic violence is an issue that can be sorted out within the four walls of the house and some amount of violence is considered as a part of normal wear and tear of marital life.

In 21st century Indian women are increasingly being educated and joining more and more working lives but still they are subjected to different kinds of domestic violences like wife beating, bride burning, mental and physical abuse, cruelty by husband and in-laws, marital rape, dowrydeath etc. All these are widespread in our society and women are facing unequal treatments in every field of their social lives.

In this context, it is also stated that after Independence of India the framers of the constitution of India were conscious about the discrimination and unequal treatment on women in every field of their lives and violence against women including domestic violence. Consequently, they included certain general as well as specific provisions in the constitution of India under Part III as “Fundamental Rights” and Part IV as “Directive Principles of State Policy” for the uplift of the status of women and also to eradicate the violence against women from the society.

The Articles under Part III of the constitution of India relating to the Fundamental rights which try to uplift the status of women and provide equal
opportunities for women irrespective of sex are stated below:

1) **According to Article 14 of the Constitution of India** –

   All persons including women are equal in the eyes of the law and they are also entitled to enjoy equal protection of laws within the territorial jurisdiction of India. It signifies that all persons irrespective of sex should be treated equally in similar circumstances. In other words, the State should not make any discrimination between one person and another, and amongst equals the law should be administered equally.

2) **Article 15 of the Constitution of India** deals with prohibition against discrimination. It prohibits the state to make any discrimination against any citizen including women on grounds of race, caste, sex, religion, place of birth etc. It states that all citizens irrespective of race, caste, sex etc. are entitled to enjoy equal rights in regard to access to shops, hotels, bathing ghats etc. But the state has the right to make any special provisions for women and children and also for the scheduled castes and the scheduled tribes.

3) **According to Article 16 of the Constitution of India** – All citizens including women will enjoy equality of opportunity in matters of public employment irrespective of their sex, races, castes, religions etc.

   But there are certain exceptions i.e.–

   (i) Parliament may prescribe by law that residence within the state is required for a particular employment.

   (ii) The State is empowered to reserve certain posts for backward classes and also for the scheduled castes and the scheduled tribes.

   (iii) Appointment in connection with a religious organisation may be reserved for persons belonging to that religion.
4) **As per Article 17 of the Constitution of India** – System of untouchability is abolished and **Untouchability (offence) Act of 1955** was enacted by the parliament. This Act was amended by **Untouchability (offence) Amendment Act 1976** in order to make the law more stringent to remove untouchability from the society.

5) According to **Article 19** of the **Constitution of India** every citizen including women have the right –

(a) to freedom of speech and expression

(b) to assemble peacefully and without arms

(c) to form Unions or associations

(d) to move freely throughout the territory of India

(e) to reside or settle down in any part of the country.

(f) to practise any profession or to carry on any lawful trade or business.

But these freedom of rights can never be absolute. A democratic State like India cannot grant absolute freedom to her citizens including women. These are reasonably restricted on the ground of security, integrity and sovereignty of India, friendly relations with foreign states, public order, decency or morality, contempt of court etc. by the authority of the state in the interest of the community.

Hence, it has been said that Article 19 does try to reconcile individual freedom with the welfare of the people.

6) **As per Article 21 of the Constitution of India** –

No person shall be deprived of life or personal liberty except according to procedure established by law. This “right to life” includes right to live with dignity, right to privacy etc.

As for example – Medical examination of a woman for testing her virginity
amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of the Constitution.

Therefore, no one can claim medical examination of a woman for testing her virginity.²

Domestic violence against women is also derogatory to Article 21 of the Indian Constitution because it undermine the self respect and dignity of the victim woman.

7) **To spread Women education compulsory in India** –

According to Article 21A of the Constitution of India – The State shall provide free and compulsory education to all children of the age between six to fourteen years in such manners as the state may determine by law.

8) **To provide facility to the Women accused** – As per Article 20 of the Constitution of India – No person including women shall be convicted of any offence except for violation of a law inforce and no person shall be prosecuted and punished for the same offence more than once and no person accused of any offence shall be compelled to be a witness against himself or herself.

9) **As per Article 22 of the Constitution of India** – No person who is arrested shall be detained in custody without informing the ground for such arrest and he/she should be produced before the nearest magistrate within a period of 24 hours of such arrest.

10) **To prevent immoral traffic in Women and Girlchild Article 23 of the Constitution of India** – prohibits the traffic in human-being and forced labour.

In pursuance of this Article, Parliament has passed the Suppression of Immoral Traffic in women and Girls Act, 1956 which is now renamed as “The immoral

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Traffic (Prevention) Act 1956” for punishing the actions which result in traffic in human beings.

11) **To prohibit child labour specially girl child as per Article 24 of the Constitution of India** – Employment of children below the age of fourteen years in factory or mine or engaged in any other hazardous employment is prohibited.

12) **Under Article 25 of the Constitution of India** – All persons including women are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion.

The Articles under Part-IV of the Constitution of India relating to the Directive Principles of State Policy which are explicitly intended to improve the status of women and their protection are stated below :-

1) **According to Article 39 of the Constitution of India,** the State shall direct its policy towards securing –
   
   (a) that the citizen, men and women shall equally have the right to an adequate means of livelihood, and

   (b) that there is equal pay for equal work for both men and women.

2) **As per Article 39-A of the Constitution of India** – The State shall provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

3) **Article 42 of the Constitution of India** states that, the State shall make provision for securing just and human conditions of work and for maternity relief.

4) **Under Article 45 of the Constitution of India** – the State shall endeavour to provide within a period of ten years from the commencement of this constitution for free and compulsory education for all children until they complete the age of
fourteen years. Thus, All women are free to choose any form of education and training in order to secure a career of their choice.

5) **Article 51A of the Constitution of India** – imposes certain fundamental duties on every citizen of India in which Article 51A(e) is related to women.

As per Article 51A(e) of the constitution of India, it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women.

6) Reservation of seats for women in panchayats and Municipalities have been provided in **Article 243D and Article 243T** of the constitution of India.

7) **Article 325 and Article 326** introduce adult franchise without distinction of sex.

Today mainly four kinds of laws are dealing with domestic violence offences. They are —

3.2 **Criminal Laws relating to Domestic Violence**

3.3 **Statutory Laws relating to Domestic Violence**

3.4 **Civil laws relating to Domestic violence**

3.5 **Remedies available under law of Torts.**

**3.2 CRIMINAL LAW RELATING TO DOMESTIC VIOLENCE :**

The incidents of domestic violence against women have been increasing over the years. Women are subjected to violences like cruelty by husband and his relatives, dowrydeath, grievous hurt, murder, marital rape by husband etc.

There are some criminal laws in India dealing with domestic violence cases which are stated below —

**3.2.1 INDIAN PENAL CODE, 1860**

The criminal law in India is contained primarily in the Indian penal code, 1860 (I.P.C). The I.P.C is supplemented by special laws, which define and punish specific
offences. There are some sections in Indian penal code, 1860 which deals with different domestic violences.

i) **WHERE CULPABLE HOMICIDE AMOUNTS TO MURDER**:

In India often women are murdered by their husbands and in-laws for flimsy reasons. In this context it is stated that under section 209 of the I.P.C, “culpable homicide” is defined as causing death by doing an act —

a) With the intention of causing death.

b) With the intention of causing such bodily injury as is likely to cause death.

c) With the knowledge that it is likely to cause death.

In the case of domestic violence, Culpable homicide amounts to murder, unless it is committed without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.³

Therefore, culpable homicide is murder, if any act of the husband by which the death of a victim woman is caused is done with the intention of causing death, or, if it is done with the intention of causing such bodily injury as the husband of the victim woman knows that it might cause death of his wife. As for example – If any husband shoots his wife with the intention of killing her and the woman dies in consequence. Then the husband of that woman commits murder.

Now it is mentioned that where there is an intention to kill, the offence is always murder. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide. If it is the most probable result, it is murder. As for Example - In one case, the accused had knocked down his wife, then put one knee on her chest and dealt with two or three violent blows

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3. *Section 300 I.P.C*
on the face with closed fist which produced huge blood clots in the brain, and she died after that either on the spot or shortly thereafter, there being no intention to cause death, and the bodily injury was not sufficient to cause death in the ordinary course of nature. It was held that the offence committed was culpable homicide not amounting to murder.

Whenever the court is confronted with the question whether the offence is murder, or culpable homicide not amounting to murder on the facts of a case, it will be convenient for the court to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death leads to the second stage of consideration, whether that act of the accused amount to culpable homicide as defined in sec. 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of sec 300, Indian penal code is reached. This is the stage at which court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four classes of the definition of murder contained in Sec 300. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder & if this question is answered in the affirmative, but the case came within any of the exceptions enumerated in sec 300, the offence would still be culpable homicide not amounting to murder. Therefore, a man's intention must, as a general rule be gathered only from his acts and in deciding the question of intention, the court has to consider (1) the nature of the weapon used, (2) the part of the body where the blow was given, (3) the force used in giving the blows from which an inference can be drawn.4

So, where each of the injuries suffered by the deceased wife was caused by the blows intended to kill the deceased, the accused husband was held guilty of murder. In domestic violence cases the law is well settled that the chain of circumstances must be

4. AIR 1979 SC 1504
complete and must clearly point to the guilt of the accused.\textsuperscript{5}

**Circumstantial Evidence** – To prove guilt of an accused person (husband) by circumstantial evidence: -

1) the circumstances should be fully proved.

2) the circumstances should be conclusive in nature.

3) all the facts established should be consistent only with the hypothesis of guilt.

4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any other person, other than the accused.\textsuperscript{6}

In a bride burning case there were hardly any shouts or cries. Accused were watching the incident through window without any hue and cry or without any serious attempt to save the deceased. Held on facts and circumstances that it was not a case of suicidal burns but the deceased was put in a condition where she could not cry and yet got burnt by a third party.\textsuperscript{7}

In another case of dowry death, the deceased wife was led to death by aphyxia and thereafter the body was burnt by soaking kerosine in the presence of the mother-in-law. Circumstances indicated that more than one had participated in committing the murder and other person, as the circumstances disclosed, was the husband of the deceased.

Today these type of bride burning cases are alarmingly on the increase. The Court has to take a pragmatic view of such cases on the evidence produced. The court relied upon the dying declaration of the deceased wife that the grandmother-in-law caught hold of her and her mother-in-law poured kerosene oil on her sari and lighted a match stick on her body and held the case to be one of murder even though, before the sub-inspector of police and before the doctor at the time of her treatment she told otherwise.\textsuperscript{8}

\textsuperscript{5} Ramesh v. State 1985 Cr L J 530 (SC)

\textsuperscript{6} Kundula Bala v. State 1993 Cr L J 1635 (SC)

\textsuperscript{7} Prabhudyal v. State 1993 Cr L J 2239 (SC)

\textsuperscript{8} Inder Kaur v. State 1986 Cr L J, 743
Thus the dying declaration was corroborated by medical evidence. Held that this was a case of murder.

In another case where a newly married and highly educated wife died from burning during midnight in dark kitchen, the husband was licentious in character and his conduct was found unnatural on knowing about the burning of his wife and he absconded for about a month — The Court held it was a case of murder and not of suicide.9

The husband was accused of murdering his wife by burning. Incident took place about 10 months after the marriage. The accused took the plea that death was accidental owing to bursting of kerosene stove and there was dying declaration of the wife against the husband. Accused was held guilty of murder.10

Finally it is stated that whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.11

Where there is doubt as to the guilt of the accused he must be acquitted and not given the lesser penalty of imprisonment for life. A provision conferring power on to the courts to exercise discretion in the matter of imposing sentence cannot be said to be violative of Art 14 of the constitution.

ii) DOWRY DEATH:

Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage, and if it is established that the wife had been subjected to cruelty by her husband or his relatives, for the demand of dowry, the death is termed a dowry death.12

The husband or relative who subjects the wife to cruelty presumed to have caused

10. Surindar kumar V. State AIR 1987 SC 692
11. Section 302 I.P.C
12. Section 304B I.P.C – Here “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.
the dowry death and will have to prove that the death was not a result of the cruelty. It is the most common type of domestic violence. As the earlier law was not sufficient to check dowry deaths, the legislature introduced stringent provisions viz, Sec 304B of I.P.C and Section 113, Indian Evidence Act, in 1986.

Section 113B of the Indian Evidence Act 1872 read as under :

113B Presumption as to dowry death – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

These two provisions were introduced in criminal law so that the person committing such inhuman crimes on married woman could not escape liability, as evidence of a direct nature is not readily available.13

The primary requirements for finding the accused guilty of an offence under section 304B, IPC are that the death of the deceased was caused by circumstances, within seven years of her marriage and that soon before her death, she was subjected to cruelty or harassment by the accused for or in connection with a demand for money.14 Unless there is evidence of dowry demand, S. 304B cannot be attracted.15

Punishment—Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Primary Requirement — The primary requirements for finding the accused guilty of the offence Under Sec 304B, IPC are that the death of the deceased was caused by

13. State of Punjab V. Iqbal Sing (1991) 3SCC1

Here dowry is defined under the Dowry Prohibition Act 1961.
burns within seven years of her marriage and that “soon before her death” she was subjected to cruelty or harassment by the accused for or in connection with demand of dowry.

In this Act “dowry” means any property or valuable security given or agreed to be given either directly or indirectly — (a) by one party to 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 any time after the marriage in connection with the marriage of the said parties, but doesnot include dower or mahr in case of person to whom the Muslim Personal Law (shariat) applies.

The dowry deaths occur within the four walls of the house, therefore the concept of deemed “dowry death” was introduced by the 1983 amendment. In order to invoke the legal presumption under section 113B of Evidence Act, it is necessary to prove that the deceased was subjected to cruelty or harassment. Further, the presumption also apply if the offence takes place within seven years of marriage. The sections 113B & 304B read in conjunction shift the burden of proof from the prosecution to the husband or his relatives, accused of the offence. This is a departure from the normal rule of evidence and was introduced to strengthen the hands of the prosecution. The provision of section 113B is mandatory in nature.

In one case the court opined that Section 113B could be applied retrospectively as it is procedural in nature.16 There has to be proximity between the incident of cruelty or harassment and the offence for the presumption of section 113B to apply.17

Generally, there can be no direct evidence available for the offence of dowry death, therefore the court must rely upon circumstantial evidence and infer from the material

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17. Samir Samara v. state of West Bengal 1991 (2) crimes 867
available. As for example - The court in one case held that the conduct of the husband in not trying to put out the flames and not taking her to hospital, will be taken as circumstance against the husband. It is also necessary to establish that cruelty or harassment meted out to the woman was on account of the failure on her part to meet the dowry demands. Along with circumstantial evidence, the courts also rely upon the dying declaration of the deceased. The statement of the deceased regarding circumstances of the transaction, which resulted in her death, would be relevant under Sec. 32(1) Evidence Act.

The motive for murder may or may not exist but in dowry death, it is inherent. The court only have to examine as to who translated it into action, as motive for dowry death is not of the individual but that of the family—Asoke Kumar v. State of Rajasthan (1991) 1 SCC 166.

So, the offence under section 304B can be tried by the sessions court, and it is a cognisable offence, where the complaint reveals a case of continuing offence of maltreatment and humiliation in various forms. Then section 178 (c) of the criminal procedure code applies. Where in domestic violence cases the charge is only under one section but the ingredients of another offence are fulfilled, the court in exercise of its inherent powers under Art 142 of the constitution can give appropriate orders in the interest of justice.

iii) ABETMENT OF SUICIDE:

Often victims of domestic violence, especially brides being harassed for dowry, are driven to commit suicide.

If any bride 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

18. CV gobindappa v. state of Karnataka (1998) 2SCC 763
years, and shall also be liable to fine.\textsuperscript{21}

When there is no direct evidence in regard to actual abetment by any of the accused and when circumstances revealed that the victim (wife) wrote a love letter to the accused husband, the charge under sec. 306 I.P.C cannot be held to have been proved. Suspicion, however strong, cannot take the place of proof.\textsuperscript{22} Following a remark by the husband (appellant) during a quarrel that the deceased (wife) should go and die, the deceased went back home and committed suicide. It was held that the suicide was not the direct result of the words uttered by the appellant. \textsuperscript{23}

**Suicide or accidental death by fire** :- In a case the point arose whether the deceased wife who sustained 80\% burn injuries on her body, committed suicide or died by accidental fire caused by bursting of a stove? Medical evidence ruled out the possibility of accidental fire in view of the burns. The circumstantial evidence emerging from the conduct of the deceased after sustaining burn injuries and correspondence of the deceased revealing a tell-tele story of continuous ill-treatment at the hands of the mother-in-law, established a case of abetment of suicide. Accused husband constantly pestering the deceased wife for bringing him a sum of Rs 10,000/-. Being in utter despair, the deceased, on the fateful day, gave out that she preferred death to life. The accused reacted by saying that she could provide him quicker relief by dying on the very same day. Following this the deceased set fire to herself. Held, in the circumstances, that the accused had instigated the deceased to commit suicide and, as such, was guilty under sec. 306.\textsuperscript{24}

In another case, where the husband has been responsible for creating circumstances provoking or forcing the wife thereby into taking the only alternative left open to her, namely, suicide, it was held that his conviction under sec 306, I.P.C was just and proper.\textsuperscript{25}

\textsuperscript{21} Section 306 of I.P.C
\textsuperscript{22} Chanchal Kumar v. State 1986 AIR 1986 SC 752.
\textsuperscript{24} Brijlal v. Prem Chand AIR 1989 Sc 1661.
\textsuperscript{25} State v. Iqbal Singh AIR 1991 Sc 1532.
**Burden of Proof**: The law has undergone radical changes due to insertion of sec 113A of the Indian Evidence Act 1872. Under the said section, if a bride commits suicide within seven years of her marriage, and if there is evidence of ill-treatment by the husband or other members of the in-law's family, led by the prosecution, the burden shifts onto the accused husband or such other members figuring as accused to prove that there was no abetment.

In one case—suicide by a newly married wife—Husband and father-in-law charged for abetting commission of suicide by wife—there was no suicide note left by the deceased—no clear evidence whether she set herself on fire or her clothes accidently caught fire—no deliberate delay on the part of the husband and father-in-law in taking the victim to hospital—accused could not be held guilty under sec 306. The Supreme court observed that from reading section 306 and 107 of IPC to together it is clear that if any person instigates any other person to commit suicide and as a result of such instigation the other person (wife) commits suicide the person causing the instigation is liable to be punished under sec. 306 for abetting the commission of suicide. A plain reading of this provision shows that before a person can be convicted under sec 306 I.P.C, it must be established that such other person committed suicide.

**Section 113A of Indian Evidence Act 1872**: In such cases, section 113A of the Indian Evidence Act must be attracted for the conclusion. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by

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26. *Section 107 of IPC—"Abetment of a thing"
28. *Presumption as to abetment of suicide by a married women—Sec.113A of Indian Evidence Act-1872.*
such relative of her husband.

In another case wife committed suicide within $1^{1/2}$ years of marriage. Although there was no proof of demand of dowry by the husband, the materials on record revealed that the deceased wife was in a state of intense mental agony because of torture by her husband, who had illicit relationship with another woman. In that circumstance, the husband could be said to have treated her with persistent cruelty. Presumption under section 113A gets attracted.29

When the wife jumped into a well within 5 years of marriage, no presumption under sec. 113A was drawn as there was no evidence of harassment by the husband or in-laws of the deceased.30

iv) **Female foeticide, or forcing the wife to terminate her pregnancy** are also other forms of domestic violence recognised as offence under the Indian Penal Code. Section 313 to 316 of Indian Penal Code are dealing with this offence.

**Causing miscarriage without woman’s consent –** According to section 313 of I.P.C whoever commits the offence of female foeticide without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**Death caused by act done with intent to cause miscarriage**– According to section 314 of I.P.C, whoever with the intention to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment mentioned above. It

29. *Anup Kumar v. State* 1999 CRLJ 2938
is not essential to this offence that the offender should know that the act is likely to cause death.

In this context it is also mentioned that after the enactment of the Medical Termination of Pregnancy Act 1971, the provision of Indian Penal Code relating to miscarriage have been subservient to it because of the non-obstante clause in section 3 of the Act which permits abortion/miscarriage by a registered practitioner under certain circumstances, viz, health, humanitarian, eugenic etc.

**Act done with intent to prevent child being born alive or to cause it to die after birth** – According Sec 315 of IPC If the husband before the birth of any child does any act with the intention of thereby preventing that child form being born alive, or causing it to die after its birth, and does by such act prevent that child form being born alive, or causes it to die after its birth shall, if such act be not caused in good faith for the purpose of saving the life of the mother (wife of the person) be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

**Causing death of quick unborn child by act amounting to culpable homicide** – According to section 316 of I.P.C, Whoever does any act under such circumstances, that if he thereby causes death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and he shall also be liable to fine.

If the husband knowing that he is likely to cause the death of his pregnant wife, does an act i.e. kick in her stomach and if it caused the death of the wife, the offence of the husband would amount to culpable homicide. But if the wife is injured, but doesnot die, but the death of an unborn quick child with which she is pregnant is thereby caused, the husband is guilty of the offence defined in this section.
v) HURT:

Causing bodily hurt is a common form of domestic violence. The Indian Penal Code defines hurt as causing "bodily pain, disease or infirmity to any person".31

The definition of "hurt" contemplates causing of pain by a person to another. So, dragging a wife out of the house was held to be an offence. The causing of pain being sufficient to constitute hurt, it is not necessary that there should be visible injury caused on the person of the victim. Nor it is necessary that injury should be received by physical contact. Causing of pain by any voluntary act is sufficient to constitute hurt.

GRIEVOUS HURT:

Any hurt may be "grievous" if it results in serious injury such as –

1. Permanent privation of the sight of either eye
2. Permanent privation of the hearing of either ear
3. Privation of any member or joint
4. Destruction or permanent impairing of the powers of any member or joint
5. Permanent disfiguration of the head or face
6. Fracture or dislocation of a bone or tooth.
7. Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow her ordinary pursuit.32

Wife beating is one kind of grievous hurt and very common form of domestic violence.

When a husband hits on the head of his wife with an axe which penetrates half an inch into her head it is an instance of injury which endangers human life. In another case an injury by a cutting instrument like sickle, on the abdomen of the wife endangering

31. Section 319 of I.P.C
32. Section 320 of I.P.C
her life amounts to grievous hurt within the meaning of the section.

In this context it must be mentioned that according to Indian penal code “Voluntarily causing hurt”\(^{33}\) and “Voluntarily causing grievous hurt”\(^{34}\) are also established as domestic violence and the Indian penal code also criminalised “Voluntarily causing grievous hurt by dangerous weapons or means”\(^{35}\) and “Voluntarily causing hurt to extort property”\(^{36}\) as another two types of domestic violence.

**VOLUNTARILY CAUSING HURT :**

When the accused husband does any act with the intention of thereby causing hurt to his wife, or with the knowledge that he is likely thereby to cause hurt to his wife, and does thereby cause hurt to his wife is said to commit the offence under section 321 of I.P.C i.e voluntarily to cause hurt.

But if the hurt which he intends to cause or knows himself to be likely to cause is grievons hurt, then it is said “Voluntarily caused grievons hurt” under section 322 of I.P.C. As for exemple - if any husband intending or knowing himself that the injury would likely to disfigure his wife’s face permanently, and would cause his wife suffer severe bodily pain for the space of twenty days, the husband has voluntarily caused grievons hurt & shall be punished with imprisonment of either description for a term which may extend to seven years or with fine according to section 325 of I.P.C

But if it is only causing “hurt” then he 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 according to section 326 of I.P. C

Also if the hurt is caused by means of any instrument for shooting, stabbing or

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\(^{33}\) 321 of Indian penalcode

\(^{34}\) Section 322 read with section 323 of I.P.C

\(^{35}\) Section 326 of I.P.C

\(^{36}\) Section 327 of I.P.C
cutting or any instrument which are used as a weapon of offence and is likely to cause death or by means of fire or any heated substance, or by means of any poison or any corrosive substance or by means of any explosive substance or by means of any substance which is deleterious to the human body to inhale, to swallow, or to receive into blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both. 37

If the husband causes hurt for the purpose of extorting from his wife any property or valuable security, he shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine according to section 327 of I.P.C.

vi) Another common form of domestic violence are wrongful restraint 38 and wrongful confinement 39 of the spouse within her matrimonial home by her husband and inlaws. The punishment for wrongful restraint is simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees or with both under section 341 of I.P.C & punishment for wrongful confinement is 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 under section 342 of I.P.C.

If the in-laws of the victim bride wrongfully confine her for 3 or more days they shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both 40. If it extends for ten or more days then they shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.41

37. Section 324 of I.P.C
38. Section 339 of I.P.C
39. Section 340 of I.P.C
40. Section 343 of I.P.C
41. Section 344 of I.P.C
vii) MARITAL RAPE:

Matital rape is also another common form of domestic violence. This is a grey area of law and evidence. While many progressive nations have legislated on marital rape, our law has so far only conferred it a limited recognition. Section 375 of I.P.C provides that if a husband has sexual intercourse with his wife who is below fifteen years of age, it would be rape.

Non-consensual sexual intercourse by a man with his own wife may be an offence if she is living separately under a decree of separation or any custom. The husband shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. In many a violent marriage, the spouse subjects the wife to acts of sexual humiliation. Interestingly, the I.P.C even address such forms of violence – the provision for “unnatural offence.” However, this provision has rarely been used in the matrimonial context. The punishment prescribed for the offence is imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. In these cases the husband adopts unnatural course for his own sexual gratification, the matrimonial victim is the wife. She can have no sexual pleasure in the company of the husband and is virtually deprived of the sexual life.

viii) MISAPPROPRIATION OF SPOUSE’S PROPERTY:

A common type of domestic violence is the misappropriation of the spouse’s property so that she is economically crippled into subjugation. The Indian Penal Code addresses this situation too. If the husband or his relative dishonestly misappropriates or converts to his own use, any property, which the wife has entrusted him with, he is liable for offence of Criminal breach of trust and shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

42. Section 376 A of I.P.C
43. Section 377 of I.P.C
44. Section 405 read with section 406 of I.P.C
ix) CRUELTY BY THE HUSBAND OR RELATIVES—(Legistative history) :-

In 1983, matrimonial cruelty was introduced as an offence in the Indian Penal Code.45 This section has been inserted by criminal Law (Second Amendment) Act, 1983 and came into force with effect from 25.12.1983. This section is the outcome of pressing needs of the society to stop all sorts of cruelty towards a married woman, which has, now a days, a burning problem of this country. It is not unknown that the greed for dowry, and indeed the dowry system as an institution, is at the root of the offence contemplated in the section.

Seope and Object :- In fact the Supreme Court had the occasion to observe, in strong language about this deep seated malady in our social order resulting in tragic deaths of newly married girls. In many cases, it is observed that instances of bride killing are alarmingly on the increase, and if the society should get rid of this growing evil, it is imperative that whenever dastardly crimes of this nature are detected and the offence is brought home to the accused, the court must deal with the offender most ruthlessly and impose deterrent punishment.

The object of section 498A is to curb the vice of cruelty to the married woman by her husband or in-laws. To give this object a reality section 113 A has been introduced in the Evidence Act raising a presumption against the husband or other relatives of the husband.

**498A – Husband or relative of husband 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.

Explanation – for the purpose of this section, “cruelty” means —

(a) any wilful conduct which is of such a nature as is likely to drive the woman

45. *Section 498 A of I.P.C*
to commit suicide or to cause injury or danger to life and limbs or health (whether mental or physical) of the woman. or

(b) harassment of the woman where harassment is with the view of coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such a demand.

In order to convict a person for a crime under section 498A IPC, the prosecution has to prove that the accused committed acts of harassment or cruelty as contemplated by the section and that the harassment or cruelty was the cause of the suicide.

The term cruelty under section 498A of the IPC includes both mental and physical cruelty. Cruelty means any wilful conduct that 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, health (whether mental or physical) or to harass or coerce her or any person related to her to meet such a demand. A reasonable nexus has to be established between the cruelty and suicide. The cruelty established has to be of such gravity as to drive an ordinary woman to commit suicide. In many cases the court found that there was no material to show that the woman was hypersensitive and that for other reasons and not on account of cruelty she would have taken her own life. The act of taking a child away from the mother and beating the woman could amount to cruelty under section 498A.

Explanation (b) to section 498A does not make each and every harassment cruelty. The harassment must have a definite object, namely to coerce the woman or any person related to her to meet their demand. 46

The initial burden of proof is still on the prosecution to show that the woman was

subjected to cruelty. It is only after this, the presumption under Sec. 113A Evidence Act is applied. The introduction of section 498A and section 113A have not altered the requirement of standard of proof. There is no absolute standard of proof in a criminal trial and the question whether the charges have been met beyond a reasonable doubt, would be dependant upon the facts and circumstances of each case. The doubt must be of a reasonable person and the standard adopted must be of a reasonable and just person for coming to a conclusion considering the particular subject matter. In a case whether the cruelty has to see if the woman was hypersensitive to ordinary petulance, discord, and differences. The presumption under section 113A of the Evidence Act would apply retrospectively, as it is procedural in nature.\textsuperscript{47}

The offences against married women are committed normally within their homes, therefore direct evidence is not available. Ordinarily, it is not expected that physical torture or abuses hurled to the woman would be noticed by the neighbours. The courts, while deciding whether the woman was harassed or ill-treated, will take into account the dying declaration, statement of the deceased and of her relatives viz the mother, sister, father etc.

If there is an offence under section 306 of IPC, then abetment has to be proved independently under section 107, IPC. Abetment does not involve the actual commission of the crime. In this context it is submitted that the constant demands of dowry, taunts, ill-treatment, cruel behaviour are serious enough provocations for a woman to commit suicide. The dying declaration of the deceased per se could not involve the accused in an offence under section 306 IPC because it is for abetment of suicide. In addition to cruelty by the husband and his relatives, the woman has also the option of filing for an appeal under the provisions of hurt and grievous hurt.

The offence under section 498A is cognisable and triable by a Magistrate First class. The bar of limitation to take cognisance of offence under section 468 Cr. P.C would

\textsuperscript{47} Gurbachan Sing V. Satpal Sing (1990) 1 SCC 445
not apply to matrimonial offences where the allegations are of cruelty, torture etc. The 
offence of cruelty is of the nature of a continuing offence.

x) **MARRYING AGAIN DURING THE LIFE OF THE WIFE :-**

Now a days cases of husbands deserting their first wives and marrying again, is 
becoming an uncontrollable crime. It is also a form of domestic violence. Social pressures 
and economic compulsions force the victim wives to keep quiet and suffer the injustice. 
The legal hurdles in getting justice are almost insurmountable. It is not an easy task for 
the wife to prove the “solemnization of the second marriage”.

**BIGAMY :-** According to section 494 of Indian penal code when a husband, 
having a wife living, marries in any case, in which such marriage is void by reason of 
its taking place during the life of first wife, shall be punished with imprisonment of either 
description for a term which may extend to seven years, and shall also be liable to fine.

Today the actual number of such cases are much higher than the reported figures 
reveal. The greatest handicap for the wife in proving the offence of bigamy is the 
requirment of strict proof of the second marriage.

The word “marries” in this section means some form of marriage recognised by 
the personal law of the parties concerned and such a marriage must be a valid marriage. 
If the marriage is not valid in the eyes of law, the question of its being void by reason 
of its taking place during the lifetime of the wife does not arise. Monogamy is enjoined 
by the personal law of both the Hindus and christians. They are not at liberty to go 
through the second marriage during the lifetime of the legally wedded first wife without 
committing the offence of Bigamy. The second marriage should be proved to be duly 
performed in accordance with the personal law applicable to the parties.

Now a days both Hindu and Christian husbands whose marriages are 
monogamons have discovered a new trick to evade the application of monogamy. They 
convert themselves to Islam and remarry. They get sympathy and protection from those
who profess Islam. The wife who can file the complaint of bigamy against her husband is handicapped. She has to fight against threats of violence held out by the husband and his co-religionists.

The argument usually put forward by the converts is, “since a Muslim is entitled to marry as many as four wives at a time, the second marriage should be valid. Such a conversion is malafide, it is not genuine so it should not enable the husband to escape the application of monogamy. A Muslim is permitted to marry a second wife only if he can treat both the wives equally. Such equality of treatment is automatically ruled out by the fact that the only reason of husband’s conversion to Islam is to desert his first wife and marry a second wife.

In Sarla Mudgal Vs. Union of India, (1995) 3 SCC 635—the Court held that if a non-Muslim person converts to Islam, only to get married again, he will be guilty of bigamy in his second marriage itself. A man cannot escape from punishment merely by going through the formalities of conversion.

In this context it is also stated that, however, this section is not applicable to a Mohammedan male as the Mohammedan personal law allows a male to have four wives at a time. Whether he can be punished under the section for marrying a fifth time will depend on which school of Muslim law applies to him. If he is Sunni Muslim, the marriage is not void but only irregular. He can make this fifth marriage valid simply by divorcing one of his current wives. If he is a Shia Muslim, his fifth marriage is void and he would be guilty of the offence of bigamy.

**Aggravated Form of Bigamy:** Section 495 of Indian Penal Code deals with the aggravated form of bigamy. When a married man by posing himself as an unmarried man, induces an unsuspecting woman to become, as she thinks, his wife, but in reality his concubine, he is guilty of one of the most cruel frauds that can be conceived. Such a man 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 offence is committed when the accused uses deceit in not giving the necessary information or purposely concealing the fact of his first marriage from his second wife. In such cases, the second wife honestly continues to believe herself to be the legally wedded wife but she is in for the greatest shock of her life when she realises that she possesses no status. There are several unreported cases of this nature. In most of the cases, the usual plea of the husband is that he married under parental pressure as he had no guts to accept the fact of the first marriage before his parents.

In such cases it is mostly the poor and illiterate women who suffer. Both the wives are deprived of the conjugal love and happiness as well as the matrimonial home. The need of a roof over their heads makes the women reconcile to their cruel fate, as the other course is to be on the street. Most of the time the natal family is unwilling to take back the victimised wife, the initial sympathy fades away very fast.

3.2.2. THE CODE OF CRIMINAL PROCEDURE, 1973:

In India often women are deserted by their husbands or living separated from their husbands without any reason. So these women who are house-wives with their children suddenly face an unexpected monetary problem because they are unable to maintain themselves with their children without the help of their husbands. In that situation code of Criminal Procedure, 1973 came to help those distressed women and their children.

Although the Criminal Procedure Code is a procedural enactment, it also confers substantive rights, “the right of maintenance” being one of the most important of such rights. It is the fundamental and moral duty of every man to maintain his wife and children when she is unable to maintain herself with her children.

According to section 125 of the Cr.P.C., if any person having sufficient means, neglects or refuses to maintain his wife and children who are unable to maintain themselves, the Magistrate of the first class may, upon proof of such neglect or refusal,
order such person to make a monthly allowance for the maintenance of his wife and
children at such monthly rate not exceeding five hundred rupees per head, or as such, the
Magistrate thinks fit, and to pay the same to such person as the Magistrate may, form time
to time, direct.

By the Cr. P.C Amendment Bill NO. xxxv of 1994, the amount of maintenance
is sought to be raised from Rs. 500/- to Rs. 1,500/- by amending subsection (1) of
Section 125 of Cr. P.C.

In case of a minor female child who is married, if the Magistrate is satisfied that
the husband of such a minor female is not possessing of sufficient means, an order can
be made against the father of the child to make such allowance until she attains the age
of majority. It may also be noted that a reference to a wife also covers a woman who is
divorced from her husband, provided that she has not remarried.

2) Such allowance shall be payable from the date of the order, or, if so ordered, from
the date of the application for maintenance.

3) If any person so ordered by the court fails without sufficient causes to comply with
the order, such Magistrate may, for every breach of the order, issue a warrant for levying
the amount due in the manner provided for levying fines, and may sentence such person,
for the whole or any part of each month’s allowance remaining unpaid after the execution
of the warrant, to imprisonment for a term which may extend to one month or until
payment if sooner made.

Provided that no warrant shall be issued for the recovery of any amount due under
this section, unless application be made to the Court to levy such amount within a period
of one year, from the date on which it became due.

Provided further that, if such person offers to maintain his wife on condition of
her living with him, and she refuses to live with him, such Magistrate may consider any
grounds of refusal stated by her, and may make an order under this section
notwithstanding such offer, if he is satisfied that there is just ground for so doing.

**Explanation**: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

If the husband ill-treats his wife (as for instance, by hitting her) so that she is compelled to leave his house, she should be justified in refusing to live with him and in claiming maintenance.

So also, it is cruel on the part of a husband suffering from a veneral disease to insist upon his wife to sleep with him, and in such a case also, she may legitimately refuse to live with him, and claim maintenance.

4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

5) On proof that any wife, in whose favour an order has been made under this section is living in adultery, or that, without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

The object of the present section is to provide a summary remedy to save dependant wife from destitution and vagrancy, and thus to serve a social purpose, apart from and independent of the obligations of the parties under their personal law. In other words, it applies to all parents, wives and children, irrespective of their religion or that of the opposite party.

The right under the present section is a statutory and self-contained right, which cannot be defeated by any thing in the personal law of the parties. But the question whether the applicant is the lawfully wed wife of the respondent is to be determined according to their personal law.
3.3. THE STATUTORY LAWS RELATING TO DOMESTIC VIOLENCE:

In India there are some statutory laws against domestic violence offences which are stated below.

3.3.1. THE DOWRY PROHIBITION ACT, 1961: Dowry has always been part of marriage system in India, but the dramatic increase in dowry giving in the post independence period, reflects the declining value of woman in the Indian society. Today, dowry has become a means of harassment leading to murders and suicide of newly married brides in their matrimonial homes.

The term “dowry” denotes property that a girl brings with her for her husband on marriage. In a plain meaning, dowry is regarded as the property that the bride’s family gives to the groom or his family upon marriage. Dowry is widely prevalent in the Indian society and it has been accepted as an appendage to marriage system. Inspite of better education, occupation and income, people are interested in the continuation of this age old practice of dowry. The cruel system of dowry has become one of the greatest evils of the marriage institution in Indian society since the lust for money has given birth to the cruel practice of bride burning, suicide, dowry death etc.

Usually the prime motive behind the cruelty to young married woman in matrimonial home, is the desire to extract maximum dowry. The miserable plight of tortured wife for bringing insufficient dowry or no dowry shocks human conscience. Dowry appears to be a factor around which the illtreatment of the brides hinges and most of the dowry death suicide, and bride burning and harassment evidently result from the dissatisfaction of the inlaws over inadequate dowry brought by the daughter-in-law.

There has been constant rise in dowry death, murder, bride burning, suicide in India. In recent years, not a day passes without a newspaper carrying reports of dowry death, bride buring, murder and suicide committed by a woman for insufficiency of
The equation in a dowry practice is clearly anti-woman because the practice of taking dowry means that a woman plus dowry is equal to a man. The practice of dowry is a great social evil and contrary to the dignity of woman. It is the symbol of women’s oppression. The practice of dowry thus not only perpetuates inferior status of women in their matrimonial homes, but has also become a cause of self immolation, suicide and death among them. This evil is a reflection of the implicit belief of male superiority in the Indian society.

In this context it is stated that, today marriage has become an occasion to demand and chance to accumulate. Boys are shamelessly and openly sold in the marriage market. The rates of dowry vary from caste to caste and mostly depends upon the groom’s accomplishment, family status and other attainments such as education, employment, wealth or other material acquisitions. The negotiation for the settlement of dowry at marriages can be compared to more of less well defined grade and amount of dowries attached to different professions among different caste groups.

Today, marriage has become a stepping stone to acquire more wealth and social status. There is no other social institution which has been commercialised as marriage.

It is submitted that dowry demands have led to a total loss of sanctity of marriage which was considered to be a sacrament and now marriage has been reduced to a big business in which the bridegroom has to be purchased by paying a high price in the form of dowry.

In this context it is stated that the practice of dowry is the root cause of innumerable social evils in the Indian society, such as:–

i) Economic Exploitation of girl’s parents,

ii) Adopting social corruption of Foul means of Earnings.
iii) Indebtedness of middle and lower classes.

iv) A cause of Frustration among unmarried girls.

v) Female Infanticide.

vi) Abortion after determining the sex of the foetus.

vii) Child marriages.

viii) Unequal Marriages.

ix) Conjugal disharmony etc.

Then in 1961, Dowry prohibition Act was passed. It was the first penal legislation to ban this evil practice, but four decades after it has been banished, dowry continues to be the pivot around which all Indian marriages revolve and has resulted in the death of a large number of married women. The Act provided six months imprisonments and a fine of Rs, 5000/- or both for taking or giving dowry.

This Act of 1961 was sought to be amended because the definition of dowry was not clear enough to ensure the conviction of offences under the Act. Now the punishment has been enhanced and a minimum and maximum punishment limits have been laid down. The dowry prohibition (Amendment) Act, 1984, was passed with a view to curb the dowry menace. It provides that the offence is punishable with imprisonment which is not less than six months, but which may extend to two years and with fine which may extend to Rs, 10,000/- for taking or giving dowry.

The Amending Act has substituted the words “as consideration for the marriage” with words “in connection with the marriage”. But the Act was found to be ineffective. Then the dowry prohibition (Amendment) Act 1986, was enacted to put an end to dowry harassment and deaths.48 It provides for the offence to giving or taking dowry a punishment which may extend to five years imprisonment and with a fine which shall not

be less than Rs. 15,000/- or the amount of the value of such dowry, which ever is more. Cruelty to women including coercion for dowry is also a criminal offence. It has now become compulsory to investigate every unnatural death of a woman, in the first seven years of her marriage both by the police and a magistrate.

The 1986 Act has added the words at "any time after the marriage". The definition has been broadened to some extent and now, continued demand even after the marriage can be dealt with strictly but the interpretation of the new changes depends on the attitude and the convictions of the court. Inspite of taking a number of preventive measures by Indian Government the dowry menace remains almost as usual. The dowry prohibition (Amendment) Act, 1986, has proved to be totally ineffective. The present Act has several loopholes and dowry deaths maintained their spiral inspite of all legislative effort to curb them.

3.3.2. THE COMMISSION OF SATI PREVENTION ACT, 1987:

It is true that one particular form of barbaric custom which was very rampant in our society in the past, eradicated a lot in the last century, and again reappeared now is 'Satipratha'. It is one kind of domestic violence on women, specially widows.

The practice of Sati reflects man's desire to acquire total control over a woman not only in this world, but also in the world hereafter in the name of high ideals like love, devotion, duty and religion. Sati Pratha is the manifestation of baseless and unjustified desire of man.

'Sati' means the burning or burying alive of the widow along with the body of her deceased husband or any other relative, or with any article, object or thing associated with the husband or relative.49

'Sati' is a traditional practice of widow immolation. It reflects the culture of barbaric society and the mystique of the Hindu women who want to prove their loyalty.

and purity even in the death on their husbands pyre.

In “Sati Sahagamana”, the widow woman with her normal state of mind voluntarily and cheerfully sacrifices her life and burns herself on her husband’s pyre along with her husband’s deadbody as per the rules of the Hindu Shastras.

The text of the sages like Angira, Vijasa and Vrishaspati Rishis expressed that every woman who burns herself with the body of her husband, will reside with him in heaven. They further said that a woman who burns herself, draws her husband out of hell, and she afterwards resides with him in heaven.

But in reality it can be found that worldly interests are mainly responsible for Sati Pratha. The Practice of Sati used to be performed for the material gain of the surviving relatives of the husband. By Sati Pratha the relatives of the deceased husband would save the expenses of maintaining the widow and later on they would acquire her legal share over her husband’s family estate.

Hence, in British period, regulation of prohibition of Sati was enacted on 4th December, 1829 by Sir William Bentinck with the help of many social reformers like Raja Rammohan Roy, Vidyasagar and others. However, the Satipratha continued to be practised rarely in some orthodox families.

In India, a woman who commits sati was traditionally glorified and immortalised. Temples were constructed for their memorials and the “Sati Mata” was worshipped as a deity. She was supposed to have the powers of a Goddess. The ‘Sati-Sthal’ or the place where a woman was supposed to have immortalised herself as a “sati” attracts a large number of “devotees” every year. It is said, there are still around 130 Sati temples in India and nearly half of them are in Rajasthan. In Uttarpradesh, Madhya Pradesh Satipratha still exists.

After independence on September 4, 1987, 17 years old Roopkanwar committed Sati. She was burnt alive on the funeral pyre of her husband Maal Singh Shekhawat at
Deorala village of Sikar district in Rajasthan. This Deorala incident came to be referred as ‘Sati case’ followed by a number of congregations, ceremonies and festivals and that attempts were made to collect funds for the construction of a temple at the site where the incident took place.

Many women’s organisations, members of Parliament and the people at large had called Roop-kanwar’s burning a murder and demanded a strong central law not only to prevent Sati but also to deter its glorification. In the absence of any specific law dealing with Sati at the time of that incident the accused persons were convicted under section 302 of I.P.C. Later, under Rajasthan Sati (Prevention) ordinance, 1987, 22 cases were filed in various police stations in connection with the alleged glorification of Sati.50

Following a demand made for a strong and effective central Act, the commission of Sati (Prevention) Bill, 1987 was drafted to punish the attempt to commit, abetment and glorification of Sati. This Bill was introduced and passed in both the Houses of the Parliament and received Presidential assent on January 3, 1988 and came into effect on March 21, 1988. But, it is a pity that the Government did not make a good law. The most obvious infirmity of the Law is the acceptance of Sati as suicide. It lays down that the woman who tries to commit Sati will be sentenced to six months imprisonment under section 309 of I.P.C. It reinforces the assertion that the Act of Sati arises out of the free choice on the part of the woman.

This negates many of the positive features of the Law and of-course contradicts other sections of the Law which acknowledge that a woman cannot commit Sati out of her own free will.

There is adequate documentation of the past Satis and the incident of Roopkanwar, to prove that Sati can never be a suicide because the woman doesnot light her own funeral pyre, someone else sets it on fire. She is either psychologically forced, drugged or

physically pushed on to it. The Law would have proved a much stronger deterrent if the section on the commission of Sati would have charged the perpetrators of the crime with murder.\textsuperscript{51}

The Act criminalises observance, support, justification or propagation of Sati. While the section on the glorification of Sati in any form is fairly comprehensive, it would have been strengthened if, as suggested by the women’s groups, even those who give donations for the temples and trusts for glorifying Sati are made liable for prosecution under the new Law.

So this Act passed with so much funfare has remained on paper and the glorification of sati in Deorala and other temples has not stopped.

In “The Telegraph” Sunday, 1st February. 2004, it is stated that sixteen years after Roop Kanwar allegedly immolated herself on the pyre of her husband in Rajasthan’s Deorala village, a special Court of Jaipur on Saturday, 31st January, 2004 acquitted all the 11 accused persons, including State BJP Vice-President Rajendra Rathore who were charged with glorifying the incident as one of Sati. The Court said the prosecution had failed to prove charges that they glorified Sati.

It is very unfortunate to mention here that despite this Law, many Sati incidents are still taking place in Uttar Pradesh, Rajasthan, recently.

On 7th May, 2005 in Banda District of U.P one Ramkumari burnt herself on her husband’s pyre and committed Sati. On May 19, 2006, one 38 years old woman named Vidyawati committed Sati at Rarhi Bujurg, 35 km from Fatepur town, Uttar Pradesh.\textsuperscript{52}

It is utterly ridiculous if this heinous custom of Sati goes on to continue in different parts of India even in the 21 century. The implementation of Law by the Government should be more vigilant and at the same time the education of the society to abandon the procedure would be more rational outlook of the Government officials today.

\textsuperscript{51} Crime Against Women and Protective Laws – By Shobha Saxena.  
\textsuperscript{52} The Telegraph, 27 May, 2005 and 20th May, 2006.
3.3.3 MEDICAL TERMINATION OF PREGNANCY (MTP) ACT, 1971:

Today in India woman has right to decide the number of children she wishes to bear and also has the right to terminate an unwanted foetus because she is often forced to conceive by her husband. However, women encounter numerous social and economic difficulties to make these rights work in practical life.

The Medical Termination of pregnancy Act, 1971 came into force in 1972 all over the country. The Act empowers a woman to have a pregnancy terminated under a specified set of circumstances. As per section 3 of the MTP Act, a pregnancy less than 12 weeks old may be terminated by a Registered Medical practitioner if he/she believes in good faith that the continuation of pregnancy would involve—

i) A risk to the life of the pregnant woman, or

ii) Grave injury to her physical or mental health, or

iii) There is substantial risk, when if the child is born, it would be abnormal or handicapped.

If the pregnancy is over 12 weeks but less than 20 weeks, the registered medical practitioner must certify about the risk to the life of the pregnant woman or that it would cause grave injury to the mental health of the pregnant woman, as for example—

The pregnancy forced upon her by an act of rape by her husband or other male persons or caused by the failure of the birth control device or method used by any married woman or her husband for the purpose of limiting the number of children.

A woman can have her pregnancy terminated even in cases where the pregnancy is over 20 weeks, provided that a registered Medical practitioner certifies that the termination of pregnancy is immediately necessary to save the life of the pregnant woman.

As per section 4 of the MTP Act, 1971, the termination of pregnancy can be performed only in a Government hospital or any place approved by the government for
conducting MTPs. If it is done in any other place, it is illegal unless the operation has to be performed to save the woman’s life. Generally only a Registered Medical Practitioner with some experience in Gynaecology and obstetrics is qualified to conduct abortions as per the rules framed under the Act.

An unqualified doctor who performs abortions will be punished. A doctor who is negligent or acts without proper care and caution can be sued for compensation. A report against him and the Hospital / clinic can be registered with the police. The affected party can also approach the appropriate Medical Council for taking action against the erring doctor. All abortions carried out by a Hospital are recorded in a secret register. They can be examined upon an enquiry or complaint. The records can be destroyed only after 5 years of an abortion.

In this context it is also stated that an abortion is illegal when it does not comply with the provisions of the MTP Act, 1971. Further, under the Indian Penal Code, 1860, certain acts are treated as offences, viz.

- Whoever causes a miscarriage (if it is not done in good faith to save the life of the woman) shall be punished up to seven years.

- Abortions carried out without the consent of the woman or under duress or in fear of injury is illegal. A woman having suffered a misconception, a woman with unsound mind, a woman in an intoxicated state or a girl below 12 years can not be allowed to give consent for abortion.

- Whoever causes the death of a woman while doing her abortion of the child may be sentenced upto 10 years and fine.

- An Act done to prevent a child being born alive or cause it to die after birth can be punished upto 10 years.

- If an unborn child dies because of a physical attack on the mother, the attacker will be punished with imprisonment upto 10 years and fine. In the event of a medical
termination of pregnancy, only the pregnant woman’s consent is required. Her husband’s consent is not necessary.

3.3.4 THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE ACT, 1994:

Today Female foeticide or forced abortion is very common and widespread crime in India. In olden days, it was impossible to determine the sex of the baby in the womb of the mother until it was delivered. As medicine advanced, new techniques were devised for preventing the genetic, chromosomal disorders of the child in the womb. With these modern techniques and machinery it has become possible to ascertain the sex of the child in the womb even in the early stages of pregnancy. The technique used to diagnose the condition, and the sex of the foetus is called “Amniocentesis”. These techniques are actually used to test the amniotic fluids, blood or any tissue of a pregnant woman for the purpose of finding any genetic or metabolic disorders. This advancement of science turned to be a curse towards female child. Instead of using these techniques for the medical purposes, the medical practitioners started using them only for the purpose of determining the sex of the child in the womb. After knowing that the foetus is female, many parents in our society dominated by male chauvanistic sections prefer to abort the child deliberately so as to prevent the birth of a female child. India has become famous for the high rate of female foeticide and female in-fanticide. This is the plight of the female sex, even in the womb she is being ill-treated and killed unwantedly in womb itself. This female foeticide is a big black spot on the face of the Indian Society.

In 1970 same enterprising doctors discovered the commercial possibilities to the desire not to have girls. Soon thousands of such clinics sprangup using various prenatal tests like chorionic villus biopsy, ultrasonography and amniocentesis to determine the sex of the unborn child. This misuse of the technology has added one more form of domestic violence to the long list of domestic violence against women. Now girls can be killed
even before they are born. Such tests, since they can be conducted only in the advanced state of pregnancy are full of risks both for the woman under going them as well as for the unborn child. But women are forced to undergo these tests. In India, abortion is not only legal but condoned (unofficially) as a family planning method of birth control. Family planning officials are given bonus for maintaining “birth quotas” and they keep quiet about infanticide.

In this context it can be stated that a survey by women’s group has shown that out of 8,000 cases of voluntary abortions 7,989 involved female foetus. Therefore, recognising that domestic violence is also perpetrated in the form of forced termination of female foetuses, the prenatal diagnostic Techniques (Regulation and prevention of misuse) Act regulates the use of prenatal diagnosis.

The objective of the Act was to provide for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

Section 3 of the Act provides that no Genetic counselling centre or Genetic Laboratory or Genetic clinic can conduct or aid in activities related to prenatal diagnostic techniques. Similarly, Medical practitioners or other persons cannot conduct or aid in conducting pre-natal diagnostic techniques at a place other than one registered under this Act.

Section 4 of the Act allows prenatal diagnostic techniques to be conducted only for detection of chromosomal abnormalities, genetic metabolic diseases, haemoglobinopathies, sex-related genetic diseases, congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board. No
prenatal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:

i) Age of the pregnant woman is above thirty-five years.

ii) The pregnant woman has undergone two or more spontaneous abortion or foetal loss.

iii) The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals.

iv) The pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.

No person, being a relative or the husband of the pregnant woman shall seek or encourage to conduct any pre-natal diagnostic techniques on her, except for the purpose specified above.

The person conducting the diagnostic procedure should have explained all known side and after effects of such procedure to the pregnant woman. Now a written consent of the pregnant woman is necessary, and communicating the sex of the foetus to the husband or any other relatives by words, sign or in any other manner, is prohibited.

Section 6 of this Act disallows the use of pre-natal diagnostic techniques including ultra-sonography for the purpose of determining the sex of the foetus. The Act prohibits advertisement of any kind by any body or person pertaining to facilities for pre-natal determination of sex available, at any centre or place. Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic clinic or gynaecologist or registered medical practitioner for conducting Prenatal Diagnostic Techniques on any pregnant woman (including such woman unless she is compelled to undergo such diagnostic techniques) for purposes other than those specified in section 4, shall be punishable, with imprisonment for a term which may extend to three years and with fine.
which may extend to ten thousand rupees and on any subsequent conviction with
imprisonment, which may extend to five years and with fine which may extend to fifty
thousand rupees. 53

Penalty for contravention of the provisions of the Act is punishable with
imprisonment for a term upto three months or with fine upto one thousand rupees or with
both and for continuing contravention with an additional fine upto five hundred rupees
for every day of continuing contravention after conviction for first such contravention. 54

3.4 CIVIL LAW RELATING TO DOMESTIC VIOLENCE:

3.4.1 THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE
ACT, 2005:

After Independence there was no specific civil law relating to Domestic violence
in India. Therefore, from the late 19th century in India there was a general consensus that
a new law dealing with the issue of domestic violence was needed, as the existing legal
frame work was insufficient to deal with the same. It was agreed by the Government of
India, that though there are a number of provisions spread over a range of legislations,
it would be preferable to have a single legislation dealing with all aspects of the problem
right from issuing prohibitory and injunctive order to grant maintenance and
compensation. However, the new legislation would only be in addition to the existing
provisions of law, so any remedy, not covered by the new law, but available under other
criminal and civil laws would still be applicable to the victim of domestic violence.

In 1992, ‘Lawyers Collective’ drafted and circulated a Bill on domestic violence

53. Section 23 of Pre Nataal Diagnostic Techniques (Regulation and Prevention of

54. Section 25 of Pre Nataal Diagnostic Techniques (Regulation and Prevention of
and this was widely circulated amongst women’s groups and organisations including the National Commission for Women (NCW). In 1994, NCW also drafted a bill on domestic violence, which was strongly criticised by women organisations. By this time, the NCW, most women’s groups, NGO’s etc. were united towards the need for a new law on domestic violence and it was also agreed that the law addressing domestic violence should be civil in nature, as the existing criminal laws had proven to be inadequate to meet the needs of the women in domestic violence.

In 1999, the ‘Lawyers Collective’ further drafted a bill on domestic violence after consultations with many women’s groups all over the India and after much pressure from women’s groups, the Government of India introduced a Bill on domestic violence in Lok Sabha, titled “The Protection from Domestic Violence Bill 2002”. But this bill had completely failed to understand the true dimension of a law on domestic violence.

1) While defining domestic violence this proposed Bill totally failed to capture a woman’s experience of abuse and daily violence in the home and also did not clearly state that mental, economic and sexual violence are also domestic violence.

2) The Government Bill also failed to declare that women have the right to reside in the “Shared household” which is the most important right for women who are subjected to domestic violence.

The most common form of domestic violence is driving the victim woman out of her matrimonial home, or forcing her to leave it. Women ejected from their matrimonial homes, often have nowhere to go and because of this fear of being thrownout, millions of women today silently tolerate extreme violence at homes, sometimes till the point of death, at the hands of their husbands and in-laws. Therefore without granting this important right to residence, a law on domestic violence will have no meaning at all.

3) The Government bill also failed to draft provisions to empower judges to grant
'residence orders, i.e. orders restraining dispossession and mandatory repossessio
of the matrimonial homes for the victim women which is perhaps the most impo
rtant reason for having a new law on domestic violence. Provisions for Emerg
ency monetary relief or custody orders for the abused woman’s children were als
o missing from this bill.
4) The Government bill made provisions for setting up of a new institution of p
rotection officers and service providers but there was no mention of any fund a
location for them.
5) The Government bill recommended mandatory counselling for victims of d
omic violence, which was indirectly forcing a woman to reconcile to her fate, in o
der to preserve the sanctity of marriage. Also, the entire purpose of counselling w
ould be fruitless if it is forced upon an individual. Unless a person undergoes it w
an open mind with the willingness to bring about a change, no benefit of coun
elling can be achieved. Therefore at last, in order to provide a remedy in civil la
for the protection of women from being victims of domestic violence and to p
vent the occurrence of domestic violence in the society, the Government of Indi
amended the previous bill and rectified the faults of the bill and drafted a new b
amed “Protection of Women from Domestic Violence Bill, 2005 (Bill No. 116 of 2
005)” which was introduced in the Parliament. The bill was passed by the Lok S
ba on 24th August, 2005 and by Rajya Sabha on 29th August 2005 and it re
ceived the assent of the President of India on 13th September, 2005 and came on
the Statute Book as “The Protection of women from Domestic violence Act, 2
005 (43 of 2005)”.

The new Act contains five Chapters and 37 sections.
As per Chapter II section 3 of the protection of women from Domestic vio
ence Act, 2005:

The term “Domestic violence” has been made wide enough to encompass ev
possibility as it covers all forms of physical sexual, verbal, emotional and economic abuse that can harm, cause injury to, endanger the health, safety, life, limb or well being, either mental or physical of the aggrieved person. This is a wide definition and covers every possible eventuality.

As per Chapter I Section 2 (a) of the Act.

The definition of an “aggrieved person” is equally wide and covers not just the wife but a woman who is the sexual partner of the male, irrespective of whether she is his legal wife or not. The daughter, mother, sister, child (male or female), widowed relative, infact, any woman residing in the household who is related in some way to the respondent, is also covered by this Act. Therefore any woman who is, or has been in a domestic or family relationship with the respondent is subjected to any act of domestic violence can complain.

As per Chapter I Section 2 (q) of the Act :

The “respondent” under the definition given in the Act is any male, adult person who is, or has been in a domestic relationship with the aggrieved person so that, his mother, sister and other relatives do not get escaped also, the case can also be filed against relatives of the husband or other male partners.

As per Chapter III Section 4 (1) of the Act :

The information regarding an act or acts of domestic violence does not necessarily have to be lodged by the aggrieved woman only, but by ‘any person who has reason to believe that’, such an act has been or is being committed. Therefore the neighbours, social workers, relatives of the victim etc can take initiative on behalf of the victim. The aggrieved or affected woman can complain to the concerned protection officer, police officer, service provider or Magistrate.

As per Section 5 of this Act :

After receiving a complaint the duties of a police officer, protection officer, service
provider and the Magistrate are

1) to inform the aggrieved person of her right to make an application for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act.

2) to inform the aggrieved person about the availability of services of the service-providers and protection officers,

3) to inform the aggrieved person, her right to avail of free legal services under the legal Services Authorities Act, 1987 and her right to file a complaint under section 498A of the Indian Penal Code, wherever relevant.

It is also envisaged that this section shall not relieve any police officer from his duty to proceed in accordance with law on receipt of information as to commission of cognizable offence.

As per Section 9 of this Act :-

Shelter-homes and medical facilities can be provided to the aggrieved woman by the protection officers, if the aggrieved woman requires so.

As per Section 12 of this Act :-

The Magistrate shall endeavour to dispose of every application made by an aggrieved person or a protection officer or any other person on behalf of the aggrieved person for seeking relief within a period of 60 days from the date of its first hearing. First hearing has to be fixed within three days of the date of receipt of the application by the court.

As per Section 16 of this Act :

Proceeding to be held in camera at the discretion of the Magistrate or if either party to the proceeding so desires.

As per Section 17 of this Act :

The Magistrate has the power to permit the aggrieved woman to stay in her place of abode and cannot be evicted by the husband in retaliation. This fear of being driven
out of the house effectively silenced many women and made them silent sufferers. The court, by this new Act, can now order, that the victim woman will not only reside in the same house, but that, a part of the house can be allotted to her for her personal use, even if she has no legal claim or share in the property.

**As per Section 18 of this Act :-**

The Magistrate after hearing the aggrieved woman and the respondent, may pass a protection order in favour of the aggrieved woman to protect the woman from acts of violence or even from the “acts which are likely to take place” in future and can prohibit the respondent from dispossessing the aggrieved woman or in any other manner disturbing her possession, or entering her place of work or if the aggrieved person is a child, the school. The respondent can also be restrained from attempting to communicate in any form, whatsoever, with the aggrieved person including personal, oral, written, electronic or telephonic contact. The respondent can even be prohibited from entering the room/area/house that is allotted to her by the court.

This order does also prohibit the respondent from alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties jointly including the stridhan or any other property of the aggrieved woman.

**As per section 19 of this Act :-**

The Magistrate may on being satisfied that the domestic violence has taken place, pass a residence order, restraining the respondent from dispossessing or disturbing the possession of the aggrieved person/woman from the shared household, directing the respondent to remove himself from the shared household, restraining the respondent or his relatives from entering the shared household, restraining the respondent from alienating or disposing of or encumbering the shared household except with the leave of the Magistrate, or, directing the respondent to secure alternate accommodation for the aggrieved woman of the same level as enjoyed by her in the shared household or to pay rent for the same.
Section 20 of the Act, allows the magistrates to direct the respondent to pay monetary relief and monthly payments of maintenance. The respondent can also pay the expenses incurred and losses suffered by the aggrieved woman and her child as a result of domestic violence and can also cover the loss of earnings, medical expenses, loss of damage to property and can also cover the maintenance of the victim and her children.

Sec 22 of the Act, allows the magistrate to direct the respondent to pay compensation and damages for injuries including mental torture and emotional distress caused by the acts of domestic violence.

Sec 23 of the Act provides for grant of interim orders by the Magistrate. He may also pass exparte orders on the basis of affidavits given by the aggrieved woman.

Section 31(1) of this Act provides that a breach of protection order or an interim protection order by the respondent shall be an offence under this Act which is punishable with imprisonment of either description which may extend to one year of imprisonment or with fine which may extend to Rs 20,000/- or with both.

It is also stated under section 31(3) of the Act, that, while framing charges under subsection (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code or any other provision of that code or the Dowry Prohibition Act, 1961, as the case may be, if the facts disclose the commission of an offence under those provisions.

Section 32(2) of this Act makes a provision that the sole testimony of the aggrieved person may be enough for the court to conclude that an offence under subsection (1) of Section 31 has been committed by the accused.

Section 33 of this Act specified/that if any protection officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order, without any sufficient cause, he shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to twenty thousand rupees, or with both.
3.4.2 REMEDIES AVAILABLE UNDER OTHER CIVIL LAWS:

In this context it is also stated, that prior to the year of 2005, domestic violence was only recognised by existing civil laws in the context of dissolution of marriage. The only specific recognition of domestic violence was the concept of “cruelty” as a ground for divorce and judicial separation.

Therefore, there were remedies for only some types of domestic violences and the remedies available were inadequate and they could not address the problem in its entirety. There was no specific remedies to a spouse, who does not wish to move for a divorce or judicial separation. Further, domestic violence in a non-matrimonial situation was not recognised. In such cases, one had to resort to general civil law.

In this context it is mentioned that for civil remedies against domestic violence perse would have to be found in Specific Relief Act and the civil Procedure code.

The basic principle in general civil law is that an invasion of right or a threat of such an invasion would entitle a person to a mandatory or prohibitive injunction, as a means of preventing the injury. Therefore, the right of a woman to physical and psychological integrity, which is actually invaded or is threatened to be invaded due to domestic violence, would, in absence of specialised remedy entitled her to seek recourse under this existing civil laws.

Other civil laws relevant to situations of domestic violence, were with respect to divorce, maintenance and custody and guardianship of children etc. The Hindu Adoption and Maintenance Act 1956, the Muslim Women Protection on Divorce Act, the Indian Divorce Act 1869, the Christian Marriages and Divorce Act, the Parsi Marriages and Divorce Act 1936, all had widely varying provisions of alimony or maintenance.

CRUELTY:

It is also submitted, that most matrimonial statutes, recognise cruelty as a ground for judicial separation or divorce, however, the concept of cruelty has not been defined
in the matrimonial statutes. Cruelty is not a term which can be put in an iron jacket. It is a human living concept. It varies from person to person. Therefore, for deciding cruelty in each case, the facts are required to be minutely scanned. Cruelty is to be determined on consideration of various factors, such as social status, custom and traditions, caste and community, upbringing of the parties and the public opinion prevailing in the locality. In the absence of any precise definition of cruelty in any matrimonial statute, the court has to satisfy itself and has to come to its decision on the facts and circumstances of each case as to whether a particular conduct amounts to cruelty or not. The court has to make an assessment of human nature and human affairs and the picture of domestic life of the spouses to be surveyed as a whole before forming judgement of their possible future relations.

Cruelty, in matrimonial relationship, is a course of conduct of one, which is adversely affecting the other. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the inquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse.

Therefore, to constitute legal cruelty, there must be danger to life or injury to health, physical or mental, or a reasonable apprehension of it. Stray incidents of violence do not constitute cruelty, but if the cumulative effect or the sum total of the violence towards the spouse affects her health, then this can be said to constitute legal cruelty. The irony of the situation is that unless the spouse can provide evidence to show that her health has been affected due to cruelty, she will not get any relief. The situation is compounded by the fact that "hearsay evidence" does not constitute evidence and because of the lack of sufficient evidence, several women with genuine woes do not get justice. With in the ambit of legal cruelty arises the concept of physical and mental cruelty, which though easy to comprehend, may be difficult to pinpoint and prove in complicated cases.
While physical cruelty is comparatively easier to prove by evidence such as letters, medical treatment certificates etc, the concept of mental cruelty is difficult to prove. Cruelty must be inferred from the whole facts and the atmosphere enclosed by the evidence. Different forms of mental cruelty may be taken together in order to find a charge of persistent cruelty.

Many acts have been held to amount to "cruelty" over the years. Some of them are as follows:

1) Refusal of the spouse to have sexual intercourse with the other.
2) Insistence on sexual practices which are repugnant to other spouse.
3) Beating, kicking, slapping or punching of a spouse.
4) Dowry demands after marriage etc.

Some of the acts of cruelty mentioned above are instances of domestic violence and as such it is clear that an act in order to amount to cruelty need not be an act of violence of criminal nature. The legal concept of cruelty is not confined to cases of personal danger. Conduct of the husband or the wife that renders the continuance of cohabition and the performance of conjugal duties impossible, amounts to cruelty. However, the courts have held that for an act to be considered as cruelty, the wife not only has to prove the ill-treatment complained of, but also the result and the danger of apprehension thereof.

i) SPECIFIC RELEIF ACT 1963:

Under section 36 of the Specific Relief Act, action for injunctions for protection of rights whether legal or equitable can be filed. An injunction is a legal process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing the wrongful act. The injunction can be "mandatory" i.e. compelling the defendant to do an act in order to protect or enforce the rights on the
plaintiff or the injunction can be “restrictive” i.e prohibiting the defendant from doing an act or acts which threatens to take away the rights or entitlement of the plaintiff. Further, the relief under this section can be permanent or temporary in nature.

**As per sec 37 of the Act:**

The temporary injunctions are such as to continue until a specified time, or until, the further order of the court, and they may be granted at any stage of a suit, and are regulated by the code of civil procedure, 1908.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

**Section 38 of Specific relief Act** deals with perpetual injunctions and Section 39 deals with situations when mandatory injunctions can be granted by the courts.

**In view of Section 38 the perpetual injunction can be granted—**

1) to prevent the breach of an obligation existing in favour of the plaintiff whether expressly or by implication, or

2) where such obligation arises from a contract which can be specifically enforced, or

3) when the defendant invades or threatens to invade the plaintiff’s right to, or enjoyment of the property.

4) Where the invasion is such that compensation in money would not afford adequate relief, or

5) Where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion, or

6) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.
Where, however, the plaintiff fails to prove his ownership and possession in the property, no injunction can be granted.

**Mandatory Injunctions:**

In order to prevent the breach of an obligation it becomes necessary for the court to compel the performance of certain acts which the court is capable of enforcing and court in such circumstance may in its discretion grant an injunction to prevent the breach complained of and also to compel the performance of the requisite acts. So in mandatory injunction, the writ of injunction issued by the court, may take a positive form. It may require a party to do particular thing. Such injunction is called mandatory injunction. Mandatory injunction is to be granted with care and circumspection. When the defendant violates the legal right but also acts unfairly, the court can grant mandatory injunction.

Mandatory injunction is granted to restore things to status quo ante. But it cannot be granted to create a new right. It is an order compelling a defendant to restore things to the condition in which they were when the plaintiff’s complaint was made, regarding the breach of the obligation.

**Section 40:** Damage in lieu of, or in addition to, injunction—

1) The plaintiff in a suit for perpetual injunction under section 38 or mandatory injunction under section 39 may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint. Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceeding, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his/her right to sue for damages for such breach.
In a suit for perpetual or mandatory injunction, the plaintiff may claim damages either in addition to or in substitution of such injunction. The plaintiff has to seek such relief in the plaint. In view of the proviso, the plaintiff is entitled to amend the plaint to include the claim for damages and the Court cannot refuse such amendment on the ground that it is malafide or barred by limitation.

The scope of the provisions of the specific Relief Act with respect to injunctions is very wide. There is no bar against provisions of the specific Relief Act, being applied to a situation involving domestic violence. However, the provisions of this Act have never been resorted to, in situations of domestic violence. Perusal of the case law under this enactment indicates that over a period of time, the courts have given a narrow construction to the provisions of the Act.

A wife who has been illegally thrown out of the “matrimonial home” by her husband or any other person can sue for re-entry to the house in terms of section 6 of the specific Relief Act, even though a wife’s right is not specifically recognised by the provision which is a general one. The jurisdiction of the court under this Section is very limited. The court does not decide the title of the property in question, nor can it direct the parties to remove or erect any structure on the property. This is a special and speedy remedy for recovery of possession, without establishing title available to persons, who have some legal right to the property and are illegally ousted from the same. The object of this Section is to discourage proceedings calculated to lead to serious breaches of peace and to provide against the person, who has taken law into his own hands, and derived any benefit from the process. Interim injunctions to ensure that the house in question is not alienated, destroyed, removed, altered or demolished can be issued in a unit under section 6.55

55. 'Domestic Violence and Law'—Report of Colloquium on justice for women empowerment through law—by Lawyers’ Collective Women’s Rights Initiative, Butterworths India, New Delhi, page- 77-78.
CODE OF CIVIL PROCEDURE 1908:

An injunction is a legal process, by which one who has invaded or threatened to invade another’s rights is restrained from doing so. Thus in domestic violence cases, it is possible to restrain a husband or his relatives from abusing a woman and inflicting violence on her by means of an injunction.

Order 39 of the Civil Procedure code deals with injunction of a temporary nature. The court has power to grant a temporary injunction to restrain certain acts of the defendant / husband or for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the wife’s property or otherwise causing injury to the wife in relation to the suit property. Such an injunction is granted until the disposal of the suit or until further order are passed by the court.

Under Rule 1 order 39, an injunction may be granted, which is onetime in nature and which may be sufficient to protect the rights of the wife during the pendency of the suit. Then Rule 2 order 39, provides for case, where suit is filed to restrain the defendant from committing a breach of contract or other injury of any kind. In such a case the plaintiff may at anytime after the commencement of the suit and either before or after the judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Therefore, an injunction under Rule 2 order 39 is continuing, which is intended to restrain repetition or continuance of breach or injury by the defendant. An injunction sought under the provisions of order 39 Rule 1 and 2 cannot stand on its own but only as an interim relief in a substantive suit for some legal civil remedy. Under Rule 2A order 39, in case of disobedience of any injunction or other order passed under Rule 1 or Rule 2 of order 39, the court may order the property of the person i.e the husband, guilty of
such disobedience or breach, to be attached, and may also order such person / husband or his relatives to be detained in the civil prison, for a term not exceeding three months, unless in the meantime, the court directs his release.

Such an attachment cannot remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the court may award such compensation as it thinks fit to the injured party and pay the balance, if any, to the party entitled there to. So under Rule 2A of order 39 the court can take penal action by way of attachment of the property or by imprisonment of the husband committing breach of an injunction order.

Therefore, in this connection, it is also necessary to note that vulnerable positions of a woman in the matrimonial home, gives rise to domestic violence, which can be avoided if the roof over her head is protected by proper legislation, giving proprietary rights to the woman in her matrimonial home, so that in cases of atrocities against her, she can get protection of the court, by interim and final orders. The remedies available under general civil law are not adequate enough to serve the purpose. Section 36 of the Specific Relief Act 1963 provides for permanent injunctions and in appropriate cases mandatory injunctions also. Even pending such proceedings appropriate intervention can be obtained under order 39 of the civil procedure code. Section 40 of the Specific Relief Act provides for enabling the aggrieved party to get, apart from injunction, damages against the offending party. However, from practical point of view, it becomes very difficult for the aggrieved spouse to invoke aforesaid provisions of civil law against husband or other in-laws and relatives from the in-laws side, staying with her under the same roof. Section 6 of the Specific Relief Act though general in nature, can hardly give sufficient protection to a wife who is thrown out of a matrimonial home illegally.

3.4.3 REMEDIES AVAILABLE UNDER THE LAWS OF MARRIAGE AND DIVORCE —

So far as the provisions relating to domestic lives of women are concerned, they
mainly cater to rights of the women as members of the family. These rights can be classified as--

(a) Matrimonial rights

(b) Guardianship of minor children

(c) Rights of maintenance.

i) HINDU MARRIAGE ACT 1955 —

The Hindu Marriage Act 1955 deals with aspects of domestic violence only in the context of judicial separation and divorce. The Act also deals with maintenance and alimony.

a) RESTITUTION OF CONJUGAL RIGHTS:

Restitution of conjugal rights is a remedy available to a spouse aggrieved by the desertion of the other spouse, without any reasonable cause. This right is available both for husband and wife, but generally in our society, wife is without reasonable excuse withdrawn from the society of the husband.

Restitution of Conjugal Rights Under the Hindu Marriage Act, 1955 —

Under section 9 of the Act, when either the husband or the wife has without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly, Where a question arises, whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

b) JUDICIAL SEPARATION:

The decree of judicial separation does not sever or dissolve the marriage. It provides time and an opportunity for reconciliation and adjustment. Mutual rights and
obligations arising out of a marriage are suspended. The parties can live separately, keeping their status of wife and husband till their life time, if they fail to reconcile. If they want to separate, they can file petition for divorce on the ground of judicial separation. Thus, the decree for judicial separation permits the parties to live apart without any obligation.

**Grounds for Judicial separation Under The Hindu Marriage Act, 1955**

Under section **10 of the Hindu Marriage Act, 1955**:

1) Either party to a marriage whether solemnized between or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in subsection (1) of section 13, and in the case of a wife also on any of the grounds specified in subsection (2) of section 13 there of, as ground on which a petition for divorce might have been presented.

2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the turth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

The following are the grounds, on which a woman can obtain judicial sepatation:

1) cruelty,

2) desertion,

3) husband has been sentenced to imprisonment for more than 7 years,

4) husband has a mental disorder that is incurable or such that the wife cannot be expected to continue living with him,

5) husband has a transmissible veneral disease,

6) husband has leprosy,
7) husband has committed rape of someone other than the wife, sodomy or bestiality,
8) husband has been converted to another religion,
9) husband has renounced the world by entering a religious order,
10) husband has not been heard of as alive for over 7 years,
11) marriage took place before the wife attained 15 years and she repudiated it before attaining 18 years,
12) husband's behaviour is such that the wife cannot reasonably be expected to continue living with him,
13) husband has caused the wife grievous hurt,
14) husband has forced the wife to submit to prostitution,
15) husband has refused to consummate the marriage for one year since the wedding,
16) husband has not provided the wife maintenance for over 2 years,
17) husband has been impotent since the marriage,
18) first wife can apply for judicial separation if her husband had married a second wife,

Following are the effects of judicial separation :-

1) That the marriage tie is not dissolved,
2) That after passing of decree of judicial separation the husband and the wife are not bound to live together.
3) After the decree of judicial separation, it will not be obligatory for the parties to co-habit with each other.
4) It does not prevent the parties from subsequently resuming co-habitation and living together as husband and wife as originally they did. It is not necessary for them to undergo the ceremony of marriage again because their original marriage still subsists inspite of these decree of judicial separation.
5) The petitioner, if she be wife, becomes entitled to alimony from the husband.
6) The mutual rights and obligations arising from the marriage are suspended.
c) DIVORCE OF HINDU WOMEN THROUGH THE HINDU MARRIAGE ACT, 1955:

Under Hindu Custom, marriage is considered as a sacred one and they have this relation by the blessings of the God. Hindus considered the separation of couple as a sin and hence the question of living separately did not arise in olden days. Once married, the tie lasts till the end of life. In modern days marriage is considered as a relation of consciousness. To live together, their thoughts should be united. If they have differences, living together is a hell on earth. Slowly the society started to digest the separate living, when they could not compromise Divorce has been introduced in modern law and the Government enacted the Hindu Marriage Act, 1955 containing the provisions of Divorce.

DIVORCE:

According to section 13 of The Hindu Marriage Act, 1955:

1) Any marriage solemnized may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
   i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
   (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
   (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;
   ii) has ceased to be a Hindu by conversion to another religion; or
   iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
In this clause —

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment or,

iv) has been suffering from a virulent and incurable from of leprosy; or

v) has been suffering from venerel diseases in a communicable form, or

vi) has renounced the material world by entering into any religious order or

vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

Here the expression “desertion” means the desertion of the petitioner by the other party to the marriage, without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of marriage by a decree of divorce on the ground —

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights between the parties to the
marriage for a period of one year or upwards after the passing of a decree for
restitution of conjugal rights in a proceeding to which they were parties.

2) A wife may also present a petition for the dissolution of her marriage by a decree
of divorce on the ground —

(i) in the case of any marriage, solemnized before the commencement of this Act,
that the husband had married again before such commencement or that any
other wife of the husband married before such commencement was alive at
the time of the solemnization of the marriage of the petitioner. But, in either
case the other wife is alive at the time of the presentation of the petition, or

(ii) that the husband has, since the solemnization of the marriages been guilty of
rape, sodomy or bestiality or

(iii) that in a suit under section 18 of Hindu Adoptions and Maintenance Act
1956 or in a proceeding under section 125 of the code of criminal procedure,
1973 or under the corresponding section 488 of the Cr.P.C, a decree or order,
as the case may be, has been passed against the husband awarding
maintenance to the wife not with standing that she was living apart and that
since the passing of such decree or order, co-habitation between the parties
has not been resumed for one year or upwards.

iv) that her marriage (whether consummated or not) was solemnized before she
attains the age of fifteen years and she has repudiated the marriage after
attaining the age but before attaining the age of eighteen years.

d) DIVORCE BY MUTUAL CONSENT:


1) Subject to the provisions of this Act, a petition for dissolution of Marriage by a
decree of divorce may be presented to the District Court by both the parties to a
marriage, together, whether such marriage was solemnized before or after the
commencement of The Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in subsection (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

No petition for divorce to be presented within one year of marriage:

As per Section 14 of the Hindu Marriage Act –

1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of a marriage by a decree of divorce, unless on the date of the presentation of the petition one year has elapsed since the date of the marriage. But, the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the Court at the hearing, of the petition, that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition, that the decree shall not have effect until after the expiry of one year from the date of the marriage, or may dismiss the petition without prejudice to any petition, which
may be brought after expiration of the said one year upon the same or substantially
the same facts as those alleged in support of the petition so dismissed.

2) In disposing of any application under this Section for leave to present a petition
for divorce before the expiration of one year from the date of the marriage, the
Court shall have regard to the interests of any children of the marriage and to the
question whether there is a reasonable probability of a reconciliation between the
parties before the expiration of the said one year.

e) MAINTENANCE:

Under section 23A of The Hindu Marriage Act, in any proceeding for divorce
or judicial separation or restitution of conjugal rights, the respondent may not only oppose
the relief sought on the ground of petitioner's cruelty or desertion, but also make a counter
claim for any relief under this Act on that ground and if the petitioner's cruelty or
desertion is proved, the Court may give to the respondent any relief under this Act to
which she would have been entitled to, if she had presented a petition seeking such relief
on that ground.

As per Section 24 of The Hindu Marriage Act, 1955, where in any proceeding
under this Act, it appears to the Court that either the wife or the husband as the case may
be, has no independent income sufficient for her or his support and the necessary
expenses of the proceeding, it may, on the application of the wife or the husband, order
the respondent to pay to the petitioner the expenses of the proceeding, and monthly
allowance during the proceeding, such sum as having regard to the, petitioner's own
income and the income of the respondent, it may seem to the court to be reasonable. But
the application for the payment of the expenses of the proceedings and such monthly sum
during the proceedings shall, as far as possible, be disposed of within sixty days from the
date of service of notice on the wife or the husband, as the case may be.

In this connection it is also specified that Under section 9 of the Hindu Marriage
Act, in a petition for restitution of conjugal rights, the court can make interim orders directing the husband to pay interim maintenance to the wife during the pendency of the petition for restitution of conjugal rights. The court is bound to decide the application of the wife for interim maintenance and litigation expenses before deciding the merits of the case. The court can also stop proceedings under Sec. 9 of the Hindu Marriage Act, to enforce obedience to maintenance order. Even this remedy is only an interim measure.

**Permanent alimony and maintenance:**

As per section 25 of The Hindu Marriage Act, 1955:

1) Any Court exercising jurisdiction under this Act, may, at the time of passing any decree or at any time subsequent thereto, on application, made to it for the purpose by the wife, order that the respondent shall pay to the applicant (wife) for her maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

3) If the Court is satisfied that the party, in whose favour an order has been made under this Section, has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just.
ii) MAINTENANCE UNDER THE HINDU ADOPTION AND MAINTENANCE ACT, 1956:

Maintenance of wife:

According to Section 18 of The Hindu Adoptions and Maintenance Act 1956:

1) Subject to the provisions of this Section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance.
   (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or wilfully neglecting her.
   (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband.
   (c) if he is suffering from a virulent form of leprosy,
   (d) if he has any other wife living,
   (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.
   (f) if he ceased to be a Hindu by conversion to another religion,
   (g) if there is any other cause justifying her living separately.

3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

iii) INDIAN DIVORCE ACT 1869:

Under section 10 of this Act, both parties to a marriage can petition for “dissolution” of the marriage on the grounds mentioned therein. One of the grounds
available to the woman is that the husband has been guilty of adultery coupled with cruelty. Thus, cruelty, the ingredients of which would involve domestic violence, has been recognised in a very limited manner, in the context of dissolution of a marriage, under the Indian Divorce Act.

**Maintenance : Section 36 of this Act** provides for alimony pendente lite and section 37 provides for permanent alimony in any suit under this Act. A deserted wife may also apply to the Court for protection orders with respect to her property under section 27 of the Act.

### 3.4.4 MATRIMONIAL CAUSES-RIGHTS OF MUSLIM WOMEN :

**Restitution of Conjugal Rights** : In Muslim law where a husband, without lawful cause, ceases to cohabit with his wife, the wife may sue the husband for restitution of conjugal rights. If the marriage was an irregular one, because of its taking place during the period of iddat, the husband cannot be given this relief, even if the marriage was consummated.

Similarly, if the marriage took place when the wife was a minor and later it was validly repudiated by her, such relief cannot be given to the husband.

### i) DISSOLUTION OF MUSLIM MARRIAGES ACT 1939 :

A decree of “dissolution” of marriage can be obtained by a Muslim Woman under section 2 of the Dissolution of Muslim Marriages Act 1939 on the ground of “cruelty” among other grounds. This is the only statute which has defined cruelty.

### ii) MUSLIM WOMEN (PROTECTION ON DIVORCE) ACT 1986 :

This Act enacts the procedure for a divorced wife to claim maintenance. Her right to claim maintenance from her husband is limited to three months after the divorce. The children are also entitled to maintenance under this Act.
SPECIAL MARRIAGE ACT 1954:

As per Section 22 of the Act, when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Where a question arises, whether there has been reasonable excuse for withdrawal from society, the burden of proving reasonable excuse, shall be on the person, who has withdrawn from the society.

Judicial Separation under The Special Marriage Act 1954: A petition for judicial separation may be presented to the District Court, by the wife under section 23 of the Act. The Divorce provision is available for women under The Special Marriage Act, 1954 as per section 27. Section 36 of the Act provides for maintenance pendentelitie in proceedings for restitution of conjugal rights and divorce. Section 37 of the Act provides for permanent alimony.

3.4.5 LAW RELATING TO MINORS:

i) THE GUARDIANS AND WARDS ACT 1890:

As per section 4(2) of The Guardian and Wards Act, 1890 "guardian" means a person having the care of the person of a minor or of his property or of both his person and property.

The Act is applicable to all irrespective of their personal laws regarding the provisions of guardianship of the Act. According to the section 24 of the Act, a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is a
subject requires. As per Section 20 of the Act, a guardian stands in a fiduciary relation to his ward, and save the child’s property as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of the office.

According to The Guardians and Wards Act 1890, the Court shall consider the following in appointing a guardian:

1) The personal law applicable
2) The welfare of the child
3) The wishes of the child if he or she is old enough to form an intelligent preference.

It has been held that a child below 6 years of age is not fit to express an intelligent preference, but if the child is above this age, the Court will take his/her wishes into account.

The Court held that the weaker financial position of the mother does not disentitle her from guardianship on the grounds of the child’s welfare.

The Court held that the cruelty by a parent to the child or adultery by a parent would debar that parent from retaining guardianship over the child.

The Court held in some cases that in any situation it is better for the child to be brought up under the care of the mother. The deciding factor of the guardianship is the welfare of the child.

Section 39 of the Act provides for removal of the guardian in case of ill treatment or neglect to take proper care of his ward.

The provisions of the Act apply equally to all religious communities to the children under the age of 21 years.

GUARDIANSHIP OF HINDU CHILD:

ii) THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956:

According to Section 4(b) of The Hindu Minority and Guardianship Act,
“guardian” means a person having the care of the person of minority or of his property or of both his person and property, and includes—

a) a natural guardian

b) a guardian appointed by the will of the minor’s father or mother

c) a guardian appointed or declared by a Court.

d) a person empowered to act as such by or under any enactment relating to any court of wards.

Section 6 of the said Act lays down as to who are the natural guardians of a Hindu minor. In case of a boy and unmarried girl, the father and after him, the mother would be guardian, but the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

The provision giving the father precedence over the mother in matters of guardianship, has been whittled down by the Supreme Court. Under section 13, the welfare of the child is paramount. Thus, when the domestic situation is not conducive to the physical or mental health of the child, an appropriate order may be sought from the Court in this regard.

3.4.6 LAW RELATING TO MAINTENANCE:

i) HINDU ADOPTION AND MAINTENANCE ACT 1956:

According to Section 20 of the Act

1) A Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

2) A legitimate or illegitimate child may claim maintenance from his or her father or mother, so long as the child is a minor.

3) The obligation of a person to maintain his or her aged or infirm parents or a daughter who is unmarried extends, in so far as the parent or the unmarried
daughter as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Guardianship Under Muslim Personal Law:

Hizanat, the guardianship of the person of a minor is only custody for the rearing up of the child and the right of Hizanat of tender age under (Sunni Law) belongs to the mother of a male child until he has completed the age of seven years and of her female child until she has attained puberty and under Shia Law, the mother is entitled to the custody of a male child until he attains the age of two years and of a female child until she attains the age of seven years. After the child has attained the above age, the custody belongs to the father. According to the Muslim Law, where the right to the custody of the child belongs to the mother, the father is bound to provide and look after not only the child but also the mother, namely his wife, so long as Hizanat lasts.

Under Muslim Law, the mother and her relatives are exclusively entitled to the custody of the illegitimate children. If a child be foundling, its custody belongs to the person who found it, or to the State.

According to section 2 of The Muslim Personal Law (Shariat) Application Act 1937, notwithstanding any custom or usage to the contrary, in all questions regarding guardianship, the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Shariat).

3.5. REMEDIES AVAILABLE UNDER TORT:

In case of domestic violence the victim wife can also claim remedies under the Law of Tort. The violence which are generally punished under Law of Tort are as follows:

TRESPASS TO THE PERSON:

If the husband of the victim wife is violent and abusive, another legal remedy
available to the wife is under the law of Torts. Tort law deals with the liability of a person for wrongs committed against another person including the wrong of “trespass to the person”. Trespass to the person is the broad term used to denote various forms of physical and psychological injury committed upon a person. There are three categories of trespass to the person—battery, assault, and false imprisonment.

In this connection it is noted that the wife do not have to divorce or judicially separate from her husband to sue him in tort.

i) BATTERY:

Battery is any physical interference with a person. So, for instance, beating a person is battery. It is not necessary that the physical interference be excessively violent, the merest touching of a person can amount to a battery if it is unwanted. Secondly, there need not be actual physical contact between the perpetrator and the victim—being hit by an object also counts as battery.

Some examples of battery are —

(a) Slapping, punching, kicking or in any other way physically striking a person.

(b) Spitting on a person’s face.

(c) Throwing over a chair in which the other person is sitting.

(d) Catching hold of a person by his clothes

(f) Seizing and laying hold of a person so as to restrain him.

It may be possible to argue that unwanted sexual contact forced upon the wife by her husband is battery. Between unmarried persons, this would definitely be considered battery. However, the position might be slightly different in the case of a married couple as Indian Law retains the archaic notion that a woman is deemed to have irrevocably consented to sexual contact with her husband. However, this rule is not applied strictly any longer, So while it is still not possible for a woman to sue her husband for rape, she
may be able to succeed on an allegation of battery, especially if the sexual interference is of a particularly heinous nature or is accompanied with violence.

ii) **ASSAULT**:

Any action that causes a person to fear that a battery will be committed upon her is an assault. So if the husband makes a gesture as if he is going to hit the wife then that is an assault even if he does not actually hit her. Threats of violence may also count as assaults if it can be said that the threat showed a clear intention to assault the wife and the husband expressing the threat clearly had the ability to carry this out, putting the wife in fear of an immediate battery. So if the husband says her wife “I am going to hit you” and advances threateningly towards her, then this is an assault. Here the assault is committed even if the husband threatening his wife does not eventually hit her or is prevented from doing so.

iii) **FALSE IMPRISONMENT**:

False imprisonment is the infliction of any unlawful bodily restraint upon a person. So for instance, being locked up in a room against the wife’s will is false imprisonment.

In order to succeed in tort suit the wife will have to establish that the assault, battery and / or false imprisonment, as the case may be, was intentional. So, for instance, if the wife is alleging battery, she will have to prove two things-

1) That an act was committed against her person.
2) That this act was committed intentionally.

**REMEDIES FOR TORTS**:

**DAMAGES**: Damages are monetary compensations for harm caused to the wife by a tort.

**Damages include the following**:

1) The medical and other expenses incurred by the wife in remedying the injury.
2) Compensation for physical pain and suffering.
3) Compensation for any loss of income and/or reduction in earning capacity as a result of the injury caused by the tort.

4) Compensation for "loss of amenity", here a amenity means the permanent or temporary loss of any faculty or ability to engage in any activity. So, for instance, being rendered unconscious or a leg injury to a wife amounts to a loss of amenity.

5) Damages for "nervous shock". Until recently, the law of torts did not recognise psychological injury or emotional distress as harm that deserved damages. This has begun to change with the development of the notion of "nervous shock" which is a term used to cover a range of psychiatric illnesses such as anxiety neurosis and reactive depression. A person who manifests these symptoms as a consequence of the commission of a tort is entitled to damages. This head of damages may be particularly useful to the wife as women who has experienced domestic violence often exhibit such symptoms—called—"Battered Woman’s Syndrome."57

In order to be awarded damages wife will have to show that she suffered loss under any or all of the above heads and that this loss was caused as a direct result of the tortious act.

INJUNCTIONS AND RESTRANING ORDERS:

An injunction is a court order whereby a person/husband is ordered to do or refrain from doing something. Injunctions can be obtained by applying under section 38 of the Specific Relief Act, 1963. Under this provision, the wife can apply for restraining orders from the Court against her husband, on the ground that she fears that he will commit abusive and violent acts against her. The advantage of applying for an injunction is that she has a lot of flexibility regarding the kind of orders she can obtain from the court. For instance, if her husband is harassing her at work, she can ask for orders

57. Bettered woman’s syndrome is recognised in English Criminal Law as justification for homicide- it is arguable from this, that the syndrome should be recognised in Civil Law as well.
restraining him from coming within a certain distance of her place of work; if she lives apart from him, she can ask for restraining orders preventing him from coming within the vicinity of her home. It may be possible for her to get restraining orders even if her husband is living in the same house. In one case, it was said that injunction will be granted if the suing spouse is in exclusive possession of the matrimonial home and the defending spouse conducts himself in a manner that is threatening to the wife, or is in any other way which is indecent or immoral. The wife may be able to get restraining orders preventing her husband from coming to a certain part of the house. Injunctions against his writing or telephoning to the wife can also be obtained. In such suits, the wife may also ask for ‘interim restraining order’. However, the courts are usually reluctant to grant interim orders as they prefer hearing the case in full, before placing restrictions on a person’s movement. In one case, the court said that only in exceptional cases of immoral or vexatious conduct, the Court will grant interim relief restraining the husband from entering the matrimonial home. The wife can apply for both damages and injunction orders in a tort suit.

Before deciding to file a tort suit against the husband, the wife should bear in mind that although in principle there is nothing to bar her from suing in tort, but there is no precedent in Indian Law where women being awarded damages against their husbands for trespass against the person. Other common law jurisdictions have begun to award damages in actions for battery between spouses.

The limitation period for bringing a tort suit for damages is three years from the date of the cause of action, in the wife’s case, the cause of action refers to the last instance of assault, battery or false imprisonment alleged by her.

The limitation period for bringing a tort suit for perpetual injunction under section 38 of the Specific Relief Act is six years from the date of the cause of action.58

CONCLUSION:

A critical examination of the Indian legal provisions reveals that most of the previous protective laws for women suffer from various loopholes and shortcomings. They are complicated and ambiguous and instead of solving the issues, make the situation more complex. Often the provisions of the Law are not clear and precise, it makes them the battleground for legal interpretation in the hierarchy of courts. Certain Laws remain confined to statute books, because the enforcement machinery is inadequate or the penalties are not awarded according to the stipulations. Many of these previous protective laws were passed in such a great hurry, that there was no time even to think about the various aspect of the enactment. There are innumerable acts, which do not take into account the social realities of a woman’s life, thus these laws may be helpful for the state to just settle the woman’s problem for the timebeing but do not actually gives her a permanent relief from her miserable inhuman situation.

In this regard it can be noted, that inspite of a number of changes in the previous laws the problems of domestic violence against women like dowry, cruelty, bride burning etc. are not only continued till today but have assumed alarming proportions. The differences in various personal laws and absences of adequate enforcement mechanisms, have made many of these laws ineffective. Recently the new civil law on domestic violence ie. “The Protection of Women from Domestic Violence Act 2005” is unable to eradicate domestic violence yet, so bride burning, dowry deaths, cruelty by husband and in laws, suicide etc still occur all over the country and the large part of women population in India continue to be victims of exploitation, discrimination and abuse in their matrimonial homes. They suffer domestic violence silently, and their progress is being thwarted by the long established socio-cultural traditions and certain social evils.

Therefore, finally it can be stated that, in past inspite of plethora of progressive and protective legislations favouring women, we failed in our aims to uplift the social status
of Indian woman and to place her at par with male in all walks of life. But now we are waiting to see that this new civil law i.e The Protection of Women from Domestic Violence Act, 2005 will be implemented properly by the State machinery and should be treated as a stronger weapon for women who are suffering from domestic violence and also this law will control the rate of increase of domestic violence in India.