

# Protection of Women under the Domestic Violence Laws in India

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## **Abstract**

The protection of women from domestic violence is a critical aspect of gender justice in India, addressed primarily through the Protection of Women from Domestic Violence Act, 2005 (PWDVA). This legislation marked a significant shift in Indian legal jurisprudence by broadening the definition of domestic violence beyond physical abuse to include emotional, verbal, sexual, and economic abuse. The Act provides a comprehensive framework for protecting women within domestic relationships, offering immediate relief through protection orders, residence rights, and maintenance. Despite its progressive intent, the implementation of the law faces challenges such as lack of awareness, societal stigma, inadequate training of enforcement agencies, and procedural delays in courts. This abstract explores the scope, efficacy, and limitations of the domestic violence laws in India, emphasizing the need for stronger institutional mechanisms, public sensitization, and legal reforms to ensure meaningful protection and empowerment of women. Ultimately, effective enforcement and societal change remain essential to transform legal protections into lived realities for victims of domestic violence.

## **Chapter 1: Historical Overview**

The advancement for the protection of women's rights on an international scale emerged with the establishment of CEDAW. Various working groups contributed to the drafting of the CEDAW text. The World Plan of Action, aimed at fulfilling the goals of the International Women's Year, also supported the initiatives of the working groups. The General Assembly further endorsed these efforts. Ultimately, on July 17, 1980, it was signed by 64 countries in Copenhagen. On that same date, two nations also submitted their instruments of ratification. The twentieth country ratified the convention on September 3, 1981, marking the day when CEDAW officially came into effect. It was the fastest time for any human rights convention to enter into force. CEDAW is said to be an international bill of rights for women. CEDAW states that, "States Parties shall take in all fields, in particular in the political, social, economic

and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”<sup>1</sup> "Extensive discrimination against women continues to persist," as stated in the CEDAW preamble. It is also accepted that the discrimination "violates the principles of equality of rights and respect for human dignity." CEDAW stipulates that there must be complete equality in family matters. A comprehensive range of legal rights, including voting rights, employment rights, rights in the realm of education, social activities, economic activities etc. were given predominance in the treaty.

### Protection against the Practise of Sati in India

Sati practice can be seen as a kind of violence. This violence has clear nexus with the domestic relationship and it demands the death of a woman. The practice of sati, it is said, was witnessed among ancient Greeks, Germans and other races also. However, it was confined to princely castes only as the wives of conquered kings were treated with contempt. On the practice of Sati, a very good account is provided by National Commission for Women.<sup>2</sup> On the custom of widow burning it refers to Max Muller<sup>3</sup>, Peter Mundy<sup>4</sup>, and a Portugese traveller: Barbosa<sup>5</sup>. In India it is not very clear how the practice originated. There is no instance or mantra in Vedas that indicates the prevalence of this practice during that time. Grihasutras also do not contain anything prescribing the widow burning. In none of the Smritis, except Vishnu Smriti, any reference of sati is found. Manusmriti is also quiet about it. There is some ancient Indian literature where a reference of this practice comes. For instance, in the Mahabharata there are some places where this practice of widow burning is shown. Similarly in The Ramayana we find that there is an instance of the self immolation of the mother of Vedavati because she was molested by Ravana. In many epigraphic accounts reference is made to practice of sati. However, it seems that in India such cases were rare. Apparently sati practice somehow grew. The Roop Kanwar incident showed that in some parts of Rajasthan this

<sup>1</sup> CEDAW, 1979, Article 3

<sup>2</sup> See, Commission of Sati (Prevention) Rules, 1988 as provide at their website: <http://ncw.nic.in/acts/TheCommissionofSatiPreventionAct1987-of1988.pdf>.

<sup>3</sup> Max Muller mentions Greek and Synthian customs of widow burning.

<sup>4</sup> Peter Mundy mentions widow burning in Surat in 1630.

<sup>5</sup> Barbosa mentions widow burning in the Vijay Nagar kingdom.

practice was still prevailing. However, apparently before its almost total eradication in India the practice was more prevalent in Bengal than anywhere else.<sup>6</sup>

Regarding laws against Sati practice, Lord William Cavendish Bentick issued an order on December 4, 1829, stating that Sati practice was unlawful and subject to punishment. This was among the first pieces of law to protect women from assault. It was stated that the practice of sati is repulsive to human emotions and is not fundamental to the Hindu religion. It was determined that a total ban on the practice was necessary because no amount of precautions had been able to stop it.<sup>7</sup>

For a while, sati was still allowed in some princely nations, even if it was soon outlawed in other places as well. Some opposed the ban on the grounds that the British government promised not to interfere in religious affairs. Raja Ram Mohan Roy and other abolitionists maintained that religious freedom could not exist beyond what was "consistent with the paramount requirements of humanity and justice."

Sati is the "burning or burying alive of any widow along with the body of her late husband or any other family member or with any object, article or thing associated with the husband or such family member;<sup>8</sup> or the burning or burying alive of any woman along with the body of any of her family members, irrespective of whether such burying or burning is claimed to be of will on the part of the widow or the women or otherwise".<sup>9</sup> The definition is wide enough to include all the cases in which a woman is killed/instigated to kill herself at the death of any other person.

Sati practice involves not just the death of the widow but also glorification of the act and establishment of some temple dedicated to the woman. The Commission of Sati (Prevention) Act, 1987 aims to eradicate all these aspects. Notwithstanding anything contained in the IPC, this Act makes it punishable to attempt to commit sati with imprisonment for one year/fine/both.<sup>10</sup> The provision seems like punishing the victim herself. This is also the case with attempted suicides. However, there is a balancing provision within the same section. Thus, before holding any person guilty, the circumstances, the act, the state of mind and all other pertinent factors shall be taken into consideration.<sup>11</sup> On a reasonable reading of the

<sup>6</sup> Cole Brooke wrote in 1795 A.D., that the martyrs of this superstition have never been numerous.

<sup>7</sup> Sati Regulation XVII A. D. 1829 of the Bengal Code, section 2

<sup>8</sup> The Commission of Sati (Prevention) Act, 1987, Section 2(1)(c)(i).

<sup>9</sup> The Commission of Sati (Prevention) Act, 1987, Section 2(1)(c)(ii).

<sup>10</sup> The Commission of Sati (Prevention) Act, 1987, Section 3.

<sup>11</sup> Ibid.

provision it seems that a lot of leverage is allowed to the judge to evaluate the circumstances and then decide the matter. No sensible judge would like to hold a woman guilty for attempted sati.

The abetment to sati, either directly or indirectly, is seen as a very serious offence. Such cases attract death penalty/life imprisonment.<sup>12</sup> The abetment to an attempt to commit sati, either directly or indirectly, is also seen as a serious offence. Such cases are punishable with life imprisonment along with fine.<sup>13</sup> The burden of proof in such cases is on the accused.<sup>14</sup> The definition of abetment of Sati is also very wide.<sup>15</sup> The legislation also takes into account the glorification of sati. The glorification of such acts has the capacity to encourage more people to attempt such acts in the future. Glorification of sati is also punishable. The punishment is a term between one to seven years and a fine between five thousand and thirty thousand rupees.<sup>16</sup> Glorification includes performance of ceremonies, taking out marches, eulogizing the sati, formation of trust, construction of temple, collection of funds etc. Actually anything done to preserve the memory of sati or honour her is an offence.<sup>17</sup>

Procedurally, such matters are to be dealt with by Collectors,<sup>18</sup> District Magistrates<sup>19</sup> and Special Courts,<sup>20</sup> which are to be constituted by the state governments.<sup>21</sup> District Magistrate or the Collector has the power to pass orders against the possible commission<sup>22</sup> or glorification<sup>23</sup> of the act. They may also pass orders for the removal of sati temple or other structure<sup>24</sup> at the cost of the defaulter.<sup>25</sup> In cases where the sati temple/structure has been in continuation for more than twenty years the orders may be issued by the state government.<sup>26</sup> Funds or property collected for the glorification of the commission of sati may be seized.<sup>27</sup> Disposal of such funds or property is to be done as per the orders of the Special Court.<sup>28</sup> Special Court may

<sup>12</sup> The Commission of Sati (Prevention) Act, 1987, Section 4(1).

<sup>13</sup> The Commission of Sati (Prevention) Act, 1987, Section 4(2).

<sup>14</sup> The Commission of Sati (Prevention) Act, 1987, Section 16.

<sup>15</sup> The Commission of Sati (Prevention) Act, 1987, Section 4, Explanation.

<sup>16</sup> The Commission of Sati (Prevention) Act, 1987, Section 5.

<sup>17</sup> The Commission of Sati (Prevention) Act, 1987, Section 2(1)(b)

<sup>18</sup> The Commission of Sati (Prevention) Act, 1987, Sections 6 – 8

<sup>19</sup> Ibid.

<sup>20</sup> The Commission of Sati (Prevention) Act, 1987, Section 9(1)

<sup>21</sup> The Commission of Sati (Prevention) Act, 1987, Section 9(2)

<sup>22</sup> The Commission of Sati (Prevention) Act, 1987, Section 6(1)

<sup>23</sup> The Commission of Sati (Prevention) Act, 1987, Section 6(2)

<sup>24</sup> The Commission of Sati (Prevention) Act, 1987, Section 7(2)

<sup>25</sup> The Commission of Sati (Prevention) Act, 1987, Section 7(3)

<sup>26</sup> The Commission of Sati (Prevention) Act, 1987, Section 7(1)

<sup>27</sup> The Commission of Sati (Prevention) Act, 1987, Section 8(1)

<sup>28</sup> The Commission of Sati (Prevention) Act, 1987, Section 8(2)

declare such funds or property forfeited to the State.<sup>29</sup> The powers of the special court are wide enough to cover not just the offences covered under The Commission of Sati (Prevention) Act, 1987 but also other offences which are not covered under this Act. Thus, the court may try all the related cases together if they are in relation to an offence under this law.<sup>30</sup>

In addition to making sati and its celebration illegal, the Commission of Sati (Prevention) Act of 1987 also causes various additional disabilities for those who engage in sati. Accordingly, the Representation of the People Act disqualifies. The disqualification takes effect on the day of the conviction and lasts for an additional five years after his release. A corrupt practice is the promotion or exaltation of sati. Section 92 of the CPC allows donations to be redirected from the Saththal.<sup>31</sup>

### Protection for Hindu widows for their remarriage

It is an undisputed fact that in many cases Hindu woman had to live as a virtual outcast after her husband's death. Widows had to shave their heads, discard their jewellery and live in seclusion. They were not allowed to enjoy any comforts of life. They were seen as cursed and inauspicious for the family. Even child widows were not allowed to live as an equal. Their plight was even worse. They had to endure the suffering for a longer duration of time. They could not marry again. Remarried woman was despised. This also encouraged sati practice. A Sanskrit scholar and passionate social reformer Ishvarchandra Vidyasagar was the first Indian intellectual to publicly argue against these evil social practices. Ishvarchandra Vidyasagar was in favour of widow re marriage in colonial India. He encouraged his contemporaries to reject the ban on widow re-marriage that caused countless women to suffer.

In 1856, British Administration observed that Hindu widows were, except some, not allowed to marry again. If they do marry their children were considered illegitimate and could not inherit property. They also observed that a lot of Hindus believe that this is not strictly in accordance with the religion. There was a longing in some sections of Hindu community to change the then existing situation regarding the remarriage of widows. British Administration thought it would be just to change this position. They also thought that the such change shall

<sup>29</sup> The Commission of Sati (Prevention) Act, 1987, Section 13.

<sup>30</sup> The Commission of Sati (Prevention) Act, 1987, Section 12(1)

<sup>31</sup> The Civil Procedure Code, 1908, Section 92.

enforce good morals and shall be for the welfare of the public.<sup>32</sup> Thus The Hindu Widows' Remarriage Act, 1856 was passed.<sup>33</sup>

This Act changed the position in law. The remarriage of widows was recognised as valid.<sup>34</sup> The remarriage could be properly solemnized by using the same words and ceremonies as in the cases of the first marriage.<sup>35</sup> But on such re marriage it cut off her rights in the properties of her deceased husband and the members of his family.<sup>36</sup> The Act did not allow the widow to be the guardian of the children in the absence of a will of the deceased so allowing her. In such a case the court, on application of certain male members of the family of the deceased, could appoint a guardian.<sup>37</sup> The Act also did not allow any childless widow to inherit if she was incapable of inheriting under the Hindu law prevailing at that time.<sup>38</sup> However, mere re-marriage, was no longer a disqualification for inheritance of any property to which she would otherwise be entitled to.<sup>39</sup> The absolute property belonging to the widow such as the property given to her in place of her claims to safeguarding were not adversely affected by this statute.<sup>40</sup> This Act was repealed in 1983 by The Hindu Widows Remarriage (Repeal) Act, 1983.

### Protection for Hindu women with respect to their property

To grant women greater privileges The 1937 Hindu Women's Right to Property Act went into effect immediately. This was the historic law that gave women the freedom to own property. This Act modified the laws pertaining to adoption, inheritance, division, and coparcenary. This Act gave a widow the right to inherit a man's property even after he leaves male children, regardless of whether the widow was subject to Mitakshara or Dayabhaga law.<sup>41</sup> Though the interest devolved upon her was a limited interest called a Hindu Woman's estate, but in view of this limited right becoming an absolute right by virtue of section 14(1) of The Hindu

<sup>32</sup> The Hindu Widows' Remarriage Act, 1856, Preamble

<sup>33</sup> The Hindu Widows' Remarriage Act, 1856, Act XV of 1856. Enacted on 25 July 1856.

<sup>34</sup> The Hindu Widows' Remarriage Act, 1856, Section 1.

<sup>35</sup> The Hindu Widows' Remarriage Act, 1856, Section 6.

<sup>36</sup> Section 2 thus runs: "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

<sup>37</sup> The Hindu Widows' Remarriage Act, 1856, Section 3.

<sup>38</sup> The Hindu Widows' Remarriage Act, 1856, Section 4.

<sup>39</sup> The Hindu Widows' Remarriage Act, 1856, Section 5.

<sup>40</sup> See, *Mayne's Hindu Law and Usage*, 15<sup>th</sup> edn., p. 60.

<sup>41</sup> The Hindu Women's Right to Property Act, 1937, Section 3.

Succession Act, 1956 in future it was an important step. By virtue of this Act she was also entitled to claim partition.<sup>42</sup>

However, this law did not make the widow a coparcener. She was only entitled to a limited estate in the deceased's property, and her interests in the property were only comparable insofar as a petition for partition was concerned. A daughter was ignored even if the widow was (somewhat) cared for. In the event that the widow passed away without a partition during her lifetime, her husband's coparcener's rights would immediately transfer to the other living coparceners in the family. Additionally, succession to impartible estates and other properties that pass to a single heir by grant or custom were exempt from the Act. The Hindu Succession Act of 1956 nullified this Act. No duty, privilege, right, or liability incurred or gained under the repealed Act has been impacted. According to the Constitution, the parliament might make rules pertaining to succession, intestacy, and wills for any kind of property, including farmland. Therefore, agricultural land was also included by the Hindu Succession Act of 1956.<sup>43</sup>

#### Protection for Hindu women with respect to their maintenance and separate residence

In 1946 an Act was passed to “give Hindu married women a right to maintenance and separate residence under certain conditions”. This was called The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946. This was one of the earliest attempts made by the state to provide some protection to women in cases of domestic violence. As the idea of domestic violence, as it is understood nowadays, was not in vogue at that time this Act does not directly mentions that it aims to provide any protection to her in such circumstances. Notwithstanding any contrary custom or law this Act entitled a woman to maintenance and separate residence from her husband under certain conditions. Thus a married woman was allowed to live separate from her husband and still claim maintenance from him if “he was guilty of such atrocity towards her as renders it undesirable or unsafe for her to live with him”;<sup>44</sup> or “if he was guilty of desertion”;<sup>45</sup> or “if he re-marry”;<sup>46</sup> or “if he ceased to be a

<sup>42</sup> Ibid.

<sup>43</sup> See, *Lakshmi Devi v Suresh Kumar Panda* AIR 1957 Ori 1; *Nidhi Swain v Khati Dibya* AIR 1974 Ori 70; *Basant Gowda v Chenna Basawaj* AIR 1971 Mys 151.

<sup>44</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(2)

<sup>45</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(3)

<sup>46</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(4)

Hindu by conversion to another religion”;<sup>47</sup> or “if he kept a concubine in the house or habitually resided with a concubine”.<sup>48</sup> The Act also allowed relief to the wife on any other ‘justifiable cause’.<sup>49</sup>

The Act did not define the scope of the expression ‘cruelty’ and for a relief under this Act the cruelty had to be such as renders it undesirable or unsafe for the wife to reside with her husband. The expression desertion was also not defined. It was also not mentioned how much duration of desertion was sufficient for the relief under the Act. The Act apparently took into consideration only the extreme situations like when “the husband keeps a concubine in the house or when he habitually resides with a concubine”. The application of this law was not expressly made retroactive in operation. Section 2(4) was worded in such a manner that it was successfully contended that it gives relief to the wife only in those cases where the husband marries a second time after the Act has come into force.<sup>50</sup> Such second marriage also did not constitute a ‘justifiable cause’ for granting relief under section 2(7). In 1946 this legislation was a very small step taken to afford protect to women in the situations of violence in a domestic relationship. At that time it was not very well understood by the legislature that violence toward woman in domestic relationship has many dimensions, it takes various forms and it has grave impact on the life of a woman. This Act has now been repealed by The Hindu Adoptions And Maintenance Act, 1956.

### Protection under the Hindu Marriage Act, 1955

The issue of spousal violence was not directly addressed by the Hindu Marriage Act of 1955. In a purely incidental way, this Act offered divorce as a civil remedy for women who experienced domestic violence. The Act's overarching goal was to outline the prerequisites for marriage and offer relief to both the husband and the wife in specific situations following the solemnization of the union. Although "cruelty" was one of these situations, the Act's goal was not to expressly address cruelty. "Cruelty" was merely a provision for the remedy of "judicial separation" under clause (b) of section 10(1) of this Act as it was first passed.

<sup>47</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(5)

<sup>48</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(6)

<sup>49</sup> The Hindu Married Women’s Right to Separate Maintenance and Residence Act, 1946, Section 2(7)

<sup>50</sup> *Laxmibai Wamanrao v Wamanrao Govindrao* AIR 1953 Bom 342; *Mt. Sukhri-bai v Pohkalsing* AIR 1950 Nag 33; *Sidda Setty v Muniamma* AIR 1953 Mad 712. This contention was not successful on some other occasions. See for e.g. *Bajinath Dharamdass v Hiran Ram Rasik* AIR 1951 Vindh-P 10; *Lakshmi Animal v Narayanaswami Naicker* AIR 1950 Mad 321.

After the amendment the words “as a ground for reasonable apprehension in the mind of the petitioner that it will be injurious or harmful for the petitioner to reside with other party” were dropped. After amendment it is sufficient to show that the respondent “treats the petitioner with cruelty”. The aim was to give a definition which is exhaustive and also inclusive in nature; so that “it meets every particular act or conduct and not fail in some conditions”.<sup>51</sup> “By the amendment the legislature must, therefore, be understood to have left to the judiciary to ascertain the facts and circumstances of every case and to decide whether the conduct amounts to cruelty or not”.<sup>52</sup> The acts of men are so varied that only such a definition is can cover all the cases.

The term ‘cruelty’ is not explained in the Act. The term ‘cruelty’ includes unjustifiable and unwarranted behavior on the part of the defendant which causes the spouse to endure distress and suffering. It should cover the cases of violence against women in their matrimonial homes. Cruelty cannot be judged on the core of the sensitivity of the spouse. The court has held that “the course of behavior which would, in general term, be risky for a spouse to reside with the other shall certainly amount to cruelty”.<sup>53</sup> The clause includes the cases of mental cruelty as well.<sup>54</sup> Mental cruelty “should be of such a nature that both the parties cannot reasonably be expected to reside together”.<sup>55</sup>

Over time, the cruelty clause was interpreted broadly and, to some extent, helped women who were subjected to various forms of violence in their married homes. It is therefore regarded as a grave attack on the wife's honor, character, standing, reputation, and health when the husband accuses her of being unchaste and engaging in extramarital affairs. Such accusations result in the most severe forms of insults and abuse.<sup>56</sup>

The wife may be entitled to divorce relief if the husband prevents her from continuing their marriage, as he may be considered a deserter. In these situations, the concept of constructive desertion will be used. Another reason for divorce is desertion. Therefore, a husband may be charged with desertion if it is implied from the situation that he intends to end the married

<sup>51</sup> See, *Praveen Mehta v Inderjit Mehta* 2002 (2) HLR 513 (SC).

<sup>52</sup> *Ibid.*

<sup>53</sup> *GVN Kameswara Rao v G Jabilli* (2002) 2 SCC 296; *Savitry Pandey v Prem Chandra Pandey* (2002) 2 SCC 73.

<sup>54</sup> It was in *Dastane v Dastane* AIR 1975 SC 1534 that the scope of cruelty was extended to the cases of mental cruelty.

<sup>55</sup> *S Hanumantha Rao v S Ramani* 1999 (1) HLR 418 (SC).

<sup>56</sup> *Vijaykumar Ramchandra Bhate v Neela Vijaykumar Bhate* AIR 2003 SC 2462. Withdrawal of such allegations unilaterally by the husband do not wipe out completely all those allegations for all purposes and does not absolve the husband from being held liable for having treated the wife with cruelty.

partnership permanently. If the woman leaves the marital residence as a result of the husband's actions, it may be assumed that the husband intended for this to occur.

### **Marital rape**

In India, marital rape is therefore not regarded as a crime. The IPC's Section 375 expresses rather antiquated ideas. It states that "sexual intercourse by man with his wife, the wife not being under 15 years old, is not rape" as an exception to the crime of rape. When a man engages in sexual activity with his spouse without her agreement or when she gives her assent through coercion or threats of coercion, it is known as marital rape. Therefore, it is an unwelcome sexual act between a husband and his spouse. For a variety of causes, women have been suffering from this. In order to keep their marriages intact, many women have been secretly enduring marital rape. The offence of marital rape is thus a serious offence but there are hardly any voices raised from the victim herself in such matters. However, having sex when separated is obviously regarded as rape. According to section 376A of the IPC, a husband engaging in sexual relations with his wife without her agreement constitutes rape if there is a separation judgment in place or if the couple lives apart according to any tradition or usage. Additionally, permission gained through coercion or physical harm is invalid, and the husband will be charged with rape under this clause.

The Criminal Procedure Code Maintenance provisions under CrPC It may be noted that under section 20(1) the monetary relief orders passed under PWDVA are in addition to the maintenance that a woman shall receive under section 125 CrPC.

The relevant portion of Section 20(1) states:

“1. While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to—

- a. the loss of earnings;
- b. the medical expenses;
- c. the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and
- d. the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.”

Section 25(2) of PWDVA is reproduced herein as under: “If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.” Section 127 of CrPC is reproduced herein as under: “On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as case may be, the Magistrate may make such alteration in the allowance he thinks fit...” There is a lot of case laws under sections 125 and 127 of the CrPC and thus the courts which are hearing the matter under Section 25(2) of PWDVA can very well use the standards of judgment already developed under Section 125 and Section 127 of the CrPC.

## The Indian Evidence Act

### Presumption of dowry death and of cruelty

Concerning the evidence for proving such crimes against women, section 113A<sup>57</sup> and 113B<sup>58</sup> were also inserted in The Indian Evidence Act by Criminal Law (second amendment) Act 46 of 1983. Section 113A of The Indian Evidence Act applies retrospectively. All the pending

<sup>57</sup> Section 113A, The Indian Evidence Act, 1872: “Presumption as to abetment of suicide by a married woman: When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Explanation: For the purposes of this section, cruelty shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)”.

<sup>58</sup> Section 113B, The Indian Evidence Act, 1872: “Presumption as to dowry death: When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, dowry death shall have the same meaning as in section 304B of the Indian Penal Code”.

cases were covered under this amendment. It does not matter when the incident took place. So even if the event took place before the amendment came into force still the amendment shall apply to the existing cases. However, the cases already decided cannot be reopened. Supreme Court has decided the matters on the retrospectivity of the amendment and has held that even before 1983 if the married woman has committed suicide still the amendment shall apply.<sup>59</sup> Logically the limit of such retrospective operation shall be seven years only.

As a normal rule of evidence when a person wants to get a relief from the procedure of court such a person is essential to prove the facts that he asserts. Under 113A the requirement of proof includes proving that:

1. The suicide was committed by a woman who was married.
2. There was abetment by husband or a relative of the husband.
3. It was committed within seven years of marriage.
4. The woman was subjected to cruelty (as defined under section 498A of Indian Penal Code) by her husband or a relative of the husband prior to her committing the suicide.

It is required to prove all the above mentioned facts. However, the wilfulness of the conduct of in-laws may be presumed if the conduct is established, when the conduct has driven the woman to commit suicide. It should be noted that this provision cannot be stretched too far. Since the act of cruelty in marriage is committed in the secrecy of the house there is hardly any scope of any eyewitnesses account. Though conspiracy, instigation and intentional aiding of the act as defined u/s 107 IPC are covered in the scope of section 113A of The Indian Evidence Act, yet if the accused intended to harm the victim but not to the extent of wanting her to die despite all the cruelty inflicted by him it is difficult to see that the case shall fall under the presumption of 113A of the Indian Evidence Act. The provision is broad enough to cover the cases of mental cruelty and not just physical cruelty.

The section 113B of The Indian Evidence Act is also a presumption. It is a presumption of dowry death. Presumption under Section 113-B is a presumption of law. This presumption is raised under following circumstances:

<sup>59</sup> “The provisions of the said section do not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and as such it is retrospective and will be applicable to ongoing cases”. See, *Gurbachan Singh v Satpal Singh* AIR 1990 SC 209.

1. The accused should be tried u/s 304B of the IPC.
2. The woman should have been subjected to cruelty or harassment.
3. It should be connected to dowry demand.
4. It should have happened soon before she died.

If these elements are proved then a presumption is raised that it was the accused who is responsible for the cause of "dowry death". This presumption is to be raised necessarily.

The court does not enjoy any discretion in such a matter. It is mandatory. But the presumption is rebuttable on evidence. 304B of IPC is a mandatory requirement though. The prosecution need to prove that section 304B is satisfied without which a presumption under 113B of The Indian Evidence Act cannot be raised.

### **Mechanism and scope of the Protection of Women from Domestic Violence Act, 2005**

#### **Applicability of the Act**

PWDVA (henceforth referred to as PWDVA) was passed in 2005 and has been in effect since October 2006. There were no specific measures addressing domestic violence prior to the passage of this statute. The applicable law was general law pertaining to murder, aiding and abetting suicide, etc. Nevertheless, those clauses did not view domestic abuse as an issue distinct from other types of criminal activity. The characteristics of domestic abuse were taken into account. A distinct and new law was required due to the "Government of India Report on Platform for Action: Ten Years after Beijing" and the then-current state of crime against women. The "Protection of Women from Domestic Violence the Act, 2005" was passed in September 2005 as a result of the work of numerous organizations and non-governmental organizations.

This Act provides a very broad definition of domestic violence. Thus:

“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;<sup>60</sup> 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 unlawful demand for any dowry or other property or valuable security;<sup>61</sup> 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);<sup>62</sup> or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.<sup>63</sup> 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.<sup>64</sup> Sexual abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.<sup>65</sup> 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.<sup>66</sup> 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

<sup>60</sup> Protection of Women from Domestic Violence Act, 2005, Section 3(a)

<sup>61</sup> Protection of Women from Domestic Violence Act, 2005, Section 3(b)

<sup>62</sup> Protection of Women from Domestic Violence Act, 2005, Section 3(c)

<sup>63</sup> Protection of Women from Domestic Violence Act, 2005, Section 3(d)

<sup>64</sup> Protection of Women from Domestic Violence Act, 2005, Section 3, Explanation I(i)

<sup>65</sup> Protection of Women from Domestic Violence Act, 2005, Section 3, Explanation I(ii)

<sup>66</sup> Protection of Women from Domestic Violence Act, 2005, Section 3, Explanation I(iii)

domestic relationship including access to the shared household.”<sup>67</sup> is domestic violence.

Domestic relationship means “a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.”<sup>68</sup> And 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.”<sup>69</sup>

Shared household means “a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.”<sup>70</sup>

#### Female relatives of the husband or male partner

In the year 2011 in *Sandhya Manoj Wankhade v Manoj Bhimrao Wankhade*<sup>71</sup> the Supreme Court of India has expanded the scope of the Act by including the female relatives of the husband or male partner in the category of possible respondents. The court has taken the logic that although the expression “female has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature planned to bar females from the realm of the complaint, which can be filed by an aggrieved wife, females would have been specifically barred, 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.” The expression relative is not specifically defined in the Act to

<sup>67</sup> Protection of Women from Domestic Violence Act, 2005, Section 3, Explanation I(iv)

<sup>68</sup> Protection of Women from Domestic Violence Act, 2005, Section 2(f)

<sup>69</sup> Protection of Women from Domestic Violence Act, 2005, Section 2(q)

<sup>70</sup> Protection of Women from Domestic Violence Act, 2005, Section 2(s)

<sup>71</sup> (2011) 3 SCC 650

exclude the female relatives. Thus, the court opined that female relatives of the respondents are also covered under the law. Thus, Mother-in-law as much as the father-in-law and even female siblings of husband and other relatives can be proceeded against as respondent.<sup>72</sup> The position is now made absolutely clear in the latest Supreme Court pronouncement in *Hiral P Harsora and Ors v Kusum Narottamdas Harsora*<sup>73</sup> Supreme Court has, to some extent, made the legislation gender neutral by holding that the “words ‘adult male’ before the word ‘person’ in S. 2(q) discriminate between persons similarly situate, and far from being in tune with, are contrary to the object sought to be achieved by the Act of 2005.” Thus, applying the doctrine of severability the Supreme Court has struck down the word ‘adult male’ that was there before the word ‘person’ u/s 2(q) of the Act. The court has also said that such striking down is permissible as it does not do any violence to the remaining part of the statute.

This, of course, is very logical. The protection is meaningless unless it is complete. It cannot be assumed that the domestic violence can be inflicted by males only.<sup>74</sup> Thus the female relatives of a husband/male partner need to be included. Moreover, on the same logic, the protection under the Act need to extended to the husband as well. It is equally logical to think that in at least some cases domestic violence may have been perpetrated by the wife (and/or her relatives) on her husband. That, perhaps, is not the footing on which the state has proceeded in making this law.

### Shared household

The notion of shared household has also been interpreted by the Supreme Court. Under section 2(s) “ ‘shared household’ means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has

<sup>72</sup> Smt Dipika Bharadwaj v Smt Ruchita Sharma Bharadwaj ILR(2008)Supp.(12)Delhi195.

<sup>73</sup> (2016) SCC OnLine SC 1118

<sup>74</sup> See also, Varsha Kapoor v UOI 2015 Cri LJ 195.

any right, title or interest in the shared household”. In *S R Batra v Taruna Batra*<sup>75</sup> there was an appeal made to the court to give a very expansive interpretation to the expression ‘shared household’. It was argued that shared household should include every household in which the parties have ever lived in the past. The court declining to accept such an expansive interpretation said: “If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grand parents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in the all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.” The court rightly opined that an interpretation that leads to an absurdity need to be rejected. Thus “the wife is only allowed to claim a right to reside in a shared household which is owned by the husband or is taken on rent by him, or which is owned/taken on rent by the family of which the husband is a member”.<sup>76</sup> The court has also observed that “the rights which may be available under any law can only be used as against the husband and not against the mother-in-law or father-in”.<sup>77</sup>

Accordingly it has been held by Delhi High Court also that a property which neither a joint family property nor is taken on rent nor is purchased by him cannot be a ‘shared household’.<sup>78</sup> Also, merely because the parents have allowed their son to live in their house because of their cordial relation, does not mean that the son’s wife shall have a claim in that property. The parents cannot be expected to bear the burden all through their lives. A woman cannot force herself against her husband’s parents. She cannot have a right to reside in their house if they do not consent to it.<sup>79</sup> Where the household is jointly owned by the brother-in-law and father-in-law and the husband had no right in it the house cannot be called the ‘shared household’ of

<sup>75</sup> (2007) 3 SCC 169. See also, *Kavita Chaudhary v Evenet Singh* 188 (2012) DLT 755; *Umesh Sharma v State* ILR (2010) Supp (1) Del 5; *Smt. Preeti Satija vs. Smt. Raj Kumari and Anr* MANU/DE/0395/2013; *Khushwant Kaur v Gagandeep* MANU/DE/3575/2014; *Savitri Devi v Manoj Kumar III*(2013)DMC689; *Anju Bala v Meera Saxena* MANU/DE/1016/2014; *Ridhima Juneja v Deven Juneja* 2013(1)Crimes263(Del.); *Nidhi Kumar Gandhi v The State II*(2009)DMC647; *Sonia Mann v State* 160(2009)DLT385; *Master Ryan thru its mother Mrs. Ridhima Juneja v P.N. Juneja and Sons II*(2009)DMC767; *Dr. Meena Chaudhary v Commissioner of Police and Ors.* MANU/DE/0024/2009; *Natasha Kohli v Mon Mohan Kohli* 172(2010)DLT516; *Mr. Barun Kumar Nahar v Parul Nahar & Anr.* 199(2013)DLT1.

<sup>76</sup> (2007) 3 SCC 169, para 22

<sup>77</sup> (2007) 3 SCC 169, para 13

<sup>78</sup> *Shumita Didi Sandhu v Sanjay Singh Sandhu* 174 (2010) DLT 79. See also, *Smt Preeti Satija v Raj Kumari* AIR 2014 Del 46.

<sup>79</sup> *Neetu Mittal v Kanta Mittal* AIR 2009 Del 72

the husband, and a residence order cannot be passed favoring the aggrieved wife. However an order may be passed that she not be dispossessed without due process of law, as guaranteed under section 17(2) of the Act.

### Void marriage situations

The approach of the courts is to extend the benefit of the legislation to the maximum possible number of cases. One of the ways in which this has been done is by providing the relief even in void marriage situations. In *Deoki Panjhiyara v Shashi Bhushan Narayan Azad*<sup>80</sup> the respondent had claimed that his marriage with the appellant is void on account of his earlier valid and subsisting marriage under the Special Marriage Act, 1954. The Supreme Court departed from the established ruling of *Yamunabai v. Anantrao* AIR 1988 SC 645 that such marriages are void ipso jure and it is not obligatory to obtain a decree of nullity in such cases, and held that the so called void marriage between respondent and appellant is yet to be annulled by a competent court and thus the wife may be given relief under the PWDVA.

This is an instance where the court has not only blurred the established distinction between void and voidable marriages but also foreclosed the possibility of any deliberation of the question whether the parties had lived in a “relationship in the nature of marriage”. In fact, in such an instance there will be no opportunity for the Court to deem whether the case falls in another possible category i.e. “relationship in the nature of marriage” in which relief might be granted.

This is yet another instance of extending the scope of the Act by diluting the technicalities of the law. It must not be overlooked here that a marriage certificate issued u/s 13 of the Special Marriage Act, 1954 was produced in this case and in law such a certificate is deemed to be sufficient proof of the existence of marriage in all cases wherever the marriage need to be proved. What more need to be shown to prove the marriage is not explained by the court.

### **Relationship in the nature of marriage**

Thus - “(a) The couple must hold themselves out to society as being akin to spouses; (b) They must be of legal age to marry; (c) They must be otherwise qualified to enter into a legal

<sup>80</sup> (2013) 2 SCC 137

marriage, including being unmarried;<sup>81</sup> and (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time”. These requirements need to be fulfilled in addition to other requirements of law such as living in shared household.<sup>82</sup> These conditions must be proved by evidence.<sup>83</sup> The court also declared that a ‘keep’ who is used for sexual purposes and is financially would not fall in this category.<sup>84</sup> The decision of the court is clearly flawed and regressive. It does nothing except creating inequalities and perpetuating the structure of dominance by men.

Of the four conditions, prescribed by the Supreme Court, the first condition demands a holding out to the society by the couple that they are akin to spouses. The second condition requires parties to marry when they attain legal age. The fourth condition requires that the holding out (as required in the first condition) should be for a noteworthy period of time.

The third condition can also be read in another manner. One can say that the third condition lays down the rule that ‘the couple must be otherwise fit to enter into a legal marriage, as well as being unmarried wherever being unmarried is a necessary qualification to enter into a legal marriage. Reading the third condition in this manner shifts the focus from the marital status of the parties to the eligibility requirements for marriage under the personal laws of the parties. In other words parties can have a relationship in the nature of marriage if they are eligible to marry each other under their personal laws, irrespective of whether they are already married or not. In this manner, a married Muslim man can have a relationship in the nature of marriage with an unmarried Muslim woman with whom he is qualified under Muslim law to marry, and logical inconsistency herein above pointed out is avoided.

But, reading the third condition in this manner creates another equally serious problem. This interpretation of the third condition makes the question of protection from domestic violence and the question of maintenance that can be granted to a woman under the Act dependent upon the religion (and thus personal laws) of the parties. The answer to the question, ‘whether a married man can have a relationship in the nature of marriage with an unmarried woman?’, will then depend upon the religion of the parties. If the parties are Muslim, the answer shall be in affirmative because in India a married Muslim man is not disqualified from marrying an

<sup>81</sup> In *Indra Sarma v V K V Sarma* 2013 (14) SCALE 448 the Supreme Court has decided that “if appellant was aware that the respondent was a married person having two children even before the commencement of relationship the status of appellant shall be that of a concubine or mistress and cannot fall under section 2(f) of the Act of 2005 and cannot fall within the meaning of domestic relationship”. She will therefore not be entitled to any relief.

<sup>82</sup> (2010) 10 SCC 469, at p. 477

<sup>83</sup> *Id.* at p. 478

<sup>84</sup> *Ibid.*

unmarried Muslim woman. But if the parties are Hindus (or Christians or Parsis for that matter), the answer shall be in negative because in India, a married Hindu (Christian or Parsi) man is disqualified from marrying another woman. Consequently, whether under PWDVA there is a case of domestic violence or not and whether protection and maintenance can be granted to the woman or not shall also depend upon the religion of the parties. Conclusion upon reading the third condition in this manner shall be that under the Act a married man and an unmarried woman can have a relationship in the nature of marriage, there can be a domestic violence in that relationship, and the woman can be entitled to protection and maintenance if the man and the woman are Muslims; but neither it shall be a relationship in the nature of marriage, nor there shall be a domestic violence, nor the woman shall be entitled to protection and maintenance if the parties are Hindus (Christians or Parsis).

This is logically absurd result. How can we logically say that the same set of facts amount to domestic violence if the parties are Muslims but do not amount to domestic violence if they are Hindus. Moreover, this result is contrary to the scope and spirit of the PWDVA which is intended to provide “for more efficient protection of the rights of woman mentioned under the Constitution who are victims of violence of any kind arising within family and for matters connected therewith or incidental thereto”<sup>85</sup> irrespective of the religion of the “aggrieved person” and the “respondent”. The issue of domestic violence cannot be based upon the religion of the parties. The Act does not provide a religion based definition of either ‘domestic violence’ or ‘aggrieved person’ or ‘respondent’. Protection and relief in cases of domestic violence, or any violence for that matter, cannot depend upon the religion of the parties.

We may now approach this problem from another perspective. We may now start by asking : ‘why would the legislature recognize a relationship in the nature of marriage as also sufficient for granting relief in cases of domestic violence when it has already recognized marriage as a condition for granting relief?’. When marriage is already recognized as a condition for granting relief, recognizing a relationship in the nature of marriage as also sufficient can only be for the purpose of making more cases eligible for relief. And, such extension from marriage to a relationship in the nature of marriage could not only be for the purpose of granting relief in more cases but more specifically also for the purpose of granting relief in those cases in which relief could not be granted if the relief remained based upon marriage only.

<sup>85</sup> The Protection of Women from Domestic Violence Rules, 2006, Preamble

Two inevitable conclusions can be drawn from here. First is, that the expression 'relationship in the nature of marriage' should be so interpreted that it includes more number of situations as compared to the situations covered under the expression 'marriage'. And second, for interpreting the expression 'relationship in the nature of marriage' a narrow notion of marriage must be abandoned. If we do not abandon the narrow notion of marriage in understanding and defining a relationship in the nature of marriage, our understanding and description shall always remain limited by the narrow notion. In that case, our understanding of a relationship in the nature of marriage, a different and independent category, shall revolve around our notion of marriage and we shall fail to provide just relief even in the most deserving cases.

The status of husband and wife always arises because of marriage. Conversely a woman is never treated as the wife of a man unless there is marriage. The notion of marriage includes some essential conditions which the parties must satisfy, and some process of solemnization which the parties must undergo. If the parties satisfy all the essential conditions and also undergo the process of solemnization it is called a valid marriage and they are called husband and wife. If the essential conditions are not satisfied the marriage is treated as a void marriage. Even if the parties satisfy all the conditions, but the process of solemnization is not undergone it is not treated as a marriage and the status of husband and wife is not conferred upon the parties. Thus, essentially, marriage means satisfying all the necessary conditions and undergoing the process of solemnization. It must be recalled here that in the year 1992 the Supreme Court of India had already held in *S P S Balasubramanyam v Suruttayan*<sup>86</sup> that a long cohabitation may give rise to a presumption of solemnization. This is by virtue of section 114 of the Indian Evidence Act, 1872 which allows the court to take these kinds of presumptions. Therefore, if a woman and a man are qualified to be wife and husband (i.e. they satisfy all the essential conditions to get married to each other) they can be presumed to be married to each other despite an absence of proof of solemnization of their marriage, provided there is sufficiently long cohabitation. It must be clearly understood here that such a relationship is treated as a relationship of marriage and not merely a relationship in the nature of marriage. In *D Velusamy* Supreme Court's definition of a relationship in the nature of marriage has four elements i.e. "i) the couple must hold themselves out to society as being akin to spouses, ii) they must be of legal age to marry, iii) they must be otherwise qualified to enter into a legal marriage, including being unmarried, and iv) they must have voluntarily

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<sup>86</sup> AIR 1992 SC 756

cohabited and held themselves out to the world as being akin to spouses for a significant period of time”. It must be noted that condition number (ii) and (iii) are nothing other than the essential conditions which the parties must in every case satisfy for valid marriage, and condition number (i) and (iv) are the conditions which in order to prove their marriage the parties may satisfy in lieu of proof of solemnization (by virtue of S P S Balasubramanyam and sec. 114 of the Indian Evidence Act, 1872). In other words, by Supreme Court’s account in D Velusamy, the only difference between a marriage and a relationship in the nature of marriage is that for ‘marriage’ solemnization must be proved and for ‘relationship in the nature of marriage’ there should be, instead of solemnization, a holding out by the parties for a long period of time that they are man and wife. The requirement of solemnization is replaced by the requirement of holding out for a long period of time. Thus, if a man and a woman who otherwise satisfy all the essential conditions to marry each other undergo the process of solemnization it is called a marriage, but if they hold themselves out as man and wife for a long period of time instead of undergoing the process of solemnization it is called a relationship in the nature of marriage.

As it is noted hereinabove that by virtue of section 114 of the Indian Evidence Act 1872 and S P S Balasubramanyam<sup>87</sup> satisfying all the essential conditions to marry each other along with a long cohabitation even without a proof of solemnization can be treated as a ‘marriage’ and not merely a ‘relationship in the nature of marriage’, all the cases that can be covered under the newly formed (by legislature) and defined (by the Supreme Court in D Velusamy) category of ‘a relationship in the nature of marriage’ are already covered in the category of ‘marriage’. Since long cohabitation can already validly replace solemnization for establishing ‘marriage’, replacing ‘solemnization’ with ‘holding out for a long period of time’ will not provide even a single case which can be covered under the category of a ‘relationship in the nature of marriage’ but not in the category of ‘marriage’. All those cases which shall be covered in the category of a ‘relationship in the nature of marriage’ shall already be covered in the category of ‘marriage’. The impact of the Supreme Court’s definition is that this newly formed category of a ‘relationship in the nature of marriage’ shall remain empty and hollow.

It is easy to see that a requirement of proving a holding out to the world for a long period of time is a more stringent demand than proving a long cohabitation. In fact the former includes the latter. It is possible that two people may be cohabiting as man and wife without holding

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<sup>87</sup> Ibid.

out to others that they are man and wife. Under the law, as it already stood, two persons cohabiting as wife and man for a long phase of time, but not so holding out could be treated as married. Ironically, such a couple which can already be treated as 'married' (for the purposes of the Hindu Marriage Act, 1955 etc.) cannot now be treated as even in a 'relationship in the nature of marriage' (for the purposes of the Domestic Violence Act, 2005).

In this sense the category 'a relationship in the nature of marriage' becomes narrower than the category 'marriage'. It demands the capacity of the parties to marry each other, long cohabitation and holding out that they are husband and wife; whereas 'marriage' demands only the capacity and solemnization (or long cohabitation). One is of the firm opinion that it should be the other way round. The category 'a relationship in the nature of marriage' should be wider (and different) than the category 'marriage'. It should include more (and different) situations as compared to the situations covered under the category 'marriage'. More specifically, it should include those cases which cannot be called 'marriage' because they do not satisfy the strict technical requirements of marriage in the eyes of law. This is possible when a relationship in the nature of marriage is differently (as compared to marriage) and not very rigidly understood. As a 'relationship in the nature of marriage' is not 'marriage', the requirements of marriage should not be expected to be met in such cases. Such a relationship should be so understood that it may include those cases which cannot be called marriage *stricto sensu*. The requirements to fall in this category should be different and less rigid. Of course, the concept of a relationship in the nature of marriage cannot be so wide that it may include all casual affairs between men and women, but at the same time it can also not be so narrow that it may include no cases other than the ones already qualified to be treated as marriage under the prevailing legal framework.

### **Historical and traditional accounts of relationship in the nature of marriage in India**

Relationships in the nature of marriage always existed in India, and at least to some extent they were always recognized in law. Therefore, to understand properly what should be meant by a 'relationship in the nature of marriage' it is important to investigate into the classical Hindu Law. There are no less than eight types of relationships (besides relationship by blood) between a man and a woman finding place in the texts. They are: 1. Patnī, 2. Yoṣhitā, 3. Avaruddhā, 4. Dāsī, 5. Bhujīṣhyā, 6. Punarbhū, 7. Svairiṇī, and 8. Vaiṣhyā. Of these, punarbhū

can be clubbed with *patnī* and can be treated as one group. Of the rest, *yoṣhitā*, *dāsī*, *svairiṇī* and *vaiṣhyā* had to be either *bhujīṣhyā* or *avaṛuddhā* to become entitled to get maintenance. None of these four categories could get maintenance if they did not also fall in the category of *bhujīṣhyā* or *avaṛuddhā*. The only difference between *bhujīṣhyā* and *avaṛuddhā* was that *bhujīṣhyā* was not required to stay with her lord at his place but *avaṛuddhā* was required to stay with him. That distinction, however, was considered irrelevant for the purposes of maintenance. Both these type of women were entitled to maintenance for the same reason i.e. their sexual fidelity to a man. *Avaṛuddhā* / *bhujīṣhyā*, therefore, can be treated as the second group. In other words, for the purposes of maintenance, there were two groups of women as far as their relationship with a man is concerned. One group was that of *patnī* (wife) and the other was that of *avaṛuddhā* / *bhujīṣhyā* (exclusively kept mistress or concubine). Any woman, *yoṣhitā*, *punarbhū*, *svairiṇī*, *dāsī* or even *vaiṣhyā* could get maintenance if she could show that she falls in either of these two groups i.e. if she could show that she was either a *patnī* or an *avaṛuddhā* / *bhujīṣhyā*.

There should be no difficulty in noticing here that the first group i.e. of *patnī* (wife) was based upon ‘marriage’, whereas the second group i.e. of *avaṛuddhā* / *bhujīṣhyā* (exclusively kept mistress or concubine) was based upon a ‘relationship in the nature of marriage’.

Further, it was also a settled position in law that an *avaṛuddhā* / *bhujīṣhyā*’s claim for maintenance was not defeated merely because she was not recognized by the family of the deceased or because her relationship with the deceased was not open or known to his family.<sup>88</sup> The status of an *avaṛuddhā* / *bhujīṣhyā* could be acquired even when others (including the family members of the man) did not know about it. This secrecy did not in any way affect her right to get maintenance. She was required to establish her sexual fidelity to the man to get maintenance from his estate. She was not required to establish that others accepted their relationship or even that others knew about their relationship. Actual commitment or fidelity to a man was more important than its knowledge to the rest of the world. In this sense, in classical Hindu law, a ‘relationship in the nature of marriage’ was established from an internal perspective of the parties without holding out to the rest of the world. For many centuries such was the accepted legal position in India!

<sup>88</sup> *Dayavati v Kesarbai* AIR 1934 Bom 66.

## CONCLUSION

The research shows that prior to the year 1983, no specific legislation dealt with the issue of violence against women within her home. In cases of violence within her home and being done by her husband/any other close male relative, the general provisions of law of crimes was applicable. Cases could be filed for murder or abetment to suicide or causing hurt and wrongful confinement etc. In other words there was no difference between a case of domestic violence and a case of violence. Domestic violence was not a distinct category of offence in the eyes of law. In 1983 IPC was amended and section 498A was inserted (also necessary amendments were made in CrPC section 198A). A distinct offence was recognized by this amendment i.e. of cruelty by husband etc. In the same year Indian Evidence Act also got amended and section 113A was inserted which created presumption as to abetment of suicide. In the year 1986 IPC again got amended and this time section 304B was inserted. This amendment also recognized a distinct category of offence i.e. dowry death. At the same time the Indian Evidence Act also got amended to create a presumption as to dowry death. However, it would be wrong to say that prior to the year 1983, there never were any efforts made to uplift the status of women in India. The correct account would be to say that there were many efforts made to make a woman's status better in society though such efforts were not properly coordinated and cannot be rightly called as efforts to completely eradicate domestic violence. Thus, Lord William Cavendish Bentick's regulation of 1829 that made practice of sati a crime; The Hindu Widows' Remarriage Act, 1856 that allowed a remarriage of a Hindu Widow and accorded legitimacy to the offsprings of such marriage; The Hindu Gains of Learning Act, 1930; The Hindu Women's Right to Property Act, 1937 conferring ownership rights on a Hindu widow; The Hindu Married Women's Right to Separate Maintenance and Residence Act, 1946 allowing a right to separate residence and maintenance from her husband even during the subsistence of her marriage; The Hindu Marriage Act, 1955 that recognized the concept of divorce and made monogamy a rule in Hindu marriages; and The Hindu Adoptions and Maintenance Act, 1956 that allowed almost equal adoption rights to a woman are all examples of how law made intermittent efforts to bit by bit uplift the status of woman in India.

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