

**DISCRIMINATION AGAINST WOMEN
WITH SPECIAL REFERENCE TO FEMALE
FOETICIDE IN STATE OF RAJASTHAN**

A THESIS

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CERTIFICATE FROM THE SUPERVISOR

It is certified that the

- (i) Thesis “**Discrimination Against women with Special Reference to Female Foeticide in State of Rajasthan**” Submitted by **Priyanka Saini**, Lecturer in Law, Excellent Law College, Kota (Rajasthan) is an original Copy of research work carried out by the candidate under my supervision.
- (ii) Her literary presentation is satisfactory and the thesis is in a form suitable for publication.
- (iii) Work evinces the capacity of the candidate for critical examination and independent judgment. The thesis incorporates new facts and a fresh approach towards their interpretation and systematic presentation.
- (iv) Priyanka Saini has put in at least 200 days of attendance every year.

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PREFACE

In this study the researcher has examined in detail the “**Discrimination Against women with Special Reference to Female Foeticide in State of Rajasthan.**” It is intended that such a study will help determine the parameters which any legislation for society must include.

The acknowledgement of the debt to other is always a pleasant task. The help given by those mentioned in this acknowledgement has been of paramount value. Despite best efforts, non-acknowledgement to some worthy patrons cannot be completely ruled out but their contribution has been equally valuable. My gratitude to them can never diminish.

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(Priyanka Saini)

Discrimination Against Women with Special Reference to Female Foeticide in State of Rajasthan

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INTRODUCTION

“Bride tortured to death for dowry”, “School going kid succumbs to his injuries after beaten by father”, “A seventy year old man killed over property dispute”, “Harassment of men in Chandigarh...” All these and what not, turn to any newspaper at random and you would find the reports of such kind of violence all over the country. These are all what we come to know through different forms of media. There are more such cases which go unreported every day. In fact, include the cases which we our self indulge in, or the ones which we witness in the neighborhood but are hesitant in taking even a single step to reduce their occurrences.

Violence against women is present across the world cutting across boundaries of culture, class, education, income, ethnicity and age. When the violence occurs within home, the abuse is effectively condoned by the tacit silence and the indifference by the instruments of the state and the law-enforcing machinery. Internationally, one in three women have been beaten, coerced into sex or abused in their lifetime by a member of her own family. Domestic violence is the most prevalent yet relatively hidden and ignored form of violence against women and girls. While reliable statistics are hard to come by, studies estimate that, from country to country, between 20 and 50 per cent of women have experienced physical violence at the hands of an intimate partner or family member. Wife beating is not only rampant, but male justify it with plethora of contexts.

In our society, violence is bursting. It is present almost everywhere and nowhere is this eruption more intense than right behind the doors of our homes. Behind closed doors of homes all across our country, women

are being tortured, beaten and killed. It is happening in rural areas, towns, cities and in metropolitans as well. It is crossing all social classes, genders, racial lines and age groups. It is becoming a legacy being passed on from one generation to another.

The term used to describe this exploding problem of violence within our homes is Domestic Violence. This violence is towards someone who we are in a relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a male's or a female's atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms such as physical, sexual or emotional.

Since times immemorial, domestic violence has been an intrinsic part of the society we are living in. The contributing factors could be the desire to gain control over another family member, the desire to exploit someone for personal benefits, the flare to be in a commanding position all the time showcasing one's supremacy so on and so forth. On various occasions, psychological problems and social influence also add to the vehemence. The present essay deals with the various forms of domestic violence prevalent in India. Their causes of occurrence in households have been analyzed categorically. The variation in the intensity of the forms with change in the geographical location and culture has also been addressed. The aftereffects of different kinds of domestic violence and the possible remedies have been highlighted. Finally, a conclusion has been drawn after the complete analysis of the topic with the juxtaposition of facts and figures at hand.

(1) Domestic Violence against Women

This form of domestic violence is most common of all. One of the reasons for it being so prevalent is the orthodox and idiotic mindset of the society that women are physically and emotionally weaker than the males. Though women today have proved themselves in almost every field of life affirming that they are no less than men, the reports of violence against them are much larger in number than against men. The possible reasons are many and are diversified over the length and breadth of the country. According to United Nation Population Fund Report, around two-third of married Indian women are victims of domestic violence and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from domestic violence, especially in the states of Bihar, Uttar Pradesh, Madhya Pradesh and other northern states¹.

State-wise Cruelty by Husbands and Relatives During 2011

S.No.	State/UT	Cruelty by Husband and Relatives	
		Incidence	Rate of Cognizable Crime
1.	ANDHRA PRADESH	13376	15.8
2.	ARUNACHAL PRADESH	18	1.3
3	ASSAM	5246	16.8
4	BIHAR	2607	2.5
5	CHHATISGARH	834	3.3
6	GOA	18	1.2

¹ Panda, P. and Agarwal, B. 2005. Marital Violence, Human Development and Women's Property Status in India. World Development. 23(5): 823-850.

7	GUJARAT	6052	10.0
8	HARYANA	2740	10.8
9	HIMACHAL PRADESH	239	3.5
10	JAMMU & KASHMIR	286	2.3
11	JHARKHAND	659	2.0
12	KARNATKA	3712	6.1
13	KERALA	5377	16.1
14	MADHYA PRADESH	3732	5.1
15	MAHARASHTRA	7136	6.4
16	MANIPUR	39	1.4
17	MEGHALAYA	21	0.7
18	MIZORAM	9	0.8
19	NAGALAND	1	0.1
20	ODISHA	2320	5.5
21	PUNJAB	1136	4.1
22	RAJASTHAN	12218	17.8
23	SIKKIM	4	0.7
24	TAMIL NADU	1812	2.5
25	TRIPURA	702	19.1
26	UTTAR PRADESH	7121	3.6
27	UTTARAKHAND	307	3.0
28	WEST BENGAL	19772	21.6
TOTAL(STATES)		97494	8.2

S.No.	State/UT	Cruelty by Husband and Relatives	
		Incidence	Rate of Cognizable Crime
1.	A &N ISLANDS	5	1.3
2.	CHANDIGARH	46	4.4
3	D &N HAVELI	3	0.9
4	DAMAN &DIU	2	0.8
5	DELHI	1575	9.4
6	LAKSHADWEEP	0	0.0
7	PUDUCHERRY	10	0.8
TOTAL(UT)		1641	8.2
TOTAL(ALL INDIA)		99135	8.2

Source: Crime in India, 2011 Statistics, NCRB, p. 218

The most common causes for women stalking and battering include dissatisfaction with the dowry and exploiting women for more of it, arguing with the partner, refusing to have sex with him, neglecting children, going out of home without telling the partner, not cooking properly or on time, indulging in extra marital affairs, not looking after in-laws etc. In some cases infertility in females also leads to their assault by the family members. The greed for dowry, desire for a male child and alcoholism of the spouse are major factors of domestic violence against women in rural areas². There have been gruesome reports of young bride being burnt alive or subjected to continuous harassment for not bringing home the amount of demanded dowry. Women in India also admit to hitting or beating because of their suspicion about the husband's sexual involvement with other women. The Tandoor Murder Case of Naina Sahni in New Delhi in the year 1995 is one such dreadful incident of a woman

² Koenig, A. M., et al. 2006. Individual and Contextual Determinants of Domestic Violence in North India. *American Journal of Public Health*. 96(1): 132-138.

being killed and then burnt in a Tandoor by his husband. This incidence was an outcome of suspicion of extra marital affairs of Naina Sahni which led to marital discord and domestic violence against her.

In urban areas there are many more factors which lead to differences in the beginning and later take the shape of domestic violence. These include – more income of a working woman than her partner, her absence in the house till late night, abusing and neglecting in-laws, being more forward socially etc. Working women are quite often subjected to assaults and coercion sex by employees of the organization. At times, it could be voluntary for a better pay and designation in the office.

Violence against young widows has also been on a rise in India. Most often they are cursed for their husband's death and are deprived of proper food and clothing. They are not allowed or encouraged for remarriage in most of the homes, especially in rural areas. There have been cases of molestation and rape attempts of women by other family members in nuclear families or someone in the neighbourhood. At times, women are even sexually coerced by their partner themselves against their will. They are brutally beaten and tortured for not conceiving a male child. Incidents like, ripping off a woman's womb for killing the female foetus when she disagrees for abortion have also come to light especially in rural areas. Female foeticide and female infanticide continue to be a rising concern.

Also as expressed by Rebecca J. Burns in the following lines, "When I am asked why a woman doesn't leave abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving." A common Indian house wife has a tendency to bear the harassment she is

subjected to by her husband and the family. One reason could be to prevent the children from undergoing the hardships if she separates from the spouse. Also the traditional and orthodox mindset makes them bear the sufferings without any protest.

Other forms of physical abuse against women include slapping, punching, grabbing, burdening them with drudgery, public humiliation and the neglect of their health problems. Some of the other forms of psychological torment against them could be curtailment of their rights to self-expression and curbing the freedom to associate with the natal family and friends.

(2) Causes of violence:

There are 4 main reasons for domestic violence to persist in India.

- 1. Male dominated society:** Even though women had risen to top positions, India was & still remains as a male dominated country.
- 2. Lack of awareness of Laws:** Victims of domestic violence are afraid to protest as there is lack of awareness or rather lack of initiative to make her aware of her rights.
- 3. Laxity in implementation of the existing Acts:** No or less efforts are made to increase awareness amongst the women by the authorities posted to implement the Act.
- 4. Bureaucracy & Fear:** If a domestic violence is reported by a third party then he/she is scrutinized as an intruder and problem maker by the community. The bureaucracy associated with reporting of domestic violence, lack of funds for support group adds up to the continued domestic violence in India.

(3) Domestic Violence Against Men

There is no question that domestic violence directed against women is a serious and bigger problem, but domestic violence against men is also increasing gradually in India. The supremacy of men in the society makes one believe that they are not vulnerable to domestic violence. Battering of men by their spouse and family members has become a concerned issue and is another form of domestic violence under purview of judiciary. In India, compared to violence against women, violence against men is less frequent but it has already taken a deadly shape in many of the western countries by now.

Males have reported incidences of assault against them like pushing, shoving, slapping, grabbing, hitting which are intended to harm them and also take their lives on many occasions. Recently, hundreds of husbands gathered in Chandigarh and Shimla to voice their opinion for men's rights and protection against domestic violence subjected to them by their wives and other family members. It reflects the need for a special law for curbing domestic violence against men in present times.

If we contemplate over the reasons behind this form of domestic violence we would find some of the possible causes such as not abiding by the instructions of the wives', inadequate earning of men, infidelity towards wives, not helping the partner in household activities, not taking a proper care of children, abusing the spouse's family, infertility of men, spying the activities of partner, doubting the partner all the time and not trusting her, revolt by the wife when asked to look after in-laws etc. On many occasions the spat between men and women becomes public thereby influencing the society around especially in the villages. In urban

areas such forms of violence may go unreported because of greater privacy. Also the families find their reputation at stake in urban areas.

(4) Domestic Violence Against Children/Teens

Children and teenagers in our society are not spared from the evil of domestic violence. In fact, this form of violence is second in terms of number of reported cases after the 'violence against women'. There is a lot of variation in the form of its occurrence in urban and rural areas and in upper/middle class and lower class families in India. In urban regions, it is more private and concealed within the four walls of homes. The possible reasons could be disobeying parental advises and orders, poor performance in academics or not being at par with other children in neighbourhood, debating with parents and other family members etc. In addition to this, factors like not being socially intelligent or as active as the parents expect them to be, abusing the parents or speaking ill about other family members, not returning home on time are some other factors.

In rural areas the reasons could be harassment for child labour, physical abuse or harm for not following family traditions, forcing them to stay at home and not allowing them to go to school etc. Domestic violence against girls is in fact more severe at homes. As the common mob mentality of India prefers to have at least one male child after marriage, the girls in most of the occasions are cursed and assaulted for having taken birth in the home. This kind abuse is prevalent both in cities and villages but is more common in latter case. Then there are cases of paedophilia causing sexual harassment of children in homes by family member themselves. In fact the number of rape cases of pre-matured girls has been rising since last few years. A survey of teens and college students found that rape accounted for 67 percent of sexual assaults in

girls. Apart from sexual abuse and rape, pushing, slapping, punching, stalking and emotional abuse are other forms of domestic violence against children.

Adding to the above mentioned causes, there are also instances of abuse against children who are physically and/or mentally challenged. Instead of providing them proper health care and treating them politely, these children are beaten and harassed for not cooperating and attending to what family members ask them to do. They are even emotionally abused by cursing them having been in such retarded or handicapped state. In fact in poor families, there have been reports of selling body organs of the retarded children for getting money in return. It reflects the height of cruelty and violence against innocent children.

(5) Domestic Violence Against Olds

This form of domestic violence refers to the violence which old people at home are subjected to by their children and other family members. This category of domestic violence largely goes under-reported in India. It is because of the dependency of olds on their children and having a fear of not being looked after or even ousted if the violence is revealed in public. The main causes of violence against aged people are – children being hesitant in bearing the expenses of the old parents, emotionally victimising the olds and beating them to death to get rid of them. On various occasions, they are beaten for doing something against the desire of family members. One of the very common reasons includes torture for property grabbing.

A perturbing trend is the vulnerability of ageing women to domestic violence in various forms. Given existing structures of gender

discrimination, old women are prone to a greater risk than men of becoming victims of material exploitation, financial deprivation, property grabbing, abandonment, verbal humiliation, emotional and psychological torment. When they fall seriously ill, it is more likely that it is the elderly women in the family who will be denied proper health care. There is also a widespread understanding that the neglect, deprivation and marginalisation of older women are the normal consequences of ageing. In fact the plight of young widows in homes as discussed above now becomes more serious as a result of the ageing of those women. They are cut off from the society they are living in, ignored, abused, cursed, and considered as bad omens. The atrocities of sons, daughter-in-laws, daughters and husbands could be another cause of domestic violence specifically against older women. They are restrained from cooking, housekeeping, or participating in activities outside the home.

While it is difficult to accurately measure the extent of the problem on a national scale, given the fact that most families deny that such abuse but we do know that the number of old people in our midst is growing. A current estimate puts the 60-plus population at around 90 million in India and is projected to have a population of 142 million older people by 2020. Given this demographic reality an important concern is the kind of action the country can take at the individual and societal level to alleviate abuse and neglect of elderly class.

(6) Other Forms of Domestic Violence in India

There are some more possible forms of domestic violence prevalent in India other than the ones listed above. On a serious note, family wars or clan wars are deadly forms of domestic violence across the country. The reason of such type of violence include dispute over

property, physically or emotionally abusing any member of other family or clan, any religious cause or conflict arising during a religious ceremony, jealousy because of progress and financial status of other family, inter-caste marriage etc. This form of violence is common in many states like Haryana, Punjab, Andhra Pradesh etc.

One of the other forms of domestic violence is ill-treatment of servants and maids in households. In many of the affluent homes, servants are deprived of their salary and basic necessities. They are harassed and beaten and to work without even taking adequate rest. Similarly maids are molested by males in the family. Atrocities against small children working as servants are common and increasing.

To some extent media is also responsible for contributing to all the above forms of violence. The exaggerated news coverage of reports of domestic violence, the daily soaps screening the torture of a daughter-in-law at the hands of family members, the films portraying an element of violence against people of all age groups etc. are some of the menaces which media is causing. It is influencing the mindset of the viewers strongly. The problem arises when instead of taking a lesson from those news clippings, films, and television shows, people start enacting the same in their homes. Comparatively, the visual media is far more influencing than the print and electronic media in these cases. Illiteracy and mob mentality of majority of Indians misguides them in all these cases.

(A) Consequences of Domestic Violence

There are varied consequences of domestic violence depending on the victim, the age group, the intensity of the violence and frequency of

the torment they are subjected to. Living under a constant fear, threat and humiliation are some of the feelings developed in the minds of the victims as a consequence of an atrocious violence. The consequences of the domestic violence in detail can be broadly categorised under the Effect on the victim himself/herself and the family , Effect on the society and the Effect on nation's growth and productivity. The 'Effect on the victim' has been further subcategorized for women, men, children and olds.

(B) Consequences of Violence Against Women

Battered women have tendency to remain quiet, agonised and emotionally disturbed after the occurrence of the torment. A psychological set back and trauma because of domestic violence affects women's productivity in all forms of life. The suicide case of such victimised women is also a deadly consequence and the number of such cases is increasing.

A working Indian woman may drop out from work place because of the ill-treatment at home or office, she may lose her inefficiency in work. Her health may deteriorate if she is not well physically and mentally. Some women leave their home immediately after first few atrocious attacks and try to become self-dependent. Their survival becomes difficult and painful when they have to work hard for earning two meals a day. Many such women come under rescue of women welfare organizations like Women Welfare Association of India (WWAI), Affus Woman Welfare Association (AWWA) and Woman's Emancipation and Development Trust (WEDT). Some of them who leave their homes are forcefully involved in women trafficking and pornography. This results in acquiring a higher risk of becoming a drug

addict and suffering from HIV/AIDS. Some of course do it by their choice.

One of the severe effects of domestic violence against women is its effect on her children. It is nature's phenomenon that a child generally has a greater attachment towards the mother for she is the one who gives birth. As long as the violence subjected to the mother is hidden from the child, he/she may behave normally at home. The day when mother's grief and suffering is revealed, a child may become upset about the happening deeply. Children may not even comprehend the severity of the problem. They may turn silent, reserved and express solace to the mother. When the violence against women is openly done in front of them since their childhood, it may have a deeper and gruesome impact in their mindset. They get used to such happenings at home, and have a tendency to reciprocate the same in their lives. It's common in especially in rural homes in India which are victimised by the evil of domestic violence.

In cases of Intimate Partner Violence (IPV), violence against women leads them to maintain a distance from their partner. Their sexual life is affected adversely. Many of them file for divorce and seek separation which again affects the life of children. Some continue to be exploited in lack of proper awareness of human rights and laws of the constitution.

In India where almost half of the population are women, they have always been ill-treated and deprived of their right to life and personal liberty as provided under the constitution of India. Women are always considered as a physically and emotionally weaker than the males, whereas at present women have proved themselves in almost every field of life affirming that they are no less than men due to their hard work

whether at home or working places. Behind closed doors of homes all across our country, people are being tortured, beaten and killed. It is happening in rural areas, towns, cities and in metropolitans as well. It is crossing all social classes, genders, racial lines and age groups. It is becoming a legacy being passed on from one generation to another. But offences against women which reflects the pathetic reality that women are just not safe and secure anywhere. According to a latest report prepared by India's National Crime Records Bureau (NCRB), a crime has been recorded against women in every three minutes in India. Every 60 minutes, two women are raped in this country. Every six hours, a young married woman is found beaten to death, burnt or driven to suicide.

Violence against women is not a new phenomenon. Women have to bear the burns of domestic, public, physical as well as emotional and mental violence against them, which affects her status in the society at the larger extent. The statistics of increasing crimes against women is shocking, where women are subjected to violence attacks i.e. foeticide, infanticide, medical neglect, child marriages, bride burning, sexual abuse of girl child, forced marriages, rapes, prostitution, sexual harassment at home as well as work places etc. In all the above cases women is considered as aggrieved person.

The term used to describe this exploding problem of violence within our homes is 'Domestic Violence'. This violence is towards someone who we are in a relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a male's or a female's atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms such as physical, sexual or emotional. 'Domestic Violence' includes harms or injuries which endangers

women's health, safety, life, limb or well being, whether mental or physical. It may also be through physical, sexual, verbal, emotional and economic abuse. According to 'United Nation Population Fund Report', around two-third of married Indian women are victims of Domestic Violence attacks and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from Domestic Violence, especially in the states of Bihar, Uttar Pradesh, Madhya Pradesh and other northern states.

What amounts to domestic violence against women? Domestic Violence undoubtedly a human right issue where it is very important to know what actually leads to act of domestic violence. The most common causes for women stalking and battering include:- exploitation of women for demanding more dowry, discrimination of women, alienation of women's self acquired property fraudulently, torture by husband and in-laws of the husband, arguing with the partner, refusing to have sex with the partner, neglecting children, going out of home without telling the partner, not cooking properly or on time, indulging in extra marital affairs, not looking after in-laws, cruelty by husband or in-laws mentally or physically, abusing & insulting by using vulgar language, sexual harassment, molestation, immoral traffic, rape, sodomy and all other inhuman acts. In all above stated causes women are subjected to torture and will be considered as the aggrieved person. Usually violence takes place due to lack of understandings between the couple as well as in the family.

The consequences of domestic violence attack on women, which will affect victim as well as family of the victim. Domestic Violence affects women's productivity in all forms of life i.e. assaulted women will

always get agonized and emotionally disturbed and remain quite after occurrence of the torment. The suicide case of such victimized women is also a deadly consequence and the number of such cases is increasing day by day. A working Indian woman may lose her efficiency in work or drop out from work in some cases. Domestic Violence may affect the life of children at the larger extent because child will be having greater attachment with her mother and once the mother's grief and sufferings revealed then child may turn silent, reserved and express solace to the mother. In some of the cases violence will lead to maintain distance from the partner whereby sexual life gets affected adversely. Sometimes marriage life will become a burden to the spouse and one of the spouses will opt out for divorce or separation which again affects life of the children.

In a case where wife is beaten up by her husband doesn't amount to domestic violence unless a sufficient reason of violation of right to life is shown. In another case where the women just not given food, it amounts to domestic violence if it is intended to achieve the ultimate purpose of necking her out of the benefits of shared household.

To prevent violence against women and to protect the rights of aggrieved women, the legislation 'The Protection of Women from Domestic Violence Act, 2005' was passed by the parliament. According to this act every women who have been deprived of their right to life by the act of husband or relatives of the husband, can file a complaint to the protection officer, police officer or magistrate in the form of 'Domestic Incident Report' i.e. Similar to First Information Report. Complaint can be filed by the victim /aggrieved person or relatives, it will be considered as the prima-facie evidence of the offence. Every 'Domestic Incident Report' has to be prepared by the Protection Officer which will assist in

the further investigation of the incidence. The protection officer will pass certain orders i.e. protection of the women, custody of respondent and order of monetary relief to the victim.

The Government of India should come out with some more stringent laws to protect the rights of women who are victims of violence of any kind occurring within the family, so that it will work as the preventive measure to eradicate the crime. A strict law to be passed to punish those women who are filing a false compliant against husband or relatives by misusing of Domestic Violence Act so that there will be fair justice to all.

(7) Review of Important Works

B. Sivarmayya in his article “Towards Equality: The Long Road Ahead” has analytically studied the report of Commission of the Status Women report. He finds women rights receiving great amount of impetus internationally in 1970s. India followed the trend and initiated reforms for women empowerment. But he laments that the reforms are yet to receive full support in India. Many of these reports remain a dead letter in practice. In the field of child marriage, polygamy, inheritance and divorce, women are at the receiving end. The petty politics and political pressures are hampering the implementation of women reforms. Child marriages are still recognized and parents are not strictly punished for the same. A husband is still supposed to hold tenancy right over agricultural land on behalf of his wife. Amongst Muslims triple divorce is still prevalent on large scale. He stresses that modern age has seen the emergence of new patriarchal class which is more sophisticated. He finds this class resorting to the concepts of plurality, minority rights and social rights to block the reforms for women in various communities. He

concludes that the time has come when India need to strongly implement Uniform Civil Code to end all the sufferings of the women in the name of religious, social and cultural traditions. This is a marvelous study regarding the problems faced by women in India. The writer would have contributed more by studying how Uniform Civil Code can be implemented. The judiciary must take more vigorous stand seeing the reluctance of legislation which is moved more by patriarchal elements.

Nandita Haksar in “Human Rights Lawyering: A Feminist Perspective” has critically studied the movements linked to women struggle in India. She starts with the judgement in the case *Tukaram v. State of Maharashtra*.³ The justice was denied to a tribal girl Mathura who was raped in police station. Women activist wrote an open letter to Chief Justice of India and criticized the judgement of the court which “gathered an impression from Mathura’s liaison with her lover that she was a person of easy virtue.” The letter further questions, “Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls?” However, the court refused any relief to women organizations as these had no locus standi. She finds women coming out strongly as the injustice were denied to them individually, and hence in the year 1982, the Supreme Court recognized NGOs right to represent oppressed and exploited people in the court. Then she goes on to study how the judiciary was heavily insensitive towards the plight of the rape victim. She finds weaknesses of holding the in-camera proceedings of rape trials as these would have hampered the access of women organizations. She also discussed the various dimensions in the law of obscenity. She fails to sympathize with rightist wing of interpretation which even protested on Miss World Contest in the name of Indian

³ AIR 1979 SC 185.

Culture. She opines that misrepresentation of women voice and identity should be curtailed legally. She interestingly build an opinion that a new school of jurisprudence should be evolved and good help can be taken from tribal customs which many a time guarantee more freedom and equality to women. However, she also cautions that codification of these customs would deprive them of evolution and would result in natural death. She concludes that new jurisprudence should evolve from human rights traditions, feminist critiques and tribal jurisprudence. However, one challenge, she finds is how to sensitize the legislature about the true understanding of culture, society and economy ‘with a vision of a future society.’

Flavia Agnes in her work “Law and Gender Inequality” has masterly carried out historical as well as legal perspective of gender injustices in Indian legal system. She critically studies the role of traditions and customs in ancient as well as medieval period for safeguarding the interests of fairer sex. She refuses to accept that Uniform Civil Code is the answer to all the problems the females are facing in Indian social and legal structure. She challenges that the so called Uniform Civil law is a modified adaptation of Hindu laws as envisaged by the colonial masters. She finds same patriarchal elements working in new laws framed for the protection of women. She argues that many a time even the women have emerged as the champion of older patriarchal values. She laments that in the name of Hindu laws, the customs and traditions were sacrificed. According to her the customs went a long way to protect the rights of women in a household. She compares how traditionally women were entitled to large amount of movable and immovable stridhana, but the same right was conspicuously absent in newly framed Hindu laws. She mocks that claim of woman’s

maintenance by her divorced husband as this maintenance is again based on the concept of sexual purity of the woman. She interestingly studies how monogamy has hampered the prospects of many women who are now not able to demand their legitimate share of maintenance from their husbands. She remarks that earlier, man was responsible for maintaining the second wife but now he is exempted from this as the second lady is at difficulty to prove that she is legally married in light of new limited code of Hindu marriage law. She finds that traditionally women rights were depended on the inalienability of certain property rights in a family, but the modern laws have made position of women more vulnerable. She aptly concludes that the legal system has to look for the dynamics in the modern society which is rapidly evolving and changing. Women are therefore also undergoing many changes. She stresses that Indian laws must address these questions and only then it can redress gender injustice.

Sudhir Chandra in his work “Enslaved Daughters” has studied a famous case of Rukhmabhai⁴ 2 of 1885 in which she later dared the society and law against becoming a property of her husband. He finds the wife Rukhmabhai against her husband Dadaji who had filed a suit for the restitution of conjugal rights against her wife. The author studied the response of contemporary liberal as well as conservative camp. He critically studies the law points involved in the case and how such arguments can force a lady go against her will to submit her physical and mental faculties before her husband. Through Rukhmabhai, the author in a way highlights the evils of the child marriage and how such marriages rob opportunity of education to the girls. She is forced into matrimonial alliance even before her maturity and as a result, the wife remained in perpetual confinement throughout her life. Though outwardly the study

⁴ Dadaji v. Bhikaji, IX ILR 529 (Bombay Series of 1885).

seemed confined to a case yet the work has raised many questions. The author has studied the question of widowhood and divorce in Hindu marriage laws. He finds the implications of English law being imposed on the Indian society which is guided by many customs and rituals. For example, he finds widow remarriage prevalent among many lower castes and even the mother of Rukhmabhai married Dr. Sakharam after the death of her first husband. He explores how restitution of conjugal right was implied in the minds of Hindu law makers yet its execution with the help of force, like in English law, was never even dreamt by ancient sages. On the wider horizon, the author has attempted to highlight the injustices a women face in the name of religion, culture and morality in a given society.

Shobha Saxena's work, "Crimes against Women and Protective Laws" is an exhaustive attempt on both empirical and theoretical aspect of crimes against women. Divided into nine chapters, this work deals with crimes ranging from rape, dowry, kidnapping, prostitution to domestic violence. She also makes critical analysis of The Indian Evidence Act, 1872, Criminal Procedure Code, 1973 and Indian Penal Code, 1860 with its biases against women. She laments that "the absence of support structure outside the institution of marriage may force women to bear crimes relating to marriage with stoicism." She also finds the long tenure of court cases acting as a deterrent to women. She remarks that there being no effective redressal system, the women are left to accept their exploitation silently. She finds that in most of the cases the law fails to study the circumstantial evidence. She quotes one such example where a husband is considered innocent if his wife did not complain against him. But at the same time if the burnt lady gives statement against her husband then the soundness of her mind is questioned. She quotes various

cases where man was acquitted inspite of circumstances going against him. She also finds social groups pressuring women to submit to their agonies. She studies many cases where the relatives of women acted as a deterrent because it would have brought stigma to family honour. She challenges the hypothesis between ‘outraging modesty’ and ‘attempt to rape.’ She finds that many a time, a culprit is charged only with Section 354 of Indian Penal Code whereas circumstances prove beyond doubt that he was out to commit rape (*Rameshwar v. State of Rajasthan*).⁵ She highlights how a bad connivance between culprit and police worked against the victim. She finds many a time, culprits putting pressure through threats to the victim. She advocates proper security system for the victim. She asserts that major social opinion and sometimes even the working of women organizations fail to safeguard the victim of sexual harassment. She concludes her work with many suggestions which may work in favour of women in seeking liberty and justice. She stresses upon the need for liberal and fast legal systems, more constructive women organizations, executive machinery should be made women sensitive and more female law officers should be inducted into the system. She finds immediate need to overhaul the rape laws. Rapes on children and adults should be differentiated and stringent provisions should be inserted to punish child rapists. She further finds the need to protect the victims so as to minimise their trauma and ensure justice to them. She suggests enhanced punishments in dowry deaths and circumstantial evidences should be given due consideration.

Zanab Banu in “Tribal Women Empowerment and Gender Issues” propounded the fact that gender differences are due to social and cultural factors. She begins with a hypothesis that every society has its own

⁵ AIR 1952 SC 54.

history, its own structure and therefore gender inequalities vary from Section to Section of the society. No doubt, this book has mainly concentrated upon the inequalities suffered upon by the tribal woman and her empowerment in the post-73rd Constitutional Amendment. However, she somehow draws the conclusion that the common status of the tribal woman can hardly be comprehended without taking into consideration the holistic situation of the tribal women viz a viz a woman in general.

In Embodiment Essays on “Gender and Identity”, edited by Meenakshi Thapan a study has been made to understand and explicate the women’s body, in both its material and representational aspects, in the context of different social, cultural and historical settings in the contemporary society. All the essays address, in one way or another, the questions relating to gender inequality which are revealed in the complex interplay between society and gender in every day life.

In Towards Equality Report of the Committee on the Status of Women in India (CSWI) has reviewed the impact of various legal and administrative provisions for women’s advancement and the current situation in all the sectors and taking into consideration all legal reforms, education and political rights. It suggests that these three institutions were designed in liberated India to realize women rights to equality. But it also laments that these three had failed to benefit the large masses of women who are affected by the problem of poverty and powerlessness, over-work and illiteracy. The committee has highlighted certain lacunas like adequate safeguards, equal social and economic distribution and certain male biases in the system and it finally recommends measure for reforms.

Justice J.N. Bhatt, Judge of Gujarat High Court, in his work, “Gender, Equality: Turmoil or Triumph?” has conceded gender equality

as a basic human right of woman. He has stressed the fact that gender relations needs to be measured in the context of participation and that it is the sharing of the important decision making process that result in inequalities. He concludes that gender based discrimination represents the ugly face of the society. He cautions that this issue is emerging as a major challenge and is one of the most all pervading forms of institutionalized deprivation.

(8) Objectives of the Study

1. To highlight the historical perspectives on the status of women;
2. To analyze the interface between domestic violence and human rights discourse;
3. To make a comparative study of the strategies to contain domestic violence in other western societies;
4. To examine the pre-enactment legal framework relating to domestic violence;
5. To make a critical assessment of the Act; and
6. To make suggestions for suitable changes in the policy.

(9) Hypotheses

1. Domestic violence against women affects human rights adversely.
2. The Protection of Women from Domestic Violence Act is conceptually flawed in the Indian context resulting in extreme incidence of domestic violence against women.
3. The inadequacy of the provisions of the Act may disintegrate the cohesiveness of family system.
4. The manner of implementation of the Act fails to answer the

current understandings of domestic violence holistically.

5. The Act is a mere adoption of western law out of tune with Indian cultural ethos and its established ideals resulting in systemic failures.

(10) Methodology

The study is both doctrinal and analytical in nature. The doctrinal part examines the theoretical bases and legal solutions offered to deal with domestic violence. The legal provisions of Protection of Women from Domestic Violence Act and law relating to female feticide are analyzed in detail and the problems and flaws therein are identified. The analytical part examines the need for culture specific treatment of the issue which is driven by family based culture of protection and care as an alternate mechanism to address the issue. The consequences of resort to criminal sanctions and alternate dispute resolution mechanisms in handling delicate familial matters are critically examined.

The relevant material is collected from primary and secondary sources. Apart from the statutes and judicial decisions, following are the sources: Scholarly books on domestic abuse in general and United Kingdom, United States of America and India in particular; Peer-reviewed papers in academic journals of various disciplines; Government publications, Reports and policy papers, relevant websites and databases newspaper articles, newsletters and domestic violence manuals and guidelines.

(11) Scope and Limitation of the Study

The study is an analysis on conceptual adequacy of Protection of Women from Domestic Violence Act, 2005 in comparison with the socio

cultural realities of India .The study starts from a historical analysis as to the perpetuation of gender inequality in Indian and western jurisdictions. The international perspective or overview of international developments in the field of acknowledging the problem of domestic violence against women is analysed being the major premise of the study. In order to understand the Indian legal structure concerning domestic violence, a survey of the available existing legal options is made. The different kinds of laws and strategies, and their advantages and disadvantages are to be explored in the Indian cultural context which is the next task taken up in the study. The research evaluates the impact of major legislations on the positions of the women enduring domestic violence in general legal regime. The study deals with the working and problems of the Act in the Indian cultural set up, the motivations and legal remedies guaranteed. A brief overview of United States and United Kingdom models are done to show the contrast and extent of the acknowledgment of the issue in developed countries. The major task undertaken through the study is to find out the loopholes existing in the present Indian legal scenario to combat the issue and suggest suitable recommendations in consonance with the specific Indian cultural values to overcome the same. The study ascertains the problem areas and challenges in the working of the Act.

The focus is limited to a doctrinal study on the topic because of the inherent limitations in attempting an empirical study. Moreover the non-reliable data is likely to come forth in, on the issue of domestic violence as it will be viewed as an invasion into familial privacy. Exhaustive case illustrations on domestic violence are not decipherable from the judgments that have been rendered by the courts in India. The law and practice of domestic violence in United States of America and United Kingdom is discussed briefly and the comparative analysis is made with

giving only a cursory glance and not a comprehensive one, due to the existence of variety of laws on the same issue in different jurisdictions within the same countries. While discussing the issue of domestic violence, the law, its implementation and the outcome is the only ambit of the study. The multidimensional plight of the victims including physical and psychological impact of domestic violence on women and children is analyzed to the extent of concern of access to justice and not from a medico-legal point of view.

In short, keeping these limitations and theoretical framework in mind, this research study attempts to review the historical and philosophical trends of domestic violence in India, the existing legal remedies to combat the problem of domestic violence, the changed situation with the advent of the new Act on domestic violence and to enquire upon as to what extent the Act serves its purpose.

CHAPTER -1

ORIGEN AND DEVELOPMENT OF DOMESTIC VIOLENCE

1.1 Position of Women in Indian Society

“Insult to women is indignity to nature”

(Brahma—vaivarta Prakriti Kanda)

Where the women are held in reverence, there do the Gods reside, is an old Sanskrit adage. A society grows if the women grow, if they partake of the spirit of progress for they are the proverbial domestic legislators, they are the matrix of social life.

Domestic violence against women is not confined to any particular political or economic system, but is prevalent in every society in the world and cuts across boundaries of wealth, race and culture. The power structure within society which perpetuate domestic violence against women are deep rooted and intransigent. The experience or threat of domestic violence inhibits women everywhere from fully exercising and enjoying their human rights.⁶ The underlying cause of domestic violence against women lies in discrimination, which denies women equality with men in all areas of life. Domestic violence is both, rooted in discrimination and serves to reinforce discrimination, preventing women

⁶ Amnesty International, 2004, It's in our hands Stop Violence Against Women, London: Amnesty International Publications, p.2.

from exercising their rights and freedoms on a basis of equality with men.⁷

The United Nations Declaration on the Elimination of Violence Against Women states that 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 that “violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.⁸

Domestic violence against women is an expression of historically and culturally specific values and standards. Social and political institutions may foster women’s subservience and violence against them. Certain cultural practices and traditions - particularly those related to notions of purity and chastity - may be invoked to explain or excuse such violence.⁹ In every part of the world, women’s roles and positions in society are prescribed. One of the key aspects of every culture is the way it defines gender roles. Almost without exception women are assigned roles, which are subservient to those of men. Virtually every culture in the world contains forms of domestic violence against women that are nearly invisible because they are seen as “normal”.¹⁰

Wife abuse is a personal violence, but it is also structural violence that has its roots in historical attitudes toward women and in the institution of marriage. It involves the control of women by men who

⁷ Ibid. at p. 5

⁸ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48 Sess., Supp. No.49, U.N. DOC, A/48/49 (1993) available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/A.RBS.48.104.EN?opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.RBS.48.104.EN?opendocument) (last visited May 20, 2004).

⁹ Amnesty International, 2004, *It’s in our hands Stop Violence Against Women*, London: Amnesty International Publications, p.6

¹⁰ Ibid. at p. 29.

have defined the parameters of women's activities and enforce a male standard of accepted "feminine" behaviour. It is the product of the patriarchal system - of religious dogma, law, and behavioural science - that makes male supremacy seem sacred, just and natural. These institutions have not only endorsed the husband's authority in the home, but also his use of physical force to punish a disobedient wife.¹¹

1.2 HISTORICAL DEVELOPMENT

In India, till the advent of the turks Indian women enjoyed great freedom and prestige, but due to certain social, economic and political exigencies and the unhappy impact of alien ideologies, inhuman restrictions clamped upon them, they were relegated to a position of servility and insignificance and they were burdened with several taboos and restrictions. Indian society has been a tradition bound society in which the traditionalists would present an idealised picture of women substantiating their claims on the basis of certain references from the vedic and classical literature.¹²

A proper assessment of Indian women necessarily involves a brief resume of the cultural background of Indian women through the ages. Unlike her western counterpart, the Indian woman is part of a culture which goes back into the past. If she has a particular conviction or acts in a specific manner, it is due to the pattern that has been ingrained in her by the fairly stable social structure of a thousand years.

The highest place has been accorded to women in Indian religious and philosophical thought. The primordial one is conceived as a harmony

¹¹ Del Martin, 'The Historical Roots of Domestic Violence', in Sonkin Daniel Jay (ed.), *Domestic Violence on Trial* (New York: Springer Publishing Co., 1987), p.4.

¹² Sood, Sushma, *Violence Against Women*, (1990), p. xi.

of ‘purusha’ (male) and ‘prakrati’ (female). The concept of ‘ardhanarishwara’ describes god—head as half female and half male. The ‘Shakti’ cult is centred around the superiority and destructive strength of the females. Rivers and streams, dawn and twilight, flowers and seasons, knowledge and music are conceived of as feminine.

The position of power, status and disabilities of the daughter, the wife, and the widow went on changing in course of time. Women enjoyed considerable freedom and privileges in the spheres of family, religion and public life, but as centuries rolled on, the situation went on changing adversely. The position which women occupied in Hindu society at the dawn of civilization during the vedic age is much better than what we ordinarily expect it to have been.

1.2.1 WOMEN IN HINDUISM

(A) Women in Vedic Period

The elevation of the feminine principle pervades vedic thought. The social structure in the vedic period admitted the equality of women. Hymn XXI of the Rig Veda extols the virtues of women as even greater than those of men.¹³

There is not one verse, not even a word indicating a slighting humiliation or an insult for women in the vedas. Instead, women are friends in life’s journey, creator, mentor, guide and partners in all fields. The very word ‘Mahila’ is made up of the root which means the repository of greatness and goodness. There is no such word as Mahila in any language, European or Asian.

¹³ Khanna and Verghese, *Indian Women Today*, (1978), Chap. 1.

Throughout the vedic period, woman was given a status equal to man's to participate in sacrificial rites, to undergo the investiture ceremony, and to be man's equal in upholding 'dharma'. She could fight wars, join in festivals, take part in philosophical discussions like Gargi and Maitreye, or even remain unmarried if she so desired.¹⁴

In the vedic period women participated in all the fields like men and took active part in every sphere of human life. During that period, women enjoyed a fair amount of freedom and equality with men. Women studied in Gurukul and enjoyed equality in learning vedas. For a long time, girls in higher societies were allowed to undergo upnayana rite. The great women like Ghosa, Apala, Lopamudra, Visvara, Gargi, Atreyi, Indrani, Yami and others had distinct qualities of art, music, dance and even fighting in the battle. Purdah was not in the vedic period. In the matter of selecting the life partner in marriage, women had equal rights. The example of polygamy was rare and mainly confined to ruling class. Dowry system was prevalent in rich and royal families only in the form of movable gifts. A widow could marry again or could undertake the recourse of liveratge (niyoga). The Indus Valley Civilization recorded the beginning of the cult of worshipping earth or goddess. But there still were certain restrictions on women's right. In vedic times, there was no discrimination between boy and girl. There were two classes of girls :

- (i) The Brahm—vadini students, who donned the sacred thread, constant reminder of the holy vows, tend the fire, and study the vedas, but in distinction from the boy students, do the begging for alms within their own parental homes, and

¹⁴ Ibid.at p. 1.

- (ii) the Sadyo Vadhey who are given only symbolically and formally immediately before marriage. Men used to regard women as partners in managing the affairs during the Grihastha, Vanaprastha and Sanyasa Ashram in life and consequently women enjoyed a quality of life comparable to that of the men.¹⁵

In order to understand the position of women in Vedic period, let us consider a few aspects of the Indo—Europeans who were the antecedents of the Rigvedic age. Griswold has given us the following picture:

The outlines of the present family system were already in existence, the father being the head, and the son's wife being adopted into the clan of her husband. It was the joint family system, the primitive names indicating that the family consisted of a man and his wife and children, his brothers and their families, his sons and their families, besides the old people, grand father and grand mother. The authority of the head of the family was unlimited. He had the power of life and death. Sons were greatly desired as warriors, avengers of blood, performers of funeral rites, and as a means for the continuation of the clan. There was, owing to the chronic warfare of the time, usually a dearth of men and superfluity of women. Hence, girl infants, as not needed, were often exposed. Old people, too, were frequently put out of the way, especially in time of need. The joint family coffer was controlled by the head of the family. Primitive Indo—European marriage was by purchase or capture. The lot of wife was not easy. She was more or less a beast of burden. Her mother—in—law ruled her with an iron hand. Separate dining of the two sexes was a primitive custom. There were also traces of “sati”, the custom of a wife voluntarily accompanying her husband in death, also of a

¹⁵ Dewan, V.K., Law Relating to Offences Against Women, (1996), P. 32.

distinct prejudice against the second marriage of widows. The brother was the guardian of the honour of his sister, and after the death of the father, an unmarried sister came under his authority. Indo—European antiquity was dominated by the idea of the necessity of marriage. It was so indispensable that unmarried dead were sometimes even married ritually to the living, so that they might be provided for in the life to come. The future comfort of the dead husband was the primitive idea of “sati”.....Griswold further says that during pre—vedic period monogamy was the rule, polygamy the exception. As between different clans, probably exogamy was the custom.... The wife as purchased was the property of her lord and master. Hence, marriage was later called the lordship (patitva) of the husband over the wife. Accordingly, there was a double standard of morality.¹⁶

J.J. Mayer states that “the veda knows nothing of any hetaerism”.¹⁷ They had a well ordered family, although there is “abundant evidence that the standard of ordinary sexual morality was not high”,¹⁸ still the marriage tie was not lightly regarded.¹⁹

Nevertheless despite polygamy, which lowered the status of women on the whole it would seem as though the normal vedic household had one husband and one wife. The Vedic Index says that “a vedic Indian could have more than one wife.... but the evidence points to the wife first wedded alone being a wife in the fullest sense”.²⁰ Wife was on “a level of equality, at the hearth, which was the alter of sacrifice”. It was wife’s duty to prepare the sacred vessels.

¹⁶ Griswold, *The Religion of Rig Veda*, (1923), pp. 7, 9, 10.

¹⁷ Meyer, *Sexual Life in Ancient India*, I, (1930), p. 124.

¹⁸ Macdonell and Keith, *V. I, I*, (1912), p. 480.

¹⁹ Griswold, *R.R.V.*, (1923), p. 10.

²⁰ Macdonell and Keith, *V. I, I*, (1912), p. 478.

During Rig Veda, married women enjoyed a place of dignity, the new wife's position within the joint family system was secure. The marriage ceremony presented the high status of the bride. Wife was not an object of subjection in the new home, but was afforded an equal status, indeed one of high importance.

Although women seem to have been on a level of equality at the hearth, boys were preferred over girls, while sons were prayed for, daughters were not. It is stated in Black Yajur Veda (i.i.6.4) that the birth of a daughter may be avoided by not spreading a bunch of sacrificial grass in all directions. There is no intercession made for daughters.

It was important for the father to have a son. If father had a daughter, but no sons, he could appoint the daughter's son "to perform his funeral rites".²¹ Sonlessness is placed on the same level as lack of property. Heinrich Zimmer says that nowhere in the vedic songs do we find a wish for a daughter.

However, A.A. Macdonell points out that "the Yajur Veda speaks of girls being exposed when born".²² Farquhar also reminds us that "since the father was supreme and since every family wanted sons, there was a tendency to set less value on woman. In consequence, many girl babies were exposed or put to death in every race practising ancestor worship".²³ In the creative period of the Vedas, Farquhar draws the conclusion, "like most primitive peoples, they practised the exposure of girl children and old people".²⁴ He says that this custom existed down to 1830, because

²¹ Griffith, R.V., 1, (1920), 347 n.

²² Macdonell, H.S.L., (1929), p. 163.

²³ Farquhar, PH., (1912), p. 18.

²⁴ Ibid., p. 22.

from that date onward, “a steady persistent crusade was carried on against female infanticide by the Government of India.”²⁵

There is no trace in the Rig Veda that women were secluded as inferiors. The vedic index says that “the maiden may be assumed to have grown up in her father’s house—sharing in the work of the house”.²⁶ She is believed to have mingled freely with the growth of the village. The vedic index also states that “women did not go to the Sabha i.e. assembly, for they were of course excluded from political activity”.²⁷

Macdonell and Keith summarize the dependent state of women in the Vedic documents:

“women could not take on inheritance, and were not independent persons in the eyes of law, whether married or not. Presumably, before marriage, they lived on their parents or brothers, and after that on their husbands, while in the event of their husbands predeceasing them, their relatives took the property, burdened with the necessity of maintaining the wife. Their earnings would be appropriated by their nearest relative—usually father or brother—in the few cases in which unmarried women could earn any thing, as in the case of courtezans If the father was dead or feeble, the sister was dependent on her brother and on his wife”.²⁸ Brotherless maidens seem to have had a hard time of it. They were likely to be ruined physically, although the Rig Veda states that ‘religious terrors would await the man who took advantage of such a woman’.

Ancient sacred writers of Vedic age knew nothing of child marriages, of unhappy, unfair present day marriages, of widow burning,

²⁵ Ibid., p. 165.

²⁶ Macdonell and Keith, VI, II, (1912), 485.

²⁷ Ibid., p. 427.

²⁸ Macdonell and Keith, V.1, II, (1912), 486, 496.

or the pathetic heart—rending sorrow of so many present— day Hindu widows. They were unaware of “purdah”, the seclusion of women, with its attendant ravages of disease. On the whole, however, considering the primitive age in which these people lived and the fact that, polygamy, prostitution, and even incest were recognized to have existed, it seems a remarkable fact that a high moral strain in family organization did run through the early Aryan civilization, an influence that gave to woman generally a status of some dignified consideration. R.W. Frazer declares that ‘there is evidence from the Rig Veda that women in vedic times occupied a far higher position than they did in their ancestral homes or even in later days in India’.²⁹

In the latter part of the vedic period, the law-maker Gautama described eight different kinds of marriages, giving latitude in the choice of spouse both to men and women. Inter-caste marriages were permitted. The lower the caste, the more liberal were the rules. A girl who was not given in-marriage at the proper age had the liberty to choose her own life partner.³⁰

Widow re—marriage by the niyoga form was permitted where by a widow could wed her brother—in—law or a man belonging to her husband’s caste. This, however, was more to maintain the family institution, than as a special licence for the sex life for a widow.³¹

Ordinarily, girls were less welcome than boys but nevertheless girls were educated like boys and had to pass through a period of Brahmacharya. Many of them became distinguished poets, who composed hymns themselves. Some of them were mentioned in Rig

²⁹ Frazer, I.T.P.P., (1915), pp. 278-79.

³⁰ Khanna, Girija and Varghese Mariamma A., Indian Women Today, (1978), pp. 1-2.

³¹ Ibid. at p. 2.

Veda, Lopamudra, Visvavara, Sikata Nivavari and Ghosha. Many of them specialized in purvamimansa, which discussed the diverse problems connected with vedic sacrifice. Leelavathi assisted her father Bhaskaracharya who was an eminent mathematician. Khana, a woman, was a great astronomer of her times. The Bhagvata refers to two daughters of Dakshayana as experts in theology and philosophy.³²

Decidedly, during vedic times, the women could fight back with violence as in the Mahabharata or with non—violence as Sita does in the Ramayana. But she never reconciled with evil as our women do today in the name of modesty or modernization.³³

(B) Position of Women in the Brahmanas

The Brahmanas are the set of literary documents subsequent to the four vedas. These are the earliest Indo—European prose writings now existing. They are extremely valuable, as they are a source of one of the most important periods in the development of India. In them we learn of the social life of the period between the Vedas and the Upanishads. The Brahmanas represent the ideology of a sacerdotal caste which played upon the natural religious instincts of the Hindus. The clever Brahmanas managed to control the people. Primarily; the priests realized they must control women. In this respect, they had much to overcome. There was the early worship of goddesses with which to reckon, likewise woman's sex nature giving her the power of motherhood, had to be reckoned with. Her freedom was a hindrance to the power and domination of the priests. The Brahmanas felt that this must be conquered so with verbal agitation, they succeeded in lowering the position of woman. They considered her

³² Ghosh, S.K., *Indian Women Through the Ages*, (1989), p. 4.

³³ Sinha, Niroj, *Women and Violence*, (1989), p. 47.

an inferior creature without a mind, with a heartless cruelty they decided that gradually even religious rights must be taken away from woman.

The priests saw to it that their directions for worship contained a tremendous overemphasis on the physical aspect of womanhood. The Brahmanas are filled with passages of explanation regarding sexual matters. Also, the necessity of male offspring for salvation was stressed emphatically. The Brahmanas emphasized the natural desire for a son, now not alone for the idea of ethical and personal immortality, but for the transmigration of souls. A son begotten became involved in the idea of salvation. Such desire was one factor which increasingly helped to bring about unfortunate child marriages, with all the accompanying misery.

*Since now, men desire a son,
Both those that have and those that have not knowledge,
What doth a man gain by a son?
Tell me that, O Narada.
A debt be payeth in him
And immortality he attaineth,
That father so seeth the face
Of a son born living.
The delights in the earth,
The delights in the fire,
The delights in the water of living beings
Greater than these is that of a father in a son.
By means of a son have fathers ever
Passed over the deep darkness;
The self is born from the self
The (son) is (a ship), well—found, to ferry over . .
Seek a son, O Brahmanas,
This is the world's advice.*

*Food is breath, clothing a protection,
Gold, an ornament, Cattle lead to marriage.
A wife is a comrade, a daughter, a misery (Kripanam)
And a son, a light in the highest heaven
A sonless one can not attain heaven”.*

(Aitareya Brahmana 7.13)³⁴

Even during the period of Brahmanas, there were evidences of respect for woman. The views of all men with regard to all women could not be dominated by the priest. Some men insisted upon worshipping the power of motherhood. In the Brahmana literature, the women speculate and argue with men, just as Draupadi does in the Epic. In the Brahmanas, women were not all together excluded from religious sacrifices.³⁵ But religious observances were allowed to maidens primarily for the purpose of securing a husband. The Satapatha Brahmana states that a daughter who has been given in marriage by her father must remain faithful to her husband. When Sukanya is reminded of her decrepit, ghostlike husband and she is urged to leave him, she replies:

“To whom my father has given me, him will I not abandon, as long as he lives.

(Satapatha 4.1.5.9)³⁶

Despite a lowered estimate of women in the Brahmanas, reverence for goddesses persisted in sacredotal documents. Despite his praise for goddesses and the implications that both gods and goddess were necessary and important. The following verse in the Satapatha Brahmanas

³⁴ With reference from Pinkham, M.W., Women in the Sacred Scriptures of Hinduism, (1941), p. 55.

³⁵ Farquhar, PH., (1912), pp. 167-68.

³⁶ Eggeling, Julius, Sacred Books of East, XXVI, (1900), p. 274.

shows that great care was taken to establish pre—eminence of the male among gods and men:

“To the male (deity) he makes offering first, then to the females To the male (deity) he makes offering both with the Vashat— call and the Svaha—call to the female (deities) only with the Svaha. He thereby endows the male pre—eminently with power”.

(Satapatha 9.4.1.6)³⁷

Priests declared that women are inferior to men, they are dependent on men and must be obedient to husband. The Brahmanas repeated the declaration in the Rig—Veda (10.9.5.15).

“Truly there is no friendship with women, and theirs are the hearts of hyenas”

(Satapatha 11.5.9).³⁸

The most important of the priestly documents re—emphasizes the low estimate of woman.

Women are given to vain things It is t him who dances and sings that they most readily take a fancy (Satapatha 3.2.4.6).³⁹

Perhaps these Brahmanical writings did not report the full story of the life of those days in so far as the wishes of the majority of people were concerned regarding the “feminine”. It is likely that many women did not realize at the time that some religious leaders were trying to subjugate womanhood. Much of the spiritual freedom which Hindu

³⁷ Eggeling, Julius, Sacred Books of East, XLIII, p. 230.

³⁸ Eggeling, Julius, Sacred Books of East, XLIV, pp. 71-72.

³⁹ Eggeling, Julius, Sacred Books of East, XXVI, p. 53.

woman had formerly possessed was wrested from them in the Brahmanas.

(C) Women in Upanishads

The Hindus' love of philosophic speculation is dominant in the third set of sacred scriptures, the Upanishads, where even women display interest in philosophic discussion. Some Hindu women as Uma, Gargi and Maitreyi were notable for their learning as is evidenced by the philosophic disputations reported in the Upanishads. Gargi even out questioned and out—wearied the Chief Philosopher of the Upanishads, Yajnavalkya. Maitreyi was a discourses on sacred knowledge (Brahmavadini).

In the Upanishads, woman is referred to as having been created by the primeval being. Brihad—Aranyaka says that 'a man's wife is his voice' (His mind truly is his self (Atman) : his voice is his wife).

As in the Brahmanas, so also in the Upanishads, there are instructions regarding sexual matters. There is explicit justification of forcible sex—violation of a woman by a man.

The universal unitary reality, which constitutes the central concept of the Upanishads is identified with various powers, both human and divine. It is identified with "a woman and the maidentoo".

(D) Women in the Laws of Manu

It is Manu's code that has had the most negative effects on Indian women for countless succeeding generations. Even today, it is his laws which keep millions helpless in the prison of Hindu orthodoxy. Manu for the first time legally assigned to woman her definite place in the scale of

society. But his laws reflect a conflict even within himself between his valuation of woman as a spiritual entity on the one side and as a unit in society on the other. He averred that a mother is more to be revered than a thousand fathers, yet his laws place woman socially on a level with the lowest of all groups in Aryan society, the Sudra.⁴⁰

Manu enumerates many laws directing a wife's conduct—he says that a wife must show to her husband such utter devotion that he must be treated like a God, even when he is conspicuously lacking in virtue. No sacrifice, no vow, no fast must be performed by women apart (from their husbands). If a wife obeys her husband, she will for that (reason) be exalted in heaven. In childhood, a female must be subject to her father, in youth to her husband; when her lord is dead, to her sons. A woman must never be independent.

The laws of Manu state that women were created to be mothers and that they may perform religious rites along with their husbands. Yet there are some passages which deny to women the privilege of offering sacrifices.

“Neither a girl, nor a (married) young woman, nor a man of little learning, nor a fool, nor a man in great suffering, nor one uninitiated, should offer an Agnihotra”.⁴¹

With regard to the status of daughters, Manu says the sale of a daughter is forbidden. He also secures property rights of daughters not only from her father's estate but also from the separate property of her mother.

⁴⁰ Das, Purdah : The Status of Indian Women, (1932), pp. 27-28.

⁴¹ Das, AC., Rigvedic Culture, (1925), p. 492.

Concerning betrothal regulations, Manu says that daughter should be given in-marriage by her father at proper time, she should be given to a distinguished, handsome, boy of the same cast, he further says that a girl of marriageable age should rather stop in her father's house until death than to be given to a man destitute of good qualities.

Failing a son of his own, a father may appoint a daughter's son to perform funeral rites. An appointed daughter is equal to a son, and is entitled to an inheritance. Child marriage is permitted for a girl even as early as the age of eight.

“A man aged thirty years, shall marry a maiden of twelve who pleases him, or a man of twenty-four, a girl eight years of age. If (the performance of) his duties would (otherwise) be impeded, (he must marry) sooner”—9.94. So far as punishment is concerned, there is no distinction on the basis of sex. Corporal punishment is prescribed for offenders, even women, according to the laws of Manu. “On women . . . the king shall inflict punishment with a whip, a cane, a rope, and the like”—(9.230).

More than once in the Laws of Manu, women and low caste Sudras are bracketed together, but he also expressed a notably high appreciation for worthy women. Knowing their disposition, which the Lord of Creatures (Prajapati) laid in them at the creation, to be such (every) man should most strenuously exert himself to guard them—(9.15—16).⁴²

Manu's social codes and sanctions left their marks permanently on the future status of the Indian women. Manu clamped down women's freedom in certain spheres in order to safeguard their position and to

⁴² With reference from Pinkham, M.W., *Women in the Sacred Scriptures of Hinduism*, (1941), pp. 71-91.

preserve the family structure. Manu's famous dictums "a woman must be her father's shadow in childhood, her husband's in her youth, her son's in old age" is too well known.⁴³ The tenets of Manu have fostered a deep rooted belief in the intellectual and otherwise inferiority of women. He says that women should never be given independence. He equated women with slave and his laws epitomize complete submission of women to men and there are still the sanctioned codes of conduct ascribed for and by and large accepted by women.⁴⁴

But Manu was not a woman hater, for it was Manu who said in Manu Smriti that—

यत्र नायूर्यस्तु पूजयन्ते रमन्ते तत्र देवता ।

यत्रैतास्तु न पूजयन्ते सर्वास्तत्राफलाः क्रियाः ॥

The home where there is respect for women is like the abode of gods but where that is not so, all other forms of worship are fruitless.

सन्तुष्ये भार्यया भर्ता भर्त्रा भार्या तथैव च ।

यस्मिन्नेव कुतो नित्यं कल्याणं तत्र वै ध्रुवम् ॥

Blessed are the houses where women are happy with their men and men are happy with their women and they will surely prosper.

स्त्रियां तु रोचमानायां सर्वं तदोचते कुलम् ।

तस्यां त्वरोचमानायां सर्वमेव न रोचते ॥

If the lady of the house is happy, the whole household will be happy, but if she is not nothing else would give delight.⁴⁵

⁴³ Khanna, Verghese, Indian Women Today, (1978), Chap. I.

⁴⁴ Sood, Sushma, Violence Against Women, (1990), p. 37.

⁴⁵ These quotations have been taken from the book of Atray, J.P., Crimes Against Women (1988).

Manu vehemently opposed the purchase of a woman. He never gave legal sanction to such a marriage. He recognized the adoption of girl child as putrika which conferred on her all the rights of a son. Manu brought down the age of marriage for a girl and advocated child marriage, though he warned fathers not to give away their daughters to men devoid of good qualities.

Though polygamy was practiced, he strongly advocated monogamy and attached the greatest importance to sexual restraint and fidelity to one's spouse. He 'laid down different rules even for a man contemplating separation. A woman deserted by her husband was given the right to marry after the lapse of a certain number of years. Thus, Manu was the principal law-maker of the conservative Hindu period. His prime objective was to safeguard the interests of the family and society at the expense of individual liberty.⁴⁶

Thus, the laws of Manu, as do all the earlier documents of Hinduism show various attitudes, both appreciative and depreciative, towards women.

(E) Women in Puranas

In the period of later smritis, women were declared to be of the same status as that of the Sudras, and so came to be gradually excluded from the study of higher theology and philosophy. Since by nature women are more religious than men, a new type of religious literature was evolved to meet their religious needs and aspirations. This was Puranic literature. It enunciated the principles of Hinduism in a homely,

⁴⁶ Khanna, Verghese, Indian Women Today, (1978), p. 2.

easy and attractive manner, illustrating them with a number of edifying stories.⁴⁷

The Puranas, eighteen in number are religious stories or “ancient tales”. They belong to popular Hinduism. There is a combination of praise and blame for women. In spite of prohibitions laid upon the feminine, there is outstanding praise of goddesses, who in the Puranas occupy a position of great importance. The idea of goddess being the Shakti, or energy of her husband took definite form in Hinduism. But in some verses, the association of womanhood with deification is scarcely recognized.

(F) Women in Mahabharata

Mahabharata, the great epic depicts the social life of India. Macdonell, the eminent Professor calls the Mahabharata “a moral encyclopaedia in Indian literature”. In this heroic age the poets of Mahabharata portray, on the whole, womanhood which was noble, intelligent and active. In this document, we see woman in the home, at court, on the battlefield, and in intellectual and spiritual capacities. Although in some of the earlier Hindu documents, women are sometimes pictured as helpless females. In the Mahabharata, we find many accomplished women, they are not only beautiful in appearance, but they possess real tact and graciousness of character.

In Mahabharata women are not only pictured as beautiful, mild, tender and long suffering but there are also women of energy, strong will and daring pride. The Mahabharata quite clearly shows that Kshatriya women are not veiled. In the Epic, women may have an important share

⁴⁷ Altekar, A.S., The Position of Women in Hindu Civilization, (1995), p. 357.

in the events of their time. Queen Gandhari appears in the Council chamber. In a passage in the Mahabharata, we note that where there are no male heirs, maidens shall be made rulers.

In Mahabharata, there is the highest praise for women and at the same time the bitterest denunciation. Despite prohibitions which the priest attempted to enforce upon the women of the epic, on the whole, these women stand out significantly. They are resolute and spiritual. They are not isolated but are in close contact with the events of their time. They are capable and serviceable members of society. As a matter of fact, the epic seems to have produced outstanding portraits of women, which have helped to stir Hindu women with hope and faith.⁴⁸

(G) Women in Ramayana

Just as Mahabharata has been termed “the odyssey of the Hindu”, so the other epic of ancient India, the Ramayana of Valmiki has been characterized as “the Iliad of the East”. The Ramayana is one of the most effective of all Hindu sacred writings. In the laws of Manu and in the Mahabharata, it is taught that a wife should reverence her husband, as if he were a veritable deity. This teaching is reaffirmed in the Ramayana.

The dependence of a woman upon her husband, son and relatives is continued from the antecedent laws of Manu. A wife’s service to her husband is taken as the best method of attaining heaven. The Ramayana reaffirmed the deep—seated Hindu conception that husband is a woman’s greatest deity.

⁴⁸ Ibid. at pp. 138-66; See also Dutt, MN., A Prose English Translation of the Mahabharata, 18 Vols., 1895-1903.

In estimating the value for womanhood of this epic poem, there is divergence of opinions. The unsupported suspicions concerning the character of womanhood which were expressed by the revered Rama have not helped forward the ethical progress of womanhood in India. Polygamy was in practice and women were humiliated publicly. There were over-emphasis on the physical aspect of womanhood.

The influence exercised by the Ramayana upon the Hindus, reaching down to the lowest strata of society is, . . . immense. The character of Sita has become the grand example to Hindu women as the embodiment of purity, chastity and wifely fidelity. She has furnished Hindu ladies with the highest and noblest conception of their duties in their various and manifold relations in life.

The sacred scriptures of Hinduism show women from infancy onward her varied relationships to mother, father, sister, and brothers, to husband and husband's family, to her children, to her home and to the community in which she lives as widow, as slave, as teacher of men, as wielder of power, Meyer asserts that as a loving wife and tender mother, woman has nowhere else found greater and more heartfelt appreciation than in old Indian literature.

However, many portions of Hindu sacred scriptures have not contributed to the appreciation of women but rather have caused real degradation. Hindu women were denied freedom of thought. According to certain sacred scriptures, her husband, however evil he might be, nevertheless is to be revered as her God . Desire for sons in order to continue religious observances of ancestors has been responsible again and again for child marriages. Such unions have often caused tragic mortality among young girls. One of the causes of female infanticide

undoubtedly has been the fact that so often daughters have been considered of little value.

Laws of Manu declared that a mother should be revered a thousand times more than a father but a woman has also been mentioned along with the Sudras. The prohibitions against the re—marriage of widows by Manu has been responsible for the pathetic condition of many Hindu widows. Even today, their desolation is often pitiable, especially that of the child widows. Education was denied to girls. A Hindu husband used sacred scriptures as sanction to repudiate his wife unjustly. Manu permits a husband to strike his wife with a rope. The sacred scriptures have been responsible for much misery suffered by Hindu women in centuries past, even today, they exert a tremendous influence.

In the sacred scriptures of Hinduism, there are many elements of strength too with regard to womanhood. There is praise and admiration for the feminine. In the early vedas, we find a deep reverence for the mother, she had the privilege of giving religious instructions to her children. Monogamy was practiced generally and in many cases, a girl was allowed the choice of a husband. Widows could remarry. Wife burning is not found in vedas. Again and again, the Hindu scriptures repeat that women are to be honoured. Religious deeds are said to be useless if women are not honoured and cherished. Hindu sacred scriptures support the ideal of equal comradeship and mutual benefits for men and women.⁴⁹

1.2.2 WOMEN IN BUDDHISM

Buddhism rose as a protest against the rigid rules of Brahmanism. In the post-vedic period, the dominance of rituals increasingly grew,

⁴⁹ Pinkham, W.S.S.H., (1941), pp. 187, 189-90.

which gave indomitable power to the Brahmanism. Buddhism opened the doors of religion to all human beings without any distinction. Buddhism is in its essence, a religion of self-culture and self-restraint. If a woman could achieve these two qualities, she was entitled to achieve Nirvana like men. Thus, after a long period, since the dissolution of the Vedic society, the doors of religion were once again opened to woman and her right to salvation proclaimed.

The advent of Buddhism saw a welcome change in women's position in the society. It allowed women the freedom to be educated, to travel as missionaries or even to remain unmarried.⁵⁰ The admission of women to the Buddhist order gave a great impetus to the cause of female education in aristocratic and well-to-do families, like Brahnavasinis in Brahmanical circles. Sanghmitra, daughter of emperor Ashoka was the first missionary undertaking the long and perilous journey by road to a part of east coast and thence by sea in order to carry the message of Buddha's teachings to Ceylone. One of the great twenty-four Thirthankars, the great teacher of Jams was Malli, a princess of Videha, later known as Mallinath.

Several women from Buddhist families used to lead a life of celibacy and became teachers of Holy Scriptures and philosophy. Among the authoresses of the Therigatha, who were all believed to have obtained salvation, 32 were unmarried women and ten married ones. Among the former Subha, Anupama and Sumedja belonged to well to do families. A Jam Jataka refers to the story of a Jam father having four highly educated.

⁵⁰ Khanna, Verghese, Indian Woman Today, (1978), p. 3.

daughters moving from place to place in the country challenging everyone for a debate on philosophical matters.⁵¹

As far as lay women were concerned, their condition was also not bad when Buddhism was dominant in India. There are references which show that the birth of a daughter was not regarded a calamity.⁵²

The religious harangues of Sakka and the philosophical discussions of Khema and Dhammadinny reveal what high intellectual capacities women can manifest when given freedom and opportunity for development. The age of marriage is generally believed to be between sixteen and twenty. The relation of the husband and wife is that of mutual respect, though the status of the former is superior. If the unmarried daughter wishes to join Buddhist order, the consent of both parents was required. The right of divorce was given under certain conditions.

The presence or sight of a widow was not considered inauspicious. Though, only one instance of widow remarriage has been recorded, this might be due possibly to the fact that widows used to join the order and so had no need to remarry.⁵³

Though, woman according to Buddhism, can reach the highest state, she is however considered inferior in status to a male Bhikkhu. In spite of this distinction, Buddhism brought great freedom and equality for woman in the sphere of religion, till now a closed circle for the elite. Now, any woman could enter it. Even the prostitutes were admitted in the

⁵¹ Ghosh, S.K., *Indian Women Through the Ages*, (1989), p. 4.

⁵² Harner, LB., *Women Under Primitive Buddhism*, n.d., pp. 19-20.

⁵³ *Ibid.*, at p. 75.

Buddhist order and therefore Amrapali decided to join the order rather than live the life of a courtesan of the whole city.⁵⁴

Nuns continued to figure in the Buddhist and Jain monastic life down to the 3rd Century AD but do not seem to have distinguished themselves as authors or poets. The institution of nunnery went out of vogue in Buddhism and Jainism from about 4th Century AD.

Though Buddhism accorded high status to women, it also considered woman an evil to be avoided by men. This was probably due to the austere measures of the Buddhist high priests for their menfolk. The jataka tales are full of long passages describing the evil and vile nature of women.⁵⁵

Summing up, it can be said that in the initial stages, when corruption had not crept in the religious world of Buddhism, it worked as a powerful democratic force against the narrow outlook of the Brahmanic culture pattern that was slowly emerging. The right of admission to the religious order generated self-confidence among women. “With the growing perception that their life was worth as an end in itself, there was liberated a spirit of independence in women and for women”.⁵⁶

1.2.3 WOMEN IN CHRISTIANITY

The Book of Genesis states that God made man as male and female. So no differentiation in rights or status is required. Yahewh or God said, “it is not good that men should be alone. I will make him a help mate”. So he fashioned woman as the help-mate of Adam, which brings out the fact that woman is companion of man; she comes out of his side;

⁵⁴ Desai, Neera, *Woman in Modern India*, (1957), p. 18.

⁵⁵ Khanna, Verghese, *Indian Women Today*, (1978), p. 3.

⁵⁶ Harner, L.B., *Women Under Primitive Buddhism*, n.d., p. 95.

and stands always by his side. Her status and role were conferred by Yahewh himself, to be companion and wife to man and mother of all the living thing of the world. Her role increased her status in the society. Polygamy was a legal fact. A man could have any number of wives and a harem. Later, the Talmud fixed the number to four wives for an ordinary man and eighteen for the king. These were abuses, which later were made legal. When coming to the New Testament, the first woman seen is Mary, the Mother of Jesus. The fact that she is accorded the status of the mother of Jesus is important. She was a companion and wife to Joseph and nurtured Christ and stood near his cross taking upon herself the ignominy and pain and accepting the rejection of Christ by the Jews. Mary is the second Eve, according to the Christian theology and is the mother of all the livings who believe in Jesus Christ. The Indian Christian woman brought up under the prevailing religions and socio-cultural patterns have lived in the false security of the male dominated church and church-related institutions.

1.2.4 WOMEN IN SIKHISM

The Sikh doctrine brought revolutionary change in the status of woman and they fully participated in “Sangat” and “Pangat” established by Guru Nanak. The practice of Sati has been condemned. The purdah, veiling of woman’s face, was eradicated. The practice of female infanticide is forbidden. Guru Amardas opened 22 centres called “Manjis” and to manage them, he appointed 35 men and 52 women. Thus women felt much relieved and their status rose highly and they started working with men shoulder to shoulder in the new society. Guru Nanak did not criticize any religion but deviated to the extent that he stressed on the practical side of the life and attacked dogmatism and formalism and casteism. The taboo that for certain period after child birth a house is

polluted, is not accepted. The emphasis has been on self-restraint and continence, so that man should look at woman, however attractive, as primarily either sisters, daughters or mother (except the woman whom he married). Even within this broad perspective, the status of women in the Sikh community is again in a state of transition.

1.2.5 WOMEN IN JAINISM

Atma has no division of male or female. Woman in particular has a unique position as Jana Matha, the woman who give birth to Thirthankara, the Jam deity. She has the highest position as the Mother of Nature. History is full of names of Jam women who did a lot for society and their religion. It is stated in Mahapurana that woman has the same rights as man, to get educated, take up jobs and so on, Vrishabha Deva, the first Thirthankara, is said to have imparted knowledge of language and mathematics to his daughters first and only then to his sons. He taught the Jam alphabets to his daughter Brahmi, thus the famous Brahamilipi is named after her. He taught mathematics to his youngest daughter Sundari. Chandrabala, the first disciple of Mahaveer, helped in propagating Jainism most effectively. Jam nuns worth names are Kamalaree, Brahmilee, Gunamathi, Sudarsana and others, as found in the oldest Kannada work Voddarathane of the century. These nuns were able to influence the social life during the period. Among all the Jam nuns Yakini Mahathara was the greatest intellectual as she defeated a Brahmin Pandit named Haribhadra Sun in theoretical arguments. Jam women were also excelled in the political field and they proved themselves as remarkable warriors. Margarine's bravery among many others is notable. Though the Jam women have shown greatness in almost all the fields of social life and brought glory to humanity, they were still responsible for

the continuation of Sati practice. This system symbolizing the authority of men has coincided with the sense of sacrifice.⁵⁷

1.2.6 WOMEN IN MUSLIM PERIOD

The invasion of the country by Muslims in 11th Century brought about further deterioration of the position of woman. Life became insecure. Restrictions on her rights and freedom and her resultant hardships were aggravated. Women were forcibly taken away to be slaves or to marry into Muslim homes. The consequent insecurity and instability further narrowed down woman's social liberties.

On the one hand, the foreign Muslim conquerors attempted to impose their coercive norms on the conquered Hindu population, on the other hand, the Hindu society itself became more and more rigid curtailing thereby the rights and freedom of the lower castes and women. Due to this two-fold reason, the post—puranic period is one of the darkest periods for women in Indian history. The steady deterioration of her status continued till the century.

Polygamy and the Purdah were two of the most important social institutions of the Muslim conquerors of India. Under the purdah system, not only were women required to live in a secluded apartment in the house, but also they had to dress in an apparel which completely covered their body excepting the eye.⁵⁸

Before the Muslim conquest, the Buddhism had not followed the custom of Sati. Social sanction for the self-immolation of widows came in with Muslim invasion. Before Muslim rule, the practice of Sati and

⁵⁷ Dewan, V.K., *Law Relating to Offences Against Women*, (1996), pp. 35-36.

⁵⁸ Desai, Neera, *Women in Modern India*, (1957), p. 23.

anumaranam did occur off and on but not as a regular feature. As a result of repressive social and religious custom, a woman sometimes even preferred Sati to widowhood.⁵⁹

Instances of Brahmin women who practiced Sati are also recorded in the 15th century and after the foreign chroniclers' record, the Hindu widows who did not observe Sati were held in great dishonour. The practice of sati was also extended to the southern parts of India. The spectacle of the living widow consuming her body in fire was so gruesome that Ibn Batuta actually fainted when he witnessed one such instance. The widow in the case was persuaded to believe that her act of self—immolation was even more auspicious than the nuptial ceremony since it guaranteed the continual association with her husband in life after death.⁶⁰

Due to lustful proposal of Alauddin Khilzi, Rani Padmavati with about 700 Rajput committed themselves to flames which came to be known as "Jauhar Vrata". Gradually child marriages were preferred in the society and the death of a widow was welcome news as she would not fall into evil hands. A woman in Hindu society has always been considered an appendage to her husband. She has no life apart from him. Consequently, on her husband's death there was no reason for her to live on. Also the husband was her sole protector. Once he was gone, who would protect her? During foreign invasions by the Turks, Muslims and others when their menfolk were killed, the widows were very naturally expected to commit sati.

⁵⁹ Khanna, Verghese, *Indian Women Today*, (1978), p. 3.

⁶⁰ Desai, Neera, *Women in Modern India*, (1957), p. 24.

Hence, immolation of widows and killing of girl child infanticide started in a large number. Such wilful violence came to be called a curse of the Hindu society. Child marriage, girl killing, widow burning all came to stay with the dignity of the conventions in Hindu society because the Hindus were destined to remain slaves for about thirteen centuries. Even the Muslim were not spared this fate when they became subjugated by the white rulers of England. They developed purdah, illiteracy, disease, legal discrimination and handicaps but the worst part of their fate is the male dominance in their society and their century old dumbness.⁶¹

As a stricter security measure, the prohibition of free movement of woman was advocated and the purdah with its elaborate form was also installed. Women participating in public discussions on vital social and philosophical problems or in popular festivals became only a memory of the past. Along with child marriage, marital infidelity on the part of males became more common. Polygamy was a practice adopted frequently among upper classes and restriction on or conditions laid down as necessary for the second marriage were also dropped.

Even during this darkest period, when the black cloud of social reaction completely submerged the freedom of woman, a silver lining was visible. Some of the Moghul emperors through social reforms tried to relieve the hardships of women.

For instance, as regards sati, Akbar did not permit it in cases where there was the slightest disinclination on the part of the widow or when a young widow's marriage was not consummated. During this period, two schools of law emerged viz. Mitakshara and Dayabhaga, the exponents of these schools being Vijnaneshwara and Jimutavahana respectively. These

⁶¹ Sinha, Niroj, *Women and Violence*, (1989), pp. 47-48.

commentators attempted to improve the position of women. They strove to give a definite share of property to women. However, in the total setting of complete subordination, these meagre rights hardly brought any benefits to women.

The Hindus did not assimilate the customs like divorce, widow remarriage and a larger share of property for women, which governed the Muslim society. The Hindu society had become so static and rigidified that their contact with the Muslims, whose social relations were relatively democratic, did not prompt them to adopt the democratic elements of the Muslim society. The Hindu society continued its old pattern of life based on the principles and directions of Manu.

1.2.7 WOMEN IN BRITISH RULE

When the Indians came in vital contact with the British in the latter half of the eighteenth century, the position of the Indian woman had reached the maximum degree of deterioration. Ideologically woman was considered a completely inferior species, inferior to the male, having no significance, no personality; socially she was kept in a state of utter subjection, denied any right, suppressed and oppressed. She was further branded as basically lacking an ethical fibre.

The patriarchal joint family, the customs of polygamy and its concomitant koolinism, the purdah, the property structure, early marriage, self-immolation of widows (sati) or a state of permanent widowhood, all these contributed to the smothering of the free development of woman.

Thus, not only social institutions and customs thwarted the free growth of her personality, but the prevailing ideology also assigned the Indian woman an inferior status. She was denied independent personality.

Her life, as Manu says, was to be associated with and subordinated to either the father, the husband or the son. In fact she had no personality of her own. She had no dreams of her own. She had no separate status as a member of the family or society. Her existence was taken for granted. Her opinion, her desires, her likes or dislikes were never to be considered. In short, the prevailing conception of woman, whether Hindu or Muslim, was basically feudal in character.

This leads us to the third side of the picture, viz. moral. As regards her moral nature, woman was considered as a temptress, a being whose sole aim is to divert man from the right path. The daughter is considered by the father as a burden to be disposed off as quickly as possible through her marriage. For her husband she is an object for having male children.

She is further regarded unfit for participation in social, political or religious functions of any significance. She is not even worthy of receiving education.

We can conclude from this that she was virtually considered as a nonentity a slave. Further in order that she may not rise in revolt against these customs, an institutional framework and an ideology were created, keeping her docile and in permanent subjection. As a result of this, the Indian woman on the eve of the British rule had not only lost her independence but her sense and urge for freedom and consequences of independent personality. As Pandita Ramabai describes her position at that time, “She is forbidden to read the sacred scriptures. She has no right to pronounce a single syllable out of them. To appeal to her uncultivated low kind of desire by giving her ornaments, to adorn her person and by giving her dainty food together with an occasional bow which costs nothing are the highest honours to which a Hindu woman is entitled.”

Naturally, in the midst of such a situation their only vocation was “to minister to men’s physical pleasures and wants; they were considered incapable of developing any of those higher mental qualities which would make them more worthy of consideration and also more capable of playing a useful part in life.”

In order to eliminate all the obstacles in form of the extant institutional complex as well as the prevailing ideology to the achievement of freedom for woman, a fundamental change in the very social structure was necessary. The feudal society based on the self—sufficient village economy, the caste and the joint family and authoritarian ideology was absolutely incapable of providing room for the liberation of woman within its framework. A new society based on new socio—economic relations and a new liberal democratic ideology was necessary for making woman conscious of her subjection, for realization of her real role in the society, for the growth of woman’s freedom movement in all spheres of life as also for a great advance in the direction of her complete freedom.

The British conquest of India resulted in the emergence of such an environment and ideology.⁶²

Thus, in the 18th Century, at the dawn of British rule, the position of women in India was in a sorry state. The vedic liberties enjoyed by women in India were forgotten. Only a narrow and static society prevailed. The British government’s attitude of non—interference with the religious sentiments of the local people stopped all social reforms for a century. However, due to the pioneering work of some leaders, changes were brought about in the social structure of the 19th century.

⁶² Desai, Neera, *Woman in Modern India* (1957), pp. 29-31.

1.2.8 WOMEN IN POST-INDEPENDENCE INDIA

With independence, women were granted equal status with men. The government made an all out effort to raise the status of women in the various fields through legislation. Compulsory education, the Hindu Marriage Act, 1955, raising of marriageable age, the Adoption Act, 1956, Dowry Prohibition Act, 1961 and legalizing of abortion are all in favour of women. But the law alone is not enough to bring about a radical change.⁶³ With rapid urbanization and industrialization of the century, exploitation of women in recent years has been a serious menace to our society.

Notwithstanding the multiplication of legislation on various fields, with a view to improve the social, political and economic conditions and status of women; even the ancient forms of victimization, child marriage and premature consummation resulting in early and dangerous pregnancies sati, female infanticide, illegal abortions, dowry deaths, rape, eve-teasing and various other forms of molestation of women still continue. In fact, since the passing of the Dowry Prohibition Act and even after several amendments to the I.P.C., Cr. P.C. and the Evidence Act, dowry deaths are on the increase. The Hindu Marriage Act of 1955 and the Hindu Succession Act, 1956 securing for women the right to divorce and property have not automatically given women rights. Under the Hindu Succession Act, parents make will depriving daughters. Though, bigamy is an offence, the rate of desertion by Hindu husbands and illegal second marriage is higher than “Talaq” rate of the Muslims.

⁶³ Khanna, Verghese, *Indian Women Today* (1978), pp. 3-4.

The advancement of reproduction technology has brought in the new phenomenon of female foeticide. One study revealed that nearly 100 percent of the aborted fetuses were females.

Women's health is given consideration only in terms of maternity, leaving women beyond the reproductive age, young, unmarried girls and widows outside health and nutrition schemes. The government's family planning programs have a heavy gender bias.⁶⁴

The condition of elderly women is also not satisfactory especially those of widows. She has to earn as also run the house and raise her children. If she does not earn, her condition is even worse. If the widow has no issues, she has to work hard as a maid servant in her husband's joint family or relations who might have taken her in and is totally dependent, for all her needs, on others. She has neither economic security nor a say in decisions concerning her and her children. Families still believe that once a daughter is given away in marriage, she can not be given away again to another person. Hence, widow remarriage, though sanctioned by Hindu Widows Remarriage Act of 1856, seldom takes place and is discouraged.⁶⁵

Thus, we see that the condition of Indian woman is very much shocking. The life of woman in India is still surrounded by violence, neglect and exploitation. What is the price fixed for a woman's services day and night within the household? Love is the reward, but where is the reward of the husband and the in-laws don't appreciate the bride's services? Perhaps nowhere, except the fire on her clothes and her body. This is happening everywhere in our country these days and the number

⁶⁴ Ghosh, S.K., *Indian Women Through the Ages*, (1989), p. 19.

⁶⁵ *Ibid.* at p. 16.

is increasing alarmingly. Even the educated urban and well informed women are exposed to such events. The Committee on the Status of Women in India rightly concludes that “the entire exercise of our committees has indicated that in certain important areas and for certain sections of the female population there has been repression from the normative attitudes developed during the freedom movement. Large section of women have suffered a decline of economic status. Even after the promulgation of these laws (legal measures), the protection enjoyed by the large masses of women from exploitation and injustice is negligible . . . though women don’t numerically constitute a minority, they are beginning to acquire the features of a minority community by the recognized dimensions of inequality of class, economic situation, status (social position) and political power . . . The chasm between the values of a new social order proclaimed by the constitution and the realities of contemporary Indian society as far as women’s rights are concerned remains as great as at the time of independence.”⁶⁶

1.3 ELEMENTS OF VIOLENCE AGAINST WOMEN

1.3.1 DEFINITION OF VIOLENCE

“Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

—DEVAW U.N. on 20thDecember 1993.

⁶⁶ Mazumdar, Veena, Towards Equality, (1974), p. 29.

1.3.2 Lexicon Meaning of Violence

The lexicon meaning of the violence refers to any physical force or any damage or injury to person or property. According to Webster's New Collegiate Dictionary,⁶⁷ violence means "exertion of any physical force for instance: (a) violent treatment or procedure, (b) profanation infringement, outrage, assault, (c) strength, energy, activity displayed or exerted, vehement, forcible or destructive action or force, (d) vehemence in feeling, passion, order, fury, fervor.

The Chamber's twentieth century dictionary describes violence as excessive unrestrained or unjustifiable use of force. Violence also means outrage, profanation injury or rape. Infliction of injury on other people is the essence of violence. It may be either physical or mental. On the legal level, it is illegal employment of methods of physical coercion for personal or group ends. The infliction of injury by police is exercise of state's force as long as it is legal. But as soon as it crosses the boundary of legality and inflicts injury for lust or for personal gain, it becomes violence and is more dangerous than the violence by ill armed and ill organized collectivity people.⁶⁸

According to Encyclopaedia of Crime and Justice,⁶⁹ in a broad sense, "violence is a general term referring to all types of behaviour either threatened or actual, that result in the damage or destruction of property or the injury or death of an individual". In a limited sense, violence means "all types of illegal behaviour, either threatened or actual that results in damage or destruction of property, or in the injury or death of an individual". In general, the definition covers that behaviour, generally

⁶⁷ Webster's New Collegiate Dictionary, 1961, p. 952.

⁶⁸ Sinha, Niroj, Women and Violence, 1989, p. 32.

⁶⁹ Encyclopaedia of Crime and Justice, Vol. 4, 1983, pp. 1618-19.

considered as violent including such crimes as criminal homicide, forcible rape, child abuse, aggravated assault and most kinds of collective violence.

According to Black's Law Dictionary, "violence means unjust or unwarranted use of force usually accompanied by fury, vehemence, or outrage, physical force unlawfully exercised with the intent to harm".⁷⁰

L.B. Curzon's Dictionary of Law defines violence as "any conduct so that it includes violent conduct towards property as well as towards persons, and it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct".⁷¹

If we take 'violence' as conduct which incurs the formal pronouncements of the moral condemnation of the community, or the deviation from conduct norms of the normative groups, the scope of cases of 'violence against women' becomes too broad. Narrowly, the term 'violence' has been applied to "physically striking an individual⁷² and causing injury",⁷³ to "the act of striking a person with the intent of causing harm or injury but not actually causing it",⁷⁴ to "acts where there is the high potential of causing injury",⁷⁵ and to "acts which may not involve actual hitting, but may involve verbal abuse or psychological stress and suffering". Megargee has defined violence as the "overtly

⁷⁰ Black's Law Dictionary, VIIth ed., 1999, p. 1564.

⁷¹ Curzon, L.B., Dictionary of Law, IVth ed., 1994, p. 403.

⁷² Kempe, et. al., "The Battered Child Syndrome", quoted by Richard Gelles in Wolfgang and Weiner, "Criminal Violence", 1982, P. 201.

⁷³ Gill, D., "Violence Against Children", 1970.

⁷⁴ Gelles and Straus, "Determinants of Violence in the Family : Towards a Theoretical Integration", in Burr, Hill, Nye and Reiss (Eds.), "Contemporary Theories about the Family", 1979.

⁷⁵ Straus, et. al., "Behind Closed Doors: Violence in the American Family", 1980.

threatened or overtly accomplished application of force which results in the injury or destruction of persons or their reputation”.⁷⁶

1.3.3 DEFINITION OF DOMESTIC VIOLENCE

Domestic violence is an extremely complex and vicious form of abuse, committed most often within the four walls of the family house and/or within a particular deep-rooted power dynamic and socio—economic structure, which do not allow even the acknowledgement or recognition of this abuse. Meaning and detection of domestic violence itself is the most demanding task.

To be honest, there is no definition of domestic violence in Indian law. This does not mean that acts of domestic violence are not punishable in India. There is no exact prototype of domestic violence it differs with households, individuals and situations. The impact of domestic violence depends upon its severity. Domestic violence could result in anything from death to minor scars. There could be a situation where this violence results in neither but causes devastating psychological impairment.

“According to Black’s Law Dictionary, “domestic violence means violence between members of a household, usually spouses, an assault or other violent act committed by one member of a household against another”.⁷⁷

The meaning of domestic violence and the range of acts which amount to domestic violence will become clear from a look at the general laws, criminal and civil, which address acts which could constitute domestic violence.

⁷⁶ Edwin Megargee in Wolfgang’s & Weiner (Eds.), “Criminal Violence”, 1982, p. 85.

⁷⁷ Black’s Law Dictionary, VIIth Ed., 1999, p. 1564.

1.3.4 Definition under Criminal Law

The Criminal law in India is contained primarily in the Indian Penal Code, 1860. The Indian Penal Code, 1860 is supplemented by special laws, which define and punish specific offences.

1.3.5 The Indian Penal Code

Under the Indian Penal Code, 1860 ‘culpable homicide’ is defined as causing death by doing an act:

- With the intention of causing death.
- With the intention of causing such bodily injury as is likely to cause death.
- With the knowledge that it is likely to cause death.⁷⁸

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.

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, the death is termed a ‘dowry death’.⁷⁹ The husband or relative who subjects the wife to cruelty is presumed to have caused the dowry death and will have to prove that the death was not a result of the cruelty.

⁷⁸ Section 299, of the Indian Penal Code, 1860.

⁷⁹ Section 304B, of the Indian Penal Code, 1860.

Female infanticide, or forcing the wife to terminate her pregnancy are also forms of domestic violence recognized as offences under the Indian Penal Code, 1860.⁸⁰

Often victims of domestic violence, especially brides harassed for dowry are driven to commit suicide. Abetment of suicide of a delirious person is an offence punishable with death or life imprisonment.⁸¹ Abetment of suicide is also an offence punishable with 10 years imprisonment.⁸²

Causing bodily hurt is a common form of domestic violence. The Indian Penal Code, 1860 defines hurt as causing “bodily pain, disease, pain or infirmity to any person”.⁸³ A hurt may be ‘grievous’ if it results in serious injury such as a fracture, loss of hearing or sight, damage to any member or joint, etc.⁸⁴

The Indian Penal Code, 1860 makes it an offence to voluntarily cause hurt⁸⁵ grievous hurt.⁸⁶ Also criminalized is the voluntary causing of grievous hurt by dangerous weapons⁸⁷ and voluntarily causing hurt to extort property.⁸⁸

Another common form of domestic violence is in the form of the wrongful restraint⁸⁹ or confinement⁹⁰ of the spouse within her

⁸⁰ Sections 313-316, of the Indian Penal Code, 1860.

⁸¹ Section 305, of the Indian Penal Code, 1860.

⁸² Section 306, of the Indian Penal Code, 1860.

⁸³ Section 319, of the Indian Penal Code, 1860.

⁸⁴ Section 320, of the Indian Penal Code, 1860.

⁸⁵ Section 321, of the Indian Penal Code, 1860.

⁸⁶ Section 322 read with section 323, of the Indian Penal Code, 1860.

⁸⁷ Section 326, of the Indian Penal Code, 1860.

⁸⁸ Section 327, of the Indian Penal Code, 1860.

⁸⁹ Section 349, of the Indian Penal Code, 1860.

⁹⁰ Section 340, of the Indian Penal Code, 1860.

matrimonial home. Use of force⁹¹ and assault⁹² on the spouse, other common forms of domestic violence, are also punishable under the Indian Penal Code, 1860.

Marital rape is yet 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 a limited recognition. 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.⁹³ In many a violent marriage, the spouse subjects the wife to acts of sexual humiliation. Interestingly the Indian Penal Code, 1860 even addresses such forms of violence—the provision for ‘unnatural offences’.⁹⁴ However, this provision has rarely been used in the matrimonial context.

A common companion of domestic violence is the misappropriation of the spouse’s property so that she is economically crippled into subjugation. The Indian Penal Code, 1860 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 the offence of criminal breach of trust.⁹⁵

⁹¹ Section 349, of the Indian Penal Code, 1860. A person is said to use force to another if he causes, motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion as brings the substance into contact with any part of the other’s body, or with anything which that other is wearing or carrying or with anything so situated that such contacts affect that other’s sense of feeling.

⁹² Section 351, of the Indian Penal Code, 1860. Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

⁹³ Section 376A, of the Indian Penal Code, 1860.

⁹⁴ Section 377, of the Indian Penal Code, 1860.

⁹⁵ Section 405 read with section 406, of the Indian Penal Code, 1860.

In 1983, matrimonial cruelty was introduced as an offence in the Indian Penal Code, 1860.⁹⁶ Cruelty was defined as “any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life or limb or health (whether mental or physical) of the woman”. It includes harassment of the woman in connection with demands for property and the like.

1.3.6 The Dowry Prohibition Act, 1961

Domestic violence is society specific. Social mores impact the type of violence perpetrated on the spouse. The ‘dowry’ system is a distinctive feature of the sub—continent. At the time of marriage, the bride’s family is expected to give gifts, in cash or in kind, to the groom.⁹⁷ Often the bride’s side commits to deferred presentations. In such situations, the bride is often subjected to domestic violence if the gifts are not made as promised. In recognition of the fact that this dowry is the genesis of domestic violence in the matrimonial home, the Dowry Prohibition Act criminalizes the giving and taking of dowry.⁹⁸

1.3.7 The Commission of Sati Prevention Act, 1987

There is another form of domestic violence which was rampant in our past but ebbed in the last century, i.e. sati, Sati means the burning or burying alive of 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.⁹⁹ The Commission of Sati Prevention Act, enacted in

⁹⁶ Section 498A, of the Indian Penal Code, 1860.

⁹⁷ ‘Dowry’ as contemplated by the Dowry Prohibition Act is a demand for property or valuable security having an inextricable nexus with the marriage. In other words, it is a consideration from the bride’s side to the groom’s side for the agreement to wed.

⁹⁸ Section 3, Dowry Prohibition Act, 1961.

⁹⁹ Section 2(1)(c), The Commission of Sati Prevention Act, 1987.

1987 after a shocking sati death in Rajasthan, criminalises observance, support, justifications or propagation of sati.

1.3.8 The Pre—conception and Pre—natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

This act recognizes that domestic violence is also perpetrated in the form of forced termination of female foetuses, the Preconception and Pre—natal Diagnostic Techniques Act regulates the use of pre-natal diagnosis. Such tests are permitted only for the purpose of detecting certain specified abnormalities and disorders.¹⁰⁰ Present Act prohibits sex selection not only after conception but even before conception on any tissue, embryo, concepts, fluid or gametes destined from either man or woman or from both of them.

1.3.9 Definition Under Civil Law

Civil law too follows criminal law, inasmuch as it addresses facets of domestic violence without specifically defining domestic violence. Even references in the statutes to aspects of domestic violence are generic and it is only through judicial decisions that such provisions have been given life and meaning.

1.3.10 The Dissolution of Muslim Marriages Act, 1939

The Dissolution of Muslim Marriages Act, 1939 stipulates cruelty as a ground for divorce. Cruelty is defined to include.¹⁰¹

¹⁰⁰ Section 4, The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

¹⁰¹ Section 2(viii), of the Dissolution of Muslim Marriage Act, 1939.

- Habitually assaulting the wife or making her life miserable by cruelty of conduct even if such conduct does not amount to physical ill—treatment.
- Associating with women of ill—repute or leading an infamous life.
- Attempting to force the wife to lead an immoral life.
- Disposing of the wife’s property or preventing her from exercising her legal rights over it.
- Obstructing the wife in the observance of her religion.

1.3.11 The Hindu Marriage Act, 1955¹⁰²

Under the HMA, cruelty is a ground for divorce as well as judicial separation.¹⁰³ However, the term ‘cruelty’ is not defined in the Hindu Marriage Act, 1955. It is through decided cases that the term has been understood to mean acts of physical as well as mental cruelty.

1.3.12 THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

The Protection of Women from Domestic Violence Act, 2005 defines the expression “domestic violence” to include actual abuse or threat of abuse—physical, sexual, verbal, emotional or economic violence. Section 3 of the Act says that any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved or tends to do

¹⁰² Section 13(1)(ia), of the Hindu Marriage Act, 1955.

¹⁰³ Section 10, of the Hindu Marriage Act, 1955.

so and includes causing physical abuse, sexual. abuse, verbal and emotional abuse and economic abuse; or

- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce him or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

For the purpose of section 3:

- (i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
- (ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
- (iii) “verbal and emotional abuse” includes—
 - (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and
 - (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

- (iv) “economic abuse” includes—
- a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
 - (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonable required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
 - (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

The landmark legislation seeks to deter domestic violence in all forms against women, including harassment due to dowry and causes like inability to bear a child or a male child.

The need for the present legislation arose as the civil law does not address the phenomenon of domestic violence in its entirety.

Definition of domestic violence can be broad or focused, amorphous or targeted. The reason that the definition of violence is important is because it shapes the response. For example, a community response, whether it be legal reform or the provision of support services, is shaped by a particular understanding of what constitutes domestic violence and whether it is to be conceptualized as an intra—family conflict, or a criminal violation of rights. The definition implied by the law is especially critical as it defines standards and thus impacts broader social perceptions of the problem. Elements of the definition that need to be considered then are the boundaries of the relationship between the perpetrator and the abused, the norms of acceptable behaviour, and the specific acts that constitute violence.

A frequent perception of domestic violence against women is that it is limited to physical harm perpetrated on adult women within a marital relationship. While this understanding may capture a large universe of the experience of women, it is predicated on the assumption that women primarily live in nuclear families. Across cultures, there are a variety of living arrangements ranging from joint families to nuclear families to single parent families. Moreover, women may be in an established relationship or in the process of separation or divorce. Violence is often not restricted to the current husband but may extend to boy-friends, former husbands, and other family members such as parents, siblings, and in—laws. A definition that acknowledges these multiple

possibilities would lead to interventions that are more inclusive of the experiences of all women.¹⁰⁴

Definitions of domestic violence rest upon not only the nature of the relationship between the perpetrator and the victim but also upon norms of acceptable behaviour. There is considerable difference of opinion regarding which behaviours or manifestations should be considered violent, as well as the level of intensity and frequency required to label a relationship as violent. Another contentious issue is how to evaluate the intent of the act, why the act was initiated, and whose view should determine this. For instance, Indian field experience indicates that significant numbers of women do not perceive acts as violence if they perceive them to be justified. The social construct surrounding the ideal “good woman”—clearly sets the limits for acceptable norms beyond which verbal and physical assaults translate into a notion of violence. Thus, wife beating is not seen as an excessive reaction if the woman gives cause for jealousy or does not perform her “wifely” duties adequately, such as having meals ready on time or adequately caring for children. This is further complicated by a common belief that violent acts are an expression of love and, merely a desire to help the subject be a “better” person.

The core of a definition of domestic violence consists of all the acts that constitute violence. Some definitions are narrow and focus on a specific act of violence and others are broader and incorporate the full range of acts. In India, public discourse and the media equate domestic violence with dowry violence. This incomplete representation undermines awareness of the widespread, daily psychological, physical, and sexual

¹⁰⁴ Leela et. al., *Domestic Violence in India, A Summary Report of Three Studies*, IICRW, Washington, D.C., September 1999, USAID, India.

abuse women confront that is often unrelated to dowry. A result, newspapers may fail to report the less sensational stories that do not involve bride—burning and unnatural death. Indian legislation on marital violence perpetuates this narrow definition. For example, both Section 498A of the Indian Penal Code and the Dowry Prohibition Act emphasize violence within the context of dowry harassment. However, informal discussions with women by researchers and activists have underlined the need for greater study of other factors and characteristics associated with abuse.

A further critical element in the definition of violence is whether it is framed as an exclusively interpersonal act or seen more broadly as an expression of power that perpetuates the subordination of women. If it is the former, the definition would only include those acts which might be seen as crimes and thus focus only on acts which result in physical evidence. If it is the latter, the definition of violence would include all acts of “physical, verbal, visual or sexual abuse that are experienced by women or girls as threats, invasion or’ assaults and that have the effect of hurting her or degrading her and/or taking away her ability to control contact (intimate or otherwise) with another individual”.¹⁰⁵ Such a definition more fully captures all the different processes by which women undergo subordination within intimate relations and fits more directly into a human right perspective.

In this work, the operational definition of domestic violence not only includes physical but also mental, emotional and financial abuse of a woman.

¹⁰⁵ Koss, M.P., L. Goodman, A. Browne, L. Fitzgerald, G.P. Keita, and N.F. Russon, *No Safe Heaven*, 1994.

Domestic violence can also be seen as a violation of the fundamental right to live with dignity, and of the right to equality and equal protection of the law guaranteed under the Indian Constitution.¹⁰⁶

According to Arun Jaitly, Minister of Law, Justice and Company Affairs, “Domestic Violence is in the majority of cases, violence against a woman by the members of the house where she resides.

It can be the husband, his parents, or siblings or any other resident who has the overt or covert latitude for actions that can cause physical or mental agony to the woman. But, the most important aspect of this kind of violence is the fact that “it happens behind the closed doors” and is most often denied by the very woman who has been the victim of violence. It is this aspect of the crime that segregates itself from all other kinds of social violence”.

In 1996, the United Nations Special Rapporteur on violence against women, Radhika Coomarswamy, submitted a report focusing on domestic violence to the Commission on Human Rights. In that report, she defined domestic violence as ‘violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law and is perpetrated by both private and state actors. She goes on the state; domestic violence is often albeit, problematically, labeled ‘family violence’ so that the actual structure of the family whether defined as a nuclear, joint or single sex becomes an important subject of investigation At its most complex, domestic violence exists as a powerful tool of oppression . . . and is used to control women in the one space traditionally dominated by women, the home’.

¹⁰⁶ Jaising, Indira, *Law of Domestic Violence*, 2000, pp. V, VI, IX.

1.4 CHARACTERISTICS OF DOMESTIC VIOLENCE

Domestic violence is violent victimization of women, within the boundaries of family, usually by men (or his family).¹⁰⁷ A woman may of any age,¹⁰⁸ she may be a girl child, unmarried, married or elderly woman including a widow or such women with whom men have marriage like relationship. Violence can be both physical and psychological. It indicates threats or aggressive behaviour towards her not only to her physical being, but towards her self-respect and self-confidence.

Domestic violence against women may be psychological, physical or sexual. Psychological violence is carried out with psychological weapons (threats, insults, humiliating treatment, denial of human existence) rather than physical attack. Physical violence 'includes all types of aggressive physical behaviour towards the woman's body (victim). Sexual violence could include both passive (denial) or active violence. It will also include cases of perversity.

Victimiser of domestic violence may be husband or his family members. Domestic violence could occasionally be seen in other relations also (i.e. by parents, brothers or others in parents family).

1.4.1 Domestic Violence in Ancient Indian Society

Violence against women is not a myth, but a reality. It exists and exists everywhere. The problem of violence against women is as old as the world in cosmologies, mythologies or legends. The type, frequency,

¹⁰⁷ Sood, Sushma, Violence Against Women, 1990, p. 268.

¹⁰⁸ Section 10, Indian Penal Code (1860), The Word 'woman' denotes a female human being of any age.

intensity and control of violence against women may vary from time-to-time or place-to-place but it is there everywhere.¹⁰⁹

Family as an institution in ancient India laid down the principles which regulated the relationship between husband and wife and parents and children. A man as a husband had certain responsibilities toward his wife. A husband was to act as a provider and was called upon to cohabit with his wife. Failure to perform such roles and responsibilities would attract punishment.¹¹⁰ The husband was also required to provide identity, leadership and physical protection to his wife. Along with these duties, a husband had certain rights and privileges. The husband had complete control over the mind and body of his wife, without his consent, a wife had no right to perform even a religious act. Husband had the right to use physical corrective methods over his erring wife which was the same as those possessed by a teacher over a pupil or a father over a son, namely, he could administer beating with a rope or a thin piece of bamboo on the back but never on the hand.¹¹¹

Kautilya also endorsed husband's right to beat his wife of refractive nature. He allows the husband to beat his wife, either with a bamboo bark or with a rope or with a palm of hand on her hips.¹¹²

A wife on the other hand had only duties. The foremost duty of a wife was to honour and serve her husband. She must always stay with him even in adverse situations. Yaj (1.77) enjoins upon a woman: 'this is the highest duty of woman that they should obey their husband's wards'.

¹⁰⁹ Srivastava, Dr. Lakshmi, Problem of violence against women—a multidisciplinary conceptual analysis. This paper was read in National Seminar on Women and Violence : Various Manifestations" at A.N.S. Institute of Social Studies, Patna on 17th January, 1988.

¹¹⁰ Kautilya BIT, Ch. I, 48

¹¹¹ Vishnu Dh. S.71.81— 82, Manu VIII, 299—300, Narada 13.14

¹¹² B.III, Ch. 3, 5.155

The Ramayana¹¹³ remarks: ‘the husband is the God and master of the wife’. The wife was completely secluded from outside contacts. It was only with the permission of her husband, that she was permitted to move out from her husband’s house. Failure to observe these restrictions attracted censor, social degradation, humiliation and punishment.¹¹⁴ The husband- wife relationship was not based on love, affection, mutual give and take and on equalitarianism. The relationship was marked by authoritarianism and submissiveness. Wife was not only secluded from outside contacts but was looked at with suspicion. Kautilya, while advising the King for his safety contended that the King should make necessary arrangements for his personal safety firstly from his wife only then he would be able to maintain the security of his kingdom.¹¹⁵ Kautilya further demanded from the king: “when in the interior of the harem, the king shall meet his queen only when her personal purity was vouch saved by an old and reliable maid servant.¹¹⁶ Such dictates establish the fact that wife was not relied upon. When the relationship between husband and wife is marked by suspicion, the question of developing close, personal and intimate relationship does not arise.

The Ramayana and Mahabharata clearly depicts the prevalence of family conflict and violence. There are numerous historical evidences of intra—family exploitation, conflicts and violence. Lord Rama abdicated the throne and went in exile in order to fulfil his father’s word of honour given to his step mother. Parasurama murdered his mother at the

¹¹³ Ayodhya Kand, 24.26—27

¹¹⁴ B.III, Ch. IV, S.158

¹¹⁵ B.I, Ch. 17, S.33

¹¹⁶ B.I, Ch. 20, S.41

command of his father¹¹⁷ Draupadi was publicly tortured by Kauravas and Ahalya was turned into stone by her husband.

Kautilya while advocating seclusion of women and vigilance in the harem described a number of instances where the queens in collaboration with their paramours and kinsmen had killed the kings. Kautilya in another context ordains: “any woman who murders her husband, preceptor, off—springs, sets fire to another’s property, poisons a man or cuts off any of the bodily joints of another shall be torn by bulls” (IV.11.5230). Kautilya even allows divorce. He contents: “mutual enmity and danger to life from the spouse may be valid reason for divorce” (III.3.S.155). These references from Kautilya stands as a testimony to the prevalence of conjugal fight and violence.¹¹⁸

Manu says that “a wife who violates the duty that she owes to her lord shall be devoured by dogs in a place frequented by many. By violating her duty towards her husband, a wife is disgraced in this world; and after death, she enters the womb of a jackal and is tormented by diseases as a punishment for her sin”.

The laws of Manu further declare that a wife may be superseded for various reasons— “A barren wife may be superseded in the eighth years, she whose children (all) die in the tenth; she who bears only daughters, in the eleventh, but she who is quarrelsome without delay”.

“But a sick wife who is kind (to her husband) and virtuous in her conduct, may be superseded (only) with her own consent and must never be disgraced”. 9.81—82.

¹¹⁷ Prabhu, P.N., Hindu Social Organization, 1963.

¹¹⁸ Most of the references of ancient literature have been derived from the four volumes of P.V. Kane, History of Dharmasastra, 1940.

“She who drinks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous, or wasteful, may at any time be superseded (by another wife)”. 9.80.

Manu states that for one year, husband shall bear with a wife who hates him, but after a year, he shall deprive her of her property.

In Thirteen Principles of Upnishads, there is explicit justification of forcible sex violation of a woman by a man—

“If she should not grant him his desire, he should bribe her. If she still does not grant him his desire, he should hit her with a stick or with his hand, and overcome her, saying: “with power, with glory I take away your glory. Thus, she becomes inglorious”.

(Brihad Aranyaka, 6.4.7)¹¹⁹

In Puranic verses too we find the mention of violence against women— “A man should chastise his wife and slaves with a string of thread or a rope made of the blades of vera grass”.

(Agni 227.46—50)¹²⁰

Above quotations of Manu are taken from Pinkham, MW., WSSH, 1941.

*“while his tender wife was exhausted withfatigue . . .
Vishwamitra all of a sudden struck her with a chastising
rod”.*

(Markandeya, 7.59)¹²¹

¹¹⁹ Hume, RE., The Thirteen Principal Upnishads, 1921, 2nd Ed., p. 169.

¹²⁰ Dutt, M.N., A Prose English Translation of the Agni Puranam, 1904, Vol. II, p. 815.

An actual historical case is recorded in which a certain Brahmana in the city of Prathishthana demeaned his wife. In this record also, is to be noted the utter fidelity of the wife in spite of her harsh treatment—“Kansika—in consequence of his pristine sins, was assailed by leprosy. His wife served her diseased husband as if he were a deity, by shampooing his feet and limbs, bathing him, clothing him, feeding him . . . by serving him in solitude, and treating him with sweet words. Although, always served by her with humanity, that highly irascible and cruel (Brahmana) used to rebuke her angrily. Still the humble wife considered him as a deity, and regarded that horrible one as the best of men.”

(Markandeya, 16.14_18)¹²²

In Mahabharata, there is an instance of the violent treatment of a woman— “while she was piteously praying . . . he dragged her forcibly by her black hair”.

(Sabha Parva, 2.6.7.32)¹²³

All the above references from ancient literature show that women were subjected to all kinds of humiliations and indignities.

1.4.2 Domestic Violence in Present Indian Society

In India, we have unique situation of co-existence of all forms of violence specially of elimination of women, e.g. selective female foeticide, female infanticide, bride burning and sati. The incidence of violence of all forms within family has also gone up. Even today, various

¹²¹ Dutt, M.N., The Markandeya Puranam, 1896, p. 30.

¹²² Ibid. at p. 79.

¹²³ Dutt, M.N., A Prose English Translation of Mahabharata, Vol. IIInd., p. 88.

forms of violence against women are prevalent in our society, though many cases remain unreported due to cultural norms, apathy or ignorance. They may manifest themselves directly in wife battering, abduction, eve-teasing, verbal abuses or verbal rebukes. Women on many occasions are victimized by all sorts of discriminations, deprivations and obstructions in goal achieving and responses. These incidents may occur in the family, offices, agricultural fields, industries or even public places. It sounds surprising that on animal level predatory aggression (killing and eating) occurs between the species and not within the species, but a human being, the highest on the evolutionary level, kills another human being of his own species.¹²⁴

Inflicting and experiencing violence in many subtle forms causing and suffering mental pain in day-to-day life, has become ways of our world in inter—personal relationships. The cruelty, the hate that exists in ourselves is expressed in the exploitation of the weak by the powerful and the cunning.¹²⁵

The worst part of the problem is that women today, are not feeling safe and secured even in the family. The concept of home, sweet home is no more, so far many women, who suffer violence against themselves by the members of the family.

Home is no safe place when it comes to aggressive behaviour. Fitz and Gerstenzang¹²⁶ observe that episodes of verbal or physical aggression are most likely to occur in the home and the relatives (such as parents offspring and spouses) were the most frequent targets of aggression.

¹²⁴ Srivastava, Dr. Lakshmi, Problem of Violence Against Women—A Multidisciplinary Conceptual Analysis, This paper was read in National Seminar on “Women and Violence: Various Manifestations”, at A.N.S. Institute of Social Studies, Patna on 17th January, 1988.

¹²⁵ Krishnamurthi, J., Commentaries on Living, 3rd Series, Edited by D. Rajagopal, 1977, p. 166.

¹²⁶ Fitz and Gerstenzang S., Anger in Everyday Life : when, why, where and with whom? Paper presented at the meeting of the Midwestern Psychological Association, Chicago, May, 1978.

Steinmetz and Straus¹²⁷ described the family as “cradle of violence”. Straus¹²⁸ drawing from incidences of violence between spouses called “the marriage license as a hitting license”.

In the last four decades, there has been an alarming increase in the incidence of violence within and outside the family. Today, we hear more about wife beating, dowry deaths, sexual crimes and even reversion to medieval practices like “sati”. Over the years, the nature of domestic violence has changed, now it has assumed following characteristics:

1. Differences between the husband and wife and increasing divorce is becoming common.
2. Men are marrying more than once, partly because they can get a new girl and partly because of the dowry.
3. Human feelings are gradually evaporating. A man resorts even to murder the wife if he does not get the expected dowry or if he is attracted to another girl.
4. The growing dowry system is gradually making the baby girl unwanted. People are resorting to foeticide and sometimes, baby girls are even killed after birth. Besides this—
5. Women are ignored in house work and outside home. They are suffering innumerable tortures from their in—laws and husbands. They are frequently beaten up and denied food and shelter.

¹²⁷ Steinmetz, S.K. and Straus, MA., *The Family as Cradle of Violence*, Society, (10), 1973, pp. 50-56.

¹²⁸ Straus, MA., *The Marriage License as a Litting License: social instigation of physical aggression in the family*. Paper presented at the Meeting of the American Psychological Association, Chicago, September, 1975.

All these cases reveal the true nature of the system of marriage and family in our society. The stereotypes rules of men and women are rigidly defined. While the material gains brought by the men are for every one to see the inputs provided by the women being distant are often invisible. The amount of time, energy and labour spent by women in performing her duties go unnoticed. Often, she has to pay in terms of sacrificing her likings, interests and skills while the society offers man many opportunities to go out of house and share with others his joys and sorrows, such opportunities are very less for a woman. This mental violence, agony of losing life's most precious treasures and the lack of opportunities to share it with somebody also stems out of our societal structure. In such violence, there are no visible body marks. But the wounds inflicted on the mind are difficult to heal.

The woman right from the moment of stepping into the husband's home tries to forget her own identity and adjust everything according to the needs of the new place and the people living in it. In spite of it, she is under a constant watch and is often criticized for anything, e.g. for not bringing enough money from her parents, for not being trained properly, etc. She tends to overlook these facts, because she has been 'trained' to do so. The society, the religion, her parents and in—laws, everyone expects her to become her husband's shadow. The worst thing is that all these come as a rude shock to her after marriage, because the institution of marriage in our society is highly glamorized. Hence for a woman, 'the union of souls' turning into a nightmare is a truly horrifying and shattering experience. The mental violence may be committed in such a subtle manner that others will never come to know of it.¹²⁹

Domestic violence can take a number of forms, including:

¹²⁹ Sood, Sushma, Violence Against Women, 1990, p. 227.

- physical behaviour (slapping, punching, pulling hair or shoving);
- forced or coerced sexual acts or behaviour (unwanted fondling or intercourse, or sexual jokes and insults);
- threats (threatening to hit, harm or use a weapon);
- psychological abuse (attack on self—esteem, attempts to control or limit another person’s behaviour, repeated insults or interrogation);
- stalking (following a person, appearing at a person’s home or workplace, making repeated phone calls or leaving written messages); or
- cyberstalking (repeated online action or e-mail that causes substantial emotional distress); and
- sacrifice of liking, interest and skills.¹³⁰

Domestic Violence knows no age, socio-economic, religious, racial, gender or educational barriers. It is a myth that only the poor or uneducated are victims of domestic abuse. Most studies indicate that there is also a high incidence of spousal abuse in the more affluent neighbourhoods. Although a poor victim has the terrible problem of not having resources available, the more affluent spouse may also be in an equally desperate trap due to social stigmas, greater economic pressures and the increased societal position and power that the partner may have at his or her disposal.

It is devastating for children to witness verbal or physical abuse, or to see the aftermath: an injured parent, a destroyed home. Fear, anger, feelings of isolation, low self—esteem and loss of trust are all common in children who witness abuse. Learning disabilities and behavioural problems which may be present are likely to intensify as they get older. In

¹³⁰ Nob. Com, What is Domestic Violence?

households where women are abused by their partners, there is often a high incidence of child abuse by the abusive parent. It is also becoming increasingly apparent that children in violent homes are frequently victims of incest and, unfortunately, the legacy of abuse doesn't stop when the children leave home. Children develop behaviour based on what they have experienced growing up. Children from violent homes are at high risk for becoming adult victims or abusers themselves

Family and friends are indirect victims of abuse. The isolation and terror that victim lives with deprives those closest to him or her from meaningful and fulfilling relationships. Often the abuser will harm others close to the victim in an effort to hurt or control the victim. An abuser may harm children, other family members, friends, pets, personal belongings and the family home.

Isolation keeps a victim trapped. Frequently, a batterer isolates the victim from the family socially, emotionally and geographically. The victim is frequently forbidden to see trusted friends and family, and is denied the opportunity to go to school or work outside the home. There is little or no access to or control over finances, in the midst of this terrible isolation, the abuser employs "brainwashing" tactics, and with no input to the contrary from anyone outside the relationship, there will be no way for the victim to test reality.¹³¹

¹³¹ Domestic Violence and the Courtroom, Understanding the Problem . knowing the Victim, findlaw.com

CHAPTER – 2

DOMESTIC VIOLENCE AND UNIVERSAL DECLARATION OF HUMAN RIGHTS

The report published in The Telegraph revealed, “differences between male and female child mortality rates over the last 40 years, reveals that from 2000 to 2010 there were 56 deaths of boys aged one to five for every 100 female deaths.”

Indian campaigners for the rights of girls said the figures reflected widespread discrimination against girls, ranging from neglect to abuse and killing of unwanted female infants.

The figures, compiled by the United Nations Department of Economic and Social Affairs, emerged as India was plunged into introspection over the case of a two year old girl fighting for her life in hospital after being abandoned by her family and trafficked between several adults before being beaten, bitten and branded by a 14 year old girl. The girl, known as Falak, is suffering from severe chest injuries and brain damage and according to her doctors is unlikely to survive the next 48 hours.

Girls are widely regarded as a burden to Indian families who fear the high costs of their weddings and resent spending money on their education only for them later to leave the home to marry.

Many women abort pregnancies when they believe they will deliver a girl, often under pressure from their husbands or in-laws who favour boys. Campaigners believe there may have been as many as eight

million cases of 'female foeticide' in India over the last decade.

This discrimination has driven India's sex ratio progressively lower. Census statistics show it fell from 976 girls per 1000 boys in 1961 to 914 in 2011. But according to campaigners the figures hide the cruelty and neglect suffered by girls kept by their families, in particular from malnutrition and denial of medical treatment. Ranjana Kumari of the Council for Social Research said Indian mothers breast feed girls for a far shorter period than they do their sons and feed them less well because they fear good nourishment will speed the advent of puberty and the need for a costly wedding. While boys are taken immediately to hospital, sick girls are kept waiting because their families do not have the same interest in their survival.

"They think they need to feed the boy, but there is less desire for the girl to survive, it is common in rural India. Boys are immediately taken to the doctor, but not the girl. She is the last to get the medicine," she said.

Female infanticide was also a factor in the UN figures, she added. "It has been a practice in central India for a long time, where mothers were made to feed the child with salt to kill the girl child."¹³²

Another report in Reuters reveals, "Increasing female feticide in India could spark a demographic crisis where fewer women in society will result in a rise in sexual violence and child abuse as well as wife-sharing, the United Nations warned.

Despite laws banning tests to determine the sex of an unborn child, the killing of female fetuses is common in some regions of India where a

¹³² By Dean Nelson, New Delhi 01 Feb 2012: The Telegraph

preference for sons runs deep.

As a result, the United Nations says an estimated 2,000 unborn girls are illegally aborted every day in India.

This has led to skewed sex ratios in regions like Punjab, Haryana, Gujarat and Himachal Pradesh as well as the capital, New Delhi, where a census in 2001 showed there are less than 800 girls for every 1,000 boys.

"The 2001 census was a wake-up call for all of us and much public awareness have been created on female feticide since then," Ena Singh, assistant representative for the United Nations Population Fund in India told Reuters.

"But initial figures show sex ratios are still declining as female feticide is becoming more widespread across the country and it is likely to be worse in the next census in 2011."

In most parts of India, sons are viewed as breadwinners who will look after their parents and carry on the family name, but daughters are viewed as financial liabilities for whom they will have to pay substantial dowries to get married off.

Demographic Crisis

Activists say female feticide is rising because of the availability of technologies like ultrasonography and amniocentesis to determine the gender of fetuses at the request of the parents.

If the fetus is found to be a girl, it is aborted.

As a result, the government says around 10 million girls have been killed by their parents either before or immediately after birth over the

past 20 years.

Experts warn that fewer women will spark a demographic crisis in many parts of country.

"There already is this phenomenon all over the country where there is a lot of sexual violence and abuse against women and children across the country," said Ranjana Kumari, director of the Centre for Social Research, a New Delhi based think-tank.

"But when there are less women in the population and more men of the same age group, there is certainly going to be much more demand for women for marriage, for sex and this pressure will certainly increase violence against women."

Experts say practices such as polyandry -- where several men, often brothers, share the same wife are already emerging in areas where there are fewer women.

Brides are also now being sold and trafficked by their parents to areas like Haryana and Punjab where bachelors are being forced to look beyond their own culture, caste and social grouping to find a wife.

Activists say these women have to adapt to an alien culture with a different language, diet, and social norms and are often treated as second-class citizens by the community who view their value based on their ability to produce male off-spring.

"There is this myth that fewer women will give them better status in society but this is a fallacy," said activist Sabu George.

"Women in India are already being treated as commodities to be

bought and sold and their plight will worsen as sex ratios continue to decline."¹³³

“By the late 1990s, female foeticide had been reported in 27 of India’s 32 states, and in some communities in Bihar and Rajasthan, the birth ratio is reported to be as low as 60 females per 100 males, compared to the natural ratios of 97 to 100 males. Parallel studies for Bangladesh and Pakistan suggest similar trends in which existing discriminatory patterns of female infanticide and neglect continue. For example, a very recent study of sex specific mortality data in Bangladesh showed that girls aged 0 to 4 years had a mortality rate that was 40 per cent higher for girls than for boys.

Asia-Pacific Population Journal, June 2002

introduction of new technologies may well continue or exacerbate these trends and contribute to rising sex ratios at birth and increasing numbers of girls “missing”.

In East Asia, it was the dramatic increase in the masculinity of sex ratios at birth which first aroused disquiet among demographers, followed by increasing concern at the rising female infant and child mortality rates. Since the mid-1980s, demographic studies in China, the Republic of Korea, Taiwan Province of China and Viet Nam have uniformly showed an increasing rise in the proportion of male births and confirmed that access to sex identification and abortion facilities is widespread and permit new forms of intervention before birth.

For China, reported sex ratios at birth rose from close to the norm of 106 male to 100 female births in the 1960s and 1970s to 108.5 in 1981,

¹³³ NitinBhalla: Rise in India's female feticide may spark crisis : Aug 31, 2007

110.9 in 1986, 110.0 in 1987, 111.3 in 1989 to 112 in 1990 and to 117/8 in 2000. Similarly sex ratios at birth have risen from 107 to 110 in Taiwan Province of China and from 107 to 114 in the Republic of Korea. For China, the figures for sex ratios at birth are complicated by the fact that not all female births are registered, but calculations which take probable rates of under-registration and the sex ratios of older children into account suggest that girls are not just “missing” from the statistics. Indeed, hypotheses based on under-reporting, abandonment and adoption appear to be much weaker than they were several years ago and attention has shifted to the more serious forms of discrimination such as infanticide, sex-selective abortion or infant and child neglect.

Field investigations suggest that the incidence of female infanticide probably rose during the 1980s when it became the subject of much media concern and, although the practice is likely to persist in poorer remote regions where it is still an accepted means for reducing fertility and achieving desired sex configurations, there is little evidence to suggest widespread female infanticide. Rather, there is a congruence of opinion among China’s demographers that the practice of female infanticide at birth is less responsible for the current rise in sex ratios than sex-selective abortion. In support of their argument, they cite the legal strictures against infanticide, the difficulty in keeping such births and deaths hidden, the considerable psychological costs and above all, they suggest that there are now considerable prenatal options including sex-selective abortion. Ironically, it is the improvements in the standards of prenatal care and in particular the development and spread of new ultrasound technologies that have been responsible for permitting an increase in sex-identification before birth. While government policy has forbidden the use of new technologies for sex identification, their

widespread use for this purpose is difficult to police and the lack of local funding for health encourages their misuse because the fees levied finance an otherwise under-funded health service and supplement low medical incomes. What lends weight to the importance of sex-selective abortion as the cause of rising sex ratios at birth in both rural and urban regions, is that even in urban hospitals where surveillance is greater, the sex ratios of aborted fetuses and of births also show high sex ratios, which suggest that numbers of women have availed themselves of prenatal sex identification tests (Gu and Li, 1994). Similar trends revealing increases in the use of sex selective abortion characterize the demographic literature for the Republic of Korea, Taiwan Province of China and Viet Nam.¹³⁴

“Female Foeticide Males Females What is female foeticide? Many people do not know the difference between a foeticide and an abortion. An abortion is the removal of an embryo from the uterus, resulting in -or caused by- its death. The spontaneous expulsion of an embryo before the 20th week of gestational age is commonly known as a miscarriage. Induced abortion is the removal of an embryo by medical, surgical, or other means for therapeutic reasons. Feticide is an act that causes the death of a fetus. In a legal context, "fetal homicide" refers to the deliberate or incidental killing of a fetus due to a criminal act, such as a punch or kick to the abdomen of a pregnant woman. As a medical term, feticide is the destruction of a fetus. The beginning of foeticide in India. What are the reasons behind female foeticide in India? What has female foeticide led to? What has the government done? What actions did the United Nations take? Has there been any changes occurring? What organizations exist that support gender equality? In India, foeticide began

¹³⁴ Angelique Chan and Brenda S.A. Yeoh : Gender, Family and Fertility in Asia: An Introduction

in the early 90's, when ultrasound techniques were recognized. Before the process, families would continue to produce children until a male child was born to be able to support the family in the future. Female foeticide has led to an increase in human trafficking. In 2011, approx. 15,000 Indian women were bought and sold as brides within regions where foeticide has led to a lack of women.

According to Vijay Rai, Project Coordinator at Plan International (India), the alarming rate of female foeticide has led to a dangerously declining sex ratio, “with negative results that are already making themselves apparent in India. These include an increase in sexual and social crimes against women, such as rape, abduction, bride selling, etc., which in turn will lead to an increase in prostitution and sexual exploitation and cases of Sexually Transmitted Diseases and Human Immunodeficiency Virus and Acquired Immune Deficiency System, with a resulting increase in physiological and psychological disorders, particularly among women, as well as unwanted pregnancies and forced abortions.”

Experts say practices such as polyandry, where several men, often brothers, share the same wife, are already emerging in areas where there are fewer women.

Initially, foeticide was supported by the Government. The practice enabled the control of population growth in India, however, after the Preconception and Prenatal Diagnostic Techniques Act was passed in 1994, and sex-selective abortion became illegal. In 2003, the act was modified putting medical professionals legally liable of the practice. The Preconception and Prenatal Diagnostic Techniques Act hasn't been carried out properly over the years and is currently enforced poorly by

authorities. The government says around 10 million girls have been killed by their parents either before or immediately after birth over the past 20 years. Experts warn that fewer women will spark a demographic crisis in many parts of the country. The UN says an estimated 2,000 unborn girls are illegally aborted every day in India. The UN Declaration of Rights of Children from 1959, which indicated that “the child, by reason of his physical and natural immaturity, needs special safeguards and care, including appropriate protection, before as well as after birth” was concerted into the UN Convention on Rights of the Child in 1989. India became signatory to the Convention in 1992. Sadly, there have been numerous incidents of the foetus being found lying in farms, floating in rivers, wrapped up in jute bags etc. Despite government measures and laws against it, foeticide has not seen a decrease in its rate; on the contrary, it is increasing rapidly. In south Indian states, children are either fed the milk of poisonous plants or covered with a wet towel so that they die later of complications from cold. In Bihar, holding the baby from the waist and shaking it back and forth snaps the spinal cord and babies are also fed with salt to increase their blood pressure; death follows in a few minutes. Furthermore, a change in the method of killing infants has been observed following the exhumation of bodies to get forensic evidence when it was suspected that an infant had been a victim of infanticide. People began to adopt methods such as starving the baby to death, which, unlike poisoning, leaves no forensic evidence as to the cause of death. In order to end gender selective abortions, a campaign in India called BetiBachao (Save Girls) was established. The BetiBachao campaign is supported by human rights groups, non-government organizations, and state and local government in India.

The Art of Living organization has been working in collaboration

with the United Nations Population Fund to educate people against the heinous practice of sex selection and female foeticide in India. The Art of Living promotes the active involvement of women in decision-making processes so that their voices are not only heard, but appropriate action is taken towards development that includes men and women at the community level. That concludes my presentation. Families want a male child so that the child can carry on the family name and support his parents.

In most parts of India, sons are viewed as breadwinners, but daughters are viewed as financial liabilities for whom they will have to pay substantial dowries to get married off. Many believe that the dowry system in Indian is the main reasoning behind the practice of foeticide. A large dowry property or money brought by the bride to her husband on their marriage is usually provided by the parents. Since parents do not want the pressure of supporting dowries for their daughters in the future, they commit foeticide.

Even though some families do not believe in foeticide, they will commit the act either way. The life transition from a female foetus to a school going girl to a caring woman is never an easy task for the fairer sex. She has to face challenges at every step of her life. Daily, there is news related to rape, sexual harassment, molestation, verbal abuse, torture, exploitation. She has to fight against gender discrimination, inequality, and hundreds of social norms are tagged with her the day she puts her steps outside her home. In order to prevent the constant worry over the parents' female child, they commit foeticide."¹³⁵

Women who constitute half a human population have been

¹³⁵ RodaAbdulkadir: Female Foeticide

discriminated, harassed and exploited irrespective of the country to which they belong, unmindful of the religion, which they profess and oblivious of the timeframe in which they live. Everywhere women are confronted with many challenges. Female foeticide is perhaps one of the worst forms of violence against women where a woman is denied her most basic and fundamental right i.e “the right to life”. The phenomenon of female foeticide in India is not new, where female embryos or fetuses are selectively eliminated after pre-natal sex determination, thus eliminating girl child even before they are born. As a result of selective abortion, between 35 and 40 million girls and women are missing from the Indian population. In some parts of the country, the sex ratio of girls to boys has dropped to less than 800:1000. The United Nations has expressed serious concern about the situation. The longstanding tradition of son preference, coupled with medical technology now gives to the status conscious Indian families, the choice between payment of large dowry for their daughters or elimination of daughters. The traditional method of getting rid of the unwanted girl child was female infanticide, where the female baby was done away with after birth in various ways – either by poisoning the baby or letting her choke on husk or simply by crushing her skull under a charpoy. With the advancement of medical technology sophisticated techniques can now be used or rather misused, to get rid of her before birth. Through ultrasound scans and amniocentesis, the sex of the foetus can be determined during the pregnancy of the woman and then the foetus is aborted if found to be female. In Indian society, female foeticide has emerged as a burning social problem during the last few years. The girl child in India is treated right from her birth as an additional burden an extra mouth to feed, a liability and another man’s property. The birth of a son is regarded as essential in Hinduism and many prayers and lavish offerings are made in temples in the hope of having a male child. Modern

medical technology is used in the service of this religion driven devaluing of women and girls. Woman is created par with man in all aspects. “Women have equal rights with men upon earth; in religion and society they are a very important element. Divine Justice demands that the rights of both sexes should be equally respected since neither is superior to the other in the eyes of Heaven.” These authoritative statements from the Bahai’s writing are regarded by Bahai’s as expressions of the Divine Will. To deprive women arbitrarily of their rights and privileges, or to deprive them to even being born or killing them in infancy is both immoral and unjust, a violation of God’s law. It has a detrimental effect on the society and the individuals who are involved in this practice are responsible for such acts.³ But does the Indian society accept this reality? If so why female foeticide and female infanticide are on the increase? The sex ratio has altered consistently in favour of boys since the beginning of the 20th century (see Table), and the effect has been most pronounced in the states of Punjab, Haryana and Delhi. It was in these states that private foetal sex determination clinics were first established and the practice of selective abortion became popular from the late 1970s.

Worryingly, the trend is far stronger in urban rather than rural areas, and among literate rather than illiterate women.¹³⁶

World over either because of societal structure or because of inequality, India is among those few nations who have seen this peculiar problem. Since female foeticide is a problem linked with the main threats to women dignity and other rights of women. United Nations has also taken into account the same. If read carefully, even Universal Declaration of Human Rights has indirect but effective provisions regarding that.

¹³⁶ Dr. Krushna Chandra Jena: Female Foeticide in India : A Serious Challenge for the Society: Orissa Review 9 December - 2008

PREAMBLE of Universal Declaration of Human Rights provides,
“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts, which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS

UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

It is clear from the Preamble itself that the declaration was meant to establish dignity of all which includes dignity of women along with their right to life

Further the Article 1 provides, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹³⁷

It must be noted that spirit of article 1 clearly suggests that all are born ‘free and equal’.

Article 2 provides, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other

¹³⁷ Article 1

limitation of sovereignty.”¹³⁸

This article corresponds to Article 15 of Indian Constitution and clearly prohibits any inequality on the basis of ‘sex’ along with other attributes.

Corresponding Article 15 (1) provides, “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

Article 3 provides, “Everyone has the right to life, liberty and security of person.” It must be noted that female foeticide clearly violates the said article because security of person’s security is put in danger.

Article 5 provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 7 provides, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8 provides, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 10 provides, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

¹³⁸ Article 2

Article 12 provides, “ No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 16 provides, “ (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17 provides, “ (1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18 provides, “ Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19 provides, “ Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 25 provides, “ (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26 provides, “ (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27 provides, “ (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material

interests resulting from any scientific, literary or artistic production of which he is the author.

It may be observed from the Article in Universal Declaration of Human Rights that woman is supposed to be treated as man and she is entitled to each and every right in the same fashion as man.

Roe v. Wade and Universal Declaration of Human Rights¹³⁹ is a landmark decision by the United States Supreme Court on the issue of abortion. Decided simultaneously with a companion case, *Doe v. Bolton*¹⁴⁰, the Court ruled 7–2 that a right to privacy under the due process clause of the 14th Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's two legitimate interests in regulating abortions: protecting prenatal life and protecting women's health. Arguing that these state interests became stronger over the course of a pregnancy, the Court resolved this balancing test by tying state regulation of abortion to the third trimester of pregnancy.

The Court later rejected *Roe's* trimester framework, while affirming *Roe's* central holding that a person has a right to abortion until viability. The *Roe* decision defined "viable" as being "potentially able to live outside the mother's womb, albeit with artificial aid", adding that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

In disallowing many state and federal restrictions on abortion in the United States, *Roe v. Wade* prompted a national debate that continues today about issues including whether, and to what extent, abortion should

¹³⁹ 410 U.S. 113 (1973)

¹⁴⁰ 410 U.S. 197 (1973)

be legal, who should decide the legality of abortion, what methods the Supreme Court should use in constitutional adjudication, and what the role should be of religious and moral views in the political sphere. *Roe v. Wade* reshaped national politics, dividing much of the United States into pro-choice and pro-life camps, while activating grassroots movements on both sides.

The Court issued its decision on January 22, 1973, with a 7-to-2 majority vote in favor of *Roe*. Burger and Douglas' concurring opinions and White's dissenting opinion were issued along with the Court's opinion in *Doe v. Bolton* (announced on the same day as *Roe v. Wade*). The Court deemed abortion a fundamental right under the United States Constitution, thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny.

Relevance: The decision was based on the principle that the right to get aborted is fundamental right and all the laws curtailing the right must strictly be scrutinized.

Since the right includes negative and positive aspects both. Hence, not to get aborted must also be fundamental right. To stop female foeticide, the courts are required to implement the same right in stricter sense and must ensure whether the same has been provided to the persons desperately need it.

2.1 Universal Declaration and other treatise

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination

against women and sets up an agenda for national action to end such discrimination.

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life including the right to vote and to stand for election as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

2.2 RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

Violence against women migrant workers the General Assembly, recalling that the Charter of the United Nations reaffirms faith in human rights and fundamental freedoms, in the dignity and worth of the human person and in the equal rights of men and women,

Reaffirming the principles set forth in the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly by its resolution 34/180 of 18 December 1979 and annexed thereto,

Welcoming the reaffirmation made in the Vienna Declaration and Programme of Action, 1/ adopted by the World Conference on Human Rights, that gender- based violence and all forms of sexual harassment and exploitation are incompatible with the dignity and worth of the human person and must be eliminated by legal measures and through national and international cooperation.

Noting that large numbers of women from developing countries continue to venture forth to more affluent countries in search of a living for themselves and their families, as a consequence of poverty, unemployment and other socio-economic situations in their home countries, while acknowledging the primary duty of States to work for conditions that provide employment to their citizens, recognizing that it is the duty of sending countries to protect and promote the interests of their citizens who seek or receive employment in other countries, to provide them with appropriate training/education, and to apprise them of their rights and obligations in the countries of employment,

Aware of the moral obligation of receiving or host countries to ensure the human rights and fundamental freedoms of all persons within their boundaries, including migrant workers, in particular women migrant workers, who are doubly vulnerable because of their gender and because they are foreigners,

Noting with concern the continuing reports of grave abuses and acts of violence committed against the persons of women migrant workers by some of their employers in some host countries,

Stressing that acts of violence directed against women impair or nullify the enjoyment by women of their human rights and fundamental freedoms,

Convinced of the need to eliminate all forms of discrimination against women and the need to protect them from gender-based violence,

1. Expresses grave concern at the plight of women migrant workers who become victims of physical, mental and sexual harassment and abuse;

2. Recognizes with appreciation the efforts exerted by some receiving countries to alleviate the negative situation of women migrant workers;
3. Welcomes the recommendation to the General Assembly by the Economic and Social Council in its resolution 1993/10 of 27 July 1993 of the draft Declaration on the Elimination of Violence against Women; 3/
4. Reaffirms the provision in the Vienna Declaration and Programme of Action that the rights of women should form an integral part of United Nations human rights activities, including the promotion of all human rights instruments specifically relating to women;
5. Calls upon all countries, particularly the sending and receiving States, to cooperate in taking appropriate steps to ensure that the rights of women migrant workers are protected;
6. Also calls upon the countries concerned to take appropriate measures to ensure that law-enforcement officials and the judiciary assist in guaranteeing the full protection of the rights of women migrant workers;
7. Urges both sending and host countries to help ensure that women migrant workers are protected from unscrupulous recruitment practices, if needed, by the adoption of legal measures;
8. Encourages Member States to consider signing and ratifying or acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

9. Invites trade unions to support the realization of the rights of women migrant workers by assisting them in organizing themselves so as to enable them better to assert their rights;
10. Requests treaty-monitoring bodies and calls upon non-governmental organizations concerned with violence against women to include, where appropriate, the situation of women migrant workers in their deliberations and findings and to supply relevant information to United Nations bodies and Governments;
11. Calls upon non-governmental organizations concerned in cooperation with both the sending and the host countries to conduct seminars and training programmes on human rights instruments, particularly those pertaining to migrant workers;
12. Urges all States, with the support of relevant non-governmental organizations, to adopt appropriate measures to provide support services to women migrant workers who have become traumatized as a consequence of violations of their rights by, inter alia, unscrupulous employers and/or recruiters, and to provide resources for their physical and psychological rehabilitation;
13. Also urges that the subject of violence against women migrant workers be included in the agenda of the Fourth World Conference on Women: Action for Equality, Development and Peace, to be held in Beijing in 1995;
14. Calls upon competent bodies and specialized agencies of the United Nations system, other intergovernmental organizations and non-governmental organizations to inform the Secretary-General of

the extent of the problem and to recommend further measures to implement the purposes of the present resolution;

15. Requests the Secretary-General to report to the General Assembly at its forty-ninth session on the implementation of the present resolution, taking into account the relevant views of the Commission on the Status of Women in its discussion of the subject of violence against women at its thirty-eighth session, in March 1994.

2.3 United Nations intergovernmental bodies dealing with relating to women:

The Commission on the Status of Women, composed of 32 members, prepares recommendations and reports to the Economic and Social Council on the promotion of women's rights in political, economic, social and educational fields. It makes recommendations to the Council on problems requiring attention in the field of women's rights.

CHAPTER-3

PROTECTION OF FEMALE FOETICIDE UNDER VARIOUS PENAL LAWS AND THEIR CONSTITUTIONAL VALIDITY

There are occasions where the judiciary takes the charge and directs the executive to implement the laws effectively. Female foeticide being the law relating to human dignity, the courts are conscious enough for implementation of these kinds of laws.

Although sex determination and sex selection (female foeticide) is a topic beginning to gain more public awareness, the laws surrounding sex selective abortions remain unclear due to political and judicial jargon. The Pre-Conception and Prenatal Diagnostic Techniques Act was passed in 1994 banning prenatal sex determination as a means to prevent sex selective abortions. According to the act, a prenatal diagnostic procedure includes any medical procedure such as ultrasonography, foetoscopy, or sampling of amniotic fluid, chorionic villi, blood, any tissue or fluid, which is sent to a genetic laboratory or clinic for pre-natal analysis or diagnostic tests for sex selection. Pre-natal analysis could include any tests conducted on pregnant women to detect genetic disorders, metabolic disorders, chromosomal abnormalities, congenital anomalies, haemoglobinopathies, and sex-linked diseases.

While the effectiveness of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 Act can be questioned, the act has clear objectives that aim to prevent any sort of prenatal sex selection. There are three main objectives to the

Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 Act. The first is to prohibit sex selection before or after conception. The second objective is to regulate pre-natal diagnostic practices so they are only used to detect genetic, metabolic, or chromosomal abnormalities, and the third objective is to prevent the misuse of these techniques for sex determination, which could lead to sex determination and sex selection (female foeticide).

“The Act is talking about two issues: the conception side and the technical procedures,” said SoumyaBhaumik, lawyer at the Centre for Social Research. “The Act is meant to prevent the abortion of female fetuses.”

The Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 Act defines sex selection as any procedure, technique, or test that is conducted for the purpose for ensuring or increasing the probability that an embryo will be of a particular sex. This law applies to any centre that provides genetic counseling to patients. This includes any institute, hospital, nursing home, or clinic, which is used for pre-natal diagnostic techniques. Even a vehicle that has any equipment that could be used for determining the sex of a fetus comes under this law. All genetic centres are required to display prominently a notice in English and in the local language or languages that conduct of sex-determination tests/disclosure of sex of the foetus is prohibited.

An important aspect of the law is that it permits the use of prenatal diagnostic techniques if tests are being conducted to diagnose medical conditions such as genetic diseases, chromosomal abnormalities, or any other disease that can be diagnosed through conducting prenatal tests.

This law only prohibits the use of prenatal tests for sex selection purposes.

While prenatal tests are permitted for detecting specific disorders, there are certain conditions that women must have in order to qualify for prenatal diagnostic practices. Prenatal techniques can be used on pregnant women if they are above 35 years, have undergone two or more spontaneous abortions or foetal loss, have been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals, or if the pregnant women or their spouses have a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.

Any medical personnel conducting a prenatal test must brief the woman on any potential risks or side effects of the test and must gain written consent from the woman before conducting the tests. In addition, anyone conducting the prenatal diagnostic must declare on each report that he/she has neither detected nor disclosed the sex of foetus to any body, and any pregnant woman undergoing ultrasonography/image scanning must declare that she does not want to know the sex of her foetus.

The Act also places prohibitions on people, including relatives and the husband of the pregnant woman. These prohibitions extend to family members or the husband of the pregnant woman encouraging or seeking the use of prenatal techniques for the purpose of sex selection. In addition, no person including the specialist or family member will communicate to the pregnant woman, her relatives, or any other person the sex of the foetus by words, signs or in any other manner.

Any person who acts contrary to this law and seeks the aid of prenatal tests to be conducted on a pregnant woman for the purpose of sex selection will be liable to be punished to up to three years imprisonment and pay a fine up to Rs.50,000. However, in case of a doctor violating this act, his/her name will be reported to the State Medical Council, who will take appropriate actions, including suspension of the doctor's practicing license.¹⁴¹

In 2000, the Constitutional Chamber of Costa Rica's Supreme Court of Justice held that human life begins at fertilization, and that zygotes, embryos, and fetuses are thus entitled to all human rights, including a right to life.¹⁴² As a result, in vitro fertilization was banned in Costa Rica, even though abortion remained legal when a pregnancy posed a risk to the woman's life or health.¹⁴³ In 2012, the Inter-American Court of Human Rights struck down Costa Rica's prohibition of IVF as a means to protect the right to life prior to birth, finding that where there are prenatal protections, they must be "gradual and incremental, according to [life's] development."

3.1 VARIOUS LAWS PROTECTING FEMALE FOETICIDE

3.1.1 THE PRE-NATAL DIAGNOSTIC TECHNIQUES (PRE NATAL DIAGNOSTIC TEST ACT) ACT & RULES

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, was enacted and brought into operation from 1st January, 1996, in order to check female foeticide. Rules have also been

¹⁴¹ By Lea Goelnitz, Intern – Centre for Social Research: June 21, 2012

¹⁴² SalaConstitucional de la Corte Suprema de Justicia [ConstitutionalChamber of theSupremeCourt of Justice], Expediente [Record] No. 95-001734-0007-CO, Voto [Vote] No. 2306-00, Mar. 15, 2000 (Costa Rica).

¹⁴³ Código Penal [CP] (Penal Code) No. 4573, art. 121, May 4, 1970 (Costa Rica)

framed under the Act. The Act prohibits determination and disclosure of the sex of foetus . It also prohibits any advertisements relating to pre-natal determination of sex and prescribes punishment for its contravention. The person who contravenes the provisions of this Act is punishable with imprisonment and fine.

Recently, Pre Natal Diagnostic Test Act and Rules have been amended keeping in view the emerging technologies for selection of sex before and after conception and problems faced in the working of implementation of the Act and certain directions of Hon'ble Supreme Court after a PIL was filed in May, 2000 by CEHAT and Ors, an NGO on slow implementation of the Act. These amendments have come into operation with effect from 14th February, 2003

3.1.2 THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994

This is an Act to provide for the regulation of the use of pre-natal 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 pre-natal sex determination leading to female foeticide; and, for matters connected there with or incidental thereto. BE it enacted by Parliament in the Forty-fifth Year of the Republic of India as follows:-

1. Short title, extent and commencement.- (1) This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.(2) It shall extend to the whole of India except the State of Jammu and Kashmir.(3) It shall come into force on such date as the Central Government may, by notification in the

Official Gazette, appoint.

2. Definitions.- In this Act, unless the context otherwise requires,--
- (a) "Appropriate Authority" means the Appropriate Authority appointed under section 17;
 - (b) "Board" means the Central Supervisory Board constituted under section 7;
 - (c) "Genetic Counseling Centre" means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients;
 - (d) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures;
 - (e) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test;
 - (f) "Gynecologist" means a person who possesses a post-graduate qualification in gynecology and obstetrics;
 - (g) "Medical geneticist" means a person who possesses a degree or diploma or certificate in medical genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining--
 - (i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956);

or(ii) a post-graduate degree in biological sciences;

- (h) "Pediatrician" means a person who possesses a post-graduate qualification in pediatrics;
- (i) "pre-natal diagnostic procedures" means all gynecological or obstetrical or medical procedures such as ultrasonography foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test;
- (j) "pre-natal diagnostic techniques" includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;
- (k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex- linked diseases;
- (l) "prescribed" means prescribed by rules made under this Act;
- (m) "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956.) and whose name has been entered in a State Medical Register;
- (n) "regulations" means regulations framed by the Board under this Act.

3.1.3 REGULATION OF GENETIC COUNSELLINGCENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.- On and from the commencement of this Act,-

- (1) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques;
- (2) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications;
- (3) no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

3.1.4 REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

4. Regulation of pre-natal diagnostic techniques.- On and from the commencement of this Act,-

- (1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in

clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-

- (i) chromosomal abnormalities;
- (ii) genetic metabolic diseases
- (iii) haemoglobinopathies;
- (iv) sex-linked genetic diseases;
- (v) congenital anomalies;
- (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no pre-natal 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 of two or more spontaneous abortions 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;

(v) any other condition as may be specified by the Central Supervisory Board;

(4) no person, being a relative or the husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purpose specified in clause (2).

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus.

(1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless—

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) No person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs or in any other manner.

6. Determination of sex prohibited.- On and from the commencement

of this Act,-

1. (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
- (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

3.1.5 CENTRAL SUPERVISORY BOARD

7. Constitution of Central Supervisory Board.-

- (1) The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the powers and perform the functions conferred on the Board under this Act.
- (2) The Board shall consist of—
 - (a) the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, ex officio;
 - (b) the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice-Chairman, ex-officio;
 - (c) two members to be appointed by the Central

Government to represent the Ministries of Central Government in charge of Woman and Child Development and of Law and Justice, ex-officio;

(d)

(e) amongst—the Director General of Health Services of the Central Government, ex officio; ten members to be appointed by the Central Government, two each from

(i) (ii) (iii) (iv) (v)

eminent medical geneticists; eminent gynaecologists and obstetricians; eminent paediatricians;

eminent social scientists; and representatives of women welfare organisations;

(f) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States;

(g) four members to be appointed by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order:

Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

(h) an officer, not below the rank of a Joint Secretary or

equivalent of the Central Government, in charge of Family Welfare, who shall be the Member-Secretary, ex officio.

8. Term of office of members.-

- (1) The term of office of a member, other than an ex officio member, shall be,-
 - (a) in case of appointment under clause (e) or clause (f) of sub-section (2) of section 7, three years; and
 - (b) in case of appointment under clause (g) of the said subsection, one year.
- (2) If a casual vacancy occurs in the office of any other members, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled by the Central Government by making a fresh appointment and the member so appointed shall hold office for the remainder of the term of office of the person in whose place he is so appointed.
- (3) The Vice-Chairman shall perform such functions as may be assigned to him by the Chairman from time to time. (4) The procedure to be followed by the members in the discharge of their functions shall be such as may be prescribed.

9. Meetings of the Board.-

- (1) The Board shall meet at such time and place, and shall observe such rules of procedure in regard to the transaction

of business at its meetings (including the quorum at such meetings) as may be provided by regulations:

Provided that the Board shall meet at least once in six months.

- (2) The Chairman and in his absence the Vice-Chairman shall preside at the meetings of the Board.
 - (3) If for any reason the Chairman or the Vice-Chairman is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.
 - (4) All questions which come up before any meeting of the Board shall be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.
 - (5) Members other than ex officio members shall receive such allowances, if any, from the Board as may be prescribed.
10. Vacancies, etc., not to invalidate proceedings of the Board.- No act or proceeding of the Board shall be invalid merely by reason of—
- (a) any vacancy in, or any defect in the constitution of, the Board; or
 - (b) any defect in the appointment of a person acting as a member of the Board; or
 - (c) any irregularity in the procedure of the Board not affecting

the merits of the case.

11. Temporary association of persons with the Board for particular purposes.

(1) The Board may associate with itself, in such manner and for such purposes as may be determined by regulations, any person whose assistance or advice it may desire in carrying out any of the provisions of this Act.

(2) A person associated with it by the Board under sub-section (1) for any purpose shall have a right to take part in the discussions relevant to that purpose, but shall not have a right to vote at a meeting of the Board and shall not be a member for any other purpose.

12. Appointment of officers and other employees of the Board.-

(1) For the purpose of enabling it efficiently to discharge its functions under this Act, the Board may, subject to such regulations as may be made in this behalf, appoint (whether on deputation or otherwise) such number of officers and other employees as it may consider necessary:

Provided that the appointment of such category of officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.

(2) Every officer or other employee appointed by the Board shall be subject to such conditions of service and shall be entitled to such remuneration as may be specified in the regulations.

13. Authentication of orders and other instruments of the Board.- All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of the Member-Secretary or any other officer of the Board authorised in like manner in this behalf.
14. Disqualifications for appointment as member.- A person shall be disqualified for being appointed as a member if, he—
- (a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or
 - (b)
 - (c)
 - (d) Corporation owned or controlled by the Government; or
 - (e) has, in the opinion of the Central Government, such financial or other interest in the Board as is likely to affect prejudicially the discharge by him of his functions as a member; or
 - (f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex.
15. Eligibility of member for reappointment.- Subject to the other terms and conditions of service as may be prescribed, any person

ceasing to be a member shall be eligible for reappointment as such member.

16. Functions of the Board. - The Board shall have the following functions, namely:--

- (i) to advise the Government on policy matters relating to use of pre-natal diagnostic techniques;
- (ii) to review implementation of the Act and the rules made thereunder and recommend changes in the said Act and rules to the Central Government;
- (iii) to create public awareness against the practice of pre-natal determination of sex and female foeticide;
- (iv) to lay down code of conduct to be observed by persons working at Genetic CounsellingCentres, Genetic Laboratories and Genetic Clinics;
- (v) any other functions as may be specified under the Act.

3.1.6 APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

17. Appropriate Authority and Advisory Committee.-

- (1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.
- (2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the

whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,--

(a) when appointed for the whole of the State or the Union territory, of or above the rank of the Joint Director of Health and Family Welfare; and

(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

is an undischarged insolvent; or

is of unsound mind and stands so declared by a competent court; or

has been removed or dismissed from the service of the Government or a

(4) The Appropriate Authority shall have the following functions, namely:--

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic

Clinic;

- (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and
 - (d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration.
- (5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.
- (6) The Advisory Committee shall consist of—
- (a) three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists;
 - (b) one legal expert;
 - (c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;
 - (d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

- (7) No person who, in the opinion of the Central Government or the State Government, as the case may be, has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex shall be appointed as a member of the Advisory Committee.
- (8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

- (9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed.

3.1.7 REGISTRATION OF GENETIC COUNSELLINGCENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

18. Registration of Genetic CounsellingCentres, Genetic Laboratories or Genetic Clinics.

- (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under this Act.

- (2) Every application for registration under sub-section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.
- (3) Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement.
- (4) Subject to the provisions of section 6, every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier.
- (5) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

19. Certificate of registration.-

- (1) The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules made thereunder and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in the prescribed form jointly or separately to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, as the case may be.
- (2) If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act or the rules, it shall, for reasons to be recorded in writing, reject the application for registration.
- (3) Every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.
- (4) The certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in a conspicuous place at its place of business.

20. Cancellation or suspension of registration.-

- (1) The Appropriate Authority may suo moto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic

Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

- (2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.
- (3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

21. Appeal. The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under section 20, prefer an appeal against such order to—

- (i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

- (ii) the State Government, where the appeal is against the order of the State Appropriate Authority, in the prescribed manner.

3.1.8 OFFENCES AND PENALTIES

22. Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.-

- (1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place.
- (2) No person or organisation shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place.
- (3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation.--For the purposes of this section, "advertisement" includes any notice, circular, label wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

23. Offences and penalties.-

- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder 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.
- (2) The name of the registered medical practitioner who has been convicted by the court under sub- section (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.
- (3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynaecologist or registered medical practitioner for conducting pre- natal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for

purposes other than those specified in clause (2) of 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.

24. Presumption in the case of conduct of pre-natal diagnostic techniques.- Notwithstanding anything in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo pre- natal diagnostic technique and such person shall be liable for abetment of offence under subsection (3) of section 23 and shall be punishable for the offence specified under that section.
25. Penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided.- Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.
26. Offences by companies.-
 - (1) Where any offence, punishable under this Act has been

committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,--

- (a) "company" means any body corporate and includes a firm or other association of individuals, and
- (b) "director", in relation to a firm, means a partner in the firm.

27. Offence to be cognizable, non-bailable and non-compoundable.- Every offence under this Act shall be cognizable, non-bailable and

non-compoundable.

28. Cognizance of offences.

- (1) No court shall take cognizance of an offence under this Act except on a complaint made by--
 - (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or
 - (b) a person who has given notice of not less than thirty days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.--For the purpose of this clause, "person" includes a social organisation.

- (2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
- (3) Where a complaint has been made under clause (b) of subsection (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.

29. Maintenance of records.

- (1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act

and the rules shall be preserved for a period of two years or for such period as may be prescribed:

Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

- (2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

30. Power to search and seize records, etc. –

- (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.
- (2) The provisions of the Code of Criminal Procedure, 1973 (2

of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.

31. Protection of action taken in good faith.- No suit, prosecution or other legal proceeding shall lie against the Central or the State Government or the Appropriate Authority or any officer authorised by the Central or State Government or by the Authority for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act.

32. Power to make rules.-

(1) The Central Government may make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for--

(i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (1) of section 3;

(ii) the form in which consent of a pregnant woman has to be obtained under section 5;

(iii) the procedure to be followed by the members of the Central Supervisory Board in the discharge of their functions under sub-section (4) of section 8;

(iv) allowances for members other than ex officio members admissible under sub-section (5) of section 9;

- (v) the period intervening between any two meetings of the Advisory Committee under the proviso to sub-section (8) of section 17;
- (vi) the terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee under sub-section (9) of section 17;
- (vii) the form and manner in which an application shall be made for registration and the fee payable thereof under sub-section (2) of section 18;
- (viii) the facilities to be provided, equipment and other standards to be maintained by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under sub-section (5) of section 18;
- (ix) the form in which a certificate of registration shall be issued under sub-section (1) of section 19;
- (x) the manner in which and the period after which a certificate of registration shall be renewed and the fee payable for such renewal under sub-section (3) of section 19;
- (xi) the manner in which an appeal may be preferred under section 21;
- (xii) the period up to which records, charts, etc., shall be preserved under sub-section (1) of section 29;

(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub-section (1) of section 30;

(xiv) any other matter that is required to be, or may be, prescribed.

33. Power to make regulations.- The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for--

(a) the time and place of the meetings of the Board and the procedure to be followed for the transaction of business at such meetings and the number of members which shall form the quorum under sub-section (1) of section 9;

(b) the manner in which a person may be temporarily associated with the Board under sub-section (1) of section 11;

(c) the method of appointment, the conditions of service and the scales of pay and allowances of the officer and other employees of the Board appointed under section 12;

(d) generally for the efficient conduct of the affairs of the Board.

34. Rules and regulations to be laid before Parliament. – Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it

is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

3.2 Indian Penal Code:

3.2.1 Section 312. Causing miscarriage

Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation :A woman who causes herself to miscarry, is within the meaning of this section.

Para I

Punishment—Imprisonment for 3 years, or fine or both—Non-cognizable—Non-bailable—Triable by Magistrate of the first class—Non-compoundable.

Para II

Punishment—Imprisonment for 7 years and fine—Non-cognizable—Bailable—Triable by Magistrate of the first class—Non-compound-able.

3.2.2 Section 313. Causing miscarriage without woman's consent

Whoever commits the offence defined in the last preceding section 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.

Para I

Punishment—Imprisonment for life, or imprisonment for 10 years and fine—Cognizable—Non-bailable—Triable by Court of Session—Non-compoundable.

3.2.3 Section 314. Death caused by act done with intent to cause miscarriage-

Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine.

If act done without woman's consent.—And if the act is done without the consent of the woman, shall be punished either with ¹[imprisonment for life] or with the punishment above mentioned

Explanation :It is not essential to this offence that the offender should

know that the act is likely to cause death.

Para I

Punishment—Imprisonment for 10 years and fine—Cognizable—
Non-bailable—Triable by Court of Session—Non-compoundable.

Para II

Punishment—Imprisonment for life, or as above—Cognizable—
Non-bailable—Triable by Court of Session—Non-compoundable.

3.2.4 Section 315. Act done with intent to prevent child being born alive or to cause it to die after birth

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from 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, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Punishment—Imprisonment for 10 years, or fine, or both—
Cognizable—Non-bailable—Triable by Court of Session—Non-compoundable.

3.2.5 Section 316. Causing death of quick unborn child by act amounting to culpable homicide

Whoever does any act under such circumstances, that if he thereby caused 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 shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Punishment—Imprisonment for 10 years and fine—Cognizable—Non-bailable—Triable by Court of Session—Non-compoundable.

3.2.6 Section 317. Exposure and abandonment of child under twelve years, by parent or person having care of it.

Whoever being the father or mother of a child under the age of twelve years, having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years; or with fine, or with both.

Explanation : This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.

Punishment—Imprisonment for 7 years, or fine, or both—Cognizable—Bailable—Triable by Magistrate of the first class—Non-compoundable.

3.2.7 Section 318. Concealment of birth by secret disposal of dead body.

Whoever, by secretly burying or otherwise disposing of the death body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

3.2.8 Constitutional Validity:

It must be noted that Constitution of India clearly provides under various provisions that there cannot be any discrimination on the ground of sex.

Article 14 provides, “The state shall not deny any person equality before law or the equal protection of laws.”

Article 15 provides, “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
 - (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
 - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

- (3) Nothing in this article shall prevent the State from making any special provision for women and children.

Article 16 (2) provides, “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.”

Article 21 provides, “ No person shall be deprived of his life and personal liberty except procedure established by law.

“India's highest court issues notices to central and state authorities for stricter implementation of the law that ban sex-determination tests and sex-selective abortions. A public interest litigation has said that recognition of pre-birth sex-selection should be considered medical malpractice as it involves the misuse of medical technology.

The Supreme Court of India has issued notices to the Indian government and the states and union territories on a petition seeking stricter implementation of laws that ban pre-natal sex-selection tests and sex-selective abortions in India. A concerned Supreme Court observed that the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 that is meant to prevent female foeticide in India, has failed.

On August 18, a two-judge bench of Justices K G Balakrishnan and D K Jain issued notices on a petition by a civil society organisation, Voluntary Health Association of Punjab. Notices were also issued to the Ministry of Health and Family Welfare, Ministry of Law and the Ministry of Women and Child Development on the petitioner's claim that though the act was amended in 2003, pursuant to a direction by the apex court,

there was need for guidelines for proper and full implementation of the act.

The petition brought to the court's attention the rampant practice of sex-selective abortions in many parts of the country, with doctors indiscriminately conducting sex-determination tests and carrying out abortions because of lax implementation of the preconception and prenatal diagnostic techniques (prohibition of sex selection) act, 1994 Act. The petitioner observed that many clinics and doctors who were performing sex-selective abortions were not even licensed to perform medical terminations of pregnancy.

Senior advocate Colin Gonsalves, appearing for the petitioner, said recognition of pre-birth sex-selection should be declared a medical malpractice and offence as it involves the misuse of medical technology by doctors who are greedy for money.

The consequence is a sharp decline in the under-six sex ratio, the petitioner said, presenting state-wise figures to support his argument. The VHAP pointed out that though legislation preventing sex-determination had been passed 12 years ago, it had virtually failed to prevent the crime. In the past 10 years, several states have registered a nearly 50% decline in child sex ratio, with states like Punjab witnessing 850 females per 1,000 males.

The discovery of a large number of female foetuses in a well at the house of a doctor in Punjab was a pointer to the impunity with which provisions of the Preconception And Prenatal Diagnostic Techniques (Prohibition Of Sex Selection) Act, 1994 Act are being violated. The country need not wait for the census to assess the impact of sex-determination tests and female foeticide being carried out by certain

ruthless doctors for their greed, throwing the country into an abyss of imbalanced ratio between males and females.

This imbalance would have serious repercussions for Indian society in future, especially on the status of women, the petitioner said, leading to increased sexual violence, trafficking and the reduced mobility of women.

The PIL asked the court to direct the reconstitution of advisory committees throughout the country by removing private doctors and replacing them with reputed CSOs and individuals committed to the implementation of the act.

It also sought a direction to the Medical Council of India to make it mandatory for all private doctors to bring to the notice of the authorities any incident or person connected with sex-determination.

The petitioner urged the court to direct the states to constitute special investigation teams to look into cases of sex-selective abortions, set up a special court and appoint special prosecutors to conduct trials in such cases.

It also sought that the authorities should not be allowed to permit the sale of ultrasound machines without proper verification of the antecedents of the buyers and be particularly vigilant about private gynaecologists, to ensure that they did not misuse this equipment.¹⁴⁴

In Centre For Enquiry Into Health v. Union Of India & Others,¹⁴⁵It is an admitted fact that in Indian Society, discrimination

¹⁴⁴ Source: The Hindu, August 19, 2006
The Tribune, August 19, 2006
IANS, August 18, 2006
Zee News, August 18, 2006

¹⁴⁵ AIR2003SC3309

against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organisations are required to approach this Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 renamed after amendment as "The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act" (hereinafter referred to as 'the Pre Natal Diagnostic Test Act') which is the normal function of the Executive.

In this petition, it was inter alia prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the Pre Natal Diagnostic Test Act, the Central Government and the State Governments be directed to implement the provisions of the Pre Natal Diagnostic Test

Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the Pre Natal Diagnostic Test Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

After filing of this petition, notices were issued and thereafter various orders from time to time were passed to see that the Act is effectively implemented.

On 4th May 2001, following order was passed. "It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.

For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of

Misuse) Act, 1994. The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act came into force from 1st January, 1996.

It is apparent that to a large extent, the Pre Natal Diagnostic Test Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry Into Health and Allied Themes which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal based in Pune and Maharashtra and the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. Prima facie it appears that despite the Pre Natal Diagnostic Test Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the Pre Natal Diagnostic Test Act: -

(A) Directions to the Central Government

1. The Central Government is directed to create public

awareness against the practice of pre- natal determination of sex and female foeticide through appropriate releases / programmes in the electronic media. This shall also be done by Central Supervisory Board as provided under Section 16(iii) of the Pre Natal Diagnostic Test Act.

2. The Central Government is directed to implement with all vigor and zeal the Pre Natal Diagnostic Test Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the Pre Natal Diagnostic Test Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

(B) Directions to the Central Supervisory Board

1. Meetings of the Central Supervisory Board will be held at least once in six months. [Re. Proviso to Section 9(1)] The constitution of the Central Supervisory Board is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. The CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii)].

3. The Central Supervisory Board shall issue directions to all State/Union Territory. Appropriate Authorities to furnish quarterly returns to the Central Supervisory Board giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about: -
 - (i) Survey of bodies specified in section 3 of the Act.
 - (ii) Registration of bodies specified in section 3 of the Act.
 - (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
 - (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
 - (v) Number and nature of awareness campaigns conducted and results flowing therefrom.
4. The Central Supervisory Board shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government.
[Re. Section 16]
5. The Central Supervisory Board shall lay down a code of conduct under section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

6. The Central Supervisory Board will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

(C) Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under section 17(6)(d) should be such persons who can devote some time for the work assigned to them.
2. All State Governments/Union Territory Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/Union Territory.
3. All State Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoarding and other appropriate means.
4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate Authorities furnish quarterly returns to the Central Supervisory Board giving a

report on the implementation and working of the Act. These returns should inter alia contain specific information about: -

- (i) Survey of bodies specified in section 3 of the Act.
- (ii) Registration of bodies specified in section 3 of the Act.
- (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
- (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
- (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

(D) Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of section 22 of the Act.
2. Appropriate Authorities are directed to take prompt action against all bodies specified in section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All State/Union Territory Appropriate Authorities are directed to furnish quarterly returns to the Central Supervisory Board giving a report on the implementation and working of the Act. These returns should inter alia

contain specific information about: -

- (i) Survey of bodies specified in section 3 of the Act.
- (ii) Registration of bodies specified in section 3 of the Act including bodies using ultrasound machines.
- (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
- (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
- (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

The Central Supervisory Board and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List the matter on 6.8.2001 for further directions at the bottom of the list."

In spite of the above order, certain States/Union Territory did not file their affidavits. Matter was adjourned from time to time and on 19th September, 2001, following order was passed "Heard the learned counsel for the parties and considered the affidavits filed on behalf of various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.

1. At the outset, we may state that there is total slackness by the Administration in implementing the Act. Some learned counsel pointed out that even though the Genetic Counselling Centre, Genetic Laboratories or Genetic Clinics

are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In our view, those Centres which are not registered are required to be prosecuted by the Authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.

It is to be stated that the Appropriate Authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.

Further wherever at District Level, appropriate authorities are appointed, they must carry out the necessary survey of Clinics and take appropriate action in case of non-registration or non-compliance of the statutory provisions including the Rules. Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.

2. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as "the Act"). Hence it is directed that the quarterly returns to Central Supervisory Board should be submitted giving the following information:-

- (a) Survey of Centres, Laboratories/Clinics,
- (b) Registration of these bodies,
- (c) Action taken against unregistered bodies,
- (d) Search and Seizure,
- (e) Number of awareness campaigns, and
- (f) Results of campaigns"

On 7th November, 2001, learned counsel for the Union of India stated that the Central Government has decided to take concrete steps for the implementation of the Act and suggested to set up National Inspection and Monitoring Committee for the implementation of the Act. It was ordered accordingly.

On 11th December, 2001, it was pointed out that certain State Governments have not disclosed the names of the members of the Advisory Committee. Consequently, the State Governments were directed to publish the names of advisory committee in various districts so that if there is any complaint, any citizen can approach them. The Court further observed thus:â€” "For implementation of the Act and the rules, it appears that it would be desirable if the Central Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issue directions not to sell machines to unregistered clinics. Learned counsel Mr. Mahajan appearing for Union of India submitted that appropriate action would be taken in this direction as early as possible.""

On March 31, 2003, it was pointed out that in conformity with the

various directions issued by this Court, the Act has been amended and titled as "The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act". It was submitted that people are not aware of the new amendment and, therefore, following reliefs were sought:

- a) direct the Union of India, State Governments / UTs and the authorities constituted under the PRE NATAL DIAGNOSTIC TEST ACT to prohibit sex selection techniques and its advertisement throughout the country;
- b) direct that the appropriate authorities shall also include "vehicles" with ultra sound machines etc., in their quarterly reports hereinafter as defined under Section 2(d);
- c) any person or institution selling Ultra Sound machine should provide information to the appropriate State Authority in furtherance of Section 3-B of the Amended Act;
- d) direct that State Supervisory Boards be constituted in accordance with the amended Section 16A in order to carry out the functions enumerated therein;
- e) direct appropriate authorities to initiate suo moto legal action under the amended Section 17(iv)(e);
- f) direct that the Central Supervisory Board shall publish half yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:
 - 1) Survey of bodies and the number of bodies registered.

- 2) Functioning of the regulatory bodies providing the number and dates of meetings held.
- 3) Action taken against non-registered bodies inclusive of search and seizure of records.
- 4) Complaints received and action taken pursuant thereto.
- 5) Nature and number of awareness programmes.
- 6) Direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.

As against this, Mr. Mahjan learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by Union of India for implementation and almost all State Governments/UTs are informed to implement the said Act and the Rules and the State Governments/UTs are directed to submit their quarterly report to the Central Supervisory Board.

Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as the State Governments/UTs to implement the same as early as possible."

At the time of hearing, learned counsel for the petitioners submitted that appropriate directions including the steps which are required to be taken on the basis of PRE NATAL DIAGNOSTIC TEST

ACT Act and the suggestion as given in the written submission be issued.

On this aspect, learned counsel for the parties were heard.

In view of the various directions issued by this Court, as quoted above, no further directions are required except that the directions issued by this Court on 4th May, 2001, 7th November, 2001, 11th December, 2001 and 31st March, 2003 should be complied with. The Central Government / State Governments / UTs are further directed that:

- a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.
- b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.
- c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.
- d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.
- e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under

the Act.

f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.

1. Delhi
2. Himachal Pradesh
3. Tamil Nadu
4. Tripura
5. Uttar Pradesh.

g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand
2. Maharashtra
3. Tripura

4. Tamil Nadu 5. Uttar Pradesh It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.

The Writ Petition is disposed of accordingly.

In view of the aforesaid order, pending IA have become infructuous and are disposed of accordingly.

In **VinodSoni and Anr. Vs. Union of India**,¹⁴⁶V.G. Palshikar, J. held, “By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of

¹⁴⁶ 2005 CriLJ 3408

the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition in so far as the challenge via Article 14 of the Constitution of India is concerned.

2. We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India. Article 21 reads thus:

"Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."

3. This provision of Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21. In our opinion, firstly we deal with protection of life and protection of personal liberty. In so far as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he, or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family

which an individual can have in exercise of liberty guaranteed by Article 21. It in turn includes nature of sex of that family which he or she may eventually decided to have and/or develop.

4. Reliance was placed, as already stated, on several judgments of the Supreme Court of India on the enlargement of the right embodied under article 21. The right basically deals with protection of life and protection of personal liberty. Personal Liberties have been or personal life has been expanded during the passage of 55 years of the Constitution. It now includes right to pollution free water and air as held in AIR 1991 S.C. page 420 It includes right to a reasonable residence for which reliance is placed on a judgment in *Shantistar Builders v. Narayan Khmalal Totame* reported in AIR 1990 S.C. page 630 This right to a reasonable residence always postulates right to a reasonable residence on reasonable restrictions and for reasonable price. This right cannot be and the Supreme Court's judgment in 1990 S.C. page 630 does not create a right to a reasonable residence in any citizen, free of any cost.

5. Then reliance is placed on a Supreme Court Judgment in AIR 1989 S.C. page 677 and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to Food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.

6. The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under article 21, which gives to every child right to full development. A child conceived is

therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expansion, or if it can be so expanded right to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under.

"The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders."

Then para 4 reads thus:

"Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub section 2 says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) hemoglobinopathies, (4) sex-linked genetic

diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.

8. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child, which is come into existence as a right to do or not to do something, which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus, which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India.

It may be noted that there are ample laws to punish female foeticide, but the lack of seriousness, societal structure, patriarchal society, are the main reasons for female foeticide. If the laws already existing implemented properly the problem may be sorted out.

CHAPTER-4

VARIOUS DIMENSIONS OF FEMALE FOETICIDE AND REGIONAL DIFFERENCE IN VARIOUS PARTS OF INDIA

In India domestic violence is the most endemic and widespread form of violence. Despite its prevalence, it is only recently, as a result of relentless effort by women's organisations, that violence against women in the home has received any public attention. Domestic violence cuts across education and income levels occurs in both joint and nuclear families. It is not necessarily related to alcohol abuse. A very little research has been done on this subject and this is largely because, like in the rest of the world, in India too, there is a tendency to overlook the incidence of the phenomenon with only the few heinous cases attracting media and public attention.

Not much research has been done in India for variety of reasons. Firstly, the semi sacred nature of the family in India society makes research into family violence a taboo. Secondly, research into the family has been largely devoted to the study of joint family which diverted attention from family conflicts in general and physical violence in particular. Thirdly, paucity of research on family violence can be attributed to the apathetic attitude of society which has relegated intra-family to believe that physical conflicts in the family do not constitute violence.¹⁴⁷

¹⁴⁷ Subadra, "Violence Against Women : Wife Battering in Chennai", Eco & Political Weekly, April 17, 1999, p.ws-30.

The age old phenomenon of wife-beating has unique manifestation in India. In most Indian homes, wife-beating is in fact one of the most accepted crimes committed against women. This problem is not confined to one particular strata of society alone. It exists everywhere though in different forms.¹⁴⁸ In India, the wife-beating seems to get camouflaged under the term dowry-deaths. The deaths which occurs within the home is the ultimate manifestation of the violence suffered by most Indian women in varying degrees.¹⁴⁹

If statistics are to be believed, almost every six hours, somewhere in India, a young married women is burnt alive, beaten to death or forced to commit suicide. Atleast 20% married women aged between 15 to 49 years experience marital violence at some point in their lives, many on an almost continual basis. In one study of battered women it was found that the percentage distribution of causes of violence against married women were dowry demands, extra marital affairs and bigamy, alcohol and gambling were the highest. The analysis revealed that for more than 50 percent of the cases, regular beating was a fact of life. Besides manual beating, 10 percent of the women were assaulted with instruments. Another study of dowry victims shows that one in every four was murdered or driven to commit suicide and more than half i.e. 61.3 percent were through out of their husbands house after a long drawn out period of harassment and torture. According to another study the victims were mostly young i.e. 18-30 years, less educated than their spouses, dependent on husbands on in-laws for their living and mostly died from burn injuries. It has also been argued that it is not only a woman's

¹⁴⁸ Mohd. Umar, *Bride Burning in India: A Socio-Legal Study*, (New Delhi : A.P.H. Publishing Corporation, 1998), p. 32.

¹⁴⁹ Flavia, 'violence in the Family : Wife Beating', in Ghadially, Rehana (ed.), *Women in Indian Society*, (New Delhi : Sage Publications, 1988) pp 151-152.

dependence with makes her vulnerable; a wife in a high status job may also be subjected to violence.¹⁵⁰

A detailed discussion on wife abuse, has rebutted convincingly, that the popular myths which surround the phenomenon of wife beating in India such as middle class women do not get beaten, the victim of violence is a small, fragile helpless women belonging to the working class, the wife beater is a man who is frustrated in his job, an alcoholic, or a paranoid person, aggressive in his relationships. Nor was it true that the so-called loving husbands did not beat their wives or that woman provokes men to beat them. Yet, many of these myths seem to pervade the analysis of wife-beating and feminine expectations in Indian society.

For instance, based on an analysis of cases which had come to the Delhi-based women's organisation, Saheli, it is evident that wife-beating was common among, all social classes as it "is a reflection of the power relationship between a husband and wife", which mirrors a woman's secondary social status.¹⁵¹ However, the pattern of violence differs from one class to another, with the whole neighbourhood being witness when a slum-dweller beats his wife to the extremely private nature of a middle class professional's physical oppression of his spouse.

Another area about which universally little is known and hardly discussed, is that of marital rape : in India, despite some thinking along these lines by feminists and legal experts, there has as yet been no amendment in law to include rape within marriage. The Only two exceptions being, firstly, if the wife is below 15 years of age and

¹⁵⁰ Pawar, M.S., "Women and Family Violence Policies and Programmes", cited in Malavika Karlekar, "Domestic Violence", *Eco & Pol Weekly*, July 4, 1998, p. 1747.

¹⁵¹ Saheli, "Wife Battering : Creating Choices for Individual Women, the Role of Government and Issues Facing the Women's Movement", Paper presented at the National Workshop on Family Violence Against Females, New Delhi, February 15-18.

secondly, if the wife is living separately under a decree of separation. Though figures on marital rape as well as other sexually demeaning and violent acts are difficult to obtain, however discussions with counsellors working with abuse women indicated that a very large percent of their clients were tortured with forced sexual intercourse. Feminine socialisation which stresses docility, compliance and shame predisposes a wife to accept a range of physical behaviour from her spouse. It would not be too extreme to hypothesise that male physical violence in marriage is related to sexual activity : detailed interviews and discussions at the women's shelter of battered women quite often led to admission of sexual excess; when a woman resisted, she was beaten, or if she did not satisfy her husband's demands (which could quite often be perverse in nature) the outcome was physical abuse.¹⁵²

It is indeed ironical that for long, the family, viewed as an individuals ballast against the world becomes the arena for legitimate physical and mental oppression of women; which the legal and police systems have, after 1975 become more receptive to certain excesses, yet much remains unstated, invisible and repressed.¹⁵³ Domestic Violence against women is a difficult and intractable health and social problem in India. The overwhelming conclusion is that wife-beating is not only deeply entrenched, but also that attitudes uniformly justify wife-beating, and few women would opt out of an abusive marriage.

4.1 Causes of Domestic Violence

There is no one single factor to account for violence perpetrated against women. Increasingly, research has focused on the inter-

¹⁵² MalvikaKarlekar, "Domestic Violence" *Eco & Pol. Weekly*, July 4, 1998, p. 1747.

¹⁵³ *Ibid.*, p. 1748.

relatedness of various factors that should improve our understanding of the problem within difficult cultural contexts. Several complex and interconnected institutionalised social and cultural factors have kept women particularly vulnerable to the violence directed at them, all of them manifestations of historically unequal power relations between men and women. Factors contributing to these unequal power relations include: socio-economic forces, the family institution where power relations are enforced, fear of and control over female sexuality, belief in the inherent superiority of males and legislation and cultural sanctions that have traditionally denied women an independent legal and social status.¹⁵⁴

4.2 Consequences of Domestic Violence

Domestic violence is a heinous offence against the society. It has many consequences on the progressive wheel it means women.

4.2.1 Health Consequences

Domestic violence against women leads to far-reaching physical and psychological consequences, some with fatal outcomes. While physical injury represents only a part of the negative health impacts on women, it is among the more visible forms of violence. Assaults result in injuries ranging from bruises and fractures to chronic disabilities such as partial or total loss of hearing or vision, and burns may lead to disfigurement. The medical complications can range from hemorrhage and sterility to severe psychological trauma. Studies in many countries and also in India have shown high levels of violence during pregnancy resulting in risk to the health of both the mother and the unborn foetus. In

¹⁵⁴ UNICEF, 2000, Innocenti Digest no. 6, Florence, Italy, :Unicef, Innoceti Research Centre, p. 7.

the worst cases, all of these examples of domestic violence can result in the death of the women – murdered by her partner.¹⁵⁵

4.2.2 Denial of Fundamental Human Rights

Perhaps the most crucial consequence of domestic violence against women is the denial of fundamental human rights to them. International human rights instruments such as a Universal Declaration of Human Rights, adopted in 1948, the Convention on the Elimination of all form of Discrimination against Women, adopted in 1979, and the Convention on the Rights of the Child, adopted in 1989, affirm the principles of fundamental rights and freedoms of every human being. Both the Convention on the Elimination of all form of Discrimination against Women and the Rights of the Child, are guided by a broad concept of human rights that stretches beyond civil and political rights to the core issues of economic survival, health, and education that affect the quality of daily life for most women and children. The two Conventions call for the right to protection from abuse and neglect.¹⁵⁶

The strength of these treaties rests on an international consensus, and the assumption that all practices that harm women and children, no matter how deeply they are embedded in culture, must be eradicated. Legally binding under international law for governments that have ratified them, these treaties oblige governments not only to protect women from crimes of violence, but also to investigate violations when they occur and to bring the perpetrators to justice.¹⁵⁷

¹⁵⁵ Sriranjana Chaudri, "Study Shows Women are Battered and Assaulted", The Times of India, Feb 2, 2000, p. 2.

¹⁵⁶ UNICEF, 2000, Innocenti Digest no. 6, Florence, Italy, :Unicef, Innocenti Research Centre, p. 8.

¹⁵⁷ United Nations ECOSOC, Report of the Special Rapporture on Violence Against Women, E/CM.4/1996/53 para 33.

4.2.3 Human Development Goals undermined

There is a growing recognition that countries cannot reach their full potential as long as women's potential to participate fully in their society is denied. Data on the social, economic and health costs of violence leave no doubt that violence against women undermines progress towards human and economic development. Women's participation has become key in all social development programmes, be the environment, for poverty alleviation, or for good governance. By hampering the full involvement and participation of women, countries are eroding the human capital of half their populations. True indicators of a country's, commitment to gender equality lie in its actions to eliminate violence against women in all its forms and in all areas of life.¹⁵⁸

The Constitution of India contains various provisions, which provide for equal rights and opportunities for both men and women. The silent features are:-

4.3 RIGHTS AGAINST DOMESTIC VOILENCE:-

4.3.1 Political Rights

Even though the fact that women participated equally in the freedom struggle and, under the Constitution and law, have equal political rights as men, enabling them to take part effectively in the administration of the country has had little effect as they are negligibly represented in politics. There were only seven women members in the Constituent Assembly and the number later decreased further. Their representation in the Lok Sabha is far below the expected numbers. This has led to the demand for reservation of 33%

¹⁵⁸ UNICEF, 2000, Innocenti Digest no. 6, Florence, Italy, :Unicef, Innoceti Research Centre, p. 8.

seats for women in the Lok Sabha and VidhanSabhas. Political empowerment of women has been brought by the 73rd and 74th Amendments¹⁵⁹ which reserve seats for women in Gram Panchayats and Municipal bodies. Illiteracy, lack of political awareness, physical violence and economic dependence are a few reasons which restrain women from taking part in the political processes of the country.

4.3.2 Economic Rights

At hand there has been series of legislation conferring equal rights for women and men. These legislations have been guided by the provisions of the fundamental rights and Directive Principles of State Policy. Here again there is a total lack of awareness regarding economic rights amongst women. Laws to improve their condition in matters relating to wages, maternity benefits, equal remuneration and property/succession have been enacted to provide the necessary protection in these areas.

4.3.3 Social justice

For providing social justice to women, the most important step has been codification of some of the personal laws in our country which pose the biggest challenge in this context. In the area of criminal justice, the gender neutrality of law worked to the disadvantage of a woman accused because in some of the cases it imposed a heavy burden on the prosecutor, for e.g. in cases of rape and dowry.

Certain areas like domestic violence and sexual harassment of women at the workplace were untouched, unthought-of. These

¹⁵⁹ 73rd and 74th Amendments of the constitution

examples of gender insensitivity were tackled by the judiciary and incorporated into binding decisional laws to provide social justice in void spheres.

Although a Uniform Civil Code is still a dream in spite of various directions of the Court, the enactment of certain legislations like the Pre-Natal Diagnostic Techniques (Prevention of Misuse) Act and the Medical Termination of Pregnancy Act prevent the violation of justice and humanity right from the womb.

In spite of these laws, their non-implementation, gender insensitivity and lack of legal literacy prevent the dream of the Constitution makers from becoming a reality. They prevent the fulfillment of the objective of securing to each individual dignity, irrespective of sex, community or place of birth.

4.4 Reported Incidents of Crimes Against Women

The crime recording authorities have not started collecting the data on the head of Domestic Violence against women, neither at the national level nor at the State level. The data are still recorded on different crimes against women under Indian Penal Code. As per the report of Law Ministry and Home Ministry tabled in Parliament national data of 2006-2010 are analysed. A total of 2,13,585 incidents of crime against women (both under IPC and SLL) were reported in the country during 2010 as compared to 2,03,804 during 2009 recording an increase of 4.8% during 2010. These crimes have continuously increased during 2006-2010 with 1,64,765 cases in 2006; 1,85,312 cases in 2007; 1,95,856 cases in 2008; 2,03,804 cases in 2009 and 2,13,585 cases in 2010.

4.5 Trend Analysis

The crime head-wise details of reported crimes during 2006 to 2010 along with percentage variation are presented in Table-1. The crime against women has increased by 4.8% over 2009 and by 29.6% over 2006. The Indian Penal Code component of crimes against women has accounted for 96% of total crimes and the rest 4% were SLL crimes against women.

The proportion of the Indian Penal Code crimes committed against women towards total the Indian Penal Code crimes has increased continuously during last 5 years from 8.2% in 2006 to 9.6% during 2010.

Table – 1

Crime Head-wise Incidents of Crimes Against Women during 2006-2010 and Percentage variation in 2010 over 2009

Sl. No.	Crime Head	Year					Percentage variation in 2010 over 2009
		2006	2007	2008	2009	2010	
1.	Rape (Sec. 376 IPC)	19,348	20,737	21,467	21,397	22,172	3.6
2	Kidnapping & Abduction (Sec. 363 to 373 IPC)	17,414	20,416	22,939	25,741	29,795	15.7
3.	Dowry Death (Sec. 302/304 IPC)	7,618	8,093	8,172	8,383	8,393	0.1
4.	Torture (Sec. 498-A IPC)	63,128	75,930	81,344	89,546	94,041	5.0
5.	Molestation (Sec. 354 IPC)	36,617	38,734	40,413	38,711	40,613	4.9

6.	Sexual Harassment (Sec. 509 IPC)	9,966	10,950	12,214	11,009	9,961	-9.5
7	Importation of Girls (Sec. 366-B IPC)	67	61	67	48	36	-25.0
8.	Sati Prevention Act, 1987	0	0	1	0	0	-
9.	Immoral Traffic (Prevention) Act, 1956	4,541	3,568	2,659	2,474	2,499	1.0
10.	Indecent Representation of Women (Prohibition) Act, 1986	1,562	1,200	1,025	845	895	5.9
11	Dowry Prohibition Act, 1961	4,504	5,623	5,555	5,650	5,182	-8.3
Total		1,64,765	1,85,312	1,95,856	2,03,804	2,13,585	4.8

The data of Rajasthan with regard to crimes against women recorded in 2010, 2011 and 2012 have been shown in table-2. These data also show the increasing trend of crimes against women every year, which includes domestic violence.

Table-2

Crime Against Women in Rajasthan

(Comparative Table of Year 2010, 2011 and 2012)

S. No.	Head	Complaint Lodged			Increase/ Decrease		Percentage	
		2010	2011	2012	2010 to 2012	2011 to 2012	2010 to 2012	2011 to 2012
1	Dowry Death	28	32	29	1	-3	3.57	-9.38
2.	Abetment to Dowry Suicide	18	12	9	-6	-3	-40.00	-25.00
3.	Cruelty to women	769	920	1298	529	378	68.79	41.09

	(498-A)							
4.	Rape	100	147	163	63	16	63.00	10.88
5.	Assault, Criminal Force, Molestation etc.	131	185	171	40	-14	30.53	-7.57
6.	Abduction / Kidnapping	197	210	219	22	9	11.17	4.29
7.	Others	53	59	54	1	-5	1.89	-8.47
Total		1293	1565	1943	650	378	50.27	24.15

4.6 CASES FORM VARIOUS REGIONAL PARTS OF INDIA

:-

4.6.1 Cases Handled and Disposed of during 2007-08

1. The National Commission for Women received a complaint from Mr. Y, a resident of Jalore, Rajasthan. The complainant alleged that his daughter had been continuously harassed for dowry by her in-laws and one day she was killed by them. The complainant lodged an First Information Report against the in-laws of his daughter for dowry death but police took no action, as most of the in-laws of his daughter were policemen. He approached National Commission for Women for help. The Commission took up the matter and a letter was sent to the Superintendent of Police, Jalore, Rajasthan, to investigate the matter. The Commission also asked for the report of the action taken. After intervention of the National Commission for Women, case was filed against the culprit U/s 498-A, 304-B and 201 of Indian Penal Code. Two of the accused persons were arrested and one surrendered himself later.
2. The National Commission for Women received a complaint from Ms. X, a resident of Bundi, Rajasthan. The complainant alleged that her husband and her in-laws continuously tortured

her. The complainant also alleged that her husband committed bigamy. The complainant's husband later deserted her and her in-laws did not accept her. She approached National Commission for Women for help. The matter was taken up by the National Commission for Women and a letter was sent to the Superintendent of Police, Bundi, Rajasthan, to investigate the matter. The Commission also asked for the report to be submitted within 7 days. After intervention of National Commission for Women a case was registered against the culprits U/s 498-A, 406 and 494 of Indian Penal Code. The accused persons were arrested under charges of domestic violence and bigamy.

3. The National Commission for Women received a complaint from Ms. X, a resident of Jodhpur, Rajasthan. The complainant alleged that she was severely harassed and tortured by the accused. She even consumed poison and tried to end her life. The accused continued to harass and torture her. She lodged a First Information Report but police took no action. She approached the National Commission for Women for help. The Commission took up the matter and a letter was sent to Superintendent of Police Jodhpur, Rajasthan asking him to conduct investigation into the matter. After intervention of National Commission for Women case was filed against the accused under Sections 306, 509 and 511 of the Indian Penal Code. The accused was arrested and the challan against them was submitted to the court.
4. The National Commission for Women received a complaint from Ms. X, a resident of Mahesh Nagar, Jaipur, Rajasthan. The

complainant alleged that her husband and in-laws harassed her for dowry. The complainant no longer wanted to live with them and wanted her 'Stridhan' back from her in-laws. The accused did not return the 'Stridhan'. She approached the National Commission for Women for help. The National Commission for Women took the matter and sent summons to both the parties. The accused party did not turn up for counselling. Therefore, a letter was sent to Crime against Women Cell, Rajasthan regarding the matter.

Thereafter, the National Commission for Women again called both the parties wherein they reached a mutual compromise. The complainant and her husband agreed to compromise and the accused gave assurance to return the 'stridhan' to the complainant.

5. The National Commission for Women registered a complaint dated from Mr. Y, a resident of Bikaner, Rajasthan. The complainant alleged that his daughter had been subjected to dowry demand, harassment, and torture by her husband and in-laws. When she failed to bring one lakh rupees as demanded by them, she was turned out of her matrimonial home. Since then she was residing with her father. The complainant made various attempts to reconcile but all his attempts proved to be in vain. The complainant approached the National Commission for Women for help. The matter was taken by the National Commission for Women and an Action Taken Report was sought from the Superintendent of Police, Bikaner, Rajasthan. An Inquiry was conducted and both the parties were called wherein they reached a mutual compromise. The complainant

left for her matrimonial home along with her husband. The complainant's husband assured the Commission that he would take care of his wife.

6. The National Commission for Women received a complaint from Ms. X, a resident of Udaipur, Rajasthan. The complainant alleged that her husband had extra-marital affairs and he used to disappear for at least 5-6 months. She further alleged that he never gave maintenance for the family. The matter was taken up by the Commission and both the parties were called wherein they reached a mutual compromise. The complainant's husband agreed to give a part of his salary to the family and assured that he would live with his family.

4.6.2 Cases Dealt with during 2008-09

1. The National Commission for Women received a complaint from Mr. X, a resident of Udaipur, Rajasthan, alleging that the husband and in-laws of his daughter subjected her to dowry demand, harassment and torture. When she failed to bring one lakh rupees as demanded by them, she was turned out of her matrimonial home. The complainant made various attempts to bring about reconciliation but all attempts proved to be unsuccessful. The complainant approached the National Commission for Women for help. The Commission took up the matter and an Action Taken Report was sought from the Senior Superintendent of Police, Udaipur, Rajasthan. On the National Commission for Women's intervention, an enquiry was conducted and both the parties were called wherein they reached mutual compromise. The complainant returned to her

matrimonial home and her husband assured that he would take care of his wife.

2. The National Commission for Women received a complaint from Ms. X, a resident of Sikar, Rajasthan. The complainant alleged that her husband was having an extra-marital affair and used to leave frequently. She further alleged that no maintenance was provided to her for meeting the day-to-day needs of her family. The Commission took up the matter and both the parties were called for a personal hearing at the Commission wherein after counselling, an amicable settlement was arrived at. The complainant's husband agreed to give a part of his salary for the maintenance of the family and also agreed that he would stay with his family.
3. The National Commission for Women received a complaint from Ms. Z, a resident of Malviya Nagar, Jaipur, Rajasthan regarding the alleged dowry demand and harassment meted out to her by her husband and in-laws. The Commission took up the matter and both the parties were called for a personal hearing at the Commission so that the matter could be sorted out at the initial stage itself. On further attempts of the Commission, both the parties reached an amicable settlement that the complainant and her husband would reside separately from their in-laws and that their in-laws would not interfere in their personal lives. After the National Commission for Women's intervention, the complainant and her husband arrived at a mutual settlement compromise. The complainant's husband also assured the Commission that he would take proper care of his wife.

4. The National Commission for Women received a complaint about the physical and mental torture meted out to a minor girl Ms. A, aged about 13 years, by her employers where the girl was employed as a domestic help. As the matter was serious, the Commission immediately sent a team headed by Ms. Manju S. Hembrom, Member of the National Commission for Women, along with members of Child Line to rescue the girl from her employers. The team visited the house and the girl was rescued from her employers. Thereafter, the National Commission for Women requested the Chief Minister, Government of Rajasthan, to personally intervene in the matter and to ensure that proper investigating be carried out in the case. The Chief Minister, Rajasthan, directed the Director General of Police, Rajasthan Police, for looking into the matter and getting it investigated through some Senior Officer and take appropriate action against the employers of the girl. As a result of the initiative of the National Commission for Women, the rescued girl Ms. A, had been taken to the Rehabilitation Centre, a Delhi-based Non-Governmental Organization.

5. The National Commission for Women received a complaint from Mrs. 5, a resident of Bundi District, Rajasthan, wherein the complainant alleged that she had been subjected to harassment torture by her husband and in-laws. She requested the Commission to ask her in-laws to return her “Streedhan—Dowry money, jewelry items, valuable goods, etc.” The Commission examined the matter and an Action Taken Report was sought from the Superintendent of Police, Bundi, Rajasthan, as regards the recovery of “Streedhan” from the in-

laws of the complainant. As a result of National Commission for Women's intervention, the police took action and the complainant recovered her valuables.

6. The National Commission for Women received a complaint from Mrs. X, Pali in October 2008. The complainant had alleged in her application that she was married in the year 1995 to Mr. Y in Rajasthan and had been leading a normal married life and were blessed by 4 children. However, subsequently her husband had taken to consuming excessive alcohol on account of which their marital life had been adversely affected. Further, Mr. "X" was also alleged to have resorted to beating his wife and, children. He had even sold a piece of land in his village on the advice of his friends. Presently, the complainant was residing in her parental house at Delhi. She stated that her husband provided no money for her maintenance for several years and that he had retained the children in his custody. Aggrieved by the situation she submitted her complaint to the Commission. The matter was taken up by the National Commission for Women and both the parties were called for a personal hearing at the Commission on an appointed date and were duly heard and counselled. As a result of the above, the husband agreed in writing that he would refrain from beating his wife and children, would support them, would not sell the remaining land in the village without the permission of his wife and would also not consume liquor.
7. The National Commission for Women received a complaint in November 2008 from Mrs. G; resident of Sri-Ganganagar alleging that she had been subjected to dowry demand,

harassment and torture by her husband and in-laws. An Action Taken Report was sought by the National Commission for Women, from the Senior Superintendent of Police, District Sri-Ganganagar, Rajasthan and as a result a compromise had been arrived at between both the parties and the dispute amicably resolved.

8. The National Commission for Women received a complaint from Mrs. D, a resident of Kota in November 2008 stating that she had been harassed and tortured in addition to being financially deprived by her husband and in-laws. The matter was taken up by the Commission and an Action Taken Report was sought from Superintendent of Police, Kota, after which both the parties had arrived at a compromise to live in harmony.
9. The National Commission for Women received a complaint from Ms. X of Chittorgarh District, Rajasthan, aged about 35 years, afflicted with health problems, regarding alleged mental torture and gender discrimination meted out to her by her parents. On the Commission taking up the matter and counselling both the parties, after a personal hearing, the parents agreed to pay due attention to their aggrieved daughter based on which the complainant requested for closure of the case.
10. The National Commission for Women received a complaint from Mrs. X of Sirohi regarding dowry demand and harassment meted out by her husband and in-laws. The Commission called both the parties for a personal hearing during which it was observed that the complainant and her husband had minor differences which had been escalated on account of negligence

by the husband thereby compelling her to leave her matrimonial home. As a result of personal hearing and effective follow-up, the parties arrived at a compromise.

11. The National Commission for Women received a complaint from Mrs. X alleging that her husband and in-laws were continuously harassing, torturing and subjecting her to physical and mental torture/domestic violence. The Commission took up the matter and an Action Taken Report was sought from the Superintendent of Police, District Jaipur, Rajasthan, requesting him to look into the complaint and to submit a report of the factual details of the case. In response to the same, the National Commission for Women received an Action Taken Report from the Deputy Superintendent of Police, Jaipur, wherein it was stated that an First Information Report under Sections 323/506/34 of Indian Penal Code had been registered against the alleged persons. In addition to this, the complainant had also initiated proceedings under Section 12 of the Protection of Women from Domestic Violence Act, 2005, which is pending in the Court.
12. The National Commission for Women received a complaint from Mrs. X, a resident of Bikaner, District of Rajasthan, alleging that she has been subjected to harassment or torture or cruelty or domestic violence by her husband and brother-in-law. The Commission took up the matter and both the parties were called for a personal hearing and counselling at the Commission. As a result of mediation, the complainant and her husband resolved their differences. Both the parties were also advised to minimize the interference of respective their in-laws

into their personal lives. The complainant went to her matrimonial home along with her husband. Two follow-ups have been conducted in this regard, which has confirmed that the parties are living in harmony.

4.6.3 Cases Dealt with during 2009-10

1. The National Commission for Women received a complaint from Smt. X, a resident of Jaipur, regarding the alleged harassment/breach of trust/cruelty/cheating/bigamy, etc. meted out to her by her husband. She stated that her husband has deserted her and that she has no knowledge about his whereabouts. Being immensely aggrieved, she approached National Commission for Women for help and intervention. The matter was taken up by National Commission for Women and efforts were made to trace the whereabouts of the complainant's husband, where after the complainant's husband appeared before the Commission. Both the parties were counselled to save their matrimonial home. Consequently, they agreed to mutually resolve their differences in the interest of the only teen-aged daughter's future.
2. The National Commission for Women received a complaint from Smt. Y, a resident of Jhunjhunu District, Rajasthan, regarding the alleged harassment/torture/domestic violence meted out to her by her husband and in-laws. The National Commission for Women took up the matter and both the parties i.e., the complainant and her husband were called for a personal hearing at the Commission. Thereafter, both the parties appeared before the Commission and were counselled wherein

the complainant's husband admitted his fault and assured the Commission in writing that in future he will take proper care of his wife.

3. The National Commission for Women received a complaint from Sh. Z, a permanent resident of Udaipur, alleging that his sister Smt. Y, has been brutally murdered by her husband and in-laws for want of more dowry. He stated that since the very inception of the marriage, his sister was subjected to dowry demand and harassment by the husband and in-law and when she failed to fulfil their aggravated demands for dowry, she was brutally murdered in District Anand of Gujarat. The complainant alleged that the police was not taking prompt action in the case and even the Investigation Officer of the case was about to drop Section 304(B) of Indian Penal Code that is "Dowry Death". The National Commission for Women took up the matter and Action Taken Reports were sought from the Director General of Police, Gandhinagar, Gujarat, District Magistrate and Collector, Anand and Superintendent of Police, Anand, wherein they were requested to initiate appropriate action. Thereafter, the Commission received an ATR from the Gujarat Police wherein it was informed that the issue was reexamined where after the charge-sheet has been presented in the concerned court and Section 304(B) of Indian Penal Code has not been dropped during the investigation.
4. A women complainant had alleged that she was subjected to physical and mental torture by her in-laws and her husband also was not interested in continuing the marital relationship. As a result, he did not take care of her. She appealed to the

Commission to get her 'Stridhan' back. The Commission called both the parties for a personal hearing. After 5-6 hearings in the Commission, both the parties reached an amicable settlement wherein the couple agreed for a mutual divorce and the groom's side returned the 'Stridhan' to the complainant at the commissions.¹⁶⁰

4.7 AGENCIES FOR PROTECTION OF WOMEN FROM DOMESTIC VOILENCE:-

The growing international concern for women's issues has motivated many Governments to study the problems of women and to provide some measures of social security and status to women. So far as Indian Government is concerned, it responded by enacting some laws for creation of authorities to deal with matters relating to women, like National Commission for Women under the National Commission for Women Act, 1990 and Human Rights Commission under the Protection of Human Rights Act, 1993.

National Commission for Women Act, 1990 was passed by Parliament with a view to set-up the National Commission for Women with the objective to investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws. This law is to provide a statutory authority to look into the women related complaints regarding deprivation of women rights and non- implementation of laws protecting women from various kinds of harassment and violence against women. Every State is to have a State Commission for Women to perform similar functions.

¹⁶⁰ About NCW National Commission for Women, official website.

For enactment of the Protection of Women from Domestic Violence Act, 2005, National Commission for Women was very instrumental.

On the other hand, Non-Government Organizations also play an important role. Victims of domestic violence, may approach any voluntary organisation including NGO Non-Governmental Organisation working for the women's cause.

There are several types of voluntary and women's organisations and each may offer a special type of assistance—shelter, medical and legal aid. While some organisations will themselves assist the women in generating the options, it always helps to have an idea of the kind of assistance one may want. The role of the voluntary organizations in providing support to women has been explicitly recognized under the Domestic Violence Act as Service Providers.

Even if a woman wants to avoid the legal action or wants to wait for some more time before she tries it out, there are some options as statutory bodies and institutions where she could think about.

4.7.1 Role of National Commission for Women

The United Nations Commission on the Status of Women in its Twenty-fifth Report had recommended to all member-states to establish National Commissions for women or similar bodies with a mandate to review, estimate and recommend measures and priorities to ensure equality between men and women and full protection of women in all spheres of her national and individual life.¹⁶¹

¹⁶¹ MukulitaVijayawargiya: "National Commission for Women: Legal Framework," 34 JIL1 (1992) 2.

Women have always been ill-treated and harassed. The matter has all along been agitated inside and outside the Parliament, by common men, by organisations and societies for the welfare of the women. Looking to the demand for effective legal measures, the Parliament enacted the National Commission for Women, 1990.

In order to ensure the implementation of various measures, the committee recommended the constitution of statutory autonomous commissions at the Centre and in all the States except Jammu & Kashmir.¹⁶²

The Committee on the Status of Women in India recommended nearly two decades ago, the setting up of a National Commission for women to fulfil the surveillance functions to facilitate redressal of grievances and to accelerate the socio-economic development of women.

The background of passing of the Act reveals that successive Committees or Commissions or Plans including the National Perspective Plan for Women (1988 to 2000) had demanded for time to time for an effective body. During 1990, the central government held consultations with Non-Governmental Organizations; social workers and experts, regarding the structure, functions, powers, etc. of the Commission proposed to be set-up. In May 1990, the Bill to constitute a Commission for women was introduced in the Lok Sabha. In July 1990, the Human Resource Development Ministry organized a National Level Conference to elicit suggestions regarding the Bill. In August, 1990 the government moved several amendments and

¹⁶² "Toward equality: Report of the Committee on Status of Women in India" by Department of Social Welfare, Govt. of India, 1974.

introduced new provisions to vest the commission with the power of a civil court. Ultimately the Bill was passed and received assent of the President on 30th August 1990.

Thus, it is in this context that the National Commission for 'Women Act, 1990 was passed. It was a major step in the protection of women's rights and enhancement of their status.

(A) Functions of the Commission:

The National Commission for Women was set-up as a statutory body in January, 1992 under the National Commission for Women Act, 1990 of Government of India, to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women.

Thus, the main task of the Commission is to study and monitor all matters relating to the constitutional and legal safeguards provided for women, to review the existing legislation and suggest amendments, wherever necessary. It will also look into the complaints and take suo-moto notice of the cases involving deprivation of the rights of women in order to provide support, legal or otherwise, to helpless women even within the family. To protect the rights of women so enable them to achieve equality in all spheres of life and equal participation in the development of the nation.¹⁶³ The commission regularly publishes a monthly newsletter, *RtshtraMahila* in both Hindi and English.¹⁶⁴

¹⁶³ Anil Sachdeva's, *An Exhaustive Commentary on The Protection of Women From Domestic Violence Act & Rules*, 2008, p. 372.

¹⁶⁴ <http://ncw.nic.in/publications.htm>.

In keeping with its mandate, the Commission initiated various steps to improve the status of women and worked for their economic empowerment. The Commission completed its visits to all the States & Union Territories except Lalshadweep and prepared Gender Profiles to assess the status of women and their empowerment. It received a large number of complaints and acted suo-moto in several cases to provide speedy justice. It took up the issue of child marriage, sponsored legal awareness programmes, ParivarikMahilaLokAdalats and reviewed laws such as Dowry Prohibition Act, 1961, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Indian Penal Code, 1860 and the National Commission for Women Act, 1990 to make them more stringent and effective. It organized workshops, consultations, constituted expert committees on economic empowerment of women, conducted workshops & seminars for gender awareness and took up publicity campaign against female foeticide, violence against women, etc. in order to generate awareness in the society against these social evils.¹⁶⁵

(B) Constitution of the Commission

Section 3 of the National Commission for Women Act, 1990

1. The Central Government shall constitute a body to be known as the National Commission for Women to exercise the powers conferred on and to perform the functions assigned to it under this Act.
2. The Commission shall consist of:

¹⁶⁵ <http://www.indiatogether.org/2006/may/wom-ncw.htm>.

- (a) A Chairpersons committed to the cause of women, to be nominated by the Central Government.
- (b) Five Members to be nominated by the Central Government from amongst persons of ability integrity and standing who have had experience in law or legislations trade unionism, management of an industry potential of women, women's voluntary organisations (including women activist), administration, economic development, health, education or social welfare; Provided that at least one Member each shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes respectively.
- (c) A Member-Secretary to be nominated by the Central Government who shall be:
 - (i) an expert in the field of management, organisational structure or sociological movement, or
 - (ii) an officer who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union with appropriate experience.¹⁶⁶

(C) The Mandate of the Commission: Section 10 of the Act

- (1) The commission shall perform all or any of the following functions, namely:

¹⁶⁶ About NCW National Commission for Women, official website.

- (a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;
- (b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguard;
- (c) make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any state;
- (d) review, from time to time, the exiting provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations;
- (e) take up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities;
- (f) look into complaints and take suo-moto notice of matters relating to:
 - (i) deprivation of women's rights;
 - (ii) non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development; and

- (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities;
- (g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal;
- (h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;
- (i) participate and advice on the planning process of socio-economic development of women;
- (j) evaluate the progress of the development of women under the Union and any State;
- (k) inspect or cause to inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action, if found necessary;

- (l) fund litigation involving issues affecting a large body of women;
 - (m) make periodical reports to the Government n any matter pertaining to women and in particular various difficulties under which women toil; and
 - (n) any other matter which may be referred to it by Central Government.
- (2) The Central Government shall cause all the reports referred to in clause (b) of sub-section (1) to be laid before each House of Parliament along with memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any such recommendations.
- (3) Where any such report or any part thereof relates to any matter with which any State Government is concerned, the Commission shall forward an copy of such report or part to such State Government who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State an4 the reasons for the non- acceptance, if any, of any such recommendations.
- (4) The Commission shall, while investigatitg any matter referred to in clause (a) or sub-clause (i) of clause (f) of sub-section (1), have all the powers of a civil court trying a suit and, in particular in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;
- (d) requisitioning any public record or copy thereof from any court or office;
- (e) issuing commissions for the examination of witnesses and documents; and
- (f) any other matter which may be prescribed.¹⁶⁷

(D) Complaint and Investigation Cell

The Commission has various cells but Complaint & Investigation Cell is one of very important Cell of them. The Complaints and Investigation Cell of the commission processes the complaints received oral, written or suo-moto under Section 10 of the National Commission for Women Act. The complaints received relate to domestic violence, harassment, dowry, torture, desertion, bigamy, rape, and refusal to register First Information Report, cruelty by husband, deprivation, gender discrimination and sexual harassment at work place.

The Complaints are tackled as below:

- Investigations by the police are expedited and monitored.
- Family disputes are resolved or compromised through counselling.

¹⁶⁷ www.india.gov.in.

- For serious crimes, the Commission constitutes an Inquiry Committee which makes spot enquiries, examines various witnesses, collects evidence and submits the report with recommendations. Such investigations help in providing immediate relief and justice to the victims of violence and atrocities. The implementation of the report is monitored by the NCW. There is a provision for having experts/lawyers on these committees.¹⁶⁸

The State Commission, the Non-Governmental Organizations and other experts are involved in these efforts. The complains received show the trend of crimes against women and suggest systemic changes needed for reduction in crimes. The complaints are analyzed to understand the gaps in routine functioning of government in tackling violence against women and to suggest corrective measures. The complaints are also used as case studies for sensitization programmes for the police, judiciary, prosecutors, forensic scientists, defence lawyers and other administrative functionaries.

The National Commission for Women, is an autonomous body set-up by the Parliament through law that is the National Commission for Women Act, 1990.

(E) Procedure of the Commission

- The women can make an application seeking the assistance of the National Commission for Women (unless one is from the State of Jammu and Kashmir, where the law does not apply).

¹⁶⁸ www.ncw.nic.in

Such an application need not be technical or complicated. There is no specific format for it.

- If the National Commission for Women is of the opinion that the woman has a genuine case, it can issue a 'notice' and call the abusers to investigate the matter. It has powers of a Civil Court in summoning witnesses and enforcing production of documents. So, if the woman doesn't want to involve the police but wishes that one's case be investigated, she may approach the National Commission for Women.
- The National Commission for Women has constituted a complaint and prelitigation cell which would investigate the woman's case.
- The National Commission for Women could also write letters to the police to co-operate with the victim or to give her protection and to help in getting her belongings back.
- The National Commission for Women could also use its offices to bring about conciliation or a settlement. However, as it has no powers of enforcement, the National Commission for Women cannot be a substitute for a legal option.¹⁶⁹

(F) Problem of Violence against Women is Multifaceted

The National Commission for Women has adopted a Multi-Pronged strategy to tackle the problem

- Generation of legal awareness among women, thus equipping them with the knowledge of their legal rights and with a capacity to use these rights;

¹⁶⁹ Jaising, Indira, "Law of Domestic Violence", Universal Law Publishing Co. Pvt. Ltd., Delhi, 2007, p. 9.

- Assisting women in redressal of their grievances through Prelitigation services;
- Facilitating speedy delivery of justice to women by organizing Parivarik Mahila Lok Adalats in different parts of the country;
- Review of the existing provisions of the Constitution and other laws affecting women and recommending amendments thereto, any lacunae, inadequacies or short comings in such legislation's;
- Organizing promotional activities to mobilize women and get information about their status and recommend paradigm shift in the empowerment of women;
- Investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;
- Review, from time to time, the exiting provisions of the Constitution and other laws affecting women;
- Take up cases of violation of the provisions of the Constitution and of other laws;
- Look into complaints and take suo-moto notice of matters;
- Deprivation of women's rights;
- Special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women;
- Undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement;
- Advice on the planning process of socio-economic development of women;

- Evaluate the progress of the development of women under the Union and any State;
- Inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action, if found necessary; and
- Fund litigation involving issues affecting a large body of women.

4.7.2 THE NATIONAL HUMAN RIGHTS COMMISSION

- The National Human Rights Commission was set-up in 1993, as a statutory body to which individuals and interested parties can make complaints on human rights violations in the country. The National Human Rights Commission has explicitly stated that women's rights will be a part of its concerns. As yet the National Human Rights Commission has taken up to specific issue' of violations, though it has attempted to address single instances of state violence on women. It is yet to take a significant interest in women's rights. Part of the problem arises out of the divisions seen between the National 'Commission for Women and the National Human Rights Commission; although a member of the Women's Commission is represented on the National Human Rights Commission, it is often assumed that the Women's Commission will deal primarily with women's rights.¹⁷⁰
- The National Human Rights Commission's ability to function as an autonomous body is yet to be established. Like the

¹⁷⁰ AnantKishor Joshi, "Women Empowerment: Hard Realities and Social Challenges", 2006 (2) RDD 15, Journal Section.

Women's Commission its establishment has been criticized as a move on the State to appear accountable without providing these bodies with sufficient autonomy to push through decision or recommendations that may appear to the country to State Interest.¹⁷¹

- Domestic Violence is a human rights violation and will fall under the purview of the National Human Rights Commission , among its other functions. The law Commission, the Minorities Commission, the Commission for Scheduled Tribes and Scheduled Castes that have been set-up to look at women's issues, but barring the Law Commission which has participated actively in recommending gender just legal change, the remaining Commissions have shown little concern for women's rights in their functioning.

4.7.3 State Women's Commissions

Like the National Commission for Women, most States have State Commissions which perform similar functions. They provide assistance to women of the concerned state. In Rajasthan also there is State Women's Commission which can institute criminal prosecutions.

Thus, it is clear that the objective of the National Commission for Women is to represent the rights of women in India and to provide a voice for their issues and concerns. The subjects of their campaigns have included, domestic violence, harassment, dowry torture, desertion, bigamy, rape, and refusal to register First Information

¹⁷¹ SurendraRajpal, "Safeguards Against Atrocities, Cruelty and Humiliation to the Women", 138 (1999).

Report, cruelty by husband, deprivation, gender discrimination, sexual harassment at work place and equal representation for women in jobs. They have also discussed police abuses against women. The Commission has also worked to guarantee women security in unconventional relationships.

4.7.4 VIOLENCE AGAINST FEMALE FOETUS AND GIRL CHILD

The ever present fact of violence, both overt and covert, physical and non—physical form has an overwhelming influence on feminine identity formation. The population of India is young, with nearly 37 percent consisting of children below 15, thus two out of every five persons are below 15 years. Early childhood is an important and delicate period in an individual's growth and developmental deficiencies during this stage lead to permanent retardation in physical and mental growth.

Much before the United Nations Convention on the Rights of the Child in 1990, the Indian Constitution provided a framework within which provisions were available for protection, development and welfare of children. Article 24 prohibits the employment of children in any factory or mine or in any other hazardous occupation. Article 39(e) and (f) lays down that the State shall direct its policy in such a manner that the tender age of children is not abused and children are given opportunities and facilities to develop in a healthy manner and childhood is protected against exploitation and against moral and material abandonment. Education of children has been recognized as the sine—qua—non for growth of children. There is a wide range of laws, including the Juvenile Justice Act, 2014; the Child Labour (Prohibition and Regulation) Act, 1986; the Immoral Traffic (Prevention) Act, 1986; the Child Marriage

(Restraint) Act, 2006 which guarantee, to a substantial extent the rights and entitlements of children. In 1974, the Government of India adopted a National Policy for Children declaring the nation's children as "supremely important assets". This policy lays down that the State shall provide adequate services to all children both before and after birth and during the growing stages for their full physical, mental and social development.

Despite all the above provisions, the girl—child in India has as yet not been given an equal status and needs to be seen as a special group suffering from several disadvantages. The girl—child experiences discrimination throughout her life and the existing socio—cultural practices make it difficult for her to overcome the handicaps posed by her unequal status.

A life cycle approach has been taken to examine the situation of girls in India from conception and birth, through early childhood into the school going years, adolescence and womanhood. A very strong gender bias is entrenched in the cultural heritage of Indian society. It is a society that idolises sons, an obsession that cuts across all differences. Sons are considered ritually and economically desirable, essential not only to light the funeral pyres of their parents in order to release their souls from the bondage of their bodies, but also to ensure continuation of the lineage and family name. They are also to become the economic support of parents in their old age.

From the day of her birth, a girl is thus viewed as more of a burden and a liability and is likely to be given a meager share of the family's affection and resources. This is because investments made for her brings no return; instead when she gets married, a sizeable dowry has to be

given to her, draining the family resources. Girls are thus socialised from the very beginning to accept their situation and the ideology of male supremacy which makes them prey to-a whole range of discriminatory practices. Family structures and social values function in such a way that girls grow up looking upon themselves as inferior and subservient, entitled to much less of everything than sons—less opportunity, less authority, less property, less status, less power and virtually no choices. The duality of values that operates in the patriarchal family is internalised at an early age, as a natural inevitable part of life. She acquires qualities of submissiveness, weakness and self-sacrifice. The socialisation process reinforces these stereotypes at all levels in the society, building her into a prisoner of her gender unable to retaliate against implicit and explicit injustice. In fact she often espouses and propagates cultural values, which militate against the interests of the female gender. Customs, rituals, traditional practices frequently make a girl the “lesser child” who is denied optimal opportunities and means required for growth and development during various stages of childhood. The burden of poverty further exacerbates her problems.

Approximately one quarter of India’s population comprises girls up to the age of 19 years. Within the backdrop of the declining sex—ratio for women, it is noteworthy that every year about 15 million girls are born in India and despite being biologically stronger than boys, almost one quarter of this number does not see their 15th birthday. In this connection problems of female foeticide and female infanticide are causing concern to Government and other development activists. Age specific death rate indicate that upto the age of 35 years more females than males die at every age level. Malnutrition in young girls triggers a vicious cycle of under—nutrition, which spans into adulthood and passes on to the next

generation. It leads to “women wastages”. Maternal mortality rate in India is unacceptably high. It is common to provide lower and inferior diet to the female child. Coupled with it is the lack of care given to her, ignoring special nutritional needs during adolescence that may render her vulnerable to complications and mortality during pregnancy and child—birth. Girls thus fail to reach their full growth potential, get married early, run considerable risk of obstetric complications and give birth to low weight babies perpetuating the vicious circle. Sex bias in health care has been indicated in several micro-level studies of hospital records.¹⁷²

Of all demographic groups, the girl child is perhaps the most socially disadvantaged. At every stage of her life cycle from conception to adulthood, she is vulnerable to human rights abuses.

It is necessary to protect the rights of the girl child—particularly her right to be born, her right to remain alive, her right to protection from neglect and abuse, her right to a secure family environment. The girl child’s first right is the right to be born and not to be aborted purely because she happens to be a girl. So far there are no fail—safe ways of preventing the misuse of foetal sex determination through amniocentesis or ultrasound tests to ensure this right.¹⁷³

In ancient India, the birth of a girl child used to be praised as the arrival of Laxmi (Goddess of Wealth) into the family. In Hinduism, “Abortion or killing of foetus has always been considered to be a sin and prohibited as such. The person who causes abortion is described as Bhrunaha “भ्रूणहा” and the killing of foetus is described as Bhrunahatih “भ्रूणहतिः”. References in Atharva Veda show that abortion was known in

¹⁷² IVth World Conference on Women, Beijing, Country Report, 1995, pp. 109-10.

¹⁷³ Ghosh, S.K., Indian Panorama—Triumphs and Tragedies, Vol. III, 1999, p. 1187

the Vedic age. Abortion was always considered to be a sin for which, however, expiation ceremonies were prescribed in Taittiriyanishad and also in Arunam. Manu in his Dharmasastra said that a killer of a priest or destroyer of an embryo casts his guilt on the willing eater of his provisions (Chapter VIII, Verse 317). Kautilya's Arthashastra provides for the highest punishment for causing abortion by physical assault. It refers to Yajnavalkya and Manu as well as Vishnupuran. Lesser punishments are also provided for inducing miscarriage by drugs.¹⁷⁴

Muslim jurists also agree unanimously that after the foetus is completely formed and has been given a soul, aborting it is haram. While Islam permits preventing pregnancy for valid reasons, it does not allow doing violence to the pregnancy once it occurs.¹⁷⁵

“The Catholic Church has always denounced and opposed abortion. It has consistently defended the right of the unborn to live. The belief is that human life comes from God at the time of conception and that man is only the custodian of his life rather than the owner and abortion represents an act that denies the sanctity of life on the assumption that the Woman is the owner of her life and that of her unborn child.¹⁷⁶

Indian Penal Code too has such provisions¹⁷⁷ which would punish the offenders who would kill the children when they are in the womb and who kill the children after their birth.

¹⁷⁴ Shaw, S.F., Encyclopaedia of Laws of the Child in India, First Edition, 2000, p. 99.

¹⁷⁵ Ibid. at p. 201.

¹⁷⁶ Shaw, S.F., Encyclopaedia of Laws of the Child in India, First Edition, 2000, p. 99.

¹⁷⁷ Section 315 of Indian Penal Code says, “whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from 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,

In spite of having so much social and legal prohibitions, the parents are deterred with the birth of a girl child in the family.

A life time of systematic gender bias for the Indian girl child begins in the mother's womb itself. Sex—linked abortions have become rampant. Middle class and upper class families go for omniscentists (foetus test which will reveal the gender of the child in womb). Actually, this test is a boon in the Medical field, which will enable the doctors to know about the congenital diseases. But, by using it for a wrong purpose, we turned it into a curse.¹⁷⁸

In twenty-first century, where globalization and information technology are being supported as the creeds of the millennium, liberalization is happening fast, there are villages and towns where girls are killed even before their cries leave their throats. Some are even killed in their mother's womb, unseen and unheard.¹⁷⁹

The traditional method of getting rid of the unwanted girl child was female infanticide where the female baby was done away with after birth in various ways—by either poisoning the baby or letting her choke on husk or simply by crushing her skull under a charpoy. With the advancement of medical technology, sophisticated techniques can now be used or rather misused, to get rid of her before birth. Through ultrasound scans and amniocentesis, the sex of the foetus can be determined during

be punished with imprisonment of either description for a term which may extend to 10 years or with fine or both.

Section 316 of Indian Penal Code punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where the death is caused, after the quickening and before the birth of the child.

¹⁷⁸ 1993(2) SCJ Jour. 65; see also, *The Hindustan Times*, April 11, 2004, p. 1.

¹⁷⁹ Misra, Preeti, 'Female Foeticide A Violation of Human Right', *Law Review*, 1999-2000 and 2000-01, Vols. 21 and 22, p. 71.

the pregnancy of the woman and the foetus is aborted if found to be female.¹⁸⁰

In several countries, prenatal diagnostic techniques are employed exclusively for detection of genetic and other congenital disorders. Nevertheless, in India, ever since their origin they are being misused mainly for sex determination purposes leading to sex selective abortions.

The world has made wonderful inventions in the area of human genetic and reproductive technologies with a noble mission to serve mankind. These discoveries, due to the lack of a powerful monitoring system created havoc and led to destruction of life of the girl child foetus resulting in diminishing sex ratio and blatant violation of the girl child's right to survival and protection. It has been accepted by demographers that there exists a link between elimination of female foetuses and widening sex ratio.

This is evidenced by the population statistics, which reveal an alarming decline in the male-female sex ratio.¹⁸¹

In 1900, the female sex ratio was 972 females for every 1,000 males; which fell to 941 per 1,000 in the 1961 census and to 927 in 1991. The situation in some states is more startling. There are only 879 women per 1,000 men in Uttar Pradesh and just 865 women per 1,000 men in Haryana. In certain communities in Bihar and Rajasthan, the sex ratio has plummeted to 600.

¹⁸⁰ The Lawyers Collective, November 2001, p. 4.

¹⁸¹ Kali'sYug, October 2000, p. 15.

Census Year	Sex Ratio No. of Female/1000 (male in India)
1901	972
1911	964
1921	955
1931	950
1941	945
1951	946
1961	941
1971	930
1981	934
1991	927
2001	933
2011	940

Source: GOI Censuses of India, 2001.

Thus in India, as per 1991 census count, there were 32 million fewer females in a population of 846 million, there being 439 million males and 407 million females. The sex ratio is not only adverse to females but has touched an all time low of 927 females per thousand males in 1991.

The 2011 census results are indeed shocking, though the sex ratio at the national level is 940 females per 1000 males. But the same ratio in the age group 0 to 6 is even lower which is 927 : 1000 as compared to 945 in 1991 . The fall in ratio of girls to boys over the past decade has been most extreme in Punjab and Gujarat, where more people can afford tests and abortions. In Punjab, India's most agriculturally prosperous state, the ratio of girls to boys has dropped to 793 girls per 1000 boys

from 875 in 1991. While in Gujarat, a leading industrial state, the figures for girls has fallen to 878 from 928 in 1991.¹⁸² According to 10th Plan Document, in Uttar Pradesh, sex ratio has declined considerably in the age group of 0 to 6 years. The ratio in this age group came down from 927 in 1991 to 940 in 2011.¹⁸³

According to the 2001 census, Punjab and Haryana, two of the most affluent states in India, have the lowest sex ratios of 793/ 1000 and 820/1000 respectively for the 0 to 6 years section.

The practice of sex determination through ultrasound largely started dominating the scene since 1970s and early 1980s, especially in Punjab and Haryana. Slogans like “Boy or a Girl”, “Spend 500 now, save 5 lakhs then” flooded the entire Punjab, Haryana and Rajasthan belt during the eighties. Dramatic reduction of birth rates since the eighties coupled with reliable and cheaper ultrasound machines in the nineties, enabling accessibility of foetal sex testing to a much larger population across the country contributed to the intensification of son preference in our patriarchal society.¹⁸⁴ Besides Sikh and Hindu communities even Jams are on female foeticide black list.¹⁸⁵

Female foeticide has become popular with the spread of amniocentesis, a medical technique evolved to discover birth defects. A part of the test involves establishing the sex of the foetus. Introduced in 1974 at a leading government-run hospital in New Delhi, the new technology was quickly appropriated by medical entrepreneurs. A spate of sex—selective abortions followed. Though a series of government

¹⁸² The Deccan Herald, Sunday, June 3, 2001, p. 3, The Telegraph, June 24, 2001, p.3.

¹⁸³ The Hindustan Times, December 15, 2002, p. 3, DainikJagaran (Hindi), December 13, 2002, p. 5. See also DainikJagran (Hindi), November 8, 2005, p.1.

¹⁸⁴ The Lawyers Collective, November 2001, p. 5.

¹⁸⁵ The Hmdustan Times, October 12, 2005, p.1.

circulars from 1977 onwards have banned the tests, “the privatisation and commercialisation of the technology” was well under way within a few years of its introduction.¹⁸⁶

A case study from a hospital in a city in western India conducted from June 1976 to June 1977 reveals that of the 700 women who sought pre-natal sex determination, 250 were found to have male foetuses and 450 females. While all the male foetuses were kept to term, 430 of the 450 female foetuses were aborted.¹⁸⁷ According to Kuntal Agarwal, the amniocentesis test and female foeticide have been prevalent since 1977 but have become popular (only) since 1982 and thereafter small towns and cities are also experiencing their effect.¹⁸⁸ A field study conducted by Sanjeev Kulkarni (1986) of the Foundation for Research in Community Health brought to light the fact that in the 1980s, 5000 amniocentesis tests were carried out annually in Bombay for determining the foetal sex. Eighty-four per cent of the gynaecologists contacted by him admitted to having performed the amniocentesis tests for sex determination. Of these, 74 per cent had started performing the tests only since 1982 and only a few cases of genetic defects were detected. The overwhelming majority of ‘patients’, most of whom were of middle or upper class status, came merely to obtain information about the sex of the foetus.

Many women who came for the tests already had at least two daughters. Several clinics were run under the guise of maternity homes, clinic laboratories and family health centers and costs ranged from Rs. 70 to Rs. 600. Thirty per cent of the doctors believed that their patients came to them under some pressure. At the same time, there is also evidence that

¹⁸⁶ Mazumdar, V., ‘Amniocentesis and Sex Selection’, paper presented at wider, Helsinki, 1992.

¹⁸⁷ Ramanamma, A. and Bambawale, U.: ‘The Mania for Sons: An Analysis of Social Values in South Asia’, *Social Science and Medicine*, 14(B), 1980, 107-10.

¹⁸⁸ Agarwal, Kuntal, ‘Survival of Females in India’, Paper presented at International Conference of Women, Development and Health, Michigan State University, Michigan, 1988.

women often took the decision on their own.¹⁸⁹ It is a moot point whether mothers to be genuinely believed that girls were burdensome or whether they were socialised into such a world view. Today, there are clinics throughout the country and “Gujarat topped the list with sex determination clinics spreading even in small towns”.¹⁹⁰ Despite the efforts of women’s organisations, voluntary groups and the media to the contrary, sex determination tests are becoming increasingly common.

Referring to the records of the primary health centres the report states that in 1995 there were 3,178 cases of female foeticide in six districts of Tamil Nadu. It was estimated in 1989 that 10,000 cases of female foeticide annually occur in Ahmedabad. In Chandigarh with a population of just six lakh; about 8,000 abortions take place annually. As a result, the number of females to 1000 males which was 793 in 1991 came down to 790 in 1995.¹⁹¹

Most Non Governmental Organizations and the medical profession, for the past two decades have failed to recognize the likelihood of the rapid spread of the female foeticide. The first private clinic was set up in Amritsar in 1979. This trend soon spread to other cities in North and Western India, resulting in adversely influencing the sex ratio in those parts of the country.

A ten year’s gap ensued before the proliferation of these clinics began in Southern India. In the early eighties, attention was being given to the issue of female infanticide but the activists had not anticipated the problem of female foeticide. Although the spread of this problem was

¹⁸⁹ Juneja, R., ‘Women should also be Punished for Foeticide’, *The Pioneer*, August 11, 1993.

¹⁹⁰ Ravindra, R.P.: ‘The Campaign against Sex Determination Tests’ in ChhayaDatar (ed), *The Struggle Against Violence*, 1993.

¹⁹¹ *The Deccan Herald*, Saturday, June 2, 2001, p. 4.

initially slower, many taluks even in backward parts of Karnataka and Andhra Pradesh now have sex determination clinics.

There were occasional media reports from 1992 onwards about the abuse of ultrasound for foetal sex determination in major cities of Tamil Nadu. Despite expression of concerns, from the mid—nineties, about the prevalence of female foeticide in rural areas. Non Governmental Organizations and others involved in work against infanticide did not prioritise action against foeticide. Even elementary steps were not taken, for instance, there was no lobbying with the state to set up the mechanisms to register sex determination clinics, as mandated by the 1994 national law; and there also was a failure to confront the medical profession's insensitivity to the gross violation of medical ethics.

Fertility decline has taken place in all economic and social groups in most parts of the country, especially in Tamil Nadu. The sharp fall in birth rates from the eighties is one contributory factor for intensification of son preference.

The indication from the grassroots level is that there will undoubtedly be an even steeper fall against girls. There are more than one thousand ultrasound clinics in Punjab, and elaborate networks from the village level to the nearest urban ultrasound clinics for referrals exist where each link gets a commission from the clinics.¹⁹²

Deteriorating women's status and the emergence of female foeticide is not a unique sociological phenomenon confined to a particular state, but a countrywide trend even in diverse cultural contexts where there has been relative greater gender equality, such as the Uttarakhand

¹⁹² George, Dr. Sabu, 'Female Foeticide in India', Health Action, September 2000, p. 25.

hills or the Kashmir Valley.¹⁹³ Prenatal sex determination tests are a basic Human Rights' violation. Female foeticide is an extreme manifestation of gender violence against women.

(A) Causes of Violence Against Female Foetus and Girl Child

In India, where there is no discrimination on grounds of caste or sex and where in theory each human being has the right to participate in social processes to create conditions of equality for the socially suppressed and disadvantaged sections of society, "the dice is heavily loaded against women. Female oppression continues from womb to tomb."¹⁹⁴ In particular discrimination occurs within the family, where norms regarding women's secondary status are reinforced in children from birth. Son preference is one of the key aspects underlining social values that view girls as burdens. Women are viewed as dependents within the family and face severe restrictions, it is not the level of income or material well-being that makes families discriminate against girl child, much of it has to do with cultural beliefs, patriarchal social norms, superstitions and mind set that combine to produce discrimination behaviour patterns.¹⁹⁵ Due to modern science and technology female infanticide has been replaced by female foeticide.

Another reason for the dangerous phenomenon of female foeticide is the extreme low valuation of female life and the low status accorded to women in India. People feel that female foeticide will keep the family size small and increase the value of girls perhaps in the long-run. Another justification is poor law and order situation that makes parents wary of

¹⁹³ Ibid. at p. 26.

¹⁹⁴ Kulshreshtra, Indira Noopur, *Women's Studies in School Education: A New Perspective*, (1989), p. 8.

¹⁹⁵ UNICEF Report published in November 1995 titled *The Progress of Indian States in Child Survival Health, Primary Education, etc. for the year 1995*.

bringing up girls in highly unsafe social environment and the likelihood of the daughter being maltreated or even killed for dowry. The motto appears to be ‘spend now save later/end now than later’. The practice of female foeticide has also been justified by the doctors and others in the name of family planning.

Dramatic reduction of birth rates in most of Indian states has also contributed to intensification of son preference in the existing patriarchal society. Parents tend to be calculative in choosing the sex of the next child and the decision is based on the birth order, sex sequence of previous children and number of sons.¹⁹⁶ Still, there exists strong cultural preference for sons who will carry the family name, inherit ancestral property, care for parents in old age and light their father’s funereal pyre.¹⁹⁷

Because of traditional gender bias, we still have cases of female infanticide, and the girl child is denied equal opportunities in terms of food, clothing and education. She faces deterioration in health and knowledge. Also in literacy, the girl child does not get a fair chance as a male child does. Poverty is another major cause of female infanticide.

Fear of sexual abuse of girl child also leads to female infanticide. A very condemnable practice that exists especially in Tamil Nadu is the “Sex practice of father—in—law” with daughter—in—law and the husband’s inability to do anything against the practice due to the fear that he would lose his share of the property from his father.

Patriarchal society has developed into a tremendously greedy and materialistic society which strongly supports the notion of male

¹⁹⁶ Health Action, September 2000, p. 24.

¹⁹⁷ The Indian Express, April 15, 2001, p. 1.

supremacy and consequently justifies, even encourages demand for dowry. It has become a 'dowry nightmare' for young women; there is a culture of criminality and immorality which has got inbuilt into the society. There is almost no social ethics which can withstand this craze. To avoid to pay huge amount of money in dowry, people eliminate their female infants.

There are some extreme situations when some mothers kill their babies as an act of 'mercy' that they may be saved from future excesses by husbands in the form of domestic violence.¹⁹⁸

It can be said that cases of foeticide and infanticide find its explanations under patriarchal theory and socio—cultural theories.

Another gruesome act committed against the girl child is incest, where she is abused by her own close relatives. Psychiatrists are of the view that molestation of a child, like any form of sexual abuse, does not necessarily have to do with sex. It is about power—a depraved sense of asserting power. In cases of father— daughter incest, there is a strong need on the part of the father to cover up their feelings of inadequacy as males by overcompensating in a patriarchal way. The father presents himself as a strong authoritarian figure, he maintains his dominant position in the family by threats and physical abuse.

Fathers in incestuous relationship generally come from a background of emotional deprivation and/or physical desertion or abandonment, i.e. they suffer from childhood trauma.

The chief reasons for child abuse in India attach themselves to prevalent myths, ignorance and superstitions beliefs. The belief that

¹⁹⁸ Sherwani, Azim, *The Girl Child in Crisis*, 1998, pp. 53-57.

having sex with an infant or a virgin can cure a man of impotency and venereal diseases is widespread, especially in rural India. The problem is further complicated because most villagers hesitate to consult a sexologist, if there is one in the area.

Impotency also incites a man to rape a minor on another ground—he is ashamed to expose his inadequacy to an adult woman but has the normal sexual urge all the same. He finds a child the easiest prey to vent his urge. A child after all, is less prone to talk later. This is aided by a total lack of resistance on the infant's part. Thus, due to vulnerability of age, the girl child suffers this trauma.

Some incestuous convicts have been reported to be psychotic at the time of commission of offence. Paedophilia, or the mental disorder that incites a man to molest a child is another reason for child abuse. According to psychiatrists, paedophilia is a definitely not a normal trait in a person. It is a sexual perversion, whose cause is yet to be totally explored. The invasion of foreign media has also led to the increase in paedophilia.

Paedophilic cases that are an outcome of the media onslaught are mostly common among teenagers. The sudden exposure to sex can have an adverse effect in the impressionable mind reared in a society that is sexually regressive. The teenager would dare to go for a minor and not for an adult women. Torn by an urge for premarital sex and yet scared be open about it, the teenager loses his sense of right and wrong.¹⁹⁹

Several cases of child abuse by mentally retarded persons are reported annually. Alcohol or drug also plays a role in incestuous

¹⁹⁹ The Pioneer, November 23, 1997.

behaviour as it acts as a destroyer of inhibition, thus neutralizing guilt. A man is no longer sure whether it is right or wrong to have sex with an infant. Such loss of control is also visible in a person who was sexually abused as a child. An abused man is prone to become an abuser out of a correct sense of vindictiveness though he may appear perfectly normal outwardly.

Lack of religious education and degradation of moral standards also lead to such crime.²⁰⁰ There are two general characteristics of the incest offender. One characteristic is inability to control impulses and the other concerns role confusion, in which the adult uses the child to meet his own needs, rather than playing the parental role of meeting the needs of the child. Love becomes perverted into sexual abuse.²⁰¹

Although it is true that many parents and care-givers, in the socially, economically, culturally and educationally deprived segments of the populations are involved in child abuse in some form or other, there has been evidence that a majority of the deprived families, do not engage in child abuse in spite of economic and social stress factors. Hence, social and economic factors have been overemphasized in the dynamics of child abuse. There are studies which have demonstrated that socio-economic stress factors are incidental intensifiers of personality—rooted etiological factors. There is an interplay of mental, physical and emotional stresses in addition to socio—economic stress factors. Vulnerable psychological character and structures and personality weaknesses in the presence of added environmental stress factors, can give expression to uncontrolled physical and emotional aggression. While the majority of parents in the disadvantaged communities do not abuse their children, many well—to—

²⁰⁰ 1996, Cr.LJ, 29.

²⁰¹ Miriam F. Hirsch, *Women and Violence* Ed D. ACSW, Van Nostrand Reinhold Company, Inc., 1981.

do parents in the upper strata of society engage in child maltreatment and child abuse practices. Hence, child abuse can be attributed to socio—economic disadvantages or to physical health problems within a family situation. The psychologists, therefore, should look for the etiology of child abuse beyond socio—economic stress factors.²⁰²

²⁰² Steele, B.F. and Pollock, C.B., A Psychiatric Study of parents who Abuse Infants and Small Children, in RE., Helter and CH. Kempe (eds.), 1968.

CHAPTER - 5

DOMESTIC VIOLENCE WITH SPECIAL REFERENCE TO JUDICIAL DECISIONS

The campaign against dowry and related violence, in the mid-1970s was possibly the first time the issue of violence at home was discussed in public. The agitations by feminist groups across the country were able to attract, the attention of the State to the growing incidents of the so-called death-by-fire. Such incidents were (and even now are) seen as accidents and not investigated properly. The campaign high lighted the difficulties in invoking the law in cases of dowry related violence, for a range of reasons. For instance, dying declarations by women were seldom treated as evidence against the husband and in-laws; and even cases that were registered on the basis of dying declarations were later dismissed by the courts on the ground of inadequacy of evidence. Thus, charges of murder or abetment to suicide could not be successfully invoked. Similarly, police would be reluctant to intervene, arguing that it was not the task of the police to intervene in "family quarrels". The campaign led to the Criminal Law (Second Amendment) Act in 1983, which introduced Section 498A in the Indian Penal Code. Under this provision, "cruelty" to the wife by the husband or his relatives was made a cognisable, non-bailable offence punishable with imprisonment up to three years and a fine. Cruelty was defined as including both physical and mental cruelty, or any harassment associated with demand for dowry. Similarly, Section 304B was introduced in the IPC in 1986 which created a new offence of "dowry death". This provision made it possible to prosecute the husband and in-laws of a woman, if she died as a result of burns or any other injury within seven years of marriage, under suspicious circumstances

and if it could be shown that she was subjected to cruelty or harassment by the husband/ in-laws in relation to demand for dowry. However, it was only after the new provisions were sought to be activated in the courts, that the women's movement realised that the focus on dowry related violence and death had been rather narrow, for it ended up distracting attention from the other numerous instances of violence that women were faced with in the home, which were not necessarily dowry related. While it was still possible to bring cases of everyday violence against women in the home within the scope of Section 498A, it was not possible to use 304B, if the violence and the eventual death were not linked with dowry. And also, only married women facing violence at the hands of the husband or their families could claim relief under 498A. Thus a lot of other forms of violence faced by unmarried women, old women and children could not be brought under this section. It did not protect women from violence in natal relationships or in relationships that have not received the legal sanction of marriage. The other problematic aspect of this provision was the definition of "cruelty" itself. Cruelty was defined to mean any wilful conduct which could have driven the woman to commit suicide or caused grave injury to her or posed a danger to her life, limb or health (either mental or physical). The definition was worded in such vague terms that it was difficult to bring issues of sexual violence, economic violence or even threats of violence within the ambit of the section. The experience with using this section in cases showed that the threshold of the impact of violent conduct on the woman, required to be proved was so high that many forms of cruelty fell through the net. A woman had to prove that she was driven to contemplate suicide, or that her life was in danger before she could access the law. Ultimately, it was entirely on the discretion of the police as to whether the conduct of the husband was of such a nature as mentioned above. Section 304B came

into play only after the woman was dead, and Section 498A which was meant to protect her from harassment and violence was as sailed by the problems discussed above, thus making the relevance of law for women facing violence at home rather limited.”²⁰³

On 26 October 2006, the Protection of Women from Domestic Violence Act came into effect, with the stated objective of providing "for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family". This invocation of the Constitution in the preamble of a law on domestic violence is significant, for the application of constitutional principles to the private domain of the family and the home has often been resisted by the lawmakers and the judiciary.²⁰⁴

Domestic violence has been on the global agenda for several decades, and in the last two, has been the subject of considerable reform activity in Asia, particularly in Singapore and Malaysia, which have enacted legislation to deal with the problem. While domestic violence affects various parties (including partners, parents, children and extended family), this article is limited to partner violence and argues for an enhanced gender analysis of the problem in this region. The evidence suggests that domestic violence disproportionately affects women as victims. The World Health Organization, in its first World Report on Violence and Health in 2002, revealed that between 40 percent and 70 percent of women who die due to homicide are killed by current or former partners. The United Nations Special Rapporteur on Violence Against Women has defined domestic violence in gender terms as "violence perpetrated in the domestic sphere which targets women

²⁰³ Indira Jaising : Bringing Rights Home: Review of the Campaign for a Law of Domestic Violence

²⁰⁴ Indira Jaising : Bringing Rights Home: Review of the Campaign for a Law of Domestic Violence

because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere." The significance of using gender as a basis of analysis is that it forces a paradigmatic shift away from domestic violence analysis best captured by the following observation: 'Instead of asking why he batters, there is a tendency to ask why she stays.' A gendered analysis compels us instead to question why men resort to violence and why violence against women occurs and is tolerated in many societies. Restructuring the debate in this way is vital for meaningful legal reform, especially from the perspectives of criminal justice and human rights. The key to understanding domestic violence from a gender perspective is to appreciate that the root cause of violence lies in an unequal power relationship between men and women that is compounded in male dominated societies. As noted recently, "Violence is ... a sign of the struggle for the maintenance of certain fantasies of identity and power. Violence emerges, in this analysis, as deeply gendered and sexualised."²⁰⁵

Section 3 of Domestic Violence Act defines 'domestic violence' as, "For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

- (a) harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any

²⁰⁵ Kumaralingam Amirthalingam : Women's Rights, International Norms, and Domestic Violence: Asian Perspectives: Human Rights Quarterly, Vol. 27, No. 2 (May, 2005), pp. 683-708

unlawful demand for any dowry or other property or valuable security; or

- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

- (i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
- (ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
- (iii) “verbal and emotional abuse” includes—
 - (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and
 - (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.
- (iv) “economic abuse” includes—
 - (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or

otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

- (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
- (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.²⁰⁶

Constitutional Perspectives

The enactment in question was passed by the Parliament with recourse to Article 253 of the Constitution. This provision confers on the

²⁰⁶ Section 2 (g) of the Act provides that ‘domestic violence’ has same meaning as provided under section 3.

Parliament the power to make laws in pursuance of international treaties, conventions, etc. The Domestic Violence Act was passed in furtherance of the recommendations of the United Nations Committee on the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²⁰⁷ The Act encompasses all the provisions of the Specific Recommendations, which form a part of General Recommendation no.19, 1992.

Protection of Women and Fundamental Rights

The Statement of Objects and Reasons declares that the Act was being passed keeping in view the fundamental rights guaranteed under Articles 14, 15 and 21. Article 21 confers the right to life and liberty in negative terms, stating that it may not be taken away except by procedure established by law, which is required, as a result of judicial decisions, to be fair, just and reasonable. The right to life has been held to include the following rights (which are reflected in the Act), among others:

1. The right to be free of violence:

In Francis Coralie Mullin v. Union Territory Delhi, Administrator,²⁰⁸

Facts: The petitioner, who is a British national, was arrested and detained in the Central Jail, Tihar under an Order dated 23rd November 1979 issued under section 3 of the COFEPOSA Act. She preferred a petition in this Court for a writ of habeas corpus challenging her detention, but by a judgment delivered by this Court on 27th February 1980, her petition was

²⁰⁷ (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 states.

²⁰⁸ 1981 AIR 746

rejected with the result that she continued to remain under detention in the Tihar Central Jail. Whilst under detention, the petitioner experienced considerable difficulty in having interview with her lawyer and the members of her family. Her daughter aged about five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month and she was not allowed to meet her daughter more often, though a child of very tender age. It seems that some criminal proceeding was pending against the petitioner for attempting to smuggle hashish out of the country and for the purpose of her defence in such criminal proceeding, it was necessary for her to consult her lawyer, but even her lawyer found it difficult to obtain an interview with her because in order to arrange an interview, he was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of a Customs Officer nominated by the Collector of Customs. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when, even after obtaining prior appointment from the District Magistrate, Delhi, her lawyer could not have an interview with her since no Customs Officer nominated by the Collector of Customs remained present at the appointed time. The petitioner was thus effectively denied the facility of interview with her lawyer and even her young daughter 5 years old could not meet her except once in a month. This restriction on interviews was imposed by the Prison Authorities by virtue of clause 3(b) sub-clauses (i) and

(ii) of the Conditions of Detention laid down by the Delhi Administration under an Order dated 23rd August 1975 issued in exercise of the powers conferred under section 5 of the the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. These two sub-clauses of

clause 3(b) provided inter alia as under:

"3. The conditions of detention in respect of classification and interviews shall be as under:-

(a)

(b) Interviews: Subject to the direction issued by the Administrator from time to time, permission for the grant of interviews with a detenu shall be granted by the District Magistrate, Delhi as under:-

(i) Interview with legal adviser:

Interview with legal adviser in connection with defence of a detenu in a criminal case or in regard to writ petitions and the like, may be allowed by prior appointment, in the presence of an officer of Customs/Central Excise/ Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who sponsors the case for detention.

(ii) Interview with family members:

A monthly interview may be permitted for members of the family consisting of wife, children or parents of the detenu"

The petitioner, therefore, preferred a petition in this Court under Article 32 challenging the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the Conditions of Detention Order and praying that the Administrator of the Union Territory of Delhi and the Superintendent of Tihar Central Jail be directed to permit her to have interview with her lawyer and the members

of her family without complying with the restrictions laid down in those sub-clauses.

Judgment: Justice Bhagwati decided that “that any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

This right is incorporated in the Act through the definition of physical abuse, which constitutes domestic violence (and is hence punishable under the Act). Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impair the health or development of the aggrieved person. Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. By adoption of such an expansive definition, the Act protects the right of women against violence.”

In my opinion it is submitted that while considering the question of validity of conditions of detention courts must necessarily bear in mind the vital distinction between preventive detention and punitive detention. Punitive detention is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while preventive detention is not by way of punishment at all, but it is intended to pre-empt a person from indulging in conduct injurious to the society.

2. **The right to dignity:**

In Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan²⁰⁹

The Supreme Court emphasised the fact that the right to life included in its ambit the right to live with human dignity, basing its opinion on a host of cases that had been decided in favour of this proposition. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted. These two facets of the right to life find mention under the definitions of sexual abuse and emotional abuse, respectively. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable, especially as such sexual abuse is not recognised by the IPC as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.

In my opinion the right to dignity and right to life would include the right against being subjected to humiliating sexual acts and the right against being insulted.

3. **The right to shelter: In Chameli Singh v. State of U.P.²¹⁰**

Facts of the case: he appellants are owners of the lands in Plot No. 16 of an extent of 5 bighas, 6 biswas and 14 biswas respectively in Village Bairam Nagar, Pargana Nahtaur, Tahsil Dhampur, District Bijnore. These lands along with other lands were notified by publication in the State

²⁰⁹ (1997) 11 SCC 123

²¹⁰ AWS(SC)-1995-12-75

Gazette under Section 4(1) of the Land Acquisition Act, 1894 (for short, "the Act") on 23-7-1983 and the declaration under Section 6 was also published simultaneously dispensing with the inquiry under Section 5-A. The appellants challenged the validity of the notification under Section 4(1) and the exercise of the power given under Section 17(1) read with Section 17(4) dispensing with the inquiry under Section 5-A. Three contentions were raised and negated by the Division Bench. The first contention was that since the lands are not waste or arable lands, notification under Section 17(4) is invalid. Secondly, it was contended that dispensing with the inquiry under Section 5-A is not justifiable as there is no urgency to take possession even though the land was acquired for providing houses to Scheduled Castes (for short, 'Dalits'). Thirdly, it was contended that on account of the acquisition, the appellants will be deprived of their lands which is the only source of their livelihood violating Article 21 of the Constitution. Thus this appeal by special leave was filed.

Decision: Justice Kirpal held "It was held that the right to life would include the right to shelter, distinguishing the matter at hand from *Gauri Shankar v. Union of India* where the question had related to eviction of a tenant under a statute. Ss. 6 and 17 of the Domestic Violence Act reinforce this right. Under S.6, it is a duty of the Protection Officer to provide the aggrieved party accommodation where the party has no place of accommodation, on request by such party or otherwise. Under S.17, the party's right to continue staying in the shared household is protected. These provisions thereby enable women to use the various protections given to them without any fear of being left homeless.

Article 14 contains the equal protection clause. It affirms equality before the law and the equal protection of the laws. Article 14 prohibits

class legislation, but permits classification for legislative purposes. A law does not become unconstitutional simply because it applies to one set of persons and not another. Where a law effects a classification and is challenged as being violative of this Article, the law may be declared valid if it satisfies the following two conditions:

1. The classification must be based on some intelligible differentia,
2. There must be a rational nexus between this differentia and the object sought to be achieved by the law.

E.P. Royappa v. State of Tamil Nadu,²¹¹

1.Facts of the case: The petitioner was a member of the Indian Administrative Service in the cadre of the State of Tamil Nadu. In November, 1969, when the post of Chief Secretary to the State fell vacant the petitioner, as the best suited, was selected for the post. The draft order in regard to the appointment approved by the Chief Minister. But then State Government given permission to the creation of a temporary post of Deputy Chairman in the State Planning Commission in the grade of Chief Secretary for a period of one year and appointed the petitioner to that post providing that he shall be entitled to the same rank and payments as permissible to the post of Chief Secretary. □ He joined the post on 7 April, 1971.

2. Against this the petitioner made a representation that the continuance of the post of Deputy Chairman in the rank of Chief Secretary for a period of more than one year would be invalid under r. 4(2) of the Indian Administrative Service (Cadre) Rules, 1954. So on 27 June, 1972 the State Government created a temporary post of officer on Special Duty of Sales Tax dept. in the grade of Chief Secretary to the

²¹¹ 1974 AIR 555

Government and appointed the petitioner to that post. He did not join this post too and proceeded on leave. After the petitioner was transferred from the post of Deputy Chairman Planning Commission and appointed Officer on Special Duty.

While the post of the Chief Secretary still vacant a junior cadre officer to the petitioner had been appointed in that post. The petitioner in this writ petition under Article 32 of the Constitution asks for a mandamus or any other appropriate writ challenging the validity of his transfer from the post of Chief Secretary, first to the post of Deputy Chairman State Planning Commission and then to the post of officer on Special Duty. Also it was violative of Arts. 14 and 16 of the Constitution as the posts of Deputy Chairman, State Planning Commission and Officer on Special Duty were inferior in rank and status to that of Chief Secretary. And that it was made in mala fide exercise of power, not on account of necessities of administration or public service, but because the second respondent was annoyed with the petitioner on account of various incidents the respondent wanted him out of the way.

Decision: Justice Bhagwati delivered the majority judgment and held, “Any law that is arbitrary is considered violative of Article 14 as well. This provision is significant in putting a stop to arbitrariness in the exercise of State power and also in ensuring that no citizen is subjected to any discrimination. At the same time, it preserves the State’s power to legislate for a specific category of people.

Article 15 disallows discrimination on the grounds of religion, caste, sex, race, etc., but permits the State to make special provisions for certain classes of persons, including women and children.

The Domestic Violence Act promotes the rights of women guaranteed under Articles 14 and 15. Domestic violence is one among several factors that hinder women in their progress, and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differential, namely, gender, and also has a rational nexus with the object of the Act. Further, the Act is far from arbitrary, in that it is a well-thought and necessary attempt to curtail domestic violence and eventually vanquish it. It is to be remembered that it is generally women who are the victims of domestic violence, and not men.

In my opinion it is submitted that at this stage, it is also essential to keep in mind Article 15(3) which empowers the State to make legislations like this for the benefit of women, thus creating an exception in their favour against the operation of Article 15(1).²¹²

5.1 Journey through Judicial Pronouncements:

In Harvinder Kaur vs Harmander Singh²¹³

Facts of the case: The husband petitioned for restitution of conjugal rights. The wife opposed. The Additional District Judge granted a decree of restitution of conjugal rights to the husband. From that decree the wife appeals to this Court, on appeal counsel for the wife attacked the constitutional validity of section 9 of the Hindu Marriage Act. The court issued 'notice to attorney-general. He appeared and argued' the case. This part of the judgment deals with the constitutional question.

²¹² Harini Sudersan & Niruphama Ramakrishnan: Domestic violence A Constitutional Perspective

²¹³ AIR 1984 Delhi 66

Judgment: Justice A. B. Rohatgi held, “Justice in the forefront of his arguments, counsel referred to *T. Sareetha v. T. Venkata Subbaiah*²¹⁴. In that case P. A. Chaudhary J. held that section 9- of the Hindu Marriage Act, 1955, (the Act) offends Articles 14 and 21 of the Constitution and therefore declared it null and; void.

The main reason for holding that section 9 offended Article 21 of the Constitution was that a decree for restitution of conjugal rights was an order "to coerce through: judicial process, the unwilling party to have sex against that person's consent and freewill with the decree-holder". This, he held, was "degrading to human dignity and monstrous to human spirit". The learned judge took the view that the British Indian courts "thoughtlessly imported that rule into our country and blindly enforced it among the Hindus and the Muims. The origin of this uncivilized remedy in our ancient country is only recent and is wholly illegitimate. Section 9 had merely aped the British and mechanically re-enacted that legal provision of the British ecclesiastical origin." In my opinion this view is based on a misconception of the true nature of the remedy of restitution of conjugal rights.

Justice A. Rohtagi further observed, “Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14- have anyplace. In a sensitive sphere which is atonce most intimate and delicate the introduction of the cold principles of constitutional law will have the

²¹⁴ AIR 1983 AP 356

effect of weakening the marriage bond. That the restitution remedy was abolished in England in 1970 by Section 20 of the Matrimonial Proceedings and Properties Act 1970. on the recommendation of the Law Commission headed by Justice Scarman is no ground to hold that it is unconstitutional in the Indian set-up.

The "domestic community" does not rest on contracts sealed with seals and sealing wax nor on constitutional law. It rests on that kind of moral cement which unites and produces "two-in-oneshop".

5.2 Peculiar approach of Supreme Court on the issues relating to domestic violence

In Gokal Chand v. Parvin Kumari,²¹⁵

Decision: The court held that the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabition is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.

In my opinion it is submitted that "in the instant case, there was no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the commencement of their

²¹⁵ AIR 1952 SC 231

relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage.

American Jurisprudence, Second Edition, Vol. 24 (2008) speaks of Rights and Remedies of property accumulated by man and woman living together in illicit relations or under void marriage, which reads as under:

“Although the courts have recognized the property rights of persons cohabiting without benefit of marriage, these rights are not based on the equitable distribution provisions of the marriage and divorce laws because the judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the state to strengthen and preserve the integrity of marriage, as demonstrated by its abolition of common-law marriage.”

In **State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors.**,²¹⁶ The issue is no more *res integra* and stands settled by a catena of decisions of this Court. For setting aside such an order, even if void, the party has to approach the appropriate forum. In **Sultan Sadik v. Sanjay Raj Subba & Ors.**,²¹⁷ This Court observed that there cannot be any doubt that even if an order is void or voidable, the same requires to be set aside by the competent court.

In my opinion it is submitted that it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent court.

In Lata Singh v. State of U.P.²¹⁸ It was observed that a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral.

²¹⁶ AIR 1996 SC 906

²¹⁷ AIR 2004 SC 1377

²¹⁸ [AIR 2006 SC 2522]

However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc. We have few other legislations also where reliefs have been provided to woman placed in certain vulnerable situations.

In my opinion it is submitted, “a relationship will fall within the expression “relationship in the nature of marriage” within the meaning of Section 2(f) of the DV Act, we should have a close analysis of the entire relationship, in other words, all facets of the interpersonal relationship need to be taken into account. We cannot isolate individual factors, because there may be endless scope for differences in human attitudes and activities and a variety of combinations of circumstances which may fall for consideration. Invariably, it may be a question of fact and degree, whether a relationship between two unrelated persons of the opposite sex meets the tests judicially evolved.

In M. Meenakshi & Ors. v. Metadin Agarwal (dead) by Lrs. & Ors.,²¹⁹

Facts of the case: The Defendant in the suit together with his other co-sharers were owners of Survey No.71, West Marredpalli, Secunderabad. A proceeding under the Urban Land (Ceiling & Regulation) Act, 1976 (for short, 'the 1976 Act') was initiated against them. In the said proceeding at the hands of the landholders, excess land was directed to be

²¹⁹ (2006) 7 SCC 470,

vested in the Central Government. The owners were allowed to retain 1000 sq. metres of land each.

Allegedly, on that premise a piece of vacant land bearing Plot No.2 in Survey No.71 measuring 1000 sq. metres which had been allotted to the defendant was allowed to be retained by him. On or about 27.06.1978 he (original Owner) entered into an agreement with the Plaintiff for sale in respect thereof on a consideration of Rs.50/- sq. yard . As on the said date, a proceeding under the 1976 Act was pending, the agreement to sell was subject to the grant of permission by the competent authority under the said Act. It stipulated that in the event of refusal on the part of the competent authority to grant such permission, the advance paid to the Defendant would be refunded. It was further stipulated that in the event of refusal on the part of the vendor to execute the sale deed upon obtaining permission, if any, not only the amount paid by way of advance was to be refunded but also damages to the extent of Rs.15,000/- was to be paid by the Defendant to the Plaintiff. The application under Section 26 of the 1976 Act filed for seeking permission to sell the said land was rejected by the competent authority by an order dated 24.08.1978. An application was filed under Section 10 of the 1976 Act on 29.04.1980 which was again rejected by an order dated 26.06.1980 stating that no vacant land measuring 1000 sq. metres was available, in view of the order passed in the proceedings under the 1976 Act and as such no permission could be granted.

Decision: This Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is non-est/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The Court observed as under:-

"It is well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est."

In my opinion it is submitted that an order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof.

In S.R. Batra And Anr vs Smt. Taruna Batra ²²⁰

Facts of the case:

The facts of the case are that respondent Smt. Taruna Batra was married to Amit Batra, son of the appellants, on 14.4.2000.

After the marriage respondent Taruna Batra started living with her husband Amit Batra in the house of the appellant no.2 in the second floor. It is not disputed that the said house which is at B-135, Ashok Vihar,

²²⁰ (2007) 1 DMC 1 (SC).

Phase-I, Delhi belongs to the appellant no.2 and not to her son Amit Batra.

Amit Batra filed a divorce petition against his wife Taruna Batra, and it is alleged that as a counter blast to the divorce petition Smt. Taruna Batra filed an F.I.R. under Sections 406/498A/506 and 34 of the Indian Penal Code and got her father-in-law, mother-in-law, her husband and married sister-in-law arrested by the police and they were granted bail only after three days. Smt. Taruna Batra had shifted to her parent's residence because of the dispute with her husband. She alleged that later on when she tried to enter the house of the appellant no.2 which is at property No. B-135, Ashok Vihar, Phase-I, Delhi she found the main entrance locked and hence she filed Suit No. 87/2003 for a mandatory injunction to enable her to enter the house. The case of the appellants was that before any order could be passed by the trial Judge on the suit filed by their daughter-in-law, Smt. Taruna Batra, along with her parents forcibly broke open the locks of the house at Ashok Vihar belonging to appellant No. 2, the mother-in-law of Smt. Taruna Batra. The appellants alleged that they have been terrorized by their daughter-in-law and for some time they had to stay in their office. Their son Amit Batra, husband of the respondent, had shifted to his own flat at Mohan Nagar, Ghaziabad before the above litigation between the parties had started. The learned trial Judge decided both the applications for temporary injunction filed in suit no.87/2003 by the parties by his order on 4.3.2003. He held that the petitioner was in possession of the second floor of the property and he granted a temporary injunction restraining the appellants from interfering with the possession of Smt. Taruna Batra, respondent herein. Against the aforesaid order the appellants filed an appeal before the Senior Civil Judge, Delhi who by his order dated 17.9.2004 held that Smt. Taruna

Batra was not residing in the second floor of the premises in question. He also held that her husband Amit Batra was not living in the suit property and the matrimonial home could not be said to be a place where only wife was residing. He also held that Smt. Taruna Batra had no right to the properties other than that of her husband. Hence, he allowed the appeal and dismissed the temporary injunction application. Aggrieved, Smt. Taruna Batra filed a petition under Article 227 of the Constitution which was disposed of by the impugned judgment. Hence, these appeals.

The learned Single Judge of the High Court in the impugned judgment held that “the second floor of the property in question was the matrimonial home of Smt. Taruna Batra. He further held that even if her husband Amit Batra had shifted to Ghaziabad that would not make Ghaziabad the matrimonial home of Smt. Taruna Batra. The Learned Judge was of the view that mere change of the residence by the husband would not shift the matrimonial home from Ashok Vihar, particularly when the husband had filed a divorce petition against his wife. On this reasoning, the learned Judge of the High Court held that Smt. Taruna Batra was entitled to continue to reside in the second floor of B-135, Ashok Vihar, Phase-I, Delhi as that is her matrimonial home.”

With respect, we are unable to agree with the view taken by the High Court.

Decision: The Bench of S.B. Sinha, Markandey Katju JJ held (judgmnet was delivered by Justice Katzu), “It is only the legislature which can create a law and not the Court. The courts do not legislate, and whatever

may be the personal view of a Judge, he cannot create or amend the law, and must maintain judicial restraint.

There is no such law in India, like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.

Here, the house in question belongs to the mother-in-law of Smt. Taruna Batra and it does not belong to her husband Amit Batra. Hence, Smt. Taruna Batra cannot claim any right to live in the said house.

In my opinion it is submitted that this narrow conception of property and ownership is the foundation of capitalist societies, not shared by other systems of jurisprudence. In Hindu law, for example, the notion of the coparcenary quite clearly vested the right to ownership of property and the right of usage in a multiplicity of users, who were entitled to use it by virtue of being in the domestic relationship. While ownership was vested with three generations of males, the women of the coparcenary married into the family, in their capacity of mothers and daughter-in-laws, had the undisputed right to reside in it. The coparcenary was quite literally the "shared household"; a joint family was defined as being "joint in food and worship". The PWDVA built on these notions and secularised this concept, thus making the right to reside available to women of all religious communities. The broad definition of the "shared household" in the PWDVA is in keeping with the family patterns in India, where married couples continue to live with their parents in homes owned by the parents.

In Jagraj Singh v. Birpal Kaur,²²¹

Facts of the case: The present appeal by special leave has been filed by the appellant-husband against the interim order dated May 04, 2006 passed by the High Court of Punjab & Haryana at Chandigarh in F.A.O. No. 13-M of 2005 issuing non-bailable warrant against him. Brief facts of the case are that marriage of the appellant and respondent was solemnized on July 6, 1993 at Barnala, District Sangrur, Punjab and from the said wedlock, a son was born to them on April 9, 1994, but he died in September, 1995. It is the case of the husband that after marriage, he went to Brunei, Darusslame in January, 1994. Respondent-wife also joined him after some days. There she appeared in an interview for a job of Pharmacist. But she was not selected for the said job and returned to the matrimonial home on February 15, 1994 and then came back to India and lived with her parents. In the meantime, relations between them became strained and on December 23, 2002, respondent-wife filed a petition for divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') on the ground of desertion and cruelty in the Court of District Judge, Faridkot, Punjab. Appellant, through his Special Power of Attorney, filed written statement contending inter alia that Faridkot Court had no territorial jurisdiction to hear and try the petition. He also denied the allegations of cruelty and desertion.

Decision: C.K. Thakker, Lokeshwar Singh JJ held, “This Court held that conjugal rights are not merely creature of statute but inherent in the very institution of marriage.

²²¹ AIR 2007 SC 2083

In my opinion it is submitted that the approach of a court of law in matrimonial matters should be "much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire". The court should not give up the effort of reconciliation merely on the ground that there is no chance for reconciliation or one party or the other says that there is no possibility of living together. Therefore, it is merely a misgiving that the courts are not concerned and obligated to save the sanctity of the institution of marriage.

In See S. Khushboo v. Kanniammal and another²²²

Facts: The appellant is a well known actress who has approached this Court to seek quashing of criminal proceedings pending against her. As many as 23 Criminal Complaints were filed against her, mostly in the State of Tamil Nadu, for the offences contemplated under Sections 499, 500 and 505 of the Indian Penal Code, 1860 [hereinafter `IPC'] and Sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 [hereinafter `Act 1986']. The trigger for the same were some remarks made by the appellant in an interview to a leading news magazine and later on the same issue was reported in a distorted manner in another periodical. Faced with the predicament of contesting the criminal proceedings instituted against her in several locations, the appellant had approached the High Court of Madras, praying for the quashing of these proceedings through the exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 [hereinafter

²²² (2010) 5 SCC 600.

`Cr.PC.']. The High Court rejected her plea vide impugned judgment and order dated 30.4.2008. At the same time, in order to prevent the inconvenience of litigating the same subject-matter in multiple locations directed that all the cases instituted against the appellant be consolidated and tried together by the Chief Metropolitan Magistrate, Egmore (Chennai). Aggrieved by the aforesaid judgment, the appellant approached this Court by way of a batch of Special Leave Petitions.

Judgment: K.G. Balakrishnan, Deepak Verma, B.S. Chauhan held, “Such relationship, it may be noted, may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship. Legislature, of course, cannot promote pre-marital sex, though, at times, such relationships are intensively personal and people may express their opinion, for and against.

Meghmala & Ors. v. G. Narasimha Reddy & Ors.,²²³

Facts of the case: These appeals have been preferred against the Judgment and Order dated 26.04.2007 of the High Court of Andhra Pradesh, at Hyderabad, passed in Writ Petition Nos. 19962-19963 of 2006, by which the High Court has allowed the said petitions against the Judgment and order of the Special Court under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (hereinafter called, "Act 1982"), dismissing the review application No. 397/2005 in LGC No. 76/1996 and in LGCSR 357/2005.

²²³ (2010) 8 SCC 383

Judgment: P. Sathasivam, B.S. Chauhan JJ held “Fraud and deception are synonymous. "Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine". An act of fraud on court is always viewed seriously.

In D. Velusamy v. D. Patchaiammal,²²⁴

Facts: The appellant herein has alleged that he was married according to the Hindu Customary Rites with one Lakshmi on 25.6.1980. Out of the wedlock with Lakshmi a male child was born, who is now studying in an Engineering college at Ooty. The petitioner is working as a Secondary Teacher in Thevanga Higher Secondary School, Coimbatore. It is alleged that the appellant herein (respondent in the petition under Section 125 Cr.P.C.) deserted the respondent herein (petitioner in the proceeding under Section 125 Cr.P.C.) two or three years after marrying her in 1986. In her petition under Section 125 Cr.P.C. she alleged that she did not have any kind of livelihood and she is unable to maintain herself whereas the respondent (appellant herein) is a Secondary Grade Teacher drawing a salary of Rs.10000/- per month. Hence it was prayed that the respondent (appellant herein) be directed to pay Rs.500/- per month as maintenance to the petitioner.

Decision: Justice Katju and Justice Thakur delivered the judgment and decided, “This Court considered the expression "domestic relationship" under Section 2(f) of the Act 2005 placing reliance on earlier judgment in Savitaben Somabhai Bhatiya v. State of Gujarat & Ors.,²²⁵ held that

²²⁴ (2010) 10 SCC 469

²²⁵ (2005) 3 SCC 636

relationship "in the nature of marriage" is akin to a common law marriage.”

In my opinion it is submitted that however, the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage.

In Inderjit Singh Grewal V. State of Punjab and Anr.²²⁶

Facts of the case: The instant appeal reveals a very sorry state of affair where the wife files a criminal complaint before the competent court to initiate criminal proceedings against her husband alleging that they had obtained decree of divorce by playing fraud upon the court without realising that in such a fact-situation she herself would be an accomplice in the crime and equally responsible for the offence. More so, the appeal raises a substantial question of law as to whether the judgment and decree of a competent Civil Court can be declared null and void in collateral proceedings, that too, criminal proceedings. Judgment: **Sathasivam, B.S. Chauhan JJ held**, “hat permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court.”

In my opinion it is submitted that n the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice.

In V.D. Bhanot Vs.Savita Bhanot²²⁷

²²⁶ Criminal appeal no. 1635 of 2011

²²⁷ 2012(1)ACR654(SC)

Facts: The Special Leave Petition was directed against the judgment and order dated 22nd March, 2010, passed by the Delhi High Court in Cr.M.C.No.3959 of 2009 filed by the Respondent wife, Mrs. Savita Bhanot, questioning the order passed by the learned Additional Sessions Judge on 18th September, 2009, dismissing the appeal filed by her against the order of the Metropolitan Magistrate dated 11th May, 2009.

Decision: Justice Altmas Kabir held “the situation comes squarely within the ambit of Section 3 of the PWD Act, 2005, which defines "domestic violence" in wide terms, and, accordingly, no interference is called for with the impugned order of the High Court.”

In my opinion it is submitted that it was rightly held that even if wife who had shared household in past but was no longer doing so when Act came into force would still be entitled to protection under Act order of High Court modified.”

In **Sou. Sandhya Manoj Wankhade V. Manoj Bhimrao Wankhade and Ors.**²²⁸

Facts of the case: This Appeal was directed against the judgment and order dated 5th March, 2010, passed by the Nagpur Bench of the Bombay High Court in Crl. W.P. No.588 of 2009, inter alia, directing the Appellant to vacate her matrimonial house and confirming the order of the Sessions Judge deleting the names of the other Respondents from the proceedings. The Appellant herein was married to the Respondent No.1 on 20th January, 2005, and the marriage was registered under the

²²⁸ 2012(2)ALT(Cri)391

provisions of the Special Marriage Act, 1954. After her marriage, the Appellant began to reside with the Respondent No.1 at Khorej Colony, Amravati, where her widowed mother-in-law and sister-in-law, the Respondent Nos.2 and 3 respectively, were residing. According to the Appellant, the marriage began to turn sour after about one year of the marriage and she was even assaulted by her husband and by the other respondents. It is her specific case that on 16th June, 2007, she was mercilessly beaten by the Respondent No.1, which incident was reported to the police and a case under Section 498-A I.P.C. came to be registered against him.

Mr. Satyajit A. Desai, learned Advocate appearing for the Respondents, defended the orders passed by the Sessions Judge and the High Court and urged that the term "relative" must be deemed to include within its ambit only male members of the husband's family or the family of the male partner. Learned counsel submitted that when the expression "female" had not been specifically included within the definition of "respondent" in Section 2(q) of the Domestic Violence Act, 2005, it has to be held that it was the intention of the legislature to exclude female members from the ambit thereof.

Judgment:

Bench of Altamas Kabir, Cyriac Joseph JJ held, “having carefully considered the submissions made on behalf of the respective parties, we are unable to sustain the decisions, both of the learned Sessions Judge as also the High Court, in relation to the interpretation of the expression "respondent" in Section 2(q) of the Domestic Violence Act, 2005. For the sake of reference, Section 2(q) of the above-said Act is extracted hereinbelow :-

"2(q). "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

From the above definition it would be apparent that although Section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage.

It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only.

In my opinion it is submitted, "in such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

In Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad and Anr.²²⁹

Facts: The appellant, who was married to the respondent in the year 2006, had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as ‘the DV Act’) seeking certain reliefs including damages and maintenance. During the pendency of the aforesaid application the appellant filed an application for interim maintenance which was granted by the learned trial court on 13.02.2008 at the rate of Rs.2000/- per month. The order of the learned trial court was affirmed by the learned Sessions Judge on 09.07.2008. As against the aforesaid order, the respondent (husband) filed a Writ Petition before the High Court of Jharkhand.

While the Writ Petition was pending, the respondent sought a recall of the order dated 13.02.2008 on the ground that he could subsequently come to know that his marriage with the appellant was void on the ground that at the time of the said marriage the appellant was already married to one Rohit Kumar Mishra.

Judgment: P. Sathasivam, Ranjan Gogoi JJ held, “Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is

²²⁹ 2013(1)ACR1089

made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005.

Our above conclusion would render consideration of any of the other issues raised wholly unnecessary and academic. Such an exercise must surely be avoided.

In my opinion the interference made by the High Court with the grant of maintenance in favour of the appellant was not at all justified. Accordingly, the order dated 09.04.2010 passed by the High Court is set aside. In *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade and ors.*,²³⁰ it was held by Justice Altams Kabir that only female relatives can file asuit under the said Act.

In Indra Sarma v. V.K.V. Sarma²³¹

Facts: Appellant and respondent were working together in a private company. The Respondent, who was working, as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, appellant left the job from the above-mentioned Company and started living with the respondent in a shared household. Appellant's family members, including her father, brother and sister, and also the wife of the respondent, opposed that live-

²³⁰ 2012(2)ALT(Cri)391

²³¹ 2014(1)ABR615

in-relationship. She has also maintained the stand that the respondent, in fact, started a business in her name and that they were earning from that business. After some time, the respondent shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning. Appellant has also stated that both of them lived together in a shared household and, due to their relationship, appellant became pregnant on three occasions, though all resulted in abortion. Respondent, it was alleged, used to force the appellant to take contraceptive methods to avoid pregnancy. Further, it was also stated that the respondent took a sum of Rs.1,00,000/- from the appellant stating that he would buy a land in her name, but the same was not done. Respondent also took money from the appellant to start a beauty parlour for his wife. Appellant also alleged that, during the year 2006, respondent took a loan of Rs.2,50,000/- from her and had not returned. Further, it was also stated that the respondent, all along, was harassing the appellant by not exposing her as his wife publicly, or permitting to suffix his name after the name of the appellant. Appellant also alleged that the respondent never used to take her anywhere, either to the houses of relatives or friends or functions. Appellant also alleged that the respondent never used to accompany her to the hospital or make joint Bank account, execute documents, etc. Respondent's family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and it was alleged that he left the company of the appellant without maintaining her.

Relief Claimed:

- 1) Pass a Protection Order under Section 18 of the DV Act prohibiting the respondent from committing any act of domestic violence against the appellant and her relatives, and further prohibiting the

respondent from alienating the assets both moveable and immovable properties owned by the respondent;

- 2) Pass a residence order under Section 19 of the DV Act and direct the respondent to provide for an independent residence as being provided by the respondent or in the alternative a joint residence along with the respondent where he is residing presently and for the maintenance of Rs.25,000/- per month regularly as being provided earlier or in the alternative to pay the permanent maintenance charges at the rate of Rs.25,000/- per month for the rest of the life;
- 3) Pass a monetary order under Section 20 of the DV Act directing the respondent to pay a sum of Rs.75,000/- towards the operation, pre and post operative medication, tests etc and follow up treatments;
- 4) Pass a compensation order under Section 22 of the DV Act to a sum of Rs.3,50,000/- towards damages for misusing the funds of the sister of the appellant, mental torture and emotional feelings; and
- 5) Pass an ex-parte interim order under Section 23 of the DV Act directing the respondent to pay Rs.75,000/- towards the medical expenses and pay the maintenance charges @ Rs.25,000/- per month as being paid by the respondent earlier.

Judgment: K.S. Radhakrishnan, J. held that “ Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal.

We are, in this case, concerned with the question whether a “live-in relationship” would amount to a “relationship in the nature of marriage” falling within the definition of “domestic relationship” under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (for short “the DV Act”) and the disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to “domestic violence” within the meaning of Section 3 of the Domestic Violence Act.”

In my opinion it is submitted that “Domestic Violence” is undoubtedly a human rights issue, which was not properly taken care of in this country even though the Vienna Accord 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights issue. UN Committee on Convention on Elimination of All Forms of Discrimination Against Women in its general recommendations had also exhorted the member countries to take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India.

In Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Anr. ²³²

Facts of the case: Sarju Singh Kushwaha had two sons, Ram Saran (elder son) and Virendra Kumar Singh Kushwaha (younger son and the first respondent). The appellant, Chanmuniya, was married to Ram Saran and had 2 daughters-Asha, the first one, was born in 1988 and Usha, the second daughter, was born in 1990. Ram Saran died on 7.03.1992. Thereafter, the appellant contended that she was married off to the first

²³² 2011(1)ALD(Cri)370

respondent as per the customs and usages prevalent in the Kushwaha community in 1996. The custom allegedly was that after the death of the husband, the widow was married off to the younger brother of the husband. The appellant was married off in accordance with the local custom of Katha and Sindur. The appellant contended that she and the first respondent were living together as husband and wife and had discharged all marital obligations towards each other. The appellant further contended that after some time the first respondent started harassing and torturing the appellant, stopped her maintenance and also refused to discharge his marital obligations towards her.

In Shalu Ojha Vs. Prashant Ojha²³³

Facts: The appellant is a young woman who got married to the respondent on 20.04.2007 in Delhi according to Hindu rites and customs, pursuant to certain information placed by the respondent on the website known as “Sycorian Matrimonial Services Ltd.”.

According to the appellant, she was thrown out of the matrimonial home within four months of the marriage on 14.8.2007. Thereafter, the respondent started pressurizing the appellant to agree for dissolution of marriage by mutual consent. As the appellant did not agree for the same, the respondent filed a petition for divorce being H.M.A. No.637 of 2007 under Section 13(1) of the Hindu Marriage Act, 1955 on 17.10.2007 before the Additional District Judge, Tis Hazari Courts, Delhi.

²³³ 2014(3)ACR3165(SC)

Decision: J. Chelameswar, A.K. Sikri Justices decided, “This Court categorically observed that - it is open to the petitioner to execute the order of maintenance passed by the learned Metropolitan Magistrate and requested the High Court to dispose of the appeal of the respondent expeditiously.”

In my opinion it is submitted that this is an unfortunate case where the provisions of the Protection of Women from Domestic Violence Act, 2005 are rendered simply a pious hope of the Parliament and a teasing illusion for the appellant.

5.3 High Court verdicts:

In Lieutenant C.W. Campbell v. John A.G. Campbell²³⁴

Decision: It was held “, the House of Lords held that cohabitation, with the required repute, as husband and wife, was proof that the parties between themselves had mutually contracted the matrimonial relation. A relationship which may be adulterous at the beginning may become matrimonial by consent. In **Captain De Thoren v. The Attorney-General**²³⁵ the House of Lords held, “that the presumption of marriage is much stronger than a presumption in regard to other facts. **In my opinion** it is submitted that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

²³⁴[(1867) Law Rep. 2 HL 269],

²³⁵ [(1876) 1 AC 686],

In India, the same principles have been followed in the case of *A. Dinohamy v. W.L. Balahamy*,²³⁶ in which the Privy Council laid down the general proposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

In the case of **Gokal Chand v. Parvin Kumari**²³⁷

Decision: This Court held that continuous co-habitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. In a subsequent decision, in *Dwarika Prasad Satpathy v. Bidyut Prava Dixit & Anr.*,²³⁸ the Court held that the standard of proof of marriage in a Section 125 proceeding is not as strict as is required in a trial for an offence under Section 494 of IPC. The learned Judges explained the reason for the aforesaid finding by holding that an order passed in an application under Section 125 does not really determine the rights and obligations of parties as the section is enacted with a view to provide a summary remedy to neglected wives to obtain maintenance.

In my opinion it is submitted that maintenance cannot be denied where there was some evidence on which conclusions of living together could be reached.

²³⁶ AIR 1927 P.C. 185

²³⁷ AIR 1952 SC 231

²³⁸ (1999) 7 SCC 675

In Meena Chodhary v. Commissioner of Police Delhi²³⁹

Facts: The appeal was directed against the judgment of the learned Single Judge dated 7th January, 2009. The appellant had filed a writ petition against certain police officers as also respondent No. 4, Mr. Basant Kumar Chaudhary, who she stated is her husband and one Mr. Jaspal Singh who is said to be a R/o B-108, Hill View Apartments, Vasant Vihar, Delhi. The writ petition was filed by the appellant (the original petitioner in the writ petition) inter alia to seek a writ of mandamus to direct the police authorities to provide her full security of life, liberty and property. She also sought a writ of mandamus to direct the police authorities from obstructing her from using the residential premises bearing No. B-108, Hill View Apartments, Vasant Vihar, Delhi and to direct the said respondent to allow her to occupy and use the said premises.

Decision: Ajit Prakash Shah Justice held, “We also find no fault with the finding of the learned Single Judge that the appellant could not have asserted a right of residence in the said apartment even if she is assumed to be the legally wedded wife of respondent No. 4, till the said apartment continued to remain the property of the mother of respondent No. 4.

In my opinion it is submitted that the court has rightly pointed the observation on the issue of right to residence.

5.4 Rajasthan High Court

In Khushi Mohd. and Ors. Vs. Smt. Aneesha²⁴⁰

²³⁹ 2015(1)JCC267

Decision: Justice Vinit Kothari held, “the Domestic Violence Act, 2005 (Act No. 43 of 2005) was enacted by the Parliament to provide for more' effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.”

In my opinion it is submitted that domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this.

In Kaniz Fatima Vs. State of Rajasthan & Anr. ²⁴¹

Facts of the case are: Complainant/Respondent No.2 Smt. Sagir Bano filed a complaint under Sections 12, 18, 19, 20, 21, 22, 23(2) of the Protection of Women From Domestic Violence Act, 2005 (for short 'the Act of 2005') in the Court of Additional Chief Judicial Magistrate No.4, Kota against six accused persons, wherein petitioner Smt. Kaniz Fatima was impleaded as accused No.3. Petitioner filed an application before the trial Court on 22.01.2008 to delete her name on the ground that no complaint under the provisions of the Act of 2005 can be filed against female as female does not fall within the meaning of respondent as defined under Section 2(q) of the Act. The trial Court on the basis of judgment of this Court in Smt. Sarita Vs. Smt. Umrao, 2008(1) Rajasthan Criminal Decisions, Page- 97, wherein the learned Single Judge of this Court took a view that term relative under proviso to Section 2(q) is quite broad and it includes all relations of husband irrespective of gender or

²⁴⁰ 2011(3)Crimes7(Raj.)

²⁴¹ 2012(1)Crimes605

sex, female can be a party to proceedings as respondent under the Act of 2005, dismissed petitioner's application dated 22.01.2008 vide order dated 25.07.2008. Being aggrieved with the above order, an appeal was preferred by petitioner, but the same was also dismissed by the Special Court, Women Atrocities and Dowry Cases, Kota, vide judgment dated 05.11.2008. Thereafter, petitioner preferred present petition under Section 482 Cr.P.C. before this Court.

Decision: Justice R. S. Chauhan held, “In our view, both the Sessions Judge and the High Court went wrong in holding otherwise, possibly being influenced by the definition of the expression respondent in the main body of Section 2(q) of the aforesaid Act.”

In my opinion it is submitted that since the question formulated in the present case has already been considered and decided by the Hon'ble Apex Court in Sandhya Manoj Wankhade's case (supra), therefore, reference is answered, that a complaint can be maintained under the provisions of the Act of 2005 against females relatives of the husband or male partner.

In Sabana (Smt.) @ Chand Bai and Anr. Vs. Mohd. Talib Ali and Anr.²⁴² **Facts of the case:** Smt. Sabana @ Chand Bai, the petitioner, and Mr. Mohammed Talib Ali, the respondent, entered into marriage on 15.10.2001 according to the Muslim customs and rites. The petitioner alleges that from the very beginning of the marriage, she was treated with physical and mental cruelty by the respondent and the members of her in-laws family. Even during pregnancy and thereafter, the respondent and the members of his family did not take care of the petitioner. It is alleged that on 15.4.2002, despite her pregnancy, she was not only assaulted but was ousted from matrimonial home and thus, in the compelling

²⁴² 2014 ALLMR(Cri)

circumstances, she left for her paternal home. Out of the wedlock, a son was born on 14.10.2002. On 6.2.2003, after a compromise had been reached between the parties, the petitioner returned to her matrimonial home. While she stayed at her matrimonial home, the respondent repudiated the paternity of the child. As a matter of fact, the petitioner had to undergo an operation for removal of uterus and therefore, the respondent and his family members started harassing her saying that she is no more fit for procreating children. On 13.2.2003, she was again beaten and sent back to her paternal home. On 2.5.2003, the respondent filed an application seeking divorce from the petitioner. On 12.7.2003, the petitioner lodged an FIR with the police against the respondent, alleging commission of the offences under Sections 498A & 406 IPC. Subsequently, on 20.9.2003, she also filed an application seeking maintenance under Section 125 Cr.P.C. before the Family Court, Jodhpur. During the pendency of the litigation between the parties, on 4.9.2004, the parties entered into compromise and the petitioner again returned to the matrimonial home. But, the parties could not live together and on 13.5.2005, the petitioner was again dumped at her paternal place by the respondent. Thereafter, on 26.2.2007, after coming into force of the Protection of Women from Domestic Violence Act, 2005 ("the Act"), the petitioner- Sabana filed an application under Sections 12, 17 to 20 and 23 of the Act before the court of competent jurisdiction i.e. Additional Chief Judicial Magistrate (Economic Offences), Jodhpur. The application was contested by the respondent by filing a reply thereto. The parties led their evidence. After due consideration of the evidence on record and rival submissions, the trial court arrived at the finding that after coming into force of the Act i.e. with effect from 26.10.2006, the petitioner never resided with the respondent and therefore, the question of her being subjected to domestic violence by the respondent, does not arise. Relying upon a decision of this court dated 7.1.2009 rendered in the matter of

"Hema @ Hemlata (Smt.) & Anr. vs. [reported in 2009(1) Cr.L.R.(Raj.), 291], the court held that any act of violence committed prior to coming into force of the Act cannot be made basis for initiating proceedings under the Act and, therefore, the petitioner cannot be said to be an aggrieved person. Accordingly, the petition preferred by the petitioner under Section 12 r/w Sections 17, 18, 19 & 20 of the Act was dismissed by the trial court vide order dated 5.6.2010. Aggrieved thereby, the petitioner preferred an appeal before the Court of Session, which stands dismissed vide order dated 19.4.2011, which is impugned in this revision petition before this Court.

Decision: Justice Lodha and Amitava Roy held, "The Court needs to eschew from taking an interpretation which would not only be violative of the rights conferred upon the citizens under Article 14 of the Constitution but would also result in denying the benefit of the beneficial provisions of the Act to the women who have been subjected to domestic violence and are compelled to live separately from the respondent on account of his own acts of omission or commission. Such an interpretation would at least partly defeat the legislative intent behind enactment of the Protection of Women from Domestic Violence Act, 2005, which was to provide an efficient and expeditious civil remedy to them, in order either to protect them against occurrence of domestic violence, or to give them compensation and other suitable reliefs, in respect of the violence to which they have been subjected.

In my opinion it is submitted that any such interpretation of the provisions incorporated creating to different classes of victims subjected to domestic violence based on fortuitous circumstances shall be discriminatory and fall foul of Article 14 of the Constitution of India."

5.5 Other High Courts:

In Neeraj Goswami and Others Vs. State of U.P. and Anr. ²⁴³

Facts of the case: Sri Surender Mohon, has prayed for direction to expunge the remarks made against him in the order dated 21.11.1994 passed in the writ petition filed by Dr. (Mrs.) Neeraj Bala Goswami. For the the purpose of appreciating the prayer, some background facts may be reiterated.

A young soldier Sri Shyamai Goswami of Meerut gave an exemplary display of courage risking his own life for the defence of his motherland during indo-Chinese war in 1962, when he was in an army detachment in a forward area in Chusul. At the gravest risk of his life, he faught undauntedly against a heavy detachment of Chinese army and by that process became severly wounded. Later on, he was rescued and treated. But his legs had to be amputated. In recognition of his gallantry and exemplary courage and devotion to duty, he was awarded the highest gallantly award for an army personnel: "Mahavir Chakra". In the year 1992, the Government of U.P. gave Col. Goswami a land measuring about 2 bighas 11 biswas and on getting a dealership of licence of L.P.G. from Indian Oil Corporation. Col. Goswami used to run the said Gas Agency. Col. Goswami married the petitioner, Dr. Neeraj Bala Goswami, but it appears that the conjugal life had to suffer a rough weather. At the time of his death, his wife used to live separately. In April 1992, Col. Goswami was found murdered in his house in the campus of Goswami Gas Agency. After the death of Col. Goswami, dispute as to ownership of the Gas Agency and right to carry on the said agency arose between his widow Dr. Neeraj Goswami and the sisters of Col. Goswami, particularly

²⁴³ 2013(2)ACR1335

Sm. Ashoka Trikha, who claimed to be a partner of Col. Goswami long before his death.

The applicant is the husband of one of the real sisters of Col. Goswami, Sm. Deepashree Mohon respondent no.14. He is a very senior member of the Indian Administrative Service. While holding a very senior assignment as an IAS Officer in Utter Pradesh Cadre, the applicant wrote two letters one dated 10th August 1993 to the Executive Director of Indian Oil Corporation and the other dated May 5, 1994 addressed to the Principal Secretary, Home Department of the State of U.P. In the order dated 21.11.1994 it was observed that "we are of the view that respondent No.3 Sri Surendra Mohon had acted with gross impropriety and in violation of the office by addressing letters dated 10th August 1993 to the Executive Director of Indian Oil Corporation and letter dated 5th May 1994 to the Principal Secretary, Home

Department of the State when his wife and other near relations were involved in the matter. We strongly disapprove of his conduct."

Decision: Justice Hansaria held "the temporary residence, as envisaged under the Act is such residence where an aggrieved person is compelled to take shelter or compelled to take job or do some business, in view of domestic violence perpetuated on her or she either been turned out of the matrimonial home or has to leave the matrimonial home. This temporary residence does not include residence in a lodge or hostel or an inn or residence at a place only for the purpose of filing a domestic violence case. This temporary residence must also be a continuing residence from the date of acquiring residence till the application under Section 12 is disposed of and it must not be a fleeing residence where a woman comes only for the purpose of contesting the case and otherwise does not reside there.

Geeta Mehrotra and another v. State of U.P. and another,²⁴⁴

Facts of the case: This appeal by special leave in which the court granted leave has been filed by the appellants against the order dated 6.9.2010 passed by the High Court of Judicature at Allahabad in Crl. Miscellaneous Application No.22714/2007 whereby the High Court had been pleased to dispose of the application moved by the appellants under Section 482 Cr.P.C. for quashing the order of the Magistrate taking cognizance against the appellants under Sections 498A/323/504/506 IPC read with Section 3/4 of the Dowry Prohibition Act with an observation that the question of territorial jurisdiction cannot be properly decided by the High Court under Section 482 Cr.P.C. for want of adequate facts.”

Judgment: Gyan Sudha mishra and Thakur JJ hel, “it just and legally appropriate to quash the proceedings initiated against the appellants Geeta Mehrotra and Ramji Mehrotra as the FIR does not disclose any material which could be held to be constituting any offence against these two appellants. Merely by making a general allegation that they were also involved in physical and mental torture of the complainant-respondent No.2 without mentioning even a single incident against them as also the fact as to how they could be motivated to demand dowry when they are only related as brother and sister of the complainant’s husband, we are pleased to quash and set aside the criminal proceedings in so far as these appellants are concerned and consequently the order passed by the High Court shall stand overruled. The appeal accordingly is allowed.”

5.6 Foreign Cases:

²⁴⁴ AIR 2013 SC 181 : 2013 (1) All LJ 261).

In Dawood and Another v. Minister of Home Affairs and Others²⁴⁵

Judgment: O'Regan, J., held, "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

In my opinion it is submitted, "The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends...."

RELATIONSHIP IN THE NATURE OF MARRIAGE:

²⁴⁵ 2000 (3) SA 936 (CC)

Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

- a) Consanguinity
- b) Marriage
- c) Through a relationship in the nature of marriage
- d) Adoption
- e) Family members living together as joint family.

Distinction

Distinction between the relationship in the nature of marriage and marital relationship has to be noted first. Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a shared household, being based on law. But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in- relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the

identifying characteristics of that relationship, since the legislature has used the expression “in the nature of”.

- Domestic relationship between an unmarried adult woman and an unmarried adult male: Relationship between an unmarried adult woman and an unmarried adult male who lived or, at any point of time lived together in a shared household, will fall under the definition of Section 2(f) of the DV Act and in case, there is any domestic violence, the same will fall under Section 3 of the DV Act and the aggrieved person can always seek reliefs provided under Chapter IV of the DV Act.
- Domestic relationship between an unmarried woman and a married adult male: Situations may arise when an unmarried adult women knowingly enters into a relationship with a married adult male. The question is whether such a relationship is a relationship “in the nature of marriage” so as to fall within the definition of Section 2(f) of the DV Act.
- Domestic relationship between a married adult woman and an unmarried adult male: Situations may also arise where an adult married woman, knowingly enters into a relationship with an unmarried adult male, the question is whether such a relationship would fall within the expression relationship “in the nature of marriage”.
- Domestic relationship between an unmarried woman unknowingly enters into a relationship with a married adult male: An unmarried woman unknowingly enters into a relationship with a married adult male, may, in a given situation, fall within the definition of Section 2(f) of the DV Act and such a relationship may be a relationship in

the “nature of marriage”, so far as the aggrieved person is concerned.

- Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship. Section 2(f) of the DV Act though uses the expression “two persons”, the expression “aggrieved person” under Section 2(a) takes in only “woman”, hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.

In Stack v. Dowden,²⁴⁶ Baroness Hale of Richmond held, “Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage..... So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans.

²⁴⁶ [2007] 2 AC 432

In MW v. The Department of Community Services,²⁴⁷ Gleeson, CJ, made the following observations “Finn J was correct to stress the difference between living together and living together ‘as a couple in a relationship in the nature of marriage or civil union’. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved.”

In Lynam v. The Director-General of Social Security,²⁴⁸ the Court considered whether a man and a woman living together ‘as husband and wife on a bona fide domestic basis’ and Fitzgerald, J. said, “Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated

²⁴⁷ [2008] HCA 12

²⁴⁸ (1983) 52 ALR 128

persons of the opposite sex meets the statutory test.” In **Tipping, J. in Thompson v. Department of Social Welfare**²⁴⁹

It was held, “ in deciding the marital status following things may be taken into consideration;

- (1) Whether and how frequently the parties live in the same house.
- (2) Whether the parties have a sexual relationship.
- (3) Whether the parties give each other emotional support and companionship.
- (4) Whether the parties socialize together or attend activities together as a couple.
- (5) Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.
- (6) Whether the parties share household and other domestic tasks.
- (7) Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.
- (8) Whether the parties run a common household, even if one or other partner is absent for periods of time.
- (9) Whether the parties go on holiday together.
- (10) Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple.”

²⁴⁹ (1994) 2 SZLR 369 (HC).

CHAPTER - 6

GLOBAL TRENDS RELATING TO DOMESTIC VIOLENCE

6.1 DOMESTIC VIOLENCE IN CHINA:-

Sexual violence is a global problem. It occurs in different cultures and in many settings of society, including the community, workplace, school, and home. The negative impact of sexual violence is not confined to the survivors; it affects the health of the whole population. Apart from reproductive and sexual health problems, including unwanted pregnancy and transmission of diseases, survivors of sexual violence may experience psychological distress comparable to Post-Traumatic Stress Disorder and may even commit suicide.

6.1.1 Scope of Chinese Societies

Broadly speaking, the Chinese population includes immigrants in Western and Asian societies, and those living in Mainland China, Hong Kong, Macau, and Taiwan. However, the majority of the Chinese live in predominantly Chinese societies, such as those of Mainland China, Hong Kong, Macau, and Taiwan. These societies differ in terms of their socio-political and socio-economic structures.

There are also huge differences between people in rural areas and those in cities, and between Northern and Southern China. In Southern China, in regions such as the Pearl River Delta and Shanghai, there is a longer history of economic development and exposure to Western cultures. When comparing men from Shanghai and Beijing, the latter are

reportedly more traditional and dominant in the home, while the former are generally viewed as less dominant. Chinese populations are heterogeneous. Caution should therefore be exercised in interpreting findings from studies, because no study can represent all Chinese people in these societies.

6.1.2 Risk Factors for Sexual Violence

Sexual violence is an abuse of a gendered power. Survivors are usually less powerful, women, children and employees, while men especially as parents or caretakers and employers are potential abusers. The study of sexual violence in China is still in its infancy. Studies of risk factors associated with intimate partner violence in general and sexual violence in particular are included in this review. When discussing the cultural, individual and other risk factors, it is important to note that the limitations of the study designs are such that it is only possible to establish that many of them are associated behaviours and circumstances, and not a causal relationship. Nonetheless they are important markers of risk contexts.

6.1.3 Cultural values and attitudes

Patriarchy has been identified as playing an important role in violence. Within the family, men may use violence to exert their position of dominance over their partner or their children. Patriarchy may also contribute to male domination in the society.

6.1.4 Patriarchal authority at home

The social and cultural legitimacy of women's subordination is regarded as an important factor that contributes to violence against

women. Patriarchal authority and holding a strong belief in patriarchal gender relationships were reported to have significant correlations with spousal violence in Chinese populations.

In Chinese culture, male dominance and patriarchal ideology have been seen as core family values and treated as proverbs of life. Even females were found to have held on to traditional values and to believe that there were good reasons to beat a wife, especially as a way of preserving the "face" of the male partner.

The lack of legal and social support for survivors is an indication of the social isolation that makes it difficult for a survivor to disclose intimate partner violence. This is particularly true for survivors growing up in rural areas of China and for immigrants to cities.

Regarding survivors of spousal violence, Liu argues that even though divorce has been used by battered women as a way to end their abusive experience in many countries, it is not common for battered women in China to use divorce as a way out of an abusive relationship. Divorce has been controlled strictly by the government and by social norms, and battered women lack personal resources. Thus, "enduring violence" has become a main coping strategy for battered women in China.

6.1.5 Patriarchal authority in society

In modern China, after 1949, the government of the People's Republic of China declared in a constitutional legal document that women should enjoy equal rights with men in respect of politics, economics, culture, education, and social life. In reality, however, legal equality between men and women does not amount to true equality. The

patriarchal social order and family system have long been supported by the economic and social processes in Chinese society. This has resulted in the subordination of women and in violence against women. The government's inaction in combating domestic violence has been criticised as a social factor, in particular, the gender insensitivity of the criminal justice system, insufficient laws combating violence against women, the lack of coordination between government departments in helping survivors, and system failure in survivor protection.

6.1.6 One-stop service for survivors of sexual violence:

A number of one-stop services are also available, these include:

Multi-purpose Crisis Intervention and Support Center: The Crisis Center, operated by the Tung Wah Group of Hospitals, is a crisis intervention and support service which aims to provide comprehensive support to survivors of sexual violence and individuals and families in crisis, or those that are facing domestic violence, and to link them with appropriate health care and social services units. The Crisis Center commenced operation on 26 March 2007. Services provided include a 24-hour hotline, crisis intervention, immediate medical examination, treatment including pregnancy prevention, screening for sexually transmitted diseases, medical follow-up (including treatment for sexually transmitted diseases), gynaecological treatment, providing a report to the police, taking statements from survivors, forensic examination, and other legal proceedings.

The Sexual Violence Crisis Centre: Apart from the mainstream casework units, a Sexual Violence Crisis Centre was set up by the Association Concerning Sexual Violence Against Women in 2000, with

funding support from the Hong Kong Jockey Club Charities Trust. Its aim is to provide a one-stop service for female survivors of sexual violence. Located in Kwong Wah Hospital, Rainlily provides services to female survivors of sexual violence including a hotline, 24-hour crisis intervention, the arrangement of police interviews and forensic examinations, medical service support, in-depth or long term counseling, escort services, a survivors' support group, volunteer training, and publicity.

Negative responses from service providers, family and community members are associated with higher levels of psychological symptoms and poorer self rated recovery among survivors. It is important then to inculcate a culture among services for sexual assault survivors that promote positive, supportive responses which can in turn lead to better psychological outcomes for survivors.

6.1.7 National policy and law making

China has been a party to the Convention on the Elimination of All Forms of Discrimination Against Women since 1980. The Chinese government adopted the Beijing Declaration and Platform for Action at the Fourth World Conference on Women, held in September 1995. The Chinese government has made several important laws to stop domestic violence and sexual harassment.

6.1.8 Marriage Law: Article 43 of the Marriage Law of the People's Republic of China states that a victim of domestic violence shall have the right to make a request to an organ of public security to halt the violence and the public security organ shall stop the violence and shall subject the wrongdoer to an administrative penalty.

6.1.9 Protection of Rights and Interests of Women Law: The government's commitment to stop all forms of domestic violence is also stated in the Law of the People's Republic of China on the Protection of Rights and Interests of Women which was amended in 2005 to include sexual harassment. Article 40 states, "Sexual harassment of women is prohibited. The female victims shall have the right to file complaints with the units where they work and the departments concerned." It is further stated in Article 46: "Domestic violence against women is prohibited. The State takes measures to prevent and stop domestic violence. The departments of public security, civil affairs, judicial administration, as well as urban and rural mass organisations of self-government at the grass-roots level and public organisations shall, within the scope of their respective duties, prevent and stop domestic violence, and provide succour to female victims."

6.1.10 Protection of Minors Article 8 states: "The parents or other guardians of minors shall fulfill their responsibility of guardianship and their obligations according to law to bring up the minors. They shall not maltreat or forsake the minors, nor shall they discriminate against female or handicapped minors. Infanticide and infant-abandoning shall be forbidden." Sexual violence against children should be prohibited and survivors should be protected.

Policy papers, stating guidelines for development of women and children, have also been published. The Programme for the Development of Chinese Women (1995 to 2000) states that equality between men and women, and the prevention of domestic violence should be adopted as basic state policies. In the Programme for the Development of Chinese Women (2001 to 2010) the government stresses the importance of the development of women and children, and makes a solemn commitment to

the international community. In the Programme for the Development of Chinese Children (2001 to 2010) it was emphasised that children should be protected from any form of violence, including sexual violence, by the enforcement of the law.

(A) Central mechanism for handling domestic violence

The National Working Committee on Children and Women under the State Council is a coordinating organisation, responsible for advising government departments on the prevention of domestic violence. The major tasks of the Committee are to coordinate government departments to implement the policies set out by the Programmes for the Development of Chinese Women and Chinese Children.

The All-China Women's Federation is the largest Non Governmental Organization that aims to improve the status of women in China. Its basic function is to support women, protect their rights and interests, and promote equality between the sexes. It promotes the ending of domestic violence as well as the protection of women and children at national and local levels through its affiliated branches in all provinces.

(B) Prevention and intervention services

The following prevention and intervention services are available in Mainland China:

- **Legal and policy responses:** The Law of the People's Republic of China on the Protection of Rights and Interests of Women has been passed by the central government and legislation by the provincial governments is in the process of enactment. Hunan and Anhwei Provinces have already passed their laws and regulations on the

Protection of Rights and Interests of Women. They have provided a clear legal definition of sexual harassment in the workplace. Anhwei has set up a specialised unit to combat sexual harassment in the workplace. Shanghai passed a similar law and regulation on April 26, 2007. The law and regulation define different types of sexual harassment and also clarify the roles of related government departments in handling sexual harassment complaints.

Some local governments are also active in combating domestic violence. For example, Fuzhou local government has established the Circuit Court for Women. The purpose of which is to safeguard women's rights and interests. It comprises eight judges, some of whom are women, as well as special jurors, including the director of the Minhou Women's federation and the heads of women's federations in 16 administrative districts. This special court serves the needs of women that are survivors of domestic violence and simplifies the legal procedures of domestic violence cases.

- **Hotline and community-based programmes:** There are increasing numbers of services in Mainland China which aim to halt or prevent domestic violence, including hotline and counseling services, shelters for battered women, and educational programmes and campaigns such as the "zero domestic violence community" campaign of the All-China Women's Federation in 2005.²⁵⁰ The hotline service is the most accessible service for women survivors in Mainland China. Most of the hotline services are provided by the All-China Women's Federation in provinces and cities. They provide information on laws, women's rights, and counseling. Service provision varies greatly between municipalities,

²⁵⁰ UNICEF (2003). *Meeting Basic Learning Needs*. New York, Consultative Group on ECCD, UNICEF. Cited in: Black M (1996). *Children First: The Story of UNICEF Past and Present*. New York: Oxford University Press.

provinces, autonomous regions, and special administrative regions.

In Shanghai, the Shanghai Women's Federation dealt with 3,000 hotline cases in a year. About 40% concerned marital conflict and about 10% reported domestic violence. Only a few callers enquired about sexual violence. The Shanghai Women's Federation organises a public campaign to promote the six rights of women (political, economic, cultural and education, property, marriage, and family) and also promotes schooling for all girls. There are two refuges for battered women in Shanghai. Although its provision of beds is modest, it is underutilised. There are three main reasons for this: (1) the lack of publicity; (2) the lack of social security and housing arrangements after divorce that makes it difficult for battered women to leave an abusive relationship; (3) the service providers are worried that it may be difficult to maintain the refuge as temporary accommodation, because service users might not want to leave after a short period of time in view of the lack of support services. There are virtually no services for women from rural areas and cities other than Shanghai.

In Beijing, in addition to the services provided by the Beijing Women's Federation, another key Non Governmental Organization is the Maple Women's Psychological Counseling Center. It also provides a hotline and counseling services to survivors of domestic and sexual violence. In Shaanxi, the Research Association for Women and Family provides training and services for battered women.

In Nanjing, an anti-domestic violence network was established in 2003. It is a Non Governmental Organization with members drawn from community leaders and volunteers, which aims to build a strong support network and identify domestic violence cases at an early stage. A refuge

was first established in 2002. There are now over 20 refuges in Nanjing. However, very few battered women have made use of the service. Apart from the refuges, there are campaigns and public forums on domestic violence prevention. New services have been provided in recent years, such as a counseling service³⁷ and a crisis support centre.³⁸ Because resource support from government is weak, these services are mainly run by volunteers.

In Shenzhen's Lo Wu district, a centre for the prevention of family violence in Lo Wu was established in 2004.³⁹ The government units involved includes the judiciary, prosecutors, police, health and civil affairs departments, and the Women's Federation. It is mainly a service coordinated by government departments. They provide support and information for the victims of family violence, and make formal referrals to the forensic services for physical examinations, which can be used as evidence in court proceedings. The centre has 10 units, covering 10 streets in Lo Wu district. It forms a strong network reaching out to families. Except for a few salaried employees who work for the Women's Federation, most of the workers are volunteers.

- **Health care and forensic examination:** There is no specific health service or health care package available for survivors of sexual violence. A forensic examination can be included in some injury examination services for domestic violence, such as that provided by Fada Institute of Forensic Medicine and Science,⁴⁰ which is subordinate to the Institute of Evidence and Forensic Science (China University of Political Science and Law). In principle, survivors of sexual violence can use this service.

6.2 DOMESTIC VIOLENCE IN HONG KONG

(a) Social policy and law reform

In Hong Kong, zero tolerance of violence is the policy for combating domestic and sexual violence,²⁵¹ but what this actually means is vague. Calls have been made for a domestic violence policy which clearly states the commitment of the government to tackle domestic violence, its philosophy to combat domestic violence and its strategies to fight and prevent domestic violence.

Hong Kong has a very comprehensive legal system which defines criminal sexual offences and criminal procedures. At present, there are three ordinances in Hong Kong that provide survivors with protection against domestic and sexual violence. They are the Crimes Ordinance (CAP 200), which defines criminal offences such as marital rape, rape, unlawful sexual act, indecent assault, incest, and other child-related sexual offences, as well as the Prevention of Child Pornography Ordinance (CAP 579). The Offences against the Person Ordinance (CAP 212) can also be applied to domestic violence appeals. The three criminal laws, which are part of the criminal justice system, are punitive in nature. Two civil statutes are preventive in nature: the Domestic Violence Ordinance (CAP 189) and the Sex Discrimination Ordinance (CAP 480).

Two major procedures deal with domestic and sexual violence cases. For criminal cases, the decision on whether or not to prosecute depends on whether the Department of Justice considers that "there is enough evidence to secure a conviction, and whether the prosecution is in

²⁵¹ S. 48. The 2005-06 Policy Address: Strong Governance for the People. 2005. Hong Kong Government SAR.

the public interest."²⁵² Following arrest, a person charged with a criminal offence will make a first court appearance before a magistrate. The appearance will be in the magistracy which has jurisdiction over the location where the alleged violence occurred. A defendant who wants to be legally represented can choose between private lawyers or the lawyers who participate under the Duty Lawyer Scheme.

Marital rape has been criminalised only recently. In a landmark decision, the House of Lords in *Regina v R*, found that a husband might be guilty of the rape of his wife if the wife did not consent to sexual intercourse. Subsequent to consultation, all parties consulted including the Government agreed that marital rape was an offence and that the law should be amended to clarify that beyond doubt. As a result, a new section 117(1B) of the Crimes Ordinance (CAP 200) was enacted: in order to avoid any doubt, it is declared that for the purposes of sections 118, 119, 120, and 121, "unlawful sexual intercourse" includes sexual intercourse that a man has with his wife.

In civil cases, an Injunction Order under the Domestic Violence Ordinance (CAP 189) can be used in domestic and sexual violence cases. The existing the Domestic Violence Ordinance (CAP 189), was created in 1986, and can no longer meet the challenges of the many faces of domestic violence.²⁵³ The amendment bill, which was gazetted on 15 June 2007, was introduced into the Legislative Council (LegCo) on 27 June 2007. The Government proposed amendments to the Domestic Violence Ordinance to enhance protection for survivors of domestic violence.

²⁵² P. 108, Roebuck, D. (ed.) (1996). *The Criminal Procedure of Hong Kong: A Descriptive Text*. Beijing: Peking University Press: and: Department of Justice (2002). *The Statement of Prosecution Policy and Practice*. Hong Kong Special Administrative Region, p.12

²⁵³ S. 41. *The 2006-07 Policy Address: Strong Governance for the People*. 2006. Hong Kong

The Sex Discrimination Ordinance (CAP 480) is also part of the civil law. The Sex Discrimination Ordinance is an anti-discrimination law passed in 1995. Discrimination on the basis of sex, marital status, pregnancy, or sexual harassment is made unlawful under this law. Protection is granted in seven different fields. The law applies to both males and females. The Sex Discrimination Ordinance provides for the establishment of an Equal Opportunities Commission to work towards the elimination of discrimination and harassment, as well as to promote equal opportunity between men and women. A complaint on sexual discrimination or sexual harassment can be lodged with the Equal Opportunities Commission. After a complaint is received, the EOC must first investigate the complaint and decide if it should be disallowed or should proceed to conciliation.

(b) Central mechanism for handling domestic violence

A Working Group on Combating Violence, chaired by the Director of Social Welfare, was created in 2001 to provide high-level coordination between the parties dealing with domestic and sexual violence. One of its tasks has been to develop approaches to the problem, from prevention and service provision to intersectoral collaboration, and so on. The Committee on Child Abuse, and similar working groups have been established to deal with child abuse and elder abuse. The working groups have adopted various procedures for handling child abuse, domestic and sexual violence cases. The Procedural Guidelines for Handling Adult Sexual Violence Cases were revised in 2007 in order to adopt a multi-disciplinary approach to working with survivors of sexual violence. The approach ensures close cooperation and collaboration with other professionals, to minimise the need for the survivor to repeat the ordeal of answering questions and to ensure that appropriate support and assistance

are facilitated. In most circumstances, with the consent of the survivors, the designated social worker and the Multi-purpose Crisis Intervention and Support Center operated by the Tung Wah Group of Hospitals, act as case manager to handle sexual violence cases.

Thus the development of professional and specialised services for sexual violence in Hong Kong is advanced and comprehensive. The criminal justice, health, and welfare systems are well developed and coordinated so that they both serve the survivors of sexual violence and deal with offenders. Over 90% of the social services are funded by the government. The great limitation of the services for sexual violence, and in general, domestic violence, is the lack of a policy. Service provision, though comprehensive, is pragmatic and uncoordinated. It is treatment-oriented, using a medical approach, rather than prevention or empowerment approaches. In terms of law reform, although the Bill of Rights Ordinance and the Sex Discrimination Ordinance were enacted in the 1990s, gender discrimination still permeates the laws and social policies of Hong Kong. While the government stresses that it objects to all kinds of discrimination, it has not revised or repealed statutory provisions or modified development strategies that are gender biased. Examples include the New Territories small house policy, the offence of gross indecency and the government's public housing policy.

In the recent reform of the Domestic Violence Ordinance, the government did not criminalise domestic violence or establish a domestic violence policy. The definition of violence remains narrow and does not include all forms of abuse such as psychological abuse, stalking, and sexual abuse in intimate relationships (including homosexual relationships). Furthermore prevention has yet to be comprehensively addressed.

The lack of a policy on sexual violence in both Mainland China and Hong Kong means there is no coherent basis from which to monitor the problem and to develop appropriate responses to survivors and programmes for perpetrators and to develop effective prevention strategies.

6.3 DOMESTIC VIOLENCE IN ENGLAND:-

Violence against women was recognised as a fundamental infringement of human rights in the 1993 United Nations Declaration on the Elimination of Violence against Women and was a major topic at the 1995 Beijing Fourth World Conference on Women (UN Women, 1995). The serious consequences of domestic violence have also been recognised by the World Health Organisation. Over the past 30 years there have been major changes in the national policy and comprehension of domestic violence in the United Kingdom driven and in response to advocacy and campaigning by the women's movement and non-governmental organisations providing services to abused women. In the shadow of policy developments, since the late 1980s, the criminal justice system, in particular the police service has been involved in configuring justice responses to the problem of domestic violence. Responses followed in the health and social care services policy arena. Many government and non-government institutions started commissioning research on domestic violence and formulating policy recommendations. At the end of the 1990s two events had a particular influence on the development domestic violence policy in the United Kingdom; first, the increasing interest in aligning United Kingdom policies with the strategic objectives agreed in the Beijing *Platform for Action* (UN Women, 1995) to promote the human rights of women, and secondly New Labour taking power in England (1997) with a manifesto commitment to take forward

policy development to combat domestic violence. During the period between 1997 and 2010, the main focus of policy and legislation on domestic violence was on implementing measures based on prevention, protection and justice and the provision of support for victims of domestic abuse, to be implemented by partnerships of service providers at local and national levels. Interestingly, in formulating policy, the government defined domestic violence in a gender-neutral way. Since 2010, following the election of a Coalition government (Conservatives and Liberal Democrats), there is a shift in policy direction with increased focus on a more broad gender -based agenda to end violence against women and girls.

Each of the four countries of the United Kingdom develops their own domestic violence strategy. Scottish policy is outlined in the Scottish Government and the Convention of Scottish Local Authorities (2009), *'Safer Lives: Changed Lives a Shared Approach to Tackling Violence against Women in Scotland'* and focuses on Prevention; Protection of victims; Provision of services and Participation of all agencies to ensure policy making and practice development around violence against women is informed by those who use domestic violence services. Recent initiatives in relation to domestic violence in Scotland are framed within meeting gender equality priorities. In Northern Ireland, the current strategy is set out in —*Tackling Violence at Home – A Strategy for Addressing Domestic Violence and Abuse in Northern Ireland* and is supported by Action Plans up to 2012. In 2008 the Northern Ireland government published — *Tackling Sexual Violence and Abuse – A Regional Strategy* (2008). These two strategies run in tandem and it planned that in March 2012 a joint Domestic and Sexual Violence and Abuse Action Plan will be published taking forward actions on a collaborative basis.

Tackling Domestic Abuse: The All Wales National Strategy supported also by yearly action plans. This was superseded in 2010 with the publication of “*The Right to be Safe*” which is six year integrated strategy for tackling all forms of violence against women and has an increased focus ensuring that —the whole violence against women agenda is tackled effectively.

DEFINITIONS :-

English criminal law does not explicitly criminalise domestic violence. Until recently there was no shared definition of domestic abuse among all interested parties. Lack of a common definition of domestic abuse has led to misinterpretations and hampered research and policy recommendations with different agencies and the government using a variety of different definitions. In 2004, government agencies agreed to the use of the following gender-neutral definition which views domestic violence as existing in a range of adult relationships:

Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.

An adult is defined as any person aged 18 years or over. Family members are defined as mother, father, son, daughter, brother, sister and grandparents whether directly related, in-laws or step-family. The definition is supported by an explanatory text:

The definition acknowledges that domestic violence can go beyond actual physical violence. It can also involve emotional abuse, the destruction of a spouse's or partner's property, their isolation from

friends, family or other potential sources of support, control over access to money, personal items, food, transportation, the telephone and stalking. Violence will often be witnessed by children and there is an overlap between the abuse of women and abuse (physical and sexual) of children. The wide adverse effects of living with domestic violence for children must be recognised as a child protection issue. They link to poor educational achievement, social exclusion and to juvenile crime, substance misuse, mental health problems and homelessness from running away. It is acknowledged that domestic violence and abuse can also manifest itself through the actions of immediate and extended family members through the perpetration of illegal activities, such as forced marriage, so-called 'honour crimes' and female genital mutilation. Extended family members may condone or even share in the pattern of abuse.²⁵⁴

The United Kingdom Government is currently reviewing policy in this area and is utilising the United Nations Declaration's (1993) definition, namely:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.

The current government is consulting on whether to extend this definition to include younger people.

²⁵⁴ http://www.cps.gov.uk/publications/prosecution/domestic/domv_guidance.html#a01.

6.3.1 THE DEVELOPMENT OF POLICY ON DOMESTIC VIOLENCE

The Home Office is defined as the lead government department for the co-ordination of domestic violence policies and initiatives, providing guidance to other governmental departments and co-operating with non-governmental organisations to develop and implement policy. The Home Office provides undertakes research, provides information and releases statistics on the prevalence of domestic violence.

6.3.2 Domestic Violence Policy Development in England 1990-2004

From the beginning of the 1990s the approach taken by successive English administrations to address domestic violence has been to promote an inter-ministerial approach to policy development at a national level and multi-agency co-ordination at local level to implement policy and to provide services. This approach is in line with United Nations recommendations (United Nations, 1993) and mirrors policy development and implementation in other related fields (for example child protection and crime prevention) and was supported in 1992 by a House of Commons Home Affairs Committee (1992) on Domestic Violence. Local level inter-agency co-ordination to tackle domestic violence was called for in a Home Office Circular published in 1995, and the establishment of local domestic violence forums in which police, social services, housing services, probation, health services, legal professionals, and a range of voluntary agencies work together in local communities to tackle domestic violence.

Inter- ministerial consultation on domestic violence paved the way for the publication of *Living without Fear: An Integrated Approach to*

Tackling Violence against Women in 1999 (Home Office and the Women's Unit of the Cabinet Office). While many hoped that this would set out a comprehensive national strategy on domestic violence, the government at this time chose to position itself as supporting locally driven and non-governmental sector multi-agency initiatives, adding value to and supporting this work, rather than taking a leading role in combating domestic violence. The central government role was framed firmly in terms of implementing criminal justice measures and crime reduction. Further guidance for local areas was published in 2000, namely, *Domestic Violence: Break the Chain Multi-Agency Guidance for Addressing Domestic Violence*. In June 2003 the Home Office published a policy consultation paper *Safety and Justice: The Government's Proposals on Domestic Violence* following wide-ranging consultation with and advocacy by a number of parties including survivors of domestic violence arguing for a more pro-active approach (Hague, 2005). *Safety and Justice* (2003) detailed the extent of domestic violence in England, the impact on victims and the wider costs to society and introduced the government's proposed strategy for tackling domestic violence based on three elements, prevention, protection and justice and support for victims to rebuild their lives. It also proposed legislative and non-legislative changes to the way domestic violence is dealt with in England and Wales and suggested a range of new measures including multi-agency reviews of domestic violence murders; criminalising breach of non-molestation and occupation orders and extending their availability; making common assault an arrestable offence; giving victims the status of vulnerable/intimidated witnesses; registration of domestic violence offenders, and specialist domestic violence courts (Home Office, 2003). *Safety and Justice*, in contrast to the majority of previous public sources, recognised not only female victimisation in domestic abuse but also

female perpetration. In December 2003 *The Summary of Responses to Safety and Justice: the Government's Proposals on Domestic Violence* was published, accompanied by the publication and introduction into Parliament of the Domestic Violence, Crime and Victims Bill and later Act (2004).

6.3.3 Recent Domestic Violence Policy Development in England 2005 to 2011

The 2005 Home Office publication of *Domestic Violence: A National Report* marked a shift in central government policy. Noting the contribution to date of statutory and voluntary organisations, it announced that the Government has now become a full member of that partnership (p.3) working in the field of domestic violence. The National Report (2005) made seventeen commitments to support and develop public services to respond proactively to domestic abuse and included support of new measures including Specialist Domestic Violence Courts and Independent Domestic Violence Advisers. The *National Domestic Violence Delivery Plan* (2005) set out objectives focusing on the reduction of the prevalence of domestic violence and domestic violence related homicides; increasing the rate domestic violence is reported to the police and brought to justice, and the provision of support and protection to victims. Performance indicators were listed to measure progress in these areas, with yearly reviews timetabled and annual progress reports were published in the period 2006 to 2009. Although this could be seen to be the first major step in national planning in which the government took a clear lead, criticisms were made of this approach. The Sixth Home Affairs Select Committee Report on Domestic Violence (2008) faulted the process of policy implementation, in particular that policy was disproportionately focused on criminal justice responses at the expense of

effective prevention and early intervention²⁵⁵ and called for a more direct focus on violence against women more generally and an increased emphasis on prevention²⁵⁵.

A subsequent government consultation paper *Together we can end violence against women and girls* (2009) focused more explicitly on actual violence against women and girls, noting the fear of domestic abuse and its impact on people's everyday lives. It made fresh proposals regarding prevention, supporting victims and bringing perpetrators to justice and finally.

Following a change in the administration in 2010, the English government introduced a new consultation criticising the previous administration for adopting a —top-down²⁵⁵ approach to domestic violence and calling for more localised responses to the problem emphasising prevention, provision of support to victims, partnership working and risk reduction, signalling a return to the approach taken before 2005. It focuses firmly on gender based violence and including so called honour based violence and female genital mutilation (*Call to End Violence against Women and Girls*, 2010). The consultation also recognised that men and boys could be victims of domestic violence and the impact of domestic abuse on families and children. In March 2011 a new action plan *Call to End Violence against Women and Girls: Action Plan* was published setting out immediate and longer term priorities for action and the responsibilities of different government departments and framing policy development within an equalities and prevention framework with a distinct and new focus not only on adults but also on the protection of children from domestic and gender based violence within families, schools and from harmful material on the internet. It is

²⁵⁵ <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmhaff/263/26304.htm>

backed by a £28 million fund to support the provision of specialist services for victims and prevention work.

6.3.4 Recent Policy relating to the impact of domestic abuse on children 2000 to 2011

After 2000, policy development increasingly recognised the inter-relationship between domestic violence and the abuse and neglect of children. *The Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000) noted the impact of domestic abuse on parenting capacity. The *Every Child Matters Outcomes Framework* (Department for Children, Schools and Families, 2003) set targets that children affected by domestic violence are identified, protected and supported. *The National Service Framework for Children, Young People and Maternity Services*, 2004 highlighted the serious effects on children who witness domestic violence. *A Vision for Services for Children and Young People affected by Domestic Violence* provided guidance focused on meeting the needs of children affected by domestic violence within the planning of integrated children's services and this was strengthened by subsequent publication of *Working Together A guide to inter-agency working to safeguard and promote the welfare of children* (2006, revised 2010) which contains statutory and non-statutory guidance to public agencies to work together in relation to domestic violence to protect children, including unborn children; empower mothers to protect themselves and their children; and to identify the abusive partners, hold them accountable for their violence and provide them with opportunities to change.

6.3.5 RELEVANT LEGISLATION

There are a range of civil remedies and criminal offences which are relevant in cases of domestic violence. Legislation has been developed to offer protection to victims and to children who witness domestic violence.

(A) Civil Law

The 1970s saw the emergence of some civil remedies for domestic abuse including the Domestic Violence and Matrimonial Proceedings Act, 1976²⁵⁶ and the Domestic Proceedings and Magistrates' Courts Act, 1978. This early legislation introduced equal protection to victims whether married or unmarried and included non-molestation and ouster orders²⁵⁷ but were limited in their scope. Moreover, magistrates tended to interpret orders restrictively, and judges were reluctant to apply ouster orders, viewing this solution as excessive. Domestic violence was also included in the Housing (Homeless Persons) Act of 1977. Victims of domestic abuse (with responsibility for children) were classified as 'in priority need', which obliged the local authority to provide accommodation.

From the 1990s more significant legislation began to be developed, superseding earlier legislation. A Family Homes and Domestic Violence Bill was introduced to Parliament in 1992 but failed to pass, resulting in increased advocacy, especially from the women's movement, for new legislation. The Family Law Act, 1996, Part IV sets out civil law remedies concerning the rights of occupation a non-owning spouse or

²⁵⁶ Repealed and replaced in 1997

²⁵⁷ A non-molestation order restrains the defendant from interfering with the plaintiff, while an ouster order requires one person to vacate the house and not return to the property for a certain period of time (Family Law Act, 1996).

civil partner; the court's powers to regulate occupation of family home; the court's duties to make certain orders and the court's powers to grant non-molestation orders (molestation being defined as violent, or pestering, or threatening behaviour or harassment). A non-molestation order can be applied to a broad range of people (a new category of *associated persons*²⁵⁸) in order to prevent further violence to the applicant or children. Ex-parte orders (Section 45) can be made taking into account the risk of significant harm but the court must allow the respondent to make representations as soon as just and convenient. Breached orders are subject to the power of arrest (Section 47). Under the previous legislation the power of arrest was more discretionary. Harne and Burton argue that the criteria for occupation orders are more restrictive than the former ouster order, as the court needs to take into account the conduct of two parties. Overall, this Act offers protection to a wider range of women, in more situations and for longer periods of time than earlier legislation. The Civil Partnership Act, 2004 (section 82, Schedule 9) amends Part IV of the Family Law Act, 1996 so that the same provisions apply to civil partners as to married couples. The Protection from Harassment Act, 1997, which extends to both civil and criminal law, deals with violence from outside the home. Whilst the Protection from Harassment Act, 1997 was originally designed to combat the problem of stalking, it is used by those who cannot apply for any order under the Family Law Act, 1996. The Protection and Harassment Act, 1997 is useful when dealing with post-separation harassment or violence with a non-cohabitant partner and for stalking. Hague argues that limitations of this Act are that it did not include occupation orders, or consider children; or the possibility that the

²⁵⁸ Associated persons – s. 62 (3) FLA 1996- includes spouses/civil partners; former spouses/civil partners; cohabitants/ former cohabitants; live in the same household (not lodgers, tenants, employees);relatives; engaged couples; intimate personal relationship with each other of significant duration; parents of a child; or both have parental responsibility of a child .

attacker is a close relative (e.g. father, son or brother).

Housing legislation with provisions for victims of domestic violence also developed from the 1990s. The Housing Act, 1996 broadened the definition of homelessness for those who are eligible for accommodation, including victims of domestic violence and articulating this explicitly. This legislation provides for housing assistance to victims by engaging with their landlords (supported housing), who can take special measures to assure the accommodation. The Homelessness Act, 2002 broadened the definition of violence to include all types of violence, not only domestic violence. Moreover, the provision of safe accommodation for victims of domestic violence has become a priority for local authorities who have been obliged to generate the homeless prevention strategies for victims of domestic abuse. In April 2003 the '*Supporting People*' housing programme for vulnerable people was launched and specifically included victims of domestic violence within eligible groups which could be supported by local authority area based grants. In 2006, new schemes including sanctuary schemes 'and panic rooms'²⁵⁹ were developed as placing a victim in temporary accommodation was recognised by some as less expensive. However, this approach is criticised as it cannot make security and surveillance as the main policy response.

Despite the fact that there is considerable research evidence pointing to potential impact of domestic violence on children's and young people's physical, mental and emotional health (Worrall *et al.* 2008), English legislation regarding the protection of children witnessing or living in contexts of domestic abuse has been relatively slow to develop.

²⁵⁹ The sanctuary scheme is defined as a possibility for the victim to remain in the accommodation by setting up additional protection measures (e.g. internal doors, safety glass, smoke alarms as well as immediate delivery of legal solutions under Family Law Act 1996 etc.) (Netto *et al.* 2009)

The major legislation regarding children, the Children Act 1989, which covers both public law (child protection) and private law (arrangements after relationship breakdown) did not explicitly acknowledge the risks and practical problems faced by women and children experiencing domestic violence. It did provide some level of intervention by local authorities if a child or children were assessed as being in need (under section 17) and for child protection intervention (under section 47) if a threshold of significant harm was reached. It was not until 2002 that The Adoption and Children Act 2002, amended the definition of significant harm provided by the Children Act 1989, by adding a new category of —impairment suffered from seeing or hearing the ill-treatment of another recognising the impact of domestic abuse on children. This legislation also enabled courts to remove a suspected child abuser from his or her property, as a part of an application for an Emergency Protection Order or Interim Care Order. The Children Act, 2004 promoted a multi-agency approach to local service delivery. This Act promoted consultation among different parties (e.g. schools, health services) regarding children’s safety and calls for closer cooperation between children’s services and the police in the identification and investigation of domestic abuse (Children Act, 2004). Harne highlights concerns relating to ensuring confidentiality given that this legislation enables a broader network of agencies and parties to possess information on children and their families.

(B) Domestic Violence, Crime and Victims Act, 2004

The Domestic Violence, Crime and Victims Act, 2004 was hailed as —the biggest piece of legislation on domestic violence in over 30 years. It extends protection offered by civil law to victims of domestic violence by making the breach of a —non-molestation order made under Part IV of the Family Law Act, 1996 a criminal offence, dealt with by the

criminal as opposed to the civil courts and with a maximum penalty of 5 years. It also extends the availability of injunctions to same sex couples and to those who, while not living together, have or have had in an intimate relationship of significant duration (Section 4). Section 12 of the Act amends previous legislation relating to restraining orders²⁶⁰ allowing courts to make restraining orders on conviction or acquittal for any criminal offence based on balance of probability⁴ evidence if there is a need for an order to protect a person or persons. These orders are intended to be both preventative and protective.

A new offence deeming that all members of a household aged 16 or over may be liable for the offence of causing or allowing the death of a child or vulnerable adult is introduced (Section 5). The women's movement in the United Kingdom is concerned about this section of the Act, noting that a woman who has been intimidated, threatened or otherwise abused may have been unable to intervene when the perpetrator's abuse of a child resulted in death; but despite this will be held equally guilty of a homicide she was powerless to prevent.

Protection for victims and witnesses is extended by the introduction of a statutory Victims Code of Practice and a Commissioner for Victims and Witnesses (Section 32). The Act also introduces statutory multi-agency domestic homicide reviews when anyone over 16 years dies of violence, abuse or neglect from a relative, intimate partner or member of the same household (Section 9). This section aims to promote multi-agency learning to develop joint responses to protect victims and bears a resemblance to arrangements for statutory reviews following the serious injury or death of a child. The Act also introduced some measures which have now been superseded; including making common assault an

²⁶⁰ Section 5 of the Protection from Harassment Act 1997.

arrestable offence (i.e. attracts a maximum of five years imprisonment or more).

Although the Domestic Violence, Crime and Victims Act, 2004 set out very important measures, some of the proposals introduced in the *Safety and Justice* (2003) are absent from the Act. The Domestic Violence Crime and Victims Act, 2004 did not include the criminalisation of the breach of an occupation order and or eliminate the time limits placed on such an order. Moreover, there are no solutions regarding the availability of legal defences to victims who kill the per perpetrator or the situation of migrant women. Although the Act did not fulfil the expectations of all parties (mainly non-governmental organisations), it was accompanied by a funding commitment to national domestic violence helplines, internet services and refuge services. An early evaluation of the implementation of this Act found limited progress in implementing its provisions had been made as well as presented some decline in the use of non-molestation orders and recommended on-going monitoring of the impact of the Act.

(C) Criminal Law

Recognising domestic violence as a crime has become an increasingly important part of government policy on crime control. Young perceives this approach towards domestic violence policy as a criminalisation of social issues. The legal solutions adopted in the United Kingdom reflect the extent to which domestic violence has become increasingly recognised as a significant social problem. Although, current criminal law does not explicitly criminalise domestic violence, the cost borne by society estimated in 2010 to be £36.7bn per annum at a minimum is one driver for changing policy and legal responses. In the

event that civil remedies fail, the criminal justice system may step in by applying criminal sanctions including the following legislation.

The legislation applied depends on the circumstances and offence of the domestic violence. Annex E of the *Crown Prosecution Service's Policy for Prosecuting Cases of Domestic Violence* (2011) provides a detailed outline of types of behaviour that can occur in cases of domestic violence and that might amount to a criminal offence²⁶¹.

There are two key problems concerning criminal law and domestic violence. First, criminal law may be seen as being more concerned with punishing the offender rather than helping the victim. Second, many people, such as neighbours, may be reluctant to become involved in what may be seen as a private matter between partners, and in the past the police were cautious about intervening in violent incidents resulting from domestic disputes. Recent policy developments supporting a pro-arrest approach have changed this picture to the extent that current government policy initiatives have noted that criminalisation may be at the expense of prevention work. Although criminal justice interventions are necessary, further remedies in relation to prevention and support of victims are seen to be needed.

6.4 DOMESTIC VIOLENCE IN RUSSIA

According to the Committee on the Elimination of Discrimination against Women, the Russian Federation is obliged to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise (article 2 (e)) and to take all appropriate measures, including legislation, to modify or abolish existing laws,

²⁶¹ http://www.cps.gov.uk/publications/prosecution/domestic/domv_guidance.html#a17

regulations, customs and practices which constitute discrimination against women (article 2 (f)).

The Convention also requires that the state modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (article 5 (a)).

Article 16 (1) of the Convention obliges the states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

6.4.1 Scale of the problem

In Russia, statistical data on crimes of domestic violence against women is fragmentary, difficult to obtain, and often simply non-existent. Nevertheless, a number of independent studies as well as statements made by representatives of government agencies provide us with an overview of the scale of the problem. In 2008, a representative of the Russian Ministry of Internal Affairs cited the following figures²⁶²:

- violence, in one form or another, is observed in every fourth family;
- two-thirds of homicides are attributable to household / domestic motives;
- each year about 14 thousand women die at the hands of husbands or other relatives;
- up to 40 percent of all serious violent crimes are committed within

²⁶² Interview with Police Lieutenant General M. Artamoshkin, Acting Head of the Department for the protection of Public Order under the auspices of the Russian Ministry of Internal Affairs, published on the website of the Ministry of Internal Affairs 01/24/2008, see www.mvd.ru/news/14047/

families.

Data on the percentage of murders committed within the family is confirmed by statistics from other regions. Thus, according to Igor Orlov, the Minister for Public Safety in the Perm Region, more than 70% of all homicides occur in the home.²⁶³ Russian women suffer three times more abuse in the family than they encounter violence from strangers.²⁶⁴

According to the official data from the Russian Ministry of Internal Affairs, as of December 2008 there are 212,700 domestic offenders on file with the police.²⁶⁵

Data on such crimes reveals increasing numbers of crimes against children. In 2008-2010, there were several cases of child homicide motivated by revenge, like the tragedy that occurred in Tatarstan.

On June 3, 2008 in the Republic of Tatarstan, 37-year-old, Alexander Grigoriev killed his 5-year-old son Alexei with the aim of settling scores with his wife, whom the killer suspected of infidelity. When Grigoriev came home that evening he asked his son why his mother was not at home. The boy replied to his father that while he was away "some man" had come to visit his mother. Wishing to take revenge on his wife, the father decided to slaughter his five-year-old son. Grabbing a knife in the kitchen, the man struck his son in the stomach at least four times. The boy died on the scene. Based on the evidence, the office of the Zarechnyi Interdistrict Investigational Department of Tatarstan instigated criminal

²⁶³ T. Semileyskaya. "This year, in the Perm Region more than 370 people have been killed in domestic violence incidents," New Region - Perm, 06. 26.2008

²⁶⁴ M. Propastina: Sociological study on the relevance of the problem of violence among the women of Magnitogorsk / Innovations in the prevention of marital problems. Ed. A. Voronkov; Cheliabinsk: 2007

²⁶⁵ According to the announcement of the press centre of the Russian Ministry of Internal Affairs "The Russian Ministry of Internal Affairs has held a scheduled session of the Government Commission on the Prevention of Offences", see the website of the Ministry of Internal Affairs, www.mvd.ru/announce/6022/

*proceedings under the Russian Criminal Code Article 105 (the intentional homicide of a person known by the killer to be in a helpless state).*²⁶⁶

Another trend revealed by statistics is the increase in the number of crimes of violence against women, especially crimes committed within the family: the period of 2002–2006 alone shows that the total number of "household" crimes increased by one-and-a-half times.

Our study, which was conducted in the regions of Russia, also confirms the constant growth of the number of registered offences. For instance, on the territory of the Udmurt Republic there were 47% more recorded domestic violence crimes in 2008 than during the same period of 2007.

As shown by the Udmurt Republic data received as a result of our investigation, there is increasing use of arms in domestic crime: 7% of homicides are committed with firearms; 28% with knives and 50% with other objects used as weapons.

In analysing such statistics, it is necessary to take into account that many victims do not report crimes to police. According to the research data of the "Congenial Home Centre," 60-70% of women suffering from domestic abuse do not seek help from law enforcement authorities.

6.4.2 Lack of specific legislation on domestic violence

(A) Weaknesses in existing legislation

In Russia, there is no developed legal framework that, in conformity with the Committee on the Elimination of Discrimination

²⁶⁶ The official site of Office of Public Prosecutor of Tatarstan. <http://www.prokrt.ru/news/o1519/>

against Women, regulates relations between family members. There is no specific law on domestic violence, which would criminalise all forms of domestic violence and set out the functions of law enforcement agencies and special services aimed at the protection of the rights of victims and the accountability of perpetrators.

Under existing laws, it is possible to render only partial protection to women victims of violence. In view of the gaps in legislation it is extremely difficult to prove crimes of domestic violence (even physical violence, which has ensuing visible evidence).

The various forms of violence against women, particularly domestic violence, are not recognized by the Russian Criminal Code as separate offences. The only applicable criminal provisions are those relating to bodily injuries or other crimes. Thus, acts of violence against women in the family, like any violent crime against a person, are punishable under Part VII of the Russian Criminal Code (crimes against the person):

- Article 112 (intentional causing of average gravity harm to health);
- Article 115 (intentional causing of minor harm to health);
- Article 116 (beating);
- Article 119 (threat of homicide or of causing grave harm to health)

None of the above-mentioned articles takes note of the relationship between the perpetrator and the victim. Moreover, a perpetrator repeated acts of violence against the same person are not specifically criminalized under Russian law. Article 18 of the Russian Criminal Code excludes "records of convictions for intentional crimes of small gravity" or of conditional sentences to be taken into account when considering

recidivism of crimes. Only Article 117 of the Russian Criminal Code (torture, the causing of physical or mental suffering by means of the systematic infliction of beatings or other forcible actions) takes into consideration the following aggravating circumstances: the victim is a minor, apparently helpless "or materially or otherwise dependent on the guilty person". However, this article is rarely invoked.

The Russian justice system considers violence committed in a public place against a stranger, to be a much greater social danger than the same actions committed within a family against relatives. In the statistical data of the Russian Ministry of Internal Affairs published on the Ministry's website, there is a separate statement on crimes committed in public places. However there is no data on crimes committed at home. Thus, domestic violence is not considered to be a crime against society, but continues to be treated as a private family matter.

A further obstacle to obtaining justice for victims is that most cases of domestic violence are brought as *private prosecutions*. Since the adoption of amendments to the Penal Code of the Russian Federation in 2003, there has been a significant change in examining cases of domestic violence. Most of them have fallen into the category of private prosecution cases (Article 115, 116. Part1, Article 129 and Article 130 of the Penal Code of the Russian Federation). From the perspective of legislators, this is justified on the basis that these crimes affect the rights and interests of specific citizens and it depends on them whether or not criminal proceedings are initiated against the offenders. However, in practice, this has meant that victims have been left virtually without protection from the State.

Article 20 of the Code of Criminal Procedure provides that private

prosecution cases may be initiated only on the basis of the statement of the injured party and are subject to termination if the parties have reconciled. The case is considered opened when the aggrieved party files a complaint that meets the requirements set forth in Article 318 of the Code of Criminal Procedure of Russia with a magistrate. If the complaint meets the requirements, the magistrate initiates the proceedings and the injured party becomes a private claimant.

Thus, the aggrieved party in cases of private prosecution has to perform a dual role. On the one hand, as the victim, she is entitled to have her interests protected by the State. However, this depends solely on her will and is instigated only at her own volition.

On the other hand, she has to act as a prosecutor, to present evidence, to formulate the charges and to seek the conviction of the guilty party. To serve as a prosecutor assumes knowledge of the prosecution process, the foundations of criminal law, the rules of gathering and presenting evidence. It is obvious that ordinary citizens do not possess such knowledge, and therefore are unable to properly present their case in court. When, in addition to issues raised above, the same question pertains to victims of domestic violence, a great role is played by the factors of post-traumatic stress, to which the victim is subject, as well as to the stage in the cycle of violence during which the complaint is filed. It should be noted that the victim usually continues to live with the abuser in one apartment, which gives him the opportunity to pressure and to intimidate her.

As a result, according to court statistics, the vast majority of cases of private complaint are terminated for two reasons:

The failure to fulfil the court's requirements to resolve the shortcomings of the complaint;

The reconciliation of the parties.

Typically, at the stage of filing the complaint, victims are unable to fulfil all the requirements, not only because of legal ignorance, but because of post-traumatic stress disorder as a result of the act of violence.

This happens because the complaints are usually filed immediately after the violence has occurred, while at that time the cycle of violence is passing into the stage of repentance by the abuser and forgiveness (reconciliation) by the victim. Women feeling guilty and believing the words of the abuser that violence will not happen again, remove the complaint and agree to reconciliation.

As a result, according to experts, 9 cases out of 10 are terminated due to the reconciliation of the parties. Thus, the offenders who have committed domestic violence go unpunished.

Under the current Penal Code of the Russian Federation, most crimes related to domestic violence against women should be covered by the crime “torment” under Article 117, which falls into the public prosecution category:

Article 117. Torment

- 1. The infliction of physical or mental suffering by means of systematic beating or by any other violent actions, unless this has involved the consequences referred to in Article 111 or 112 of this Code, shall be punishable by deprivation of liberty for a term of up to three years.*

2. *The same act committed:*

- a) *against two or more persons;*
- b) *against a person or his relatives in connection with the official activity of this person or the discharge of his public duty;*
- c) *against a woman who is in a state of pregnancy, which is evident to the convicted person;*
- d) *against obvious juvenile or a person who is in a helpless state, as known by the convicted person, or in material or any other dependence on the convicted person, and also in respect of a person, kidnapped or seized as a hostage;*
- e) *with the use of torture;*
- f) *by a group of persons, a group of persons under a preliminary conspiracy, or an organized group;*
- g) *by hire;*
- h) *by reason of national, racial, or religious hatred or enmity, shall be punishable by deprivation of liberty for a term of three to seven years.¹⁸»*

The commentary to this article indicates that "torment" should be understood as the infliction of physical and mental suffering to a victim, including systematic beatings, use of torture, threats, and insults. Other violent means of torment include, for example, sleep, food, and water deprivation, cold-rooms, biting, whipping, and binding.¹⁹ All of these actions, particularly systematic beating, not to mention threats and insults, exist in virtually every case of domestic violence.

In order for an action to be recognized as torment, it is essential to establish the systematic character of such actions by the perpetrator. As

directed by the Supreme Court of the Russian Soviet Federative Socialist Republic, whose interpretation is systematically followed to this day, in cases of torment three or more criminal acts constitute a systematic character. It is known that domestic violence is also characterized by being systematic.

However, according to the same ruling of the Supreme Court, battery, which does not constitute torment, committed in the course of an argument and caused by personal hostility cannot be regarded as torment.

Interpretation of the crime clearly presents a problem. On the one hand, torment is classified as ‘violent acts committed three times or more, such as battery, torture, threats and insults, which caused minor harm to the health of the victim.’

On the other hand, the law does not contain a clear time frame within which these systematic violent actions must be committed: whether this should happen within a year, a month or a day.

Moreover, the formula “battery, which does not constitute torment, committed in the course of an argument and caused by personal hostility” is open to an overly broad interpretation: is violence a ‘argument or disagreement’ or a manifestation of ‘personal hostility’? What does it mean exactly –“which does not constitute torment”? It is abundantly clear that these vague definitions would not be interpreted in favour of a female victim.

Thus, the only article of the Penal Code, which covers the crimes related to domestic violence, is ineffective.

(B) Lack of protective measures

Under Russian legislation there is no provision to issue a protective order. This measure, as international experience has shown, is primarily preventive, and could help to prevent more violent crimes. According to international studies, the life and well-being of a woman is most at risk at the time when she is leaving her abuser. In Russia such killings have taken place.

(C) Case in Voronezh in June 2008:

A 37-year-old special education teacher brutally massacred his ex-wife. The murderer, who had worked previously in criminal investigation, killed the victim with a screwdriver. According to the investigation, the suspect went to the pharmacy, where his ex-wife worked as a pharmacist. But the conversation between ex-spouses escalated into a quarrel. In anger, the man stabbed his former wife more than 60 times with a screwdriver in the head and neck, whereupon she died on the scene.

A protective order is a legal document designed to protect against abuse and to provide victims of domestic violence with appropriate forms of legal assistance. These are usually issued by judges after a hearing conducted in accordance with the special provisions of the Civil Code dealing with domestic violence, instigated at the request of the victims of the abuse, their lawyers or their representatives. Protective orders provide victims of domestic violence with a broad range of legal protection. First of all, the perpetrator of the abuse must stop the harassment, threats, physical violence. A protective order prohibits the defendant from entering into any contact with the plaintiff, whether by telephone, letter, in the form of gifts or by personal visits. The warrant may also prohibit

the defendant from approaching his former victim, to visit those places where she is working or studying. Sometimes, judges require the defendant to undergo a course of treatment for abuse of drugs or alcohol or to attend psychological counseling for the cessation of physical violence.

Thus, the main purpose of protective orders is the separation of the two conflicting parties: the alleged abuser and his potential victim. By issuing a protective order, the judge has not yet rendered a decision on the merits of the issue of guilt and responsibility, but imposes upon both parties a certain order of lawful behaviour in the coming months of paramount importance is the prevention of further escalation of violence and its possible grievous consequences.

As demonstrated by the Commission's expert survey, representatives of the judicial system support the need for increased preventive efforts, which must be backed by legislation.

The Commission stresses the ineffectiveness of the current Russian law, particularly in the area of domestic violence. The current legal framework does not take into account the specifics of such criminal acts against women and the danger that the violence poses to their health, safety and life. Protective measures for victims, such as protective orders, which are particularly necessary in a situation of domestic violence, do not exist.

The Commission believes that assigning the status of private prosecution to most domestic violence cases (Art. 115, 116(1) of the Penal Code) means that victims will remain without adequate state protection. They have to act in the prosecutorial capacity themselves,

while not having legal education nor right to legal aid. This situation is at odds with the obligations of the Russian Federation to protect the rights and freedoms of citizens. In particular, this constitutes a breach of Art. 2 of the Committee on the Elimination of Discrimination against Women which demands that the states ensure through competent national tribunals and other public institutions the *effective protection* of women against any act of discrimination.

(D) Lack of governmental support and public policies aimed at combating violence against women

Today in Russia the main obstacle to effective response to violence against women is the absence of a federal public policy that defines the problem as a serious impediment to the observance and achievement of women's rights as human rights.

In the early 90s, there was a significant rise not only of public activity in the area of women's rights, but also in that of the state. This was particularly noticeable during the Beijing Conference in 1995, which stimulated the adoption of the Beijing Platform for Action for the advancement of women at both the regional and Federal levels. This led to the establishment of national and regional mechanisms for monitoring the status of women and to the development of effective interaction between public organizations and various government agencies. At the same time, there were the first attempts to adopt legislation on the prevention of domestic violence which, unfortunately, did not bear fruit. But gradually, the problem of women's rights in general, as well as that of violence against women, has ceased to be a priority of the government and to be analyzed with adequate gravity.

The administrative reform of the Federal government (as of 2004), accompanied by structural changes and staff changes, has effectively destroyed the previously existing national mechanisms for establishing equal rights for women. To date, virtually all state agencies dealing with gender equality have been liquidated or have ceased to function.

The National Action Plan for the advancement of women and enhancing their role in society (2001-2005) ended in 2005. In 2004, the Commission on Women in the Russian Federation under the leadership of Deputy Minister of the Russian Federation suspended its work. The Commission on Women, Family and Demographics under the auspices of the President of the Russian Federation in the Federation Council was also eliminated.

Work on a wide range of gender issues at the state level is handled by the State Duma Committee on Family, Women and Children and the Ministry of Social Development and Health. The issues of violence are not a priority in their work.

The insufficient action of the State is also beginning to be noticed by the people of Russia: according to a Gallup survey (2008); 73.3 percent of the respondents stated that the State has not taken the necessary measures to combat domestic violence.

Another example demonstrating the non-priority of the problem is the lack of the Russian Federation in a campaign to combat violence against women, conducted by the European Council in 2006 to 2007. To date, Russia is the only member country of the European Council who did not respond to the European Council's questionnaire regarding this campaign.

The State's attitude of non-priority towards issues of violence against women is also reflected in the lack of an adequate number of specialized agencies such as social hostels and shelters where female victims can find refuge. According to a study undertaken by ANNA, in Russia there are only twenty-three such institutions, which are usually funded by local budgets. The total number of beds is about 200, and this includes not only women but children as well.

Despite all the work done over the last 20 years to combat violence against women in Russia, a systemic approach at government level is still lacking. Although a measure of progress is reflected in the Report, the Russian government has not yet done enough. There is no body within the legislative and executive branch of the federal government, no federal programme or national action plan to combat violence and help its victims. The Russian government must demonstrate political will and make respect for the rights of women, particularly in the area of violence against women, its priority. A consolidated federal programme or a national plan of action to combat violence and help its victims is required.

6.5 DOMESTIC VIOLENCE IN UNITED STATES OF AMERICA:-

Domestic violence is a distinctive and complex type of violence. The intimate relationship between the victim and the perpetrator is historically construed as private and therefore beyond the reach of law. The often hidden site of the violence buttresses this conceptualization. The victim is often financially dependent on her abuser, and other economic and familial factors complicate the victim's response to abuse. Moreover, women who complain of domestic violence frequently face intimidation, retaliation, and stigmatization, and thus incidents of

domestic violence are notoriously under-reported and under-prosecuted throughout the world, including the United States.

Any meaningful analysis of the nature and content of the United States' obligations with respect to domestic violence must flow from a comprehensive understanding of the reality that States are obliged to address. Until the United States enacts effective preventative and remedial measures to eradicate violence against women within its borders, the promise of women's rights in the United States will remain a deferred dream.

Each year, between one and five million women in the United States suffer nonfatal violence at the hands of an intimate partner. Domestic violence affects individuals in every racial, ethnic, religious, and age group; at every income level; and in rural, suburban, and urban communities. Notwithstanding the prevalence of domestic violence across demographic categories, it is overwhelmingly a crime perpetrated against women. Women are five to eight times more likely than men to be the victims of domestic violence. The Department of Justice reports that between 1998 and 2002 in the United States, 73% of family violence victims were female, 84% of spouse abuse victims were female, and 86% of victims of violence committed by an intimate partner were female.

Not only are women more likely than men to experience domestic violence, but they also represent an even greater percentage of victims in the most serious of the assault cases by an intimate partner. Women are also far more likely than men to be the victims of battering resulting in death at the hands of an intimate partner. In 1996 alone, over 1,800 murders were attributed to intimate partners, and nearly 75% of those victims were women. In the United States, more than three women are

murdered by their husbands or boyfriends every day, and approximately one-third of women murdered each year are killed by an intimate partner. According to an estimate by the Centers for Disease Control and Prevention, from 1981 to 1998, the number of domestic violence fatalities in the United States exceeded 300,000.

Government sources indicate that one-third of women in the United States experience at least one physical assault at the hands of an intimate partner during the course of adulthood. Due to feelings of shame and fear of retribution that prevent women from reporting assault, this statistic may significantly underestimate the incidence of domestic violence in the United States. The historical characterization of domestic violence as a “private” or family matter may also contribute to the under-reporting of domestic violence.

Not all women in the United States experience domestic violence with the same frequency. The data suggests that although the domestic violence epidemic cuts across the lines of gender, race, and immigration status – affecting women and men, African Americans, Latinas, American Indian and Alaska Natives and whites, and immigrants and United States citizens – it has a particularly pernicious effect on groups which lie at the intersection of these categories: poor ethnic minorities, immigrants, and American Indians and Alaska Native women.

While poor minority and immigrant battered women in the United States are among those most in need of governmental support and services, including domestic violence services, these groups are chronically underserved. This greater need for an effective government response is due, in large part, to the social, familial, and financial isolation experienced by many minority and immigrant women.

Nationwide, black women report their victimization to the police at a higher rate (67%) than white women (50%), black men (48%), and white men (45%). African American women account for 16% of the women reported to have been physically abused by a husband or partner in the last five years, but were the victims in more than 53% of the violent deaths that occurred in 1997. A recent study found that 51% of intimate partner homicide victims in New York City were foreign-born. Another study determined that 48% of Latinas reported their partners' violence against them had increased since they immigrated to the United States.

The greater level of reported domestic violence among African Americans, Hispanics, American Indian and Alaska Native women and immigrants is attributable, in large part, to the extreme levels of poverty in minority and immigrant communities. African Americans and Hispanics make up 22.8% of the population, but account for 47.8% of those living in poverty. Poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; in the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.

Data also indicates that women are at much greater risk of domestic violence when their partners experience job instability or when the couple reports financial strain. Abuse has also been found to be more common among young, unemployed urban residents – a large percentage of whom are racial minorities and immigrants. The majority of homeless women were once victims of domestic violence, and more than half of all women receiving public assistance were once victims of domestic violence. Although accurate statistics on the intersection of race and

gender in the homeless population and the population of those receiving public assistance in the United States are not available, statistics do demonstrate that racial minorities make up the majority of the homeless population and that the majority of women receiving public assistance are racial minorities.

Thus, combinations of poverty, age, employment status, residence, and social position – not race or culture, per se – may explain the higher rates of abuse within certain ethnic communities. Yet race remains salient because of its inextricable connection with these other factors. Race also plays a significant role in the victimization of at least one group: American Indian and Alaska Native women. Unlike other groups, the majority of American Indian and Alaska Native women reporting intimate partner violence identify their abuser as non-Native. American Indian and Alaska Native women face unique access to justice because determining which government (federal, state, or tribal) is responsible for the investigation and prosecution of violent crimes on Indian lands depends on the race of the perpetrator and the race of the victim.

6.5.1 FEDERAL LEGAL AND LEGISLATIVE DEVELOPMENTS

As noted above, Violence Against Women Act is a comprehensive legislative package first enacted in 1994 and reauthorized with new provisions in 2000 and 2005. As described below, Violence Against Women Act will be reauthorized in 2011. The passage of Violence Against Women Act was unquestionably a bellwether moment in the fight against domestic violence in the United States, but on its own Violence Against Women Act does not and cannot fulfill the United States' obligation to prevent, investigate, and punish violations of women's rights to be physically safe. Nor does it provide compensation

for damages resulting from failures of the United States to do so.

Violence Against Women Act seeks to provide funding for training of police, prosecutors, and advocates in dealing with domestic violence, funds shelters, civil legal services, and other services for domestic violence victims, especially in “demonstration” projects that can be replicated by other organizations, and encourages best practices by states by conditioning receipt of funding on, among other things, states’ use of mandatory arrest policies when domestic violence is reported and the removal of fees for applying for protective orders. Violence Against Women Act further criminalizes certain acts of domestic violence that cross state lines, making them federal, criminal matters, and it requires states, territories, and Native American tribes to give full faith and credit to protective orders made by other states, territories, and tribes. Portions of Violence Against Women Act, which will be discussed in other sections of this briefing, also provide immigration relief to battered immigrants and seek to prevent discrimination against domestic violence victims who live in certain types of federally funded housing.

Yet Violence Against Women Act fails to accomplish three crucial objectives: (1) it does not provide any direct remedy when abusers or police officers violate victims’ rights, (2) it does not require participation by all states or monitor their progress, and (3) it does not fully or adequately fund all the services that are needed for victim safety.

6.5.2 Domestic Violence and Child Custody, and Economic Considerations in Family Law Litigation

A substantial body of empirical research confirms that domestic violence has serious negative effects on children. Numerous studies show

an alarming co-occurrence of domestic violence and child physical and sexual abuse. The weight of the research demonstrates that 30% to 60% of children living in homes where domestic violence occurs are also physically or sexually maltreated. It is beyond dispute that children who suffer from direct physical and/or sexual abuse often experience multiple emotional and behavioral problems, as well as a variety of trauma symptoms, including nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development. Significantly, studies show that children who are exposed to domestic violence, but who have not been physically or sexually abused themselves, exhibit levels of emotional and behavioral problems, trauma symptoms, and compromised social and academic development comparable to children who are direct victims of physical and sexual abuse. Consequently, domestic violence is known to have multiple, seriously detrimental effects on children even when children are not themselves the direct targets of parental aggression.

Research also confirms that men who batter are likely to parent very differently from other fathers. Violent fathers tend to be under-involved with their children and more likely to use negative parenting practices, such as spanking, shaming, and exhibiting anger towards their children. Other parenting deficits common to violent fathers include systematically undermining and interfering with the other parent's authority, utilizing controlling and authoritative parenting styles, having unreasonable expectations of other family members, refusing to accept input from others, remaining inflexible, and elevating their own needs above those of their children. In addition, violent parents tend to be very poor role models, impeding their children's development of healthy relationships and conflict resolution skills.

While it is often assumed that domestic violence and its impact on children end once a battered parent separates from her abuser, research demonstrates otherwise. First, it is now known that the effects of trauma, once engrained, do not go away on their own, but survive even when the threat that created the trauma is removed. Second, studies show that domestic violence often first starts and frequently escalates at the time of separation.¹⁹³ Third, abusive partners often intensify stalking, harassment, and other non-violent coercive tactics upon separation, where physical proximity is less likely. In addition, where children are involved, abusive parents often utilize custody proceedings to continue their campaign of abuse against their former partners. Indeed, the threat to seek custody is a common strategy used by abusive parents to enhance post-separation power and control over a former partner. Finally, children often remain the bridge that keeps their parents connected long after the parents have physically separated. In light of this reality, it is not uncommon for abusive parents to use their children as instruments of ongoing coercive control even after separation, often during visitation exchange. In one recent study, 88% of women surveyed reported that their abusers had used their children to control them in various ways and to varying degrees not only during their relationships, but beyond.

The harsh interplay between domestic violence and custody disputes is not rare. Studies show that 25 to 50 percent of disputed custody cases involve domestic violence. When abused women attempt to leave their abusive relationships, they are often threatened with the loss of their children. Batterers are more likely than non-abusive fathers to seek sole custody of their children, and are just as likely to gain custody as non-abusive fathers.

6.5.3 Law and Policy Problems

As a result of an increasingly sophisticated understanding of domestic violence, including its detrimental impact on adult victims and children, and its corresponding relevance to child custody determinations, both legislative bodies and professional organizations in the United States have taken strong action to discourage custody awards to violent parents. In 1990, for instance, the United States House of Representatives passed House Concurrent Resolution 172 which “expressed the sense of Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.” In 1989, and then again in 1994, the American Bar Association passed resolutions calling for statutory presumptions against allowing custody to batterers. In 1994, the National Council of Juvenile and Family Court Judges added a rebuttable presumption against allowing custody to batterers to its Model Code on Domestic and Family Violence. The American Psychological Association added its recommendation in 1996 that states adopt statutes giving custody preference to the non-violent parent whenever possible. Currently, nearly all states in the United States require the court to consider domestic violence when making custody awards, and twenty-two states, plus the District of Columbia, have legislative presumptions against joint custody where domestic violence has occurred.

Despite extensive research on the detrimental effects of domestic violence on children and the risks that attend unrestricted parental access where domestic violence has occurred, many courts are still reticent about assessing the impact of domestic violence on children when crafting custody arrangements. A number of empirical studies confirm that courts

frequently fail to identify and consider domestic violence and fail to provide adequate safety protections in court orders, even where a history of substantiated violence is known to exist. This same phenomenon has been observed in the context of child custody mediations, child custody evaluations, and visitation determinations.

Because domestic violence and its impact on children and their battered parents is neither consistently identified nor adequately accounted for in child custody determinations, the safety of domestic violence victims and their children is compromised in family courts today across the United States.

Like custody proceedings, child protection proceedings are governed mostly by state and local law, although similar standards are utilized nationally. Using New York as a representative example, child protection proceedings may be initiated at the discretion of the agency administering child protective services if an investigation by the agency reveals credible evidence to support a report or complaint alleging child maltreatment. The presence of domestic violence in the home has been used as the credible evidence needed to support the allegations of child endangerment contained in a report or complaint. Proceedings have been initiated against the parent who has been the victim of domestic violence, alleging neglect on the part of the victim for failing to protect the child from witnessing domestic violence. Once court proceedings are initiated, the court has the power to order removal of a child if “necessary to avoid imminent danger to the child’s life or health.” Although the National Council of Juvenile & Family Court Judges Guidelines and agency “best practices” indicate that victims of domestic violence should not be deemed unfit parents based upon the batterer’s actions, this rule is not always adhered to in practice.

6.5.4 Effects and Consequences of Domestic Violence and Law

(A) Child protection proceedings

Adult victims of domestic violence are often blamed for failing to protect their children. Instead of taking steps to remove the batterer from the home and hold him accountable, child protection systems allege neglect on the part of the abused caregiver and remove the children from her custody. The manner in which many states apply ‘failure to protect’ statutes against the non-offending caregiver results in re-victimization of battered women by the unjust removal of children from their care.

These results often occur whether or not the adult victim has consented to the batterer’s presence in the home, despite estimates that one-half to two-thirds of all abuse occurs when women are single, separated, or divorced. This practice of victim-blaming allows the batterer to continue to deprive the woman of power and control over her life, even after she has taken steps to separate herself and her children from the abusive partner.

When a woman does not take steps to leave an abusive partner, it may be used as evidence against her in child protection proceedings. However, this presumption of neglect ignores the reality that domestic violence often escalates upon separation from the abuser, and that it is the victim who best understands her unique situation, including the risks which leaving may pose for herself and her children. The manner in which child protection systems require an abuse victim to meet someone else’s expectations regarding actions that should be taken for the safety of herself and her children further undermines her autonomy and may actually exacerbate the danger of abuse.

When a victim does draw attention to her domestic violence experience by reaching out for help, the result can be an investigation by child protective services, a finding that she is a neglectful parent and, ultimately, the termination of her parental rights. This deters many women from reporting instances of abuse, causing them to forego the pursuit of security and justice out of fear that they will lose their children.

(B) Custody proceedings in divorce and family courts

Additionally, victims of domestic violence involved in custody proceedings reported court systems that were broken or biased against them in the administration of justice and deviations in the judicial process that resulted in violations of due process. For example, victims have reported *ex parte* communications between one party and the judge, disallowance of witness testimony that would support the victim's story, inaccurate or lack of access to hearing transcripts, legal guardians who were ineffective representatives of the child victims, and the use of unsubstantiated allegations leading to removal of custody.

Often, decisions made throughout the custody proceedings by various actors, many of whom are "advocates" of the victim/mothers, actually placed the children in danger. For example, victim/mothers reported that they were told by their attorneys, legal guardians, or the judges not to oppose visitation, even when the mothers felt it was unsafe to allow the abusers access to the children or the children themselves protested the visitation. Frequently, courts failed to grant victim/mothers adequate child support, the direct result of which was a contested custody dispute. In one study, 58% of women interviewed reported that requesting child support triggered retaliation by the abuser, often in the form of custody battles.

Victims also reported their voices went unheard in custody proceedings and they were advised by their advocates and court personnel to refrain from mentioning domestic abuse during custody disputes. In one study, half of the women interviewed stated their own attorneys told them that the mention of domestic abuse would hurt their case, and the other 0% were advised by court personnel, including mediators, to ignore their experience as domestic abuse victims.

When domestic violence is not identified and when a history of domestic violence is not accounted for in custody proceedings, custody and/or unrestricted access to the child may be granted to the abusive parent, thereby threatening the safety and wellbeing of the child and his or her battered parent.

CHAPTER - 7

CONCLUSIONS AND SUGGESTIONS

7.1 Conclusion

This chapter is related to conclusion and suggestion. I write for those women who do not speak, for those who do not have a voice because they were so terrified, because we are taught to respect fear more than ourselves. We've been taught that silence would save us, but it won't.

The above mentioned quote rightly reflects the situation and condition of women in the society. There is considerable number of women in the society who do not or in-fact cannot speak for their rights, cannot complaint about their conditions, and cannot take decisions about their own future. Though everybody knows that without women world would not be same as it appears.

The researcher has tried to attempt to find out and discuss the issues relating to conditions of women. For the same, the researcher has attempted to discuss condition of women in India, other part of world, laws relating to women etc.

1. After going through the thesis and research the researcher can conclude the following that the researcher has observed, "Violence against women is present across the world cutting across boundaries of culture, class, education, income, ethnicity and age. When the violence occurs within home, the abuse is effectively condoned by the tacit silence and the indifference by the instruments of the state and the law-enforcing machinery.

Internationally, one in three women have been beaten, coerced into sex or abused in their lifetime by a member of her own family. Domestic violence is the most prevalent yet relatively hidden and ignored form of violence against women and girls. While reliable statistics are hard to come by, studies estimate that, from country to country, between 20 and 50 per cent of women have experienced physical violence at the hands of an intimate partner or family member. Wife beating is not only rampant, but male justify it with plethora of contexts.

2. In our society, violence is bursting. It is present almost everywhere and nowhere is this eruption more intense than right behind the doors of our homes. Behind closed doors of homes all across our country, women are being tortured, beaten and killed. It is happening in rural areas, towns, cities and in metropolitans as well. It is crossing all social classes, genders, racial lines and age groups. It is becoming a legacy being passed on from one generation to another.
3. The term used to describe this exploding problem of violence within our homes is Domestic Violence. This violence is towards someone who we are in a relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a male's or a female's atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms such as physical, sexual or emotional.
4. Since times immemorial, domestic violence has been an intrinsic part of the society we are living in. The contributing factors could be the desire to gain control over another family member, the desire to exploit someone for personal benefits, the flare to be in a

commanding position all the time showcasing one's supremacy so on and so forth. On various occasions, psychological problems and social influence also add to the vehemence. The present essay deals with the various forms of domestic violence prevalent in India. Their causes of occurrence in households have been analyzed categorically. The variation in the intensity of the forms with change in the geographical location and culture has also been addressed. The aftereffects of different kinds of domestic violence and the possible remedies have been highlighted. Finally, a conclusion has been drawn after the complete analysis of the topic with the juxtaposition of facts and figures at hand.

5. This form of domestic violence is most common of all. One of the reasons for it being so prevalent is the orthodox and idiotic mindset of the society that women are physically and emotionally weaker than the males. Though women today have proved themselves in almost every field of life affirming that they are no less than men, the reports of violence against them are much larger in number than against men. The possible reasons are many and are diversified over the length and breadth of the country. According to United Nation Population Fund Report, around two-third of married Indian women are victims of domestic violence and as many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or forced sex. In India, more than 55 percent of the women suffer from domestic violence, especially in the states of Bihar, Uttar Pradesh, Mahdhya Pradesh and other northern states²⁶⁷.

²⁶⁷ Panda, P. and Agarwal, B. 2005. Marital Violence, Human Development and Women's Property Status in India. *World Development*. 23(5): 823-850.

6. The most common causes for women stalking and battering include dissatisfaction with the dowry and exploiting women for more of it, arguing with the partner, refusing to have sex with him, neglecting children, going out of home without telling the partner, not cooking properly or on time, indulging in extra marital affairs, not looking after in-laws etc. In some cases infertility in females also leads to their assault by the family members. The greed for dowry, desire for a male child and alcoholism of the spouse are major factors of domestic violence against women in rural areas²⁶⁸. There have been gruesome reports of young bride being burnt alive or subjected to continuous harassment for not bringing home the amount of demanded dowry. Women in India also admit to hitting or beating because of their suspicion about the husband's sexual involvement with other women. The Tandoor Murder Case of NainaSahni in New Delhi in the year 1995 is one such dreadful incident of a woman being killed and then burnt in a Tandoor by his husband. This incidence was an outcome of suspicion of extra marital affairs of NainaSahni which led to marital discord and domestic violence against her.
7. In urban areas there are many more factors which lead to differences in the beginning and later take the shape of domestic violence. These include – more income of a working woman than her partner, her absence in the house till late night, abusing and neglecting in-laws, being more forward socially etc. Working women are quite often subjected to assaults and coercion sex by employees of the organization. At times, it could be voluntary for a better pay and designation in the office.

²⁶⁸ Koenig, A. M., et al. 2006. Individual and Contextual Determinants of Domestic Violence in North India. *American Journal of Public Health*. 96(1): 132-138.

8. Violence against young widows has also been on a rise in India. Most often they are cursed for their husband's death and are deprived of proper food and clothing. They are not allowed or encouraged for remarriage in most of the homes, especially in rural areas. There have been cases of molestation and rape attempts of women by other family members in nuclear families or someone in the neighbourhood. At times, women are even sexually coerced by their partner themselves against their will. They are brutally beaten and tortured for not conceiving a male child. Incidents like, ripping off a woman's womb for killing the female foetus when she disagrees for abortion have also come to light especially in rural areas. Female foeticide and female infanticide continue to be a rising concern.
9. Also as expressed by Rebecca J. Burns in the following lines, "When I am asked why a woman doesn't leave abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving." A common Indian house wife has a tendency to bear the harassment she is subjected to by her husband and the family. One reason could be to prevent the children from undergoing the hardships if she separates from the spouse. Also the traditional and orthodox mindset makes them bear the sufferings without any protest.
10. Other forms of physical abuse against women include slapping, punching, grabbing, burdening them with drudgery, public humiliation and the neglect of their health problems. Some of the other forms of psychological torment against them could be curtailment of their rights to self-expression and curbing the freedom to associate with the natal family and friends.

11. There are 4 main reasons for domestic violence to persist in India:
- (i) **Male dominated society:** Even though women had risen to top positions, India was & still remains as a male dominated country.
 - (ii) **Lack of awareness of Laws:** Victims of domestic violence are afraid to protest as there is lack of awareness or rather lack of initiative to make her aware of her rights.
 - (iii) **Laxity in implementation of the existing Acts:** No or less efforts are made to increase awareness amongst the women by the authorities posted to implement the Act.
 - (iv) **Bureaucracy & Fear:** If a domestic violence is reported by a third party then he/she is scrutinized as an intruder and problem maker by the community. The bureaucracy associated with reporting of domestic violence, lack of funds for support group adds up to the continued domestic violence in India.
12. In ‘**ORIGEN AND DEVELOPMENT OF DOMESTIC VIOLENCE**’, the researcher has observed, “Domestic violence against women is not confined to any particular political or economic system, but is prevalent in every society in the world and cuts across boundaries of wealth, race and culture. The power structure within society which perpetuate domestic violence against women are deep rooted and intransigent. The experience or threat of domestic violence inhibits women everywhere from fully

exercising and enjoying their human rights.²⁶⁹ The underlying cause of domestic violence against women lies in discrimination, which denies women equality with men in all areas of life. Domestic violence is both, rooted in discrimination and serves to reinforce discrimination, preventing women from exercising their rights and freedoms on a basis of equality with men.²⁷⁰

13. The United Nations Declaration on the Elimination of Violence Against Women states that 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 that “violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.²⁷¹
14. Domestic violence against women is an expression of historically and culturally specific values and standards. Social and political institutions may foster women’s subservience and violence against them. Certain cultural practices and traditions - particularly those related to notions of purity and chastity - may be invoked to explain or excuse such violence.²⁷² In every part of the world, women’s roles and positions in society are prescribed. One of the key aspects of every culture is the way it defines gender roles. Almost without exception women are assigned roles, which are subservient to those of men. Virtually every culture in the world

²⁶⁹ Amnesty International, 2004, *It ‘s in our hands Stop Violence Against Women*, London: Amnesty International Publications, p.2.

²⁷⁰ *Ibid.*, p. 5

²⁷¹ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48 Sess., Supp. No.49, U.N. DOC, A/48/49 (1993) available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/A.RBS.48.104.EN?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/A.RBS.48.104.EN?opendocument) (last visited May 20, 2004).

²⁷² Amnesty International, 2004, *It ‘s in our hands Stop Violence Against Women*, London: Amnesty International Publications, p.6

contains forms of domestic violence against women that are nearly invisible because they are seen as “normal”.²⁷³

15. On ‘**FEMALE FOETICIDE VIS A VIS UNIVERSAL DECLARATION OF HUMAN RIGHTS**’, the researcher has discussed various relationship between human rights and female foeticide. In the chapter the researcher has observed, “The figures, compiled by the United Nations Department of Economic and Social Affairs, emerged as India was plunged into introspection over the case of a two year old girl fighting for her life in hospital after being abandoned by her family and trafficked between several adults before being beaten, bitten and branded by a 14 year old girl. The girl, known as Falak, is suffering from severe chest injuries and brain damage and according to her doctors is unlikely to survive the next 48 hours.
16. Girls are widely regarded as a burden to Indian families who fear the high costs of their weddings and resent spending money on their education only for them later to leave the home to marry. Many women abort pregnancies when they believe they will deliver a girl, often under pressure from their husbands or in-laws who favour boys. Campaigners believe there may have been as many as eight million cases of 'female foeticide' in India over the last decade.
17. This discrimination has driven India's sex ratio progressively lower. Census statistics show it fell from 976 girls per 1000 boys in 1961 to 914 in 2011. But according to campaigners the figures hide the cruelty and neglect suffered by girls kept by their families, in

²⁷³ Ibid., p. 29.

particular from malnutrition and denial of medical treatment. Ranjana Kumari of the Council for Social Research said Indian mothers breast feed girls for a far shorter period than they do their sons and feed them less well because they fear good nourishment will speed the advent of puberty and the need for a costly wedding. While boys are taken immediately to hospital, sick girls are kept waiting because their families do not have the same interest in their survival. "They think they need to feed the boy, but there is less desire for the girl to survive, it is common in rural India. Boys are immediately taken to the doctor, but not the girl. She is the last to get the medicine," she said.

18. Female infanticide was also a factor in the UN figures, she added. "It has been a practice in central India for a long time, where mothers were made to feed the child with salt to kill the girl child."²⁷⁴
19. Another report in Reuters reveals, "Increasing female feticide in India could spark a demographic crisis where fewer women in society will result in a rise in sexual violence and child abuse as well as wife-sharing, the United Nations warned.
20. Despite laws banning tests to determine the sex of an unborn child, the killing of female fetuses is common in some regions of India where a preference for sons runs deep. As a result, the United Nations says an estimated 2,000 unborn girls are illegally aborted every day in India.
21. This has led to skewed sex ratios in regions like Punjab, Haryana,

²⁷⁴ By Dean Nelson, New Delhi 01 Feb 2012: The Telegraph

Gujarat and Himachal Pradesh as well as the capital, New Delhi, where a census in 2001 showed there are less than 800 girls for every 1,000 boys. "The 2001 census was a wake-up call for all of us and much public awareness have been created on female feticide since then," Ena Singh, assistant representative for the United Nations Population Fund in India told Reuters. "But initial figures show sex ratios are still declining as female feticide is becoming more widespread across the country and it is likely to be worse in the next census in 2011."

22. In most parts of India, sons are viewed as breadwinners who will look after their parents and carry on the family name, but daughters are viewed as financial liabilities for whom they will have to pay substantial dowries to get married off.
22. Activists say female feticide is rising because of the availability of technologies like ultrasonography and amniocentesis to determine the gender of fetuses at the request of the parents. If the fetus is found to be a girl, it is aborted.
23. As a result, the government says around 10 million girls have been killed by their parents either before or immediately after birth over the past 20 years. Experts warn that fewer women will spark a demographic crisis in many parts of country. "There already is this phenomenon all over the country where there is a lot of sexual violence and abuse against women and children across the country," said Ranjana Kumari, director of the Centre for Social Research, a New Delhi based think-tank. "But when there are less women in the population and more men of the same age group, there is certainly going to be much more demand for women for

marriage, for sex and this pressure will certainly increase violence against women."

24. Experts say practices such as polyandry where several men, often brothers, share the same wife are already emerging in areas where there are fewer women. Brides are also now being sold and trafficked by their parents to areas like Haryana and Punjab where bachelors are being forced to look beyond their own culture, caste and social grouping to find a wife.
25. Activists say these women have to adapt to an alien culture with a different language, diet, and social norms and are often treated as second-class citizens by the community who view their value based on their ability to produce male off-spring. "There is this myth that fewer women will give them better status in society but this is a fallacy," said activist Sabu George. "Women in India are already being treated as commodities to be bought and sold and their plight will worsen as sex ratios continue to decline."²⁷⁵
26. "By the late 1990s, female foeticide had been reported in 27 of India's 32 states, and in some communities in Bihar and Rajasthan, the birth ratio is reported to be as low as 60 females per 100 males, compared to the natural ratios of 97 to 100 males. Parallel studies for Bangladesh and Pakistan suggest similar trends in which existing discriminatory patterns of female infanticide and neglect continue. For example, a very recent study of sex specific mortality data in Bangladesh showed that girls aged 0 to 4 years had a mortality rate that was 40 per cent higher for girls than for boys .

²⁷⁵ NitinBhalla: Rise in India's female foeticide may spark crisis : Aug 31, 2007

27. Introduction of new technologies may well continue or exacerbate these trends and contribute to rising sex ratios at birth and increasing numbers of girls “missing”. In East Asia, it was the dramatic increase in the masculinity of sex ratios at birth which first aroused disquiet among demographers, followed by increasing concern at the rising female infant and child mortality rates. Since the mid-1980s, demographic studies in China, the Republic of Korea, Taiwan Province of China and Viet Nam have uniformly showed an increasing rise in the proportion of male births and confirmed that access to sex identification and abortion facilities is widespread and permit new forms of intervention before birth.
28. For China, reported sex ratios at birth rose from close to the norm of 106 male to 100 female births in the 1960s and 1970s to 108.5 in 1981, 110.9 in 1986, 110.0 in 1987, 111.3 in 1989 to 112 in 1990 and to 117/8 in 2000. Similarly sex ratios at birth have risen from 107 to 110 in Taiwan Province of China and from 107 to 114 in the Republic of Korea. For China, the figures for sex ratios at birth are complicated by the fact that not all female births are registered, but calculations which take probable rates of under-registration and the sex ratios of older children into account suggest that girls are not just “missing” from the statistics. Indeed, hypotheses based on under-reporting, abandonment and adoption appear to be much weaker than they were several years ago and attention has shifted to the more serious forms of discrimination such as infanticide, sex-selective abortion or infant and child neglect.
29. Field investigations suggest that the incidence of female infanticide probably rose during the 1980s when it became the subject of much media concern and, although the practice is likely to persist in

poorer remote regions where it is still an accepted means for reducing fertility and achieving desired sex configurations, there is little evidence to suggest widespread female infanticide. Rather, there is a congruence of opinion among China's demographers that the practice of female infanticide at birth is less responsible for the current rise in sex ratios than sex-selective abortion. In support of their argument, they cite the legal strictures against infanticide, the difficulty in keeping such births and deaths hidden, the considerable psychological costs and above all, they suggest that there are now considerable prenatal options including sex-selective abortion. Ironically, it is the improvements in the standards of prenatal care and in particular the development and spread of new ultrasound technologies that have been responsible for permitting an increase in sex-identification before birth. While government policy has forbidden the use of new technologies for sex identification, their widespread use for this purpose is difficult to police and the lack of local funding for health encourages their misuse because the fees levied finance an otherwise under-funded health service and supplement low medical incomes. What lends weight to the importance of sex-selective abortion as the cause of rising sex ratios at birth in both rural and urban regions, is that even in urban hospitals where surveillance is greater, the sex ratios of aborted foetuses and of births also show high sex ratios, which suggest that numbers of women have availed themselves of prenatal sex identification tests. Similar trends revealing increases in the use of sex selective abortion characterize the demographic literature for the Republic of Korea, Taiwan Province of China and Viet Nam.²⁷⁶

²⁷⁶ Angelique Chan and Brenda S.A. Yeoh : Gender, Family and Fertility in Asia: An Introduction

30. “Female Foeticide Males Females What is female foeticide? Many people do not know the difference between a foeticide and an abortion. An abortion is the removal of an embryo from the uterus, resulting in -or caused by- its death. The spontaneous expulsion of an embryo before the 20th week of gestational age is commonly known as a miscarriage. Induced abortion is the removal of an embryo by medical, surgical, or other means for therapeutic reasons. Feticide is an act that causes the death of a fetus. In a legal context, "fetal homicide" refers to the deliberate or incidental killing of a fetus due to a criminal act, such as a punch or kick to the abdomen of a pregnant woman. As a medical term, feticide is the destruction of a fetus. The beginning of foeticide in India. What are the reasons behind female foeticide in India? What has female foeticide led to? What has the government done? What actions did the United Nations take? Has there been any changes occurring? What organizations exist that support gender equality? In India, foeticide began in the early 90’s, when ultrasound techniques were recognized. Before the process, families would continue to produce children until a male child was born to be able to support the family in the future. Female foeticide has led to an increase in human trafficking. In 2011, approx. 15,000 Indian women were bought and sold as brides within regions where foeticide has led to a lack of women.
31. According to Vijay Rai, Project Coordinator at Plan International (India), the alarming rate of female foeticide has led to a dangerously declining sex ratio, “with negative results that are already making themselves apparent in India. These include an increase in sexual and social crimes against women, such as rape,

abduction, bride selling, etc., which in turn will lead to an increase in prostitution and sexual exploitation and cases of Sexually Transmitted Diseases (STDs) and HIV/AIDS, with a resulting increase in physiological and psychological disorders, particularly among women, as well as unwanted pregnancies and forced abortions.”

32. Initially, foeticide was supported by the Government. The practice enabled the control of population growth in India, however, after the Preconception and Prenatal Diagnostic Techniques Act was passed in 1994, and sex-selective abortion became illegal. In 2003, the act was modified putting medical professionals legally liable of the practice. The The Preconception and Prenatal Diagnostic Techniques Act hasn't been carried out properly over the years and is currently enforced poorly by authorities. The government says around 10 million girls have been killed by their parents either before or immediately after birth over the past 20 years. Experts warn that fewer women will spark a demographic crisis in many parts of the country. The UN says an estimated 2,000 unborn girls are illegally aborted every day in India. The UN Declaration of Rights of Children from 1959, which indicated that “the child, by reason of his physical and natural immaturity, needs special safeguards and care, including appropriate protection, before as well as after birth” was concerted into the UN Convention on Rights of the Child in 1989. India became signatory to the Convention in 1992. Sadly, there have been numerous incidents of the foetus being found lying in farms, floating in rivers, wrapped up in jute bags etc. Despite government measures and laws against it, foeticide has not seen a decrease in its rate; on the contrary, it is

increasing rapidly. In south Indian states, children are either fed the milk of poisonous plants or covered with a wet towel so that they die later of complications from cold. In Bihar, holding the baby from the waist and shaking it back and forth snaps the spinal cord and babies are also fed with salt to increase their blood pressure; death follows in a few minutes. Furthermore, a change in the method of killing infants has been observed following the exhumation of bodies to get forensic evidence when it was suspected that an infant had been a victim of infanticide. People began to adopt methods such as starving the baby to death, which, unlike poisoning, leaves no forensic evidence as to the cause of death. In order to end gender selective abortions, a campaign in India called BetiBachao (Save Girls) was established. The BetiBachao campaign is supported by human rights groups, non-government organizations, and state and local government in India.”

33. In the next chapter, the researcher has discussed various penal laws relating to female foeticide and their constitutional validity. The researcher has discussed, “Although sex determination and sex selection (female foeticide) is a topic beginning to gain more public awareness, the laws surrounding sex selective abortions remain unclear due to political and judicial jargon. The Pre-Conception and Prenatal Diagnostic Techniques Act was passed in 1994 banning prenatal sex determination as a means to prevent sex selective abortions. According to the act, a prenatal diagnostic procedure includes any medical procedure such as ultrasonography, foetoscopy, or sampling of amniotic fluid, chorionic villi, blood, any tissue or fluid, which is sent to a genetic laboratory or clinic for

pre-natal analysis or diagnostic tests for sex selection. Pre-natal analysis could include any tests conducted on pregnant women to detect genetic disorders, metabolic disorders, chromosomal abnormalities, congenital anomalies, haemoglobinopathies, and sex-linked diseases.

34. While the effectiveness of The Preconception and Prenatal Diagnostic Techniques Act. can be questioned, the act has clear objectives that aim to prevent any sort of prenatal sex selection. There are three main objectives to The Preconception and Prenatal Diagnostic Techniques Act. The first is to prohibit sex selection before or after conception. The second objective is to regulate pre-natal diagnostic practices so they are only used to detect genetic, metabolic, or chromosomal abnormalities, and the third objective is to prevent the misuse of these techniques for sex determination, which could lead to sex determination and sex selection (female foeticide). “The Act is talking about two issues: the conception side and the technical procedures,” said Soumya Bhaumik, lawyer at the Centre for Social Research. “The Act is meant to prevent the abortion of female fetuses.”
35. The Preconception and Prenatal Diagnostic Techniques Act defines sex selection as any procedure, technique, or test that is conducted for the purpose for ensuring or increasing the probability that an embryo will be of a particular sex. This law applies to any centre that provides genetic counseling to patients. This includes any institute, hospital, nursing home, or clinic, which is used for pre-natal diagnostic techniques. Even a vehicle that has any equipment that could be used for determining the sex of a fetus comes under this law. All genetic centres are required to display prominently a

notice in English and in the local language or languages that conduct of sex-determination tests/disclosure of sex of the foetus is prohibited.

36. An important aspect of the law is that it permits the use of prenatal diagnostic techniques if tests are being conducted to diagnose medical conditions such as genetic diseases, chromosomal abnormalities, or any other disease that can be diagnosed through conducting prenatal tests. This law only prohibits the use of prenatal tests for sex selection purposes. While prenatal tests are permitted for detecting specific disorders, there are certain conditions that women must have in order to qualify for prenatal diagnostic practices. Prenatal techniques can be used on pregnant women if they are above 35 years, have undergone two or more spontaneous abortions or foetal loss, have been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals, or if the pregnant women or their spouses have a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.
37. Any medical personnel conducting a prenatal test must brief the woman on any potential risks or side effects of the test and must gain written consent from the woman before conducting the tests. In addition, anyone conducting the prenatal diagnostic must declare on each report that he/she has neither detected nor disclosed the sex of foetus to any body, and any pregnant woman undergoing ultrasonography/image scanning must declare that she does not want to know the sex of her foetus.
38. The Act also places prohibitions on people, including relatives and

the husband of the pregnant woman. These prohibitions extend to family members or the husband of the pregnant woman encouraging or seeking the use of prenatal techniques for the purpose of sex selection. In addition, no person including the specialist or family member will communicate to the pregnant woman, her relatives, or any other person the sex of the foetus by words, signs or in any other manner.

39. Any person who acts contrary to this law and seeks the aid of prenatal tests to be conducted on a pregnant woman for the purpose of sex selection will be liable to be punished to up to three years imprisonment and pay a fine up to Rs.50,000. However, in case of a doctor violating this act, his/her name will be reported to the State Medical Council, who will take appropriate actions, including suspension of the doctor's practicing license.²⁷⁷
40. In 2000, the Constitutional Chamber of Costa Rica's Supreme Court of Justice held that human life begins at fertilization, and that zygotes, embryos, and fetuses are thus entitled to all human rights, including a right to life.²⁷⁸ As a result, in vitro fertilization was banned in Costa Rica, even though abortion remained legal when a pregnancy posed a risk to the woman's life or health.²⁷⁹ In 2012, the Inter-American Court of Human Rights struck down Costa Rica's prohibition of IVF as a means to protect the right to life prior to birth, finding that where there are prenatal protections, they must be "gradual and incremental, according to [life's] development."

²⁷⁷ By Lea Goelnitz, Intern – Centre for Social Research: June 21, 2012

²⁷⁸ SalaConstitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice], Expediente [Record] No. 95-001734-0007-CO, Voto [Vote] No. 2306-00, Mar. 15, 2000 (Costa Rica).

²⁷⁹ Código Penal [CP] (Penal Code) No. 4573, art. 121, May 4, 1970 (Costa Rica)

- 41 Further Indian Penal Code and other various laws have been discussed. The researcher has further discussed Constitutional Law and relevant provisions.
42. On **‘VARIOUS DIMENSION OF FEMALE FOETCIDE AND REGIONAL DIFFERENCE IN VARIOUS PARTS OF INDIA’** the researcher has discussed “The age old phenomenon of wife-beating has unique manifestation in India. In most Indian homes, wife-beating is in fact one of the most accepted crimes committed against women. This problem is not confined to one particular strata of society alone. It exists everywhere though in different forms.²⁸⁰ In India, the wife-beating seems to get camouflaged under the term dowry-deaths. The deaths which occurs within the home is the ultimate manifestation of the violence suffered by most Indian women in varying degrees.²⁸¹
43. If statistics are to be believed, almost every six hours, somewhere in India, a young married women is burnt alive, beaten to death or forced to commit suicide. Atleast 20% married women aged between 15 to 49 years experience marital violence at some point in their lives, many on an almost continual basis. In one study of battered women it was found that the percentage distribution of causes of violence against married women were dowry demands, extra marital affairs and bigamy, alcohol and gambling were the highest. The analysis revealed that for more than 50 percent of the cases, regular beating was a fact of life. Besides manual beating, 10 percent of the women were assaulted with instruments. Another

²⁸⁰ Mohd. Umar, *Bride Burning in India: A Socio-Legal Study*, (New Delhi : A.P.H. Publishing Corporation, 1998), p. 32.

²⁸¹ Flavia, 'violence in the Family : Wife Beating', in Ghadially, Rehana (ed.), *Women in Indian Society*, (New Delhi : Sage Publications, 1988) pp 151-152.

study of dowry victims shows that one in every four was murdered or driven to commit suicide and more than half (61.3 percent) were through out of their husbands house after a long drawn out period of harassment and torture. According to another study the victims were mostly young (18-30 years), less educated than their spouses, dependent on husbands on in-laws for their living and mostly died from burn injuries. It has also been argued that it is not only a woman's dependence which makes her vulnerable; a wife in a high status job may also be subjected to violence.²⁸²

44. A detailed discussion on wife abuse, has rebutted convincingly, that the popular myths which surround the phenomenon of wife beating in India such as middle class women do not get beaten, the victim of violence is a small, fragile helpless women belonging to the working class, the wife beater is a man who is frustrated in his job, an alcoholic, or a paranoid person, aggressive in his relationships. Nor was it true that the so-called loving husbands did not beat their wives or that women provokes men to beat them. Yet, many of these myths seem to pervade the analysis of wife-beating and feminine expectations in Indian society.
44. For instance, based on an analysis of cases which had come to the Delhi-based women's organisation, Saheli, it is evident that wife-beating was common among, all social classes as it "is a reflection of the power relationship between a husband and wife", which mirrors a woman's secondary social status.²⁸³ However, the pattern of violence differs from one class to another, with the whole

²⁸² Pawar, M.S., "Women and Family Violence Policies and Programmes", cited in Malavika Karlekar, "Domestic Violence", *Eco & Pol Weekly*, July 4, 1998, p. 1747.

²⁸³ Saheli, "Wife Battering : Creating Choices for Individual Women, the Role of Government and Issues Facing the Women's Movement", Paper presented at the National Workshop on Family Violence Against Females, New Delhi, February 15-18.

neighbourhood being witness when a slum-dweller beats his wife to the extremely private nature of a middle class professionals physical oppression of his spouse.

45. Another area about which universally little is known and hardly discussed, is that of marital rape: in India, despite some thinking along these lines by feminists and legal experts, there has as yet been no amendment in law to include rape within marriage. The Only two exceptions being, firstly, if the wife is below 15 years of age and secondly, if the wife is living separately under a decree of separation. Though figures on marital rape as well as other sexually demeaning and violent acts are difficult to obtain, however discussions with counsellors working with abuse women indicated that a very large percent of their clients were tortured with forced sexual intercourse. Feminine socialisation which stresses docility, compliance and shame predisposes a wife to accept a range of physical behaviour from her spouse. It would not be too extreme to hypothesis that male physical violence in marriage is related to sexual activity : detailed interviews and discussions at the women's shelter of battered women quite often led to admission of sexual excess; when a woman resisted, she was beaten, or if she did not satisfy her husband's demands (which could quite often be perverse in nature) the outcome was physical abuse.²⁸⁴
46. It is indeed ironical that for long, the family, viewed as an individuals ballast against the world becomes the arena for legitimate physical and mental oppression of women; which the legal and police systems have, after 1975 become more receptive to certain excesses, yet much remains unstated, invisible and

²⁸⁴ MalvikaKarlekar, "Domestic Violence" Eco & Pol. Weekly, July 4, 1998, p. 1747.

repressed.²⁸⁵ Domestic Violence against women is a difficult and intractable health and social problem in India. The overwhelming conclusion is that wife-beating is not only deeply entrenched, but also that attitudes uniformly justify wife-beating, and few women would opt out of an abusive marriage.”

47. The researcher has discussed various judgments relating to domestic violence. The researcher has observed, “In **Sabana (Smt.) @ Chand Bai and Anr. Vs.Mohd.Talib Ali and Anr.** ²⁸⁶ Justice Sangeet Raj Lodha observed , “The legal question that falls for our determination in this reference made by the learned Single Judge of this Court reads as follows: Whether the Protection of Women from Domestic Violence Act, 2005 can be applied retrospectively specially where the aggrieved party (wife) was divorced by the respondent (husband) prior to the Act coming into force on October 26, 2006 or not? The aggrieved person, who had been in domestic relationship with the respondent at any point of time even prior to coming into force of the Act and was subjected to domestic violence, is entitled to invoke the remedial measures provided for under the Act.”²⁸⁷
48. The enactment in question was passed by the Parliament with recourse to Article 253 of the Constitution. This provision confers on the Parliament the power to make laws in pursuance of

²⁸⁵ Ibid., p. 1748.

²⁸⁶ 2013(4)WLN306

²⁸⁷ ibid

international treaties, conventions, etc. The Domestic Violence Act was passed in furtherance of the recommendations of the United Nations Committee on the CEDAW. The Act encompasses all the provisions of the Specific Recommendations which form a part of General Recommendation no.19, 1992.

49. The Statement of Objects and Reasons declares that the Act was being passed keeping in view the fundamental rights guaranteed under Articles 14, 15 and 21. Article 21 confers the right to life and liberty in negative terms, stating that it may not be taken away except by procedure established by law, which is required, as a result of judicial decisions, to be fair, just and reasonable. The right to life has been held to include the following rights (which are reflected in the Act), among others:

- (i) The right to be free of violence: In *Francis Coralie Mullin v. Union Territory Delhi, Administrator*, the Supreme Court stated, any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21. This right is incorporated in the Act through the definition of physical abuse, which constitutes domestic violence (and is hence punishable under the Act). Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impair the health or development of the aggrieved person . Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. By adoption

of such an expansive definition, the Act protects the right of women against violence.

- (ii) The right to dignity: In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, the Supreme Court emphasised the fact that the right to life included in its ambit the right to live with human dignity, basing its opinion on a host of cases that had been decided in favour of this proposition. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted. These two facets of the right to life find mention under the definitions of sexual abuse and emotional abuse, respectively. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable, especially as such sexual abuse is not recognised by the IPC as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.
- (iii) The right to shelter: In *Chameli Singh v. State of U.P.*, it was held that the right to life would include the right to shelter, distinguishing the matter at hand from *Gauri Shankar v. Union of India* where the question had related to eviction of a tenant under a statute. Ss. 6 and 17 of the Domestic Violence Act reinforce this right. Under S.6, it is a duty of the Protection Officer to provide the aggrieved party accommodation where the party has no place of

accommodation, on request by such party or otherwise. Under S.17, the party's right to continue staying in the shared household is protected. These provisions thereby enable women to use the various protections given to them without any fear of being left homeless.

50. Article 14 contains the equal protection clause. It affirms equality before the law and the equal protection of the laws. Article 14 prohibits class legislation, but permits classification for legislative purposes. A law does not become unconstitutional simply because it applies to one set of persons and not another. Where a law effects a classification and is challenged as being violative of this Article, the law may be declared valid if it satisfies the following two conditions:

- (i) The classification must be based on some intelligible differentia,
- (ii) There must be a rational nexus between this differentia and the object sought to be achieved by the law.

51. As a result of the ruling in cases such as *Royappa v. State of Tamil Nadu*, any law that is arbitrary is considered violative of Article 14 as well. This provision is significant in putting a stop to arbitrariness in the exercise of State power and also in ensuring that no citizen is subjected to any discrimination. At the same time, it preserves the State's power to legislate for a specific category of people.

52. Article 15 disallows discrimination on the grounds of religion, caste, sex, race, etc., but permits the State to make special

provisions for certain classes of persons, including women and children. The Domestic Violence Act promotes the rights of women guaranteed under Articles 14 and 15. Domestic violence is one among several factors that hinder women in their progress, and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differential, namely, gender, and also has a rational nexus with the object of the Act. Further, the Act is far from arbitrary, in that it is a well-thought and necessary attempt to curtail domestic violence and eventually vanquish it. It is to be remembered that it is generally women who are the victims of domestic violence, and not men. At this stage, it is also essential to keep in mind Article 15(3) which empowers the State to make legislations like this for the benefit of women, thus creating an exception in their favour against the operation of Article 15(1).²⁸⁸

53. On **GLOBAL TRENDS RELATING TO DOMESTIC VIOLENCE** the researcher has observed the condition of women in China, Hong Kong and other nations. Thus it may be observed that the all efforts to make the study exhaustive have been made. After studying the condition of women with special reference to domestic violence and female foeticide, it may be concluded that women were always treated as second class citizens, in-fact they got their citizenship rights after a long time than men got theirs.

²⁸⁸ HariniSudersan&NiruphamaRamakrishnan: Domestic violence A Constitutional Perspective

The problem, as we know is not new and various efforts have been made to settle the issue but the success rate was very low.

7.2 SUGGESTIONS:

1. As it may be known that these are **types of Violence against Women:**
 - **Criminal Violence** - Rape, abduction, murder, etc.
 - **Domestic Violence** – dowry deaths, wife battering, sexual abuse, maltreatment of widows, etc.
 - **Social Violence**- forcing a mother for female foeticide, eve teasing, refusing to give a share to women in property, forcing a widow to commit ‘Sati’, harassing daughter-in-law for more dower, etc.
2. It has been observed that “Fifty years have passed since the commencement of the Constitution, when the concept of formal equality became part of this supreme law, yet, in all walks of life we find women far behind her gender counterpart i.e. man. Sons and daughters in the same family get education, status and opportunities to develop their potential quite differently. Similarly, a husband and wife living in the same house have different rights and duties.
3. A desperate picture emerges if one sets to analyse and compare the status of rights of men and women in agricultural land in the largest province in this country, i.e. Uttar Pradesh. Agriculture, being the dominant sector of our economy, such an analysis gives an insight into the participation of women in holding land in the

province and consequently throws light on the status of property rights of women in general in this country.

4. The U.P. Zamindari Abolition and Land Reforms Act, 1950, was passed with the express motive of abolishing the 'Zamindari System' in the province and according to its provisions the entire land in the province, barring certain exceptions, has come to be vested in the State since then. Further, three types of tenure holdings have been created by the Act, but the inheritance of the tenure holding has been restricted to men. The discrimination is based purely on gender and nothing else. Section 171 of the Act clearly lays down that in case a male tenure holder dies then his son or his male descendants will come to inherit his rights in the holding of land. His own daughter and son's daughter and the descendants of daughters have been excluded for this purpose.
5. While restricting the right of inheritance to the male only, the legislature has not only deprived a daughter or any other female descendant from inheritance but also the widowed wife. The law has thus expressly and deliberately maintained male hegemony in production relations and has incorporated a clear bias in favour of male descendants as opposed to the females. The existence of daughters and widows has been totally ignored and they have been excluded for all purposes in the matter of inheritance.
6. Not only gender but other pretexts have also been carved out to ensure the exclusion of women from the arena of property rights. The marital status of women has been prescribed as a further disqualification. A married daughter has been completely excluded. If no male descendant is there, the rights of the deceased would come to be inherited even by his brothers or other male relatives but not by his own daughter. In categorical terms, the Act has

preferred the brother of a deceased to a married daughter of the deceased for inheritance in tenure holding. Thus, even in a nuclear family where there is no male survivor, the married daughter cannot inherit the rights, rather her uncle has been found by our legislature in its wisdom, to be a suitable heir to inherit the tenure holding. Thus gender and marriage based discrimination by the legislature has to a great extent ensured that the rights in land holding of the family will continue to be possessed by the males to the exclusion of females.

7. It is pertinent to consider here that no stretch of the imagination can provide justification for such biased, inequitable and arbitrary discrimination and that too in the light of the so much talked of fundamental right to equality as provided in the Constitution itself. But still the supporters of such legislation in relation to agricultural land mainly rely on two arguments in their favour, first that the privileged position of men in contrast to women and consequent exclusion of women will protect the land from fragmentation and, secondly, that it will keep the landholding intact by saving it from 'outside' interference. Here we see the feudal prejudice that the independent family units developed through males are 'inside' the family and those through females are 'outside' the family.
8. The first argument against fragmentation is not justified, for all the sons have been treated as legal heirs for the purpose of inheritance. The contention against fragmentation of land would have had force had there been a law of primogeniture i.e. inheritance by the eldest son alone. It is true that the other male descendants have not been subjected to this type of inequality, bias and arbitrariness. Further the argument against fragmentation is devoid of any merit because the scheme of the Act does not restrict the maximum number of

sons which in its turn decides the number of shares, thus, the division of land even among six or seven sons is not fragmentation but if it comes to division of land among two or three sons and daughters there is a hue and cry regarding fragmentation of land. It is clear from the present state of affairs that the legislature has discriminated against women without any reservations and has thus consciously perpetuated patriarchy in rural production relations.

9. The other argument raised in favour of inheritance for male descendants is that after marriage a daughter goes to live with her husband at a different place hence is unable to take care of the land. In order to keep the land intact and save it from the 'outside' interference of other persons, it ought to be kept out of the reach of female members in the family. This argument is totally baseless and without any material basis as a male working at a different place does not lose his right to inheritance, even if the land is practically inaccessible to him. The male residing even in a distant or remote region does not lose his right to inheritance in another village. In this era of fast communication and women coming forward to take up all types of responsibilities, the prejudice based upon an assumption that a woman cannot take care of her land is nothing but a false pretext to exclude her from holding the rights. The fallacy of the above argument and the deep-rooted gender bias in the minds of those who run the State is patently clear from the fact that even in the case of acquisition of land by the government, where no question of fragmentation or interference with land arises, and the matter is only to get the net monetary proceeds (acquisition compensation), the daughter is still not entitled to receive the same and only sons are entitled to it.
10. In contrast to Uttar Pradesh, in those regions in India where there

have been strong mass movements in rural areas, some small but beneficial and comparatively progressive piece of legislation, like the Hindu Succession (Andhra Pradesh Amendment) Act 1986, could be brought on the statute book. This Act of 1986 has brought about a progressive amendment in the law by conferring a status of coparcenor on the daughters by suitably amending the original Act. The preamble of this amending Act, recognising the necessity of such amendment, says that the amendment is necessary because the ‘exclusion of the daughters has led to the creation of the socially pernicious dowry system with its attendant social ills.’ In Andhra Pradesh thus the law of succession has been suitably amended so that it should be in conformity with the fundamental right guaranteed in the Constitution of India.

11. The corresponding law in Uttar Pradesh is not only *ultra vires* of the Constitution, being violative of the fundamental rights to equality, it is also far behind the public opinion and contrary to the declared aim of bourgeois democracy to establish an egalitarian society, even if on paper. There patently seems to be a conscious attempt on the part of the State to perpetuate the patriarchal production relations and thus maintain the *status quo* in this biggest province, in the country.”²⁸⁹
12. The Hindu Succession Act enacted in 1956 was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance – it was therefore a process of codification as well as a reform at the same time. Prior to this, the Hindu Women’s Rights to Property Act, 1937 was in operation and though this enactment was itself radical as it conferred rights of succession to the Hindu widow for

²⁸⁹ AparnaBhardwaj: <http://www.revolutionarydemocracy.org/rdv6n1/gender.htm>

the first time, it also gave rise to lacunae which were later filled by the Hindu Succession Act. Hindu Succession Act was the first post-independence enactment of property rights among Hindus – it applies to both the Mitakshara and the Dayabhaga systems, as also to persons in certain parts of South India previously governed by certain matriarchal systems of Hindu Law such as the Marumakkatayam, Aliyasantana and Nambudri systems. “²⁹⁰

13. Since it has been seen that there are more than one factor responsible for the condition of women, if we attempt to prioritize the problems and then try to sort them out, conditions of women may be improved considerably.
14. **Financial stability:** As it has been observed that women who have no property on their name whatsoever are most pathetic in condition, women with house on their name have been better in comparison and women who have house as well as agricultural land are best compared to both mentioned earlier.
 - Hence a suggestion may be made that irrespective of religion and customs; there should be equal right to inherit property.
 - There must serious efforts be made to ensure better opportunities for employment for women.
 - Specific efforts should be made to provide financial assistance to women to start business.

15. **Social:** “Every man I meet wants to protect me. I can't figure out what from.” ²⁹¹ This quotation rightly reflects that

²⁹⁰ Shruti Pandey:
<http://www.muslimpersonallaw.co.za/inheritedocs/Property%20Rights%20of%20Indian%20Women.pdf>

²⁹¹ Mae West

women are considered as object in the society and not the subject. Efforts must be made to change the bias of men and the women towards women. Attitude of society, particularly in India is not very kind towards women. It has been seen that women are not considered as suitable to all kind of jobs. This notion must vehemently be denied.

16. **Religious status:** The provisions to allow women to take part in religious and spiritual ceremonies such as mutavalli, shebait etc. may supplement the earlier suggestion.
17. **Legal Status:** There are certain areas within the legal domain where women are not given enough protection.
 - **Section 375 of Indian Penal Code:** It has been seen that marital rape is not considered as rape at all except few conditions such as tender age of wife. There is no rational behind the law and it should be amended as soon as possible.
 - Irretrievable breakdown of marriage should be added as a ground for divorce.
18. **Political Decision Making:** Women should be provided with an opportunity to take decisions with respect to individual, family, society and for the nation also.
 - It shows the pathetic condition of political India that only in 2 states women are CM.
 - 66 MPs are women in 16th Loksabha, which is less than even 15% of total membership.
 - There are thirteen states where not even a single woman has been elected for loksabha.
 - In Rajasthan 25 MLAs are women out of 200 seats.

- It is suggested that women should be more in number so that decisions making must be neutral.
- It is really shocking that men enact even laws for women.

19. Other societal requirements:

- Literacy rate among women should be improved.
- Laws like prenatal should be implemented effectively.
- Awareness against tolerance of domestic violence should be made.
- Female Foeticide, since it is an offence, should be strictly prohibited. It has seen that prosecution is very less in this area.
- Then only we can say that the society is equal. A nation becomes complete when the whole nation collectively takes decision for its own fait; writes own destiny and architects won future.
- We must not forget women are equally talented and devoted as men, if not more.

A saying “For most of history, Anonymous was a woman.”²⁹² Appears to be correct and time to recognize the same.

²⁹² Virginia Woolf

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