

**IS DOMESTIC VIOLENCE A LESSER CRIME?  
COUNTERING THE BACKLASH AGAINST  
SECTION 498A, IPC**

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**Occasional Paper No.61**

(January 2017)



**CENTRE FOR WOMEN'S DEVELOPMENT STUDIES**

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Published by:  
Centre for Women's Development Studies, New Delhi



# IS DOMESTIC VIOLENCE A LESSER CRIME? COUNTERING THE BACKLASH AGAINST SECTION 498A, IPC

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## Introduction

Section 498A was introduced in 1983 by the Criminal Law (Second) Amendment Act in the Indian Penal Code. It recognizes cruelty against a married woman by her husband and in-laws as a crime for which it lays down punishment of imprisonment which may extend up to three years and/or fine. Seen as a significant legal provision introduced after extensive pressure from women activists and lawyers besides being discussed in the Parliament during the 1980s, it criminalized violence within homes for the first time and empowered married women who faced violence in the marital house to raise their voice against such abuse. Section 498A puts the onus on the State to remedy the situation of women facing torture in the 'sacred' private familial domain. However, over the years it has been seen that domestic violence is being treated as a lesser crime by the police as well as the judiciary who constitute the primary agencies for enforcement and implementation of this law. The state, in fact, is reluctant to act against the perpetrators of violence. Instead of addressing the existing social realities or expanding the definition of domestic violence to include other forms of crimes against women within homes, less attention is paid to abuse inflicted within the families. Rather, an unreasonable and baseless myth of abuse and misuse of Section 498A has been propagated to underplay the seriousness of the crime committed within the four walls of the house. The state promotes the normative ideal of conjugality and in the process, ends up reinforcing gender injustice. This results in a scenario where those working with the victims of domestic violence use Section 498A as a strategic and pragmatic tool to bring the husband to the negotiating table to arrive at a *samjhauta* (compromise). Therefore, instead of punishing the guilty, the legal system is being manipulated to arrive at a 'settlement' with the accused. One of the fallouts of such an action

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<sup>1</sup> This paper is based on the author's experience of working on the issue of violence, gender, governance and rights issues over the years as a feminist, lawyer and a researcher. She has in the past authored a paper titled 'Understanding Justice Delivery System from the Perspectives of Women' Litigants as Victims of Domestic Violence in India: Specifically, in Context of Section 498A' in 2005 published by the CWDS. This paper in 2016 extends those thoughts and ideas and has been further developed along the author's personal and professional journey in the arena of law and as a part of research work she has undertaken, as an ICSSR fellow, affiliated to the CWDS, New Delhi. The author personally expresses her gratitude to both these organizations for their support and conveys her special thanks to Dr Indu Agnihotri, Director CWDS for providing meaningful insights, thought provoking discussions and crucial inputs. The views expressed here are personal and the author takes responsibility for the same. She may be contacted at shalu\_nigam@rediffmail.com

is a lower conviction rate. Instead of making a dent on the patriarchal social order, this legal provision has been used to reiterate existing biases and stereotypes against women. The situation today is that domestic violence is treated as a 'social crime' when compared with violence by strangers, even though it is much more severe in nature. Why is wife beating considered as a lesser crime by the state, society and the law? Why is the perpetrator of this crime not held accountable for his actions? Why are different parameters and standards of justice utilized when a woman is abused? Why has the criminal justice system failed to deliver justice to the victims of domestic violence? How effective is the strategy adopted by the women's movement in India whereby a heavy emphasis is placed on legal reforms to achieve the goal of gender justice? Why has the state failed to see women as autonomous citizens outside the construct of family or kinship? Why could the remedies beyond the law, such as provision of shelter homes or material and economic support for women not be implemented? This study examines these questions while using secondary data and refers to the multidisciplinary research studies and reports on the issue from the perspectives of the survivors to focus on a 'bubble up' approach rather than the 'top down' style of understanding the issue of domestic violence.

### **Domestic Violence in a Socio-Legal Context**

Domestic Violence is also known as intimate partner violence, wife battering, domestic abuse, wife beating, coercive control<sup>2</sup>, cross bedroom terrorism<sup>3</sup> or patriarchal terrorism. Domestic violence is centered on three key elements – violence, domesticity and structural inequality<sup>4</sup>. Domesticity contextualizes both spatial location and relationship between the abused and the victim; structural inequalities work through the paradigm of power and control while the violence is continuous, from which escape is difficult. Johnson<sup>5</sup> identified different types of domestic violence and used the concept of intimate or patriarchal terrorism besides, common couple violence and violence resistance. He suggested that the term wife beating basically implies patriarchal terrorism as this is a form of violence where the perpetrator exerts control over the victim. This is rooted in

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<sup>2</sup> Stark, Evan (2012) Re-presenting Battered Women: Coercive Control and the Defense of Liberty, Paper prepared for Violence Against Women: Complex Realities and New Issues in Changing World, University of Quebec, Canada.

<sup>3</sup> Nigam, Shalu (2005) Understanding Justice Delivery Mechanism from the Perspective of Women's Litigants as Victims of Domestic Violence in India, Occasional Paper No 39, CWDS, New Delhi.

<sup>4</sup> Dempsey, Michelle M. (2006) What Counts as Domestic Violence? A Conceptual Analysis, William and Mary Journal of Women and Law, 12 (2) 301-333.

<sup>5</sup> Johnson, Michael P. (1995) Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women, Journal of Marriage and Family, 57, 283-294.

patriarchal traditions where an abuser feels it is necessary to control women<sup>6</sup>. Other theorists have also described the pattern of power and control behavior as depicted by the Power and Wheel theory<sup>7</sup> which include use of non-violent control techniques like emotional abuse, isolation, using children, using male privilege, economic abuse, threat, intimidation and blaming besides violent behavior.

The roots of domestic violence are deeply entrenched and began with the emergence of a pattern of monogamous pairing relationships which is devised in a manner that a man is supposed to control and protect the woman and enjoys privileges like identity and authority over her and the children in return<sup>8</sup>. The woman's job is restricted to 'procreation and child rearing', 'looking after' the needs of her husband and children and taking care of the household. Such, heterosexual marriages are almost ubiquitously celebrated and legitimized in the society where state regulations reward such arrangements while stigmatizing and criminalizing all other forms of relationships by enforcing coercive policies and rules. This system is based on a differential power equation where a woman's role is to conform to and comply with the norms. Engels contended that this arrangement serves as a tool to perpetuate patriarchal relations through control of labour, reproduction and property. Okin<sup>9</sup> opined that in an asymmetric, gendered society, heterosexual marriage enhances women's vulnerability and causes economic subordination under the guise of moral protection. Simone de Beauvoir<sup>10</sup> referred to Hegel's master slave dialectic as analogous, in many respects, to the relationship of man and woman. This proposition treats woman as the 'Other' in relation to man. Friedan<sup>11</sup> saw housewives trapped in the 'chains of mistaken ideas and misinterpreted facts of incomplete truths and unreal choices'. Frequently, restrictions are placed on married women. They are not allowed to manage property, enter into contract or sue someone on their own. This makes them economically and legally dependent on their husbands. A home is considered to be a 'man's castle'. He is seen as the preserver of its sanctity<sup>12</sup>. Like chattel, a wife 'belongs' to her husband, and any act of violence between them is considered as a private matter. Hence, English Common law

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<sup>6</sup> Johnson, Michael P. and Leone J.M. (2005) Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from National Violence Against Women Survey, *Journal of Family Issues*, 26 (3), 322-349.

<sup>7</sup> Pence, E. and Paymar M. (1993) *Education Groups for Men Who Batter: The Duluth Model*, Springer, New York.

<sup>8</sup> Martin, Del (1976) *Battered Wives*, San Francisco, Glide.

<sup>9</sup> Okin, Susan Miller (1989) *Justice, Gender and Family*, New York: Basic Books

<sup>10</sup> Simone de Beauvoir (1949) *The Second Sex*, Vintage 2010

<sup>11</sup> Friedan, Betty (1963) *The Feminist Mystique*, WW Norton and Company Inc NY p. 20

<sup>12</sup> Dobash, RE, and Dobash R. (1979) *Violence against Wives*, Free Press, New York

allows a husband to chastise his wife to maintain discipline<sup>13</sup>. Therefore, for ages, men have mistreated, abused and battered their wives, yet, the legal system over the world began responding only towards the end of twentieth century.

### **Inequitable Marital Relations and Domestic Violence in a Patriarchal Society**

Marriage in contemporary patriarchal society is not based on equality or partnership. Patriarchy creates an institution consisting of an uninterrupted hierarchical system of shaping and defining identities; it organizes kinship, division of labour and structures property rights while controlling women's sexualities and subjectivities. Families socialize individuals to accept gender subordination and assist in establishing male control over women's sexuality, mobility and labour. More so, patriarchal societies inculcate the value of women as receivers and men as providers<sup>14</sup>. Femininity implies that women have to be docile, submissive, obedient, malleable, self sacrificing and tolerant while masculinity values aggression, manliness, toughness, dominance and similar such traits. Hence, commonly, men are conditioned to be aggressive and perpetrators of violence whereas women are conditioned to be recipients of such aggression and are expected to endure it silently. No deviation is tolerated. Complaints made by women are treated as irrational. Fractured marriages are considered abnormal and undesirable. Feminist interventions with regard to marriage and violence are equated with destruction of a sacrosanct institution whereby those questioning violence are seen as family breakers, thus precipitating social chaos<sup>15</sup>.

Among Hindus marriage is considered a sacrament. As per practice, a woman on marriage is supposed to shift to the husband's or the matrimonial house or *sasura*<sup>16</sup> as his dependent. This practice of patri-local, viri-local marriages clubbed with patri-lineal arrangements where property and identity rests with men further intensifies women's situation of vulnerability. As women move to the marital home, they find themselves bereft of any support and often at the mercy of the husband and his family. The concept of 'joint families', prevalent in most parts of North India, further endorses this hierarchal arrangement where the

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<sup>13</sup> Blackstone, William (1987) Commentaries on the Laws of England. St. Paul, West Minnesota, US

<sup>14</sup> Sarkar, Lotika, U Ramanathan and M Mehra (1994) Gender Bias in law: Dowry, A Report, Karmika, Delhi

<sup>15</sup> Hirsch Susan F (1998) Pronouncing and Preserving: Gender and Discourses on Disputing in an African Islamic Court, University of Chicago Press, Chicago

<sup>16</sup> The house of her husband and her in-laws

oldest male patriarch enjoys the authority and power whereas the young woman is at the bottom of the hierarchy and is expected to comply without questioning<sup>17</sup>. The institution of the family thrives by perpetuating unequal power relations<sup>18</sup>. Violence and coercion along with notions of 'family honour' and 'shame' are often used to discipline the young or new entrants<sup>19</sup>. Women are socially, culturally and normatively victimized in such undemocratic families<sup>20</sup>. Patriarchal society hardly recognizes the anxieties, frustrations and resentments associated with such relocation of a girl into an unfamiliar situation where going back is deemed undesirable<sup>21</sup>. The state, because of its vested interest, in maintaining the status quo, reiterates the dependent position of women in order to keep the 'family' intact.

Thus, the situation existing today is such that many women are forced to bear the violence inflicted within the home silently. The National Family Health Survey-3<sup>22</sup>, conducted in 2005-06, reveals that 54 percent women and 51 percent men agree that it is justifiable for a husband to beat his wife. The survey indicates that two out of every five women in the age group of 15 to 49 years reported having faced one or the other form of violence in their lifetime. Further, 35 percent women in the age group of 15-49 have experienced physical or sexual violence; this proportion is 40 percent for ever-married and 17 percent for never married women. Also, 26 percent women reported that their husbands exercise control over them and get jealous or angry if they talk to other men, 18 percent husbands do not trust their wives with money, 16 percent do not allow their wives to meet their female friends or family while others accuse their wives of being unfaithful. Data indicates that women in employment face more violence as compared to women who are unemployed. NFHS-3 also reported that a

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<sup>17</sup> The concept of permanency of asymmetrical marital bond which also places the husband on the pedestal as a Lord or a Master while degrading women is deeply embedded. Rituals such as *Karvachauth* where women fast and pray for the long life of their husbands are celebrated with much hype by the majority of the urban educated women even in the modern India, especially in the North. Also, the symbols worn by married Hindu women such as putting *sindoor* on forehead or wearing of *mangalsutra* are seen as a mark of status and protection against advances from other men.

<sup>18</sup> Kandiyotti, Denise (1998) Bargaining with Patriarchy, *Gender and Society*, 2:274-290.

<sup>19</sup> Madhurima (1996) Violence Against Women: Dynamics of Conjugal Relations, Gyan Publishing House, Delhi.

<sup>20</sup> Dr BR Ambedkar in his writings and speeches has explained the manner in which patriarchy subjugates women in a casteist society and this is later identified by many other scholars as reconstitution of multiple patriarchies which is central to the formation of 'Indian tradition'. See Rege, S. (2013) Against Madness of Manu: BR Ambedkar's Writings on Brahmanical Patriarchy, Navanaya, Delhi.

<sup>21</sup> As per an age-old dictum, a girl who enters as a bride in a matrimonial home could leave it only when she dies.

<sup>22</sup> National Family Health Survey <http://rchiips.org/nfhs/factsheet.shtm>.

culture of silence around violence prevents women from speaking out against it. Only one in four women who faced violence had sought help whereas two out of three decided not to tell anyone or seek any help. Another study conducted in 2005<sup>23</sup> concluded that nearly five crore married women are victims of domestic violence and merely 1 out of 1000 air their grievances. Lately, NFHS-4 for 2015-16 for first phase<sup>24</sup> also reported that the number of married women who have experienced violence has increased as compared to the previous years.

It may be said that the major reason for infliction of violence on women within the home is men's sense of their right and their urge to assert authority to punish 'their' women for perceived wrong doing, men's sense of control to instill discipline, expectations from women as wives, mothers and as daughters-in-law, besides men's possessiveness and jealousy. For women, a sense of shame, stigma and guilt along with the fear of reprisal prevents them from speaking up<sup>25</sup>. The internal dynamics of the traditional family plays a significant role while constricting the bonds of affection and isolating women at the time of crisis<sup>26</sup>. Many keep silent for years and accept violence as a part of the 'marital package'. Leaving an abusive relationship is not easy. A study<sup>27</sup> observed that 89 percent did not seek help for the sake of family integrity, 70 percent feared being beaten again and 49 percent felt that it would not improve their situation. Several factors operate to determine a woman's decision whether to raise her voice against violence in a relationship<sup>28</sup>. Commonly these include non-availability of viable options outside the institution of marriage, refusal of the natal family or *maika* to cooperate either by choice or because of socio-economic compulsions, lack of awareness about rights, fear, love, isolation and importantly, the absence of support mechanisms and similar such facilities.

### **Prevalence, Extent and Impact of Domestic Violence**

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<sup>23</sup> Centre for Social Research (2005) Section 498 A IPC: Used or Misused?, Delhi. .

<sup>24</sup> Available at <http://rchiips.org/nfhs/research.shtml>. Accessed on September 25, 2015.

<sup>25</sup> Nigam, Shalu (2016) Re-examining Family Violence: Perceptions of Survivors from India, Research World, Volume IV, Society of Social Scientists, Agartala, In process.

<sup>26</sup> Agnihotri, Indu and R Palriwala (1993) Tradition, the Family and the State: The Politics of Women's Movement in the Eighties Mimeograph, Centre for Contemporary Studies, Nehru Memorial Museum and Library, New Delhi.

<sup>27</sup> Shrivastava, Prateek S. and S.R. Shrivastava (2013) A Study of Spousal Domestic violence in an Urban Slum of Mumbai, International Journal of Preventive Medicine, 4(1) 27-32.

<sup>28</sup> Singh, Kirti (2015) Marital Cruelty and 498A: A Study on Legal Redressal of Victims in Two States, AIDWA and Indian School of Women's Studies and Development, Sponsored by NCW, Delhi.



This scenario does not prevail in India alone. In 2013, the World Health Organization (WHO) reported<sup>29</sup> that nearly 35 percent women worldwide face violence by partners in some regions. Approximately, 38 percent have experienced intimate partner violence. In comparison to high income regions around the world, such as North America, Europe, and Australia, the comparative prevalence of domestic violence is significantly higher in South Asia and South East Asia. Another report released by the UN pointed out that around one third women worldwide have experienced physical and/or sexual violence by intimate partners at some point in their lives<sup>30</sup>. A study<sup>31</sup> in South Asia reported that the regional prevalence of intimate partner violence is high and it is highest in India where women are abused not once but multiple times.

In India, a study by ICRW showed that half of the women in a sample of 10,000 across seven cities stated that they had faced violence<sup>32</sup>. Another study highlights that nearly 70 percent women experience some form of violence, while 66 percent remain silent about mistreatment<sup>33</sup>. It has been observed that the higher socio-economic status may offer protection against physical abuse but could not protect against sexual violence<sup>34</sup>. Recently, an additional study by ICRW<sup>35</sup> found that 52 percent women faced violence and 60 percent men reported acting violently against their partners. Yet, another research which compared the officially reported cases of violence in the NCRB with data from the NFHS observed that out of 100,000 women surveyed, 6,590 women responded that their husbands had physically forced them to have sexual intercourse against their will<sup>36</sup>. Domestic violence thus permeates the everyday lives of women and continuously has an adverse impact on their health and survival.

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<sup>29</sup> World Health Organization (2013) Global And Regional Estimates Of Violence Against Women: Prevalence And Health Effects Of Intimate Partner Violence And Non-Partner Sexual Violence, Report no. 1, Geneva.

<sup>30</sup> United Nations Statistics Division (2015) *The World's Women, 2015*, chapter 6, New York.

<sup>31</sup> Solotaroff, Jennifer L. and RP Pande (2014) *Violence Against Women and Girls: Lessons from South Asia*, World Bank, Washington, p. 34-36.

<sup>32</sup> International Center for Research on Women and Center for Development and Population Activities (2000) *Domestic Violence in India: A Summary Report of a Multi-Site Household Survey*, Washington, DC.

<sup>33</sup> No Private Matter: Confronting Domestic Violence in India, 14, accessed October 30, 2014, <http://www.dasra.org/research/flip/index.php?report=38#features/63>. Accessed on January 16, 2015.

<sup>34</sup> Koenig, M.A., R Stephenson, S. Ahmed, S.J. Jejeebhoy and J. Campbell (2006) Individual and Contextual Determinants of Domestic Violence in North India, *American Journal of Public Health*, 96(1), 132-38.

<sup>35</sup> Nanda, Priya, GA Verma, R Khanna, A Khan, et.al. (2014) *Study on Masculinity, Intimate Partner Violence and Son Preference in India*, ICRW, New Delhi.

<sup>36</sup> Rukmini, S. (2014) *Marital And Other Rapes Grossly Under-Reported*, *The Hindu*, October 22.

In pure physical terms, the consequences of domestic violence encompass wounds, cuts, bruises, broken bones, internal or external bleeding, organ damage or death. About 23 percent of men in India who admitted committing physical violence and 14 percent of those alleged to be inflicting sexual violence reported injury to their wives<sup>37</sup>. A study<sup>38</sup> elsewhere reported that worldwide 40 to 70 percent of women die due to violence by intimate partners. Suicide is found to be a leading cause of death among Indian women in the age group of 15 to 49 years<sup>39</sup>, and it rose by 126% during 1990 to 2010<sup>40</sup>. Physical violence is linked to increased risk of developing heart and blood vessels related diseases including stroke<sup>41</sup>. A strong connection is found between domestic violence and its adverse impact on the mental and emotional well being of women and children<sup>42</sup>. Wife battering increases the risk of unwanted pregnancy, primarily through its restrictive effect upon women's ability to practice contraception<sup>43</sup>. Physical violence combined with sexual abuse is associated with increasing prevalence of HIV infection<sup>44</sup>. High incidences of coercive sexual violence during pregnancy occur irrespective of education or socio-economic status and adversely affect the mother and foetus<sup>45</sup>. It may lead to physical trauma to the foetus, maternal anemia, stress and high risk of mortality<sup>46</sup>. Evidence shows that domestic violence results in low birth weight babies, premature deliveries<sup>47</sup>,

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<sup>37</sup> Duvvury, Nata, M. Nayak and K. Allendorf (2002) Links between Masculinity and Violence: Aggregate Analysis. Domestic Violence in India: Exploring Strategies, Promoting Dialogue, In Men, Masculinity and Domestic Violence in India, Summary Report of Four Studies, Public Health Institute, CA

<sup>38</sup> Ellsberg, Mary (2006) Violence Against Women and the Millennium Development Goals: Facilitating Women's Access to Support, International Journal of Gynecology and Obstetrics, 94 (3), 325–32.

<sup>39</sup> Patel, V., C, Ramasundarahettige, L. Vijayakumar, J.S. Thakur, V. Gajalakshmi, et al. (2012) Suicide mortality in India: A Nationally Representative Survey, Lancet, 379, 2343-51.

<sup>40</sup> Kay, Meera (2013) Suicide is a Leading Cause of Death in Young Indian Women, Finds International Study, British Medical Journal, 346, f 1900.

<sup>41</sup> As reported by Bahuguna, Karnika (2016) Study Links Violence To Early Signs Of Heart, Blood Vessel Diseases In Women, Down to Earth, March 4.

<sup>42</sup> Kumar, Shuba, L. Jeyaseelan, S. Suresh, and R.C. Ahuja (2005) Domestic Violence and Its Mental Health Correlates in Indian Women, British Journal of Psychiatry, The Journal of Mental Science, 187, 62–67.

<sup>43</sup> Krug, E.G., L.L. Dalhberg, J.A. Mercy, A.B. Zwi, R. Lozano (2002) World Report on Violence and Health, World Health Organization, Geneva p. 149–181

<sup>44</sup> Silverman, Jay G. M.R. Decker, N. Saggurti, D. Balaiah, and A. Raj (2008) Intimate Partner Violence and HIV Infection among Married Indian Women, JAMA, 300(6):703-710

<sup>45</sup> Chhabra, S. (2008) Sexual Violence Among Pregnant Women in India, Journal of Obstetric and Gynecological Research, 34 (2) 238-241.

<sup>46</sup> Ackerson, L.K. and S.V. Subramanian (2008) Domestic Violence and Chronic Malnutrition among Women and Children in India, American Journal of Epidemiology, 167 (10) 1188–96.

<sup>47</sup> Murphy, Claire C, S Berit, M. Terri, L Du Mont (2001) Abuse: A Risk Factor For Low Birth Weight? A Systematic Review And Meta Analysis, Canadian Medical Association Journal, 164(11),1567–1572.

neonatal<sup>48</sup> and early childhood mortality<sup>49</sup>. Violence experienced by mothers severely affects the well being of children<sup>50</sup> including their immunization<sup>51</sup>.

Domestic violence also entails hidden and visible costs<sup>52</sup>. For victims, it implies cost of medical treatment besides expenses due to loss of job, decreased productivity and irrevocable emotional and personal damages in addition to its impact on physical or mental health<sup>53</sup>. Often, survivors find themselves struggling to manage children, working and attending court proceedings, at the same time. Violence also involves expenditure in terms of lost work days, expenses incurred in seeking legal assistance, disruption of leaving home, moving and changing jobs, instability, besides cost in terms of safety and security<sup>54</sup>. For those in jobs, it is difficult to continue with the work pressure after facing years of abuse. In the absence of welfare services and child support policies, wife battering adversely affects women and children. For the state, existence of such a situation entails that a large number of citizens will not be able to make an effective contribution to the society.

### **When a Home Becomes Worse than a Prison**

Home is a place which is supposed to provide safety, security and comfort. In cases of violence by strangers, a home provides a sense of protection. However, in a situation where a woman is abused within the home by those who are entrusted with the obligation to 'protect' her, she finds no escape. Violence in homes therefore has devastating consequences for the survivors and obstructs their quality of life<sup>55</sup>. It becomes worse than custodial torture or a power rape situation; in the home, a perpetrator violently exhibits his power and authority continuously over a prolonged period from which a victim cannot easily escape.

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<sup>48</sup> Sabarwal, Shagun, M.C. McCormick, J.G. Silverman, and S.V. Subramanian (2012) Association Between Maternal IPV, Victimization and Childhood Immunization in India, *Journal of Tropical Pediatrics* 58 (2): 107–13.

<sup>49</sup> Jejeebhoy, Shireen J. (1998) Associations Between Wife-Beating And Fetal And Infant Death: Impressions From A Survey In Rural India, *Studies in Family Planning*, 29(3):300–308.

<sup>50</sup> Ackerson, supra n 43 Also, Ahmed S, et.al (2006) Effects of Domestic Violence on Perinatal and Early-Childhood Mortality: Evidence from North India, *American Journal of Public Health* 96 (8) 1423–8.

<sup>51</sup> Sabarwal, Shagun, et al. Supra n 45.

<sup>52</sup> Duvvury, Nata (2016) Violence Against Women Harm Us All: Will Measuring the Pain Help Prevent it? *The Guardian*, October 28

<sup>53</sup> Jejeebhoy, Shireen, K.G. Santhya, and R. Acharya. (2010) Health and Social Consequences of Marital Violence: A Synthesis of Evidence from India, United Nations Population Council, New Delhi.

<sup>54</sup> Duvvury, Nata, A Callan, P Carney, and S Raghavendra (2013) Intimate Partner Violence: Economic Costs and Implications for Growth and Development, In *Women's Voice, Agency, and Participation*, Research Series 2013 No. 3, World Bank, Washington DC.

<sup>55</sup> Nigam, S. (2008) *Domestic Violence in India: What One Should Know?* We the People Trust, India.

For a victim, the trust within the relationship no longer exists and the word 'home' loses its meaning as it no longer remains safe.

In Western countries, the term Battered Woman Syndrome, coined by Lenore Walker<sup>56</sup> has been used to describe the psychological condition of a woman who experiences a constant cycle of abuse or is assaulted multiple times for a prolonged period. A woman depicts distinct psychological and behavioural symptoms that occur when multiple episodes of violence are combined with patterns of intimidation, mental abuse and control. Consequently, she suffers from 'learned helplessness'<sup>57</sup> when she begins to believe that there is no escape from the terror situation. The threat of further violence and intimidation prevents her from sharing her concerns with anyone else thus ensuring isolation. A woman who has been assaulted and victimized over years may develop irrational beliefs and blame herself for the abuse<sup>58</sup>. She becomes hyper-vigilant, has disrupted interpersonal relationships and may develop a fear for her life or the lives of loved ones whom the abuser may have harmed or threatened to harm. This fear and threat of violence, besides its uncertainty, compels a woman to indulge in destructive behavior. The Battered Woman Syndrome, thus, is a deeply layered multiple victimization, where a woman can think of no other option but to attack her perpetrator. Women in such situations shift their focus from escape from the violence to mere survival<sup>59</sup>. However, this theory is criticized for being victim centric. Yet, the term Battered Woman Syndrome is now accepted legally in America, Europe and other Western countries and is used to refer to the severe psychological trauma caused by domestic abuse. Law in India has not considered these intricate aspects of domestic violence except until recently when the Delhi High Court while pronouncing its decision in *State v Hari Prashad*<sup>60</sup> under Section 306 IPC for abetting suicide of the victim. While recognizing the fact that as in the Battered Women Syndrome cases, a victim could defend herself by launching a counter attack, the Court opined that, "Pushpa could not do so because biologically she was weaker...The provocation by Hari Prashad became her compulsion to end the domestic relationship and she did by taking the extreme step of suicide". The Indian legal system thus recognizes cruelty in marriage, yet it is still to understand the intricate social and psychological complexities of the situation of a woman victim of domestic violence.

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<sup>56</sup> Walker, Lenore E (1984) *The Battered Woman Syndrome*, Springer Publishing Company, New York.

<sup>57</sup> Seligman, M. E. P. (1972) Learned helplessness, *Annual Review of Medicine*. 23 (1): 407–412

<sup>58</sup> Walker Lenore E (1979) *The Battered Women*, Harper and Row, NY

<sup>59</sup> Nigam, Shalu (2016) *Battered Women Syndrome: Applying this Legal Doctrine in the Indian Context*, *Countercurrents*, August 6.

<sup>60</sup> Criminal Appeal 333 of 2000 decision given on February 10, 2016

Another theory holds that a woman continues to stay in a violent relationship because she develops a traumatic bonding with the abuser. This is termed as the Stockholm syndrome<sup>61</sup>. Coined in 1973, this term describes the response of four employee captors, three women and one man, when they were held hostage in a bank in Stockholm. The hostages expressed sympathy towards their captors. This is considered as highly irrational behavior because their life was in danger, yet they construed their captors as kind. Essentially, it is seen as a survival strategy. Scholars have used this paradox to define male – female relations in a violent situation where a female hostage refuses to leave because she develops a bond with the perpetrator. Nevertheless, when applied in the Indian context these theories require a critical adaptation. For instance, while recognizing the concept of ‘learned helplessness’, the situation of ‘systemic helplessness’ where the cultural and economic factors that perpetuate violence without offering any realistic choices to the victims require a relook. In India, women often continue to stay in violent relationships because viable options outside are not made available. As mentioned above, the absence of support networks as well as range of factors like fear, stigma, children, cultural conditioning, all prevent women to walk out from a violent relationship. Acceptance of domestic violence as a normal phenomenon by the society also acts to prevent the opposition to this. Legal and social institutions further treat women as second grade citizens, reinforce patriarchal assumptions, reiterate entrenched sexist, misogynist beliefs and deny them legal entitlements in practice, if not on paper. The Committee on the Status of Women in India in its Report titled ‘Towards Equality’,<sup>62</sup> while drawing linkages between dismal conditions of women’s lives and increasing social disparities in its recommendations specifically noted that ‘in order to release women from their dependent and unequal status, improvement of their employment opportunities and earning power has to be given highest priority’<sup>63</sup>. However, this has not happened.

## **II ‘Cruelty Against a Married Woman’ and the Criminal Justice System in India**

Stringent laws have been made across the globe against the crime of violence within homes. In India, it is in the late 1970s that women’s groups took to the

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<sup>61</sup> Graham, D.L, Rawlings E., Rimini N. (1988) Survivors of terror: battered women, hostages, and the Stockholm syndrome In: Feminist perspectives on wife abuse, ed by K. Yllo and M. Bograd, Sage, California, p. 217-33.

<sup>62</sup> Government of India (1975) Towards Equality: A Report of the Committee on Status of Women in India, Ministry of Education and Social Welfare, New Delhi.

<sup>63</sup> Mazumdar, Vina 2000) ‘Political Ideology of the Women's Movement's Engagement with Law’, Occasional Paper 34, Centre for Women Development Studies, New Delhi

streets to protest against dowry related murders and after much effort the Criminal Law (Second) Amendment Act 1983<sup>64</sup> introduced section 498A in the Indian Penal Code. During the year 1978-79, many young brides who failed to fulfill the demands for dowry made by their marital families were murdered<sup>65</sup>. The murder of 21-year-old Shashibala in 1979<sup>66</sup> within a year of her marriage acted as a stimulus. Soon 'dowry violence' became a metaphor for describing cases of deaths of young women in their matrimonial homes, while also unmasking the internal dynamics and daily trauma of 'traditional family life'<sup>67</sup>. Wide media coverage gave a push to the campaign. Public protests against police apathy grew vehemently<sup>68</sup>. The campaign translated the assertion of 'personal is political'. Public protests were held around shaming the families who demanded dowry, raising consciousness about dowry related violence and insisting that the police take strict action in such cases. A private member<sup>69</sup> Bill was introduced to amend the Dowry Prohibition Act, 1961 and the matter was subsequently referred to a Joint Select Committee (JSC) of both the Houses of Parliament. By August 1982, the JSC presented its report to the Lok Sabha<sup>70</sup>. The Committee identified several deficiencies such as the narrow definition of dowry, procedural lapses in filing cases and lack of deterrent punishment. The notorious murder of Sudha Goel<sup>71</sup> became a further point to rally when the High Court overturned the conviction of the husband, the mother in law and the brother in law.

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<sup>64</sup> In its statement of objects and reasons it says that, "Cases of cruelty by husband and relatives of husbands which culminates in suicide by, or murder of the helpless women concerned, constitute only a small fraction of the cases involving such cruelty".

<sup>65</sup> During the year 1979, 358 cases of deaths were reported in Delhi where less than fifty were reported as suicides, 23 were labeled as bride burning and remaining were classified as accidental. These were increased to 466 in 1981 and 537 by 1982. In Forbes, Geraldine (1996) Women in Modern India, Cambridge University Press, New York. Also, in response to a question in Parliament, the then Minister of Home Affairs Mr P. Chidambaram noted that registered cases of dowry deaths nationwide numbered 999 in 1985, 1319 in 1986, and 1786 in 1987. The real number remains far higher as many of such cases were never reported. Also, the number of cases under 498A increased by 51% in ten years from 28579 in 1995 to 58319 in 2015 as documented by the NCRB.

<sup>66</sup> Her mother Satya Rani Chaddha became the face of the campaign to introduce reform in dowry law. Together with Shahjahan Aapa, she took a step towards building a shelter home for women later.

<sup>67</sup> Agnihotri and Parliwala supra.

<sup>68</sup> Street plays such as '*Om Swaha*' have been used to communicate directly with the people to raise awareness as to the manner in which police was dealing with the issue of dowry death in a non serious manner

<sup>69</sup> Smt. Pramila Dandvate introduced a Bill to amend the dowry law in the year 1980.

<sup>70</sup> Chaired by Smt Krishna Sahi.

<sup>71</sup> State v Lakshman Kumar AIR 1986 SC 250, The Supreme Court ultimately held the accused husband and mother in law guilty. Some of the other cases too raised similar concerns. Jethmalani Rani and P.K. Dey (1995) Dowry Deaths and Access to Justice in Empowerment, Laws and Dowry Death: Kali's Yug, Har-Anand, New Delhi

Meanwhile, many women's organizations came together under the banner of the *Dahej Virodhi Chetna Manch*<sup>72</sup> (DVCM). The DVCM campaign was 'driven by activists who asserted women's agency in social change'<sup>73</sup>. The members of DVCM "viewed legal changes as an instrument of social change, aware of inadequacies in the laws and the collusion and connivance of the police and local administration. Its efforts were directed at changing public consciousness, in order to build the necessary social and political will to ensure action that would be effective in eradicating both the practice of dowry and increasing brutalities against brides"<sup>74</sup>. The recommendations of the JSC became a point of mobilization for the women's movement and provided the basis for evolving a common minimum programme and a demand charter. The memorandum issued by the DVCM in 1982 stated that 'dowry was not an isolated phenomenon' but an aspect of 'inferior female condition' and 'the erosion of women's status and devaluation of female life'. It called for transformation of family relations and society and raised the urgent demand for 'legal, administrative and social measures'. Demands were made for equal property rights for women in marital as well as parental property, registration of marriages, legal aid, common civil code, use of mass media and issues relating to school curricula<sup>75</sup>. DVCM took up signature and postcard campaigns, held public meetings, organized street plays, protests, rallies, marches and demonstrations to mobilize public opinion as well as took up consciousness raising and *dharnas* while also lobbying with the MPs<sup>76</sup>.

Confronting, educating and pushing the disinterested government to fulfill its responsibilities emerged as major challenges before the movement. Yet, it succeeded in building and shaping the public response. One of the major hurdles was the fact that the 'Indian family and its traditions' had been cast as bedrock of the social fabric by the government, 'representatives' of society, the judiciary and the academics. The spread of dowry was seen as degeneration of moral,

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<sup>72</sup> A coalition of women's organizations and groups came together on March 8, 1981 to protest against rape, dowry, domestic violence and other atrocities against women. Some of the slogans read, "Women are not for burning, Women are human being" and "Let not the Marriage fire become a funeral pyre", "*stri par na ho atyachar, ham parosi hain zimmedar*" (we neighbor are responsible that women are not abused) A street play '*Aurat*' was performed on the day the DVCM delegation met with the Prime Minister to urge her to introduce proposed amendments to the Dowry Act.

<sup>73</sup> Agnihotri, Indu and V Mazumdar (1995) Changing Terms of Political Discourse: Women's Movement in India 1970s-1990s, EPW 30 (29) 1869-78.

<sup>74</sup> Ibid.

<sup>75</sup> The wide spread public campaign, especially in Delhi, focused on the JSC recommendations and was spread over four years. It resulted in two successive amendments later, in the year, 1984, and in 1986, in the Dowry Prohibition Act, 1961.

<sup>76</sup> Palriwala, Rajni (2010) Women Are Not For Burning: The Anti-Dowry Movement in Delhi in Social Movements: Concerns for Equity and Security, Readings in Sociology, Edited by TK Oomen, Oxford University Press, New Delhi.

social and familial values and demands made by the women's movement had been thwarted in the name of 'custom', 'family' or 'religion'. Nonetheless, one of the significant achievements of the movement was to break the silence around violence by shattering the traditional image of ideal, devoted, self sacrificing women and to expose sites and categories of humiliation and torture that women are subjected to. Some scholars have suggested that the movement had to find ways to negotiate within two separate domains – the state and the community, which are interlinked in complicated ways and therefore articulation of many issues became challenging<sup>77</sup>. Also, different women's organizations involved in DVCM campaign had different notions and perspectives of women's oppression and therefore, working out a concrete set of demands became crucial in order to work under a common umbrella.

A few researchers have argued that a major lacuna is that the women's movement focused on legal reforms in spite of the known fact that law in no way ensures gender justice<sup>78</sup>. Additionally, it has been opined that establishing links between dowry related violence and domestic abuse has weakened the campaign. Agnes noted that perhaps "it was easier to focus on 'dowry' as an external element and project the mother in law as the main culprit, than address the issue of sexual control, lack of property rights in the natal home and stigma of divorce"<sup>79</sup>. She opined that it seems easier to demand a new law rather than challenging the patriarchal structure. Kishwar<sup>80</sup> too argued on the similar lines. Nevertheless, the efforts made by the movement played a significant role in shaping the reform of laws, influencing the response of the government and shaping the public consciousness, especially among young women.

The state responded several years after the first protest held by the movement, and the Criminal Law (Second) Amendment Bill was introduced as a package of measures to curb violence within the home. The then Minister of Home Affairs, Venkatasubbaiah introduced the Bill to 'cover cases of cruelty on account of dowry or otherwise' in recognition of ineffectiveness of the Dowry Prohibition Act, 1961. During the debates, there were members within the Parliament who argued that the legal provisions were inadequate and not punitive enough. Others opposed it on the basis of notions of the sacred aura attached to the

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<sup>77</sup> Ghosh Shobha V (2004) Contextualizing Domestic Violence: Family, Community and State in Behind Closed Doors: Domestic Violence in India, Ed R Bhattacharya, Sage, Delhi

<sup>78</sup> Menon, Nivedita (1998) Rights, Law and Feminist Politics: Rethinking our Practice, in Swapna Mukhopadhyay (ed.), In the Name of Justice: Women and Law in Society, Manohar, Delhi.

<sup>79</sup> Agnes, Flavia and D'Mello A. (2015) Protection of Women from Domestic Violence, EPW L 44 p. 76-84 on p. 77

<sup>80</sup> Kishwar, Madhu (1988) Rethinking Dowry Boycott, Manushi, 48, 10-13



family while objecting to the critique of marriage. There were those who got worried because they perceived women as agents challenging the domestic hierarchy. While some demonstrated acceptance of feminist views, others treated the issue with pity seeing women as helpless victims<sup>81</sup>. The legislative debates conceptualized domestic abuse as a part of the wider phenomenon of violence against women while ignoring the specificity of wife beating<sup>82</sup>. Also, a few arguments linked domestic violence with the issue of dowry although others focused on the celebration of Indian culture, putting women on a pedestal as mothers and projected their traditional stereotypical image rather than seeing them as citizens claiming their rights. Yet, others reiterated the misogynist position that 'women are women's worst enemies' while pitting mothers in laws against daughters in law. Some viewed domestic violence as a male versus female issue while others added a salacious tinge to the debate where the use of female sexuality was depicted as an instrument of social change while negating the question of women's powerlessness within marriage<sup>83</sup>. In many such positions, violence is trivialized and normalized. The concept of setting up shelter homes was not taken up seriously and any discussion on single woman facing violence within the family was ignored. Any existence of women apart from the marital tie is considered as an anomaly in such arguments<sup>84</sup>. However, these debates do highlight the fact that domestic violence is not an episodic issue. Rather it relates to vulnerability of women in marriage.

Nonetheless, a consensus finally emerged and the Criminal Law (Second) Amendment Act, 1983<sup>85</sup> introduced Section 498A, 304B and added stringent punishments under Section 306 in the Indian Penal Code. These provisions criminalized domestic violence, dowry deaths and abetment to suicide. Section 113(A) was introduced in the Indian Evidence Act, which states that if a woman commits suicide within seven years of marriage, and there was an evidence of cruelty prior to her death, her husband and in-laws would be held responsible for her murder unless evidence to the contrary is provided. Also, amendments were made in the Code of Criminal Procedure directing post-mortem and inquiry in cases of the unnatural death of a woman within 7 years of marriage to determine the cause of death. Furthermore, while passing the provisions under 498A, some of the members argued that the injury could only be reported by

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<sup>81</sup> Lok Sabha Debates 1983 Vol. 42 n. 1 dated 15<sup>th</sup> July 447

<sup>82</sup> Lok Sabha Debates 1982 Vol. 30 n. 1 p 305-06

<sup>83</sup> Lok Sabha Debates 1984 Vol 45 April 5 279. (Shri Moil Chand Dada stated, "You women influence men at night, you can persuade them to do anything"). (Translated from Hindi)

<sup>84</sup> Gangoli, Geetanjali (2007) *Indian Feminism: Laws, Patriarchies and Violence in India*, Ashgate UK

<sup>85</sup> 46 of 1983 with effect from 25<sup>th</sup> December 1983 amended the IPC, the CrPC and the Indian Evidence Act

`the injured woman, or her relative by blood or by the public servant of such class and category as notified by the State government'<sup>86</sup>. However, after debate, Section 198A was added in the Criminal Procedure Code which states that "No Court shall take cognizance of an offence punishable section 498A of the Indian Penal Code except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption"<sup>87</sup>. Thus, it may be said that the demands made by the women's movement were twisted and tweaked in various ways by the state while enacting and implementing the law.

Of these amendments, Section 498A, IPC is the only criminal provision that specifically addresses the situation of domestic violence or cruelty against a married woman within her matrimonial house. Besides dealing with day to day violence, this provision is invoked before a woman dies in her marital home and therefore it also acts as a deterrent to dowry deaths. It is preventive in nature as compared to Section 304B which can be cited only after a woman dies in the matrimonial home because of demands made for dowry by the husband or her in-laws. The purpose is to reduce the number of dowry deaths<sup>88</sup>. The law criminalizes cruelty in everyday lives of women and seeks certainty of legal response, thereby addressing age-old historical and social wrongs. In the situation of powerlessness, it empowers women to voice their concerns relating to the pain, humiliation and torture they face in their daily lives. Prior to enactment of this law, violence within the home was not named. The word `cruelty' that has been introduced under the personal laws is more of a gender-neutral term and it does not consider the situation of domestic violence as abuse of wife by husband or in-laws per se<sup>89</sup>. However, Section 498A provides visibility to violence which is private in nature and is influential enough to shake the age-old belief that tolerating violence within marriage is women's destiny.

Section 498A states,

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<sup>86</sup> This stand was criticized by the MP Susheela Gopalan who argued that the women's organizations play a crucial role in assisting victims. Refer Lok Sabha Debates 1983, Vol. 4 n. 1 21 November 431

<sup>87</sup> The Criminal Procedure Code, 1973, Section 198A, Prosecution of offences under section 498A of the IPC

<sup>88</sup> Jaising, Indira (2014) Concern for the Dead Condemnation for the Living, EPW XLIX 30 July 26 p. 34-36

<sup>89</sup> For example, under the Hindu Marriage Act, any party can apply for divorce or separation on the grounds of cruelty. Beyond that it has no implications in providing any form of justice to women. The courts have interpreted `cruelty' as a dispute between husband and wife and have dwelled on crux of matrimonial relationship as in Manju Panwar v V.P.S. Panwar in Mat Appeal (FC) 90/2014, decided on 21.9.16, Deb Narayan Haldar v Anushree Haldar (2003) SCC 3174, Samar Ghosh v Jaya Ghosh (2007) 4 SCC511, Ravi Kumar v Julmidevi (2010) 4 SCC476 among others

“498A. Husband or relative of husband of a woman subjecting her to cruelty—  
Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

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

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Given the historical context, the law expansively defined ‘cruelty’ as an intentional infliction of suffering and is explicitly gendered in scope. Section 498A IPC made cruelty against married woman a cognizable, non-compoundable and non-bailable offence where the accused can be arrested without warrant. This provision clearly introduced an element of deterrence. It categorized the offence as: 1) physical as well as mental cruelty, 2) cruelty that drives a woman to commit suicide; 3) harassment for money or property; 4) potential perpetrators are husband or in-laws; and 5) people other than victim may file a complaint. It established the fact that criminal assault on a woman is in no way a private matter. It condemns violence within the intimate sphere of marriage. The core statement made is that abusive behavior against married women will not be tolerated. Enactment of this law has substantive as well as symbolic significance as it explicitly sends the message that a woman’s safety is important. Section 498A establishes the accountability of the state and puts onus on the police and judiciary to protect women against cruelty within homes. The purpose is to hold the perpetrator accountable for his violent actions and to punish the guilty with the aim of preventing him from indulging in ‘the misdirected track of a brazen sense of entitlement and impunity and false sense of power over women’<sup>90</sup>. When implemented in the true spirit, the provisions of 498A could have lessened the incidence of harassment, violence and murder of married women<sup>91</sup>. However, more than thirty-three years later, since this law came into existence, its provisions have not yet been implemented adequately enough to facilitate the goal of gender justice.

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<sup>90</sup> op.cit.

<sup>91</sup> Raja Lakshmi, T. K. (2008) *The Real Victim Frontline* 25 (15) 10-12 .

## **The Definition of Cruelty under Section 498A IPC**

‘Cruelty’ under Section 498A includes mental and physical cruelty. However, the manner in which it is interpreted by the law enforcement agencies is narrow. Also, its scope is evidently limited as compared to the description of ‘domestic violence’ laid down under the Protection of Women Against Domestic Violence Act, (PWDVA) 2005. The criminal law enacted in 1983 is much more restricted and conceptualized cruelty within the ambit of conjugality, while the civil law extends the scope of domestic dispute to include other domestic relationships. Moreover, in order to register a complaint under 498A, a woman is supposed to prove that she has suffered to such a severe extent that she has been driven to contemplate suicide or that her life has been in danger<sup>92</sup>. The routine violence women face every day is not considered. Physical violence is not an episodic form of abuse or an isolated event. Rather it involves a series of abuse or daily assaults. The cumulative forms of violence in between the episodes of ‘cruelty’ when women experience control, threat, intimidation, fear, coercion or trivial forms of abuse like slapping, punching, pushes, kicks and the like is not taken into account while interpreting the provisions under 498A. The ‘trivial incidents’ constitute the larger pattern of violence which harm women in the long run, yet these are ignored by this law. Instead, the law sees specific episodes of violent acts in isolation. Furthermore, it is often left to the interpretation and discretion of the police and judiciary to assess if the particular form of abuse faced by women at the hands of her husband qualifies as ‘cruelty’ under the law. Thus, even when an accused commits multiple offenses, punishment remains non-existent. Besides, the law has failed to address the issue of children harmed within families because of exposure to violence.

Further, the scope of violence is limited as it does not address other forms of violence inflicted by fathers, brothers, uncles, fathers in law, brothers in law or even larger community or kinship network. Females within the families are aborted<sup>93</sup>, killed as infants, discriminated upon in terms of food, education, health and other resources, forcefully married off at an early age, denied sexual and reproductive autonomy, coerced to uphold patriarchal traditions, tortured, attacked, raped, forced to undergo abortions, sold, trafficked, killed for honour, hunted as witches, thrown out of the house, denied property rights and are

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<sup>92</sup> Jaising, I (2009) Bringing Rights Home: Review of Campaign for a Law on Domestic Violence, EPW XLIV 44, 50-57.

<sup>93</sup> Sex ratio in 1901 was 972 females per 1000 males. It went down to 933 in 2001 and 943 in 2011. Source: Census of India

abused in numerous other ways<sup>94</sup>. However, all such forms of violence are excluded under the purview of the law. The restricted construction of 'cruelty' fails to see the fact that women are discriminated, exploited, brutalized or murdered both within natal or marital families besides being tortured by the larger kinship or community networks and are bound by socio-economic as well as cultural compulsions from which escape is almost impossible. Though this point may imply that too many expectations are being raised from 498A alone, yet, these issues are being described here because the law, neither through 498A nor via any other legal provisions has comprehensively examined such varied forms of violence women face within the home<sup>95</sup>.

### **Differentiating Between Rape and Marital Rape: Creating Hierarchy of Violence**

Susan Brownmiller<sup>96</sup> in her famous book titled 'Against Our Will' wrote that "Man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times along with the use of fire and the first crude stone axe. From prehistoric times to the present, I believe that rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear." Thus, rape has been used ubiquitously as a crude weapon by men to exploit, threaten, harass and abuse women in public as well as private spheres, since ancient times. Moreover, rape within marriage implies much more than forced sex or sex without consent. Marital rape is ongoing continuous, coerced sex or a compulsive violation. It is a manipulated sex for which a perpetrator may threaten, intimidate or blackmail the victim and often in such situations, the victim has no choice but to accept such coercive ravage. Also, it is not a one-time incident. Rather a wife is raped continuously with no possibility of escape. Yet, marital rape, as a critical issue has received less attention by the

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<sup>94</sup> Sharma, Sumedha (2016) Return their Names, Dignity, The Tribune, September 11. It is reported that thousands of women are sold and resold in Mewat for sexual gratification and are forced to live worse life than that of animals.

<sup>95</sup> The PCPNDT Act, 1994, the MTP Act, 1971, the Child Marriage Prohibition Act and several other laws have been enacted to deal with specific issues, however, a comprehensive reexamination of the concept of violence within homes show that not all forms of abuses are addressed by law. 498A deals only with violence married women face; and therefore, it is limited in scope. Also, as explained later, even while registering the complaint under 498A, other sections of IPC such as those relating to hurt, grievous hurt, miscarriage, causing injuries are not evoked and this omission by the state leads to denial of justice to women.

<sup>96</sup> Brownmiller, Susan (1975) Against Our Will: Men, Women and Rape, The Ballantine Publishing Group, NY

state<sup>97</sup>. Further, statistics point out that the sexual abuse within families includes not only rape of a women as wives but also women are raped as daughters, mothers, sisters, nieces, daughters in laws, sisters in laws and in similar such 'prohibited' relationships<sup>98</sup>. However, marital rape or incest is still considered to be an impermeable domain today wherein the state has refused to intervene even after recommendations have made to legislate against it<sup>99</sup>. The definition of cruelty is therefore narrowly construed not only under Section 498A but also the provisions under Section 375 and 376 of the IPC have failed to recognize marital rape as a crime<sup>100</sup>.

Section 498A criminalizes violence within marriage. However, it does not criminalize rape within the relationship. The law thus maintains dual standards. A husband, if he physically abuses his wife, he may be penalized, however, if he rapes her, he is not punished. The law, thus sanctions the crime within the *char-diwari* while creating a hierarchy of violence, treating marital rape as a lesser crime. The law, in fact, contradicts itself as rape is considered as a crime when it is committed by a stranger outside marriage, yet when it occurs within the house by a person whom the victim trusts, it is not considered as a crime. The law minimizes the gravity of offence committed within the sanctity of home while ignoring the basic fact that rape committed within the confines of home is equivalent to custodial rape where the power and authority of rapist comes into play<sup>101</sup>. Such structural controversies created and legitimized by the law reinforce patriarchal interests. Sexual assault by a stranger is treated as a heinous crime and society desires stringent punishment or even death penalty on the assumption that a woman is raped as another man's daughter, sister or wife. However, when it comes to marital rape, what is suggested as a pragmatic approach is 'settlement', 'compromise', or 'adjustment' on the assumption that 'wife' is a property of her husband and therefore she is supposed to bear such

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<sup>97</sup>Nigam, Shalu (2015) The Social and Legal Paradoxes Relating to Marital Rape in India: Addressing Structural Inequalities, Countercurrents, June 03 <http://www.countercurrents.org/nigam030615.htm>

<sup>98</sup> NCRB (2014) Crimes in India, 2014, Government of India.

<sup>99</sup> Justice Verma Committee Report 2013 recommended to introduce the law against marital rape however this was not done when the Criminal Law Amendment Act (2013) was introduced

<sup>100</sup> Section 375 and 376 of IPC also do not address the issue of marital rape. Though the PWDVA has expanded the definition of domestic violence to include sexual abuse under Section 3(ii), however, till date no specific remedy is available to women abused sexually within marriage despite an intense debate to criminalize marital rape. See Akhtar Sadia (2016) National Commission for Women questions Centre's Silence on Criminalizing Marital Rape, The Wire, July 15. Also in a PIL filed before the Delhi High Court, the Centre in its reply while arguing for decriminalization of marital rape stated that "the private affairs of husband and wife based on traditional social structure needs to be protected". See The Times of India (2016) Marital Rape Law Protects Hubby-wife Privacy: Govt, August 30

<sup>101</sup> Nigam S (2016) Re-examining Family Violence: Perceptions of Survivors from India, Research World Volume IV, Society of Social Scientists, Agartala In process

violence silently. This approach ignores the fact that the rape whether committed inside the home or outside it has serious repercussions and therefore has to be treated accordingly. The law against marital rape could not be legislated because of prejudiced, unfair, sexist, misogynist views upheld by the state which ignores the concept of consent of a woman besides overlooking a woman's autonomy and her dignity as an individual<sup>102</sup>. Law fails to see women as independent citizens and ignores their oppression and marginalization within the family as well as in the larger social structure. This indicates the narrow, false and insensitive approach taken by the state while responding to crimes against women. In fact, incongruous rules governing the institution of family are considered as natural, eternal and innate while normalizing and trivializing violence<sup>103</sup>.

### **Linking Dowry with Domestic Violence: A Serious Manipulation of Law by the State**

Dowry is a hegemonic North Indian, upper caste, Brahminical practice which replaced the custom of `bride price'<sup>104</sup> with giving of gifts by the parents and relatives of bride at the time of marriage or before or after it. Dowry has become more pervasive with the sanskritization and emergence of consumerist culture in a feudal society. Marketization has fuelled materialistic attitudes and the concept of dowry deepens with globalization, wherein the greed to acquire wealth reduces woman to a commodity. In fact, dowry has continued to grow as a compulsive, coercive, non-voluntary and oppressive practice in post colonial India<sup>105</sup> to an extent that today it has become a burden<sup>106</sup>. Now, it has spread its tentacles among other communities too despite attempts made to legislate against it. In fact, currently, the law against dowry draws a distinction between dowry and *stridhan* thus partly justifying dowry, in a sense that, dowry given to a daughter for her use is legal but when a coercive demand is made by in-laws it is treated as a social evil. This presumption does not recognize the fact that the valuables given to a daughter by her parents are not controlled by her once she steps into her matrimonial household, as often, dowry is considered as an

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<sup>102</sup> Even, Section 497 IPC pertaining to adultery is also based on the postulation that a wife is a property of her husband. Any man other than her husband, has sex with her is attacking another man's property and therefore be penalized.

<sup>103</sup> In a recent judgment the Court ordered that the denial of sex to husband for a long time amounts to cruelty under the Hindu Marriage Act, The Hindu (2016) Denying Sex to Husband ground for Divorce: SC, October 13

<sup>104</sup> Srinivas, M.N. (1984) Some Reflections on Dowry, Oxford University Press, New Delhi

<sup>105</sup> AIDWA (2003) Expanding Dimensions of Dowry, Indian School of Women Studies and Development, Delhi

<sup>106</sup> Palriwala Rajni (2009) The Spider's Web: Seeing Dowry, Fighting Dowry, in Dowry: Bridging The Gap Between Theory And Practice, Edited by Tamsin Bradley, E. Tomalin and M. Subramaniam, Women Unlimited, Delhi.

exchange that transpires between two families. Also, legally, dowry is considered as a pernicious `social' evil and not a `legal crime' despite its strong linkages with dowry deaths, murders, suicide by women and torture of brides and their families for extorting money and valuables. The law, in fact, sees dowry as well as domestic violence as moral and social evils which require social measures to be dealt with, rather than as crimes that need to be punished.

Further, the Criminal Second Amendment Law passed in 1983 while enacting against cruelty also deliberated on the issue of dowry and somehow flawed linkages have been drawn between dowry and domestic violence by the majority of the state actors. In fact, some lawyers have argued that Section 498A created a system of double jeopardy, as it replicates the Section 4 of the Dowry Prohibition Act and the accused is tried for the same crime under two laws which is legally untenable<sup>107</sup>. Nevertheless, what is overlooked in this argument is that Section 4 of the Dowry Prohibition Act merely punishes the demand for dowry where as 498A deals with aggression, violence and brutalities. This is not to deny the fact that women are tormented for not bringing dowry, yet, besides dowry, women are abused in everyday lives routinely for reasons ranging from putting extra salt in curry or not serving hot food, the crying of a child, talking to a stranger, disobedience, quarrelling with mother in law, using contraceptives without permission, not being able to produce babies<sup>108</sup> and several such (non)reasons<sup>109</sup>. However, the police, judiciary and other stake holders somehow portray a strong connection between dowry and domestic violence and therefore when a woman survivor approaches them, they often end up advising her to add a dowry component to the complaint so that the `case could become strong'. Agnes opined that, "the blame also lies with the women's movement which, in the 1980s, gave dowry-related violence greater importance and demanded separate legal provisions to address this issue. This only served to undermine routine domestic violence"<sup>110</sup>. Menon<sup>111</sup> opined that fighting dowry through criminal law is a misplaced strategy. It has been further argued that evidence of spiraling dowry is an indication of the failure of the women's movement to fight dowry. However, there are scholars who have argued that the anti-dowry movement has played a great role in bringing the issue of violence in the public

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<sup>107</sup> Gangoli, Geetanjali (2007) *Indian Feminism: Law, Patriarchies and Violence in India*, Ashgate Publishing, UK.

<sup>108</sup> Jejeebhoy, S.J. (1998) *Wife Beating in Rural India: A Husband's Right?* EPW, 33 (15) 855-62.

<sup>109</sup> Sudhir, U (2016) `Beaten for Leaving Geyser on', *Said Hyderabad Techie's Wife Before Death*, NDTV, Sept. 13.

<sup>110</sup> Agnes, Flavia (2015) *Section 498A, Marital Rape and Adverse Propaganda*, EPW, L 23 June 6, p 12-15.

<sup>111</sup> Menon, N. (1999) *Gender and Politics in India*, OUP, New Delhi.



fora, while at the same time condemning it and therefore has reshaped the debate relating to domestic violence<sup>112</sup>. The DVCM document also emphasized the relation between dowry and multiple aspects of women's inequality and oppression. Yet, the patriarchal state wrongly draws conclusions while linking dowry to domestic violence to deprive women of their legal entitlements.

Basu<sup>113</sup> argued that dowry as a system flourished because both giver and taker are penalized<sup>114</sup>. According to her, little has been done to address the social mechanism in which dowry thrives and that dowry violence has subsumed all other forms of domestic violence and oppression that women experience. Other scholars argue that dowry boycott is futile as it is the only way where a daughter could get her share in the parental property<sup>115</sup>. However, this argument instead of pushing the inheritance right of a daughter to claim her share in parental property mistakenly wrapped it in the vice of dowry. Palriwala<sup>116</sup> suggested that this view see daughters as burdens and marginal members of the family thus denying them their economic rights. Some of these arguments also overlook the fact that linking dowry with the political economy of compulsory marriage enhances women's vulnerability through domestic control<sup>117</sup>. In fact, a few women's organizations have drawn a link between dowry and sex selective abortions as well as other forms of discrimination and subordination including son preference, indebtedness among poor families and devaluation of women<sup>118</sup>. Suggestions have been made to redefine conjugal contracts. Also, recommendations have been made to create conditions to make women economically independent. Furthermore, Karat<sup>119</sup> stated that the women's movement could not transform the structures of gendered inequality in which dowry is embedded without a much larger socio-political movement that addresses a range of socio-economic inequalities. However, despite a range of recommendations made to eradicate dowry, the state did little to emancipate the women's situation thereby strengthening the dowry web. No efforts have been made by the patriarchal establishment to break the multi-structural links between dowry and violence, or to initiate social, economic or political processes

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<sup>112</sup> Kapur and Cossman supra

<sup>113</sup> Basu, Srimati (2009) Legacies of Dowry Prohibition Act in India, in *Dowry: Bridging The Gap Between Theory And Practice*, Edited by Tamsin Bradley, E. Tomalin and M. Subramaniam, Women Unlimited, Delhi.

<sup>114</sup> This is one of the main point of the DVCM document.

<sup>115</sup> Kishwar, Madhu (1988) Rethinking Dowry Boycott, *Manushi* (48) 10-13.

<sup>116</sup> Palriwal, R. (1989) Reaffirming The Anti Dowry Struggle, *EPW*, 24(17) p 942-44.

<sup>117</sup> Agnihotri and Palriwala supra

<sup>118</sup> AIDWA survey (2003)

<sup>119</sup> Karat, Brinda (2005) *Survival and Emancipation: Notes from Indian Women Struggles*, Three Essays Collective, Delhi

to eliminate dowry or to discuss the issue of women's lack of access to financial resources or economic opportunities, or to construe women as independent individual citizens outside the construct of family or kinship. The inaction on the part of the state to make economic or material provisions for women in their natal or marital family apart from women's legal claim to property further deepened the crisis.

### **How 498A Failed Women Survivors of Domestic Violence?**

The experience of over three decades with 498A reveals that though the law provides an open strategic platform where a woman facing violence within marital home can raise her concerns yet in its implementation, it is limited and has not been able to provide steady or predictable solutions to end domestic abuse. In other words, as the Constitutional guarantee of equality failed to uphold gender parity<sup>120</sup>, similarly, the provisions under 498A could not deter violence against women within marital relationships. Law, in fact, has acted to dis-empower women victims of violence because it introduced mediation within marriage while linking it to the question of women's survival. Initially, lawyers and the women's groups used it as a tool to bargain for women's economic rights vis-à-vis violent husbands, thus shaping the law while creating a new legal culture. For instance, when a battered wife files a complaint under 498A, the violent husband is called upon and the counselor or the police negotiate on behalf of the woman. As the victim has no other means to support herself, she is either sent back to the violent situation with no legal guarantee that she will not be abused again or the case is 'settled' if she stays in her *maika* with little or no recompense<sup>121</sup>. The case is sent to trial only after the negotiations fail and it is then that the police help her in the retrieval of her *stridhan*<sup>122</sup>. No punitive action is taken against the abusive husband or in-laws in cases where the woman chooses to go back to a violent home<sup>123</sup>. Instead of seeing wife beating as a crime against women's body, integrity or dignity, the manner in which 498A is implemented is such that the remedies to the violence are linked to the women's economic dependence in marriage and thus makes the execution of law ambiguous. 498A is used to provide customized solutions to the conventional

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<sup>120</sup> Sarkar, Lotika (1995) Constitutional Guarantees: The Unequal Sexes, CWDS, New Delhi

<sup>121</sup> For obtaining maintenance from her violent husband or to obtain separation of divorce order applications have to be filed accordingly either under Section 125 CrPC or civil and personal laws

<sup>122</sup> Under Section 406 IPC *stridhan* can be retrieved with the help of police, however, it has been seen that police often fails because of their delayed action or their apathy

<sup>123</sup> Even if the accused husband or in-laws are jailed, it is easier to get bail in such cases because of apathy of police and judiciary. Once the accused is out of jail, the criminal case continues in the court and most of them end up in 'settlement' between the parties. As per the provisions of the law, punishment to the guilty is rarely inflicted.

problem and in the process, protects abusive husbands while offering no long-term remedy to the battered wife. Rather than empowering women as agents to control their lives and to assert their agency, the law took away the privileges complainants have in the criminal justice system. Section 498A has twisted and moulded the criminal law to create family counseling or mediation centers. However; such reshaping could not provide justice to the victims of violence. In fact, efficacy of law is drastically reduced as it fails to bring any major social transformation in shaping the concept of equity or partnership within marriage or to deter violence. Also, most of the implementers of law are men and in their role as 'protectors' they use laws to their own end by enforcing more control on women's lives. The law, thence, proves to be a 'subversive site'<sup>124</sup> where competing visions and ideologies relating to family, traditions and culture are brought to filter women's claims. The law has failed to relate violence to abuse of power with its significant implications on the notions of citizenship and property because it could not visualize women survivors as individual citizens claiming justice. In fact, the law sees women's averment enmeshed within patriarchal familial network, while recognizing them as wives and therefore lesser citizens. Agnihotri and Mazumdar<sup>125</sup> noted a sense of defeat in the women's movement with regard to the agitation initiated in 80s as it ended up in perpetuating a 'women as victim syndrome'.

The provisions under 498A failed to adequately challenge the notions of patriarchy inherent within families instead it refueled discriminatory tendencies while further marginalizing women's claims. As Vina Mazumdar noted there exists "an extraordinary lack of sensitivity among the law making and enforcement agencies, and public opinion, especially within the upper and middle classes – both urban and rural. On the issue of domestic violence, we were accused by many of 'wanting to break up the family'. Even some older women's groups were critical and thought we were carrying the debates and agitations too far"<sup>126</sup>. The power politics worked in a manner that this law has been wrongly interlinked and intertwined with the construct of family and marriage. Instead of putting onus on the offending husbands for disturbing the peace by inflicting violence, those who argue to provide for women's safety have been incorrectly termed as 'family breakers'. What was overlooked in this assumption is that institution of family is endangered once a man inflicts violence. Censuring those who constructively aim to prioritize the safety and rights of women and children in such a violent

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<sup>124</sup> Kapur, Ratna and Brenda Cossman (1996) *Subversive Sites: Feminist Engagements With Law in India*, Sage, Delhi

<sup>125</sup> *Supra*.

<sup>126</sup> Mazumdar (2000) *supra*.

situation is of no help. In fact, as it has rightly been said that in a male dominated society, "the women's assertion of citizen's claims to participate as equals in the political and development process put them in direct confrontation with the forces of conservatism and reaction' while `harking back on traditions and culture and the positing of images which emphasize women's reproductive role as the only natural, historical one"<sup>127</sup>.

Moreover, besides hurdles in implementation of law, the problems magnified because legal reforms were not accompanied by social, economic or political actions despite such demands being made<sup>128</sup>. The patriarchal state has neither shown keenness to reform the situation nor has implemented comprehensive measures to liberate women. Rather than creating favorable socio-economic conditions to facilitate women's emancipation by providing shelter homes, medical or psychosocial support services or economic opportunities, the state chose to favor the groups of men who vociferously argued against 498A. The state without substantiating their averments through fact finding, checking statistics or exploring ground realities, is obsessed to dilute this legal provision. It may be said that the state cunningly has created conditions whereby the law loses its efficacy and deterrent effect. Though the state is duty bound to lessen the crime, it reinforced the status quo by treating domestic violence as a lesser crime. By paying no attention to its legal obligations to redress gender inequality or women's powerlessness and by protecting violent husbands by not prosecuting them, the state is reiterating women's subjugation<sup>129</sup>. In fact, it may be said that created as a response to women's movement agitation against dowry deaths, sieved halfheartedly through legislative debates, erroneously interpreted and twisted by judiciary, speciously shaped and crafted by executive, battered by the well lobbied men's movement and contested fiercely by the zealous media, 498A has been applied in unanticipated and unforeseen ways and has been transformed in the process<sup>130</sup>.

## **Section 498A IPC: Tribulations and Further Actions**

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<sup>127</sup> Agnihotri and Mazumdar (1995) supra.

<sup>128</sup> Ganguli, Rupa (2003) AIDWA to Generate Movement Against Dowry, People's Democracy, XXVII 35. 16 noted that proposals were made to fight against dowry and violence which include holding police and administration accountable, introducing system of joint *pattas*, literacy programmes, special programmes for health care and social security to suffering women, registration of marriage, review of socio-economic situation, yet not many of these are implemented.

<sup>129</sup> Jeejobhoy SJ and R Cook (1997) State Accountability for Wife Beating: the Indian Challenge, Lancet 349 s110-12.

<sup>130</sup> Basu S (2015) Trouble With Marriage: Feminists Confront Law and Violence in India, Orient Black Swan, India.

It has been seen that the provisions of 498A have not been interpreted in a manner as to help women rather the complainants have been made to run around within the courts and the police stations to ensure that they receive maintenance or retrieve their *stridhan*. The experiences show that no efforts have been made to safeguard the rights of victims. Once a complaint is filed under 498A, a survivor is left with no material support and is frequently dispossessed of her matrimonial house. The state has hardly provided any shelter homes for women in distress. Moreover, to pressurize a woman to withdraw her complaint and to counter the legal proceedings, her husband often would file an application for divorce, restitution of conjugal rights, custody case, or similar such provisions available under the personal laws. The multiplicity of litigation adds to the legal complications and complainants often found themselves running from pillar to post. The non-supportive approach of the state clubbed with the difficulties within the legal system further adds to the women's woes.

In order to remedy such complexities, further demands were made to establish a less informal mechanism and therefore the Family Court Act was enacted in 1984. The purpose of establishing the Family Courts is to provide informal apparatus for 'speedy settlement of matrimonial disputes' and to provide remedies relating to maintenance, custody and divorce, all under one roof. Emphasis is laid on inexpensive and non-adversarial method of resolving 'family disputes'. However, the Act, focuses on 'preservation of family' or 'brokering compromises' instead of providing justice to the victims and therefore whenever a complaint is filed it becomes mandatory for the parties to undergo counseling<sup>131</sup>. What is wrongfully strengthened is the belief that women prefer to go back to the violent homes without any sense of protection. Bringing material support, medical aid, child care services, short stay facilities, financial support, legal aid, shelter homes, safety or sensitive machinery under a roof was not anticipated as a solution to provide relief to the victims, despite the knowledge that this comprehensive package is essential to remedy the situation of domestic violence. The only support provided through the family court is counseling and more counseling to push women back to the violent situation, 'adjust', 'compromise' and 'save the marriage', even if it endangers their life and limb because no options could be imagined outside the 'sacrosanct' institution of family. Also, it is much easier and more economical to push women back to violent situation. Another choice offered is 'settlement' where a victim is left with

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<sup>131</sup> Counseling here implies coercive persuasion to adjust and compromise and not the psycho social support as required

no other alternative but to fend for herself and her children in lieu of meagre amount of money, if any, offered by the violent husband or probably stay in her natal home or *maika* or may remarry. Experiences also indicate that these so called 'women friendly' adjudication spaces failed to address the concerns of the victims of violence<sup>132</sup>. Studies have shown that the family courts were not free from difficulties like backlog, exploitative commercial approach of lawyers, long drawn battles, multiple court proceedings and insensitive approach of officials. In other word, these courts are 'family centric'<sup>133</sup> rather than 'victim or survivor centric'.

Further, despite the knowledge that victims of matrimonial violence find it difficult to walk out of a violent relationship because they are economically dependent on their husbands and have no place to live<sup>134</sup>, no efforts have been made by the state to materially emancipate the situation of the survivors of wife beating. Though a few women's organizations initiated shelter services, yet, their numbers have been far and few. Some women's groups could achieve only partial success as they are dependent on the state for funding and are 'suspected by women in the middle-class localities'<sup>135</sup>; besides there are concerns for personal safety that forced them to control women's mobility<sup>136</sup>. Others contended with providing legal aid, developing community support network or providing skill based training besides counseling. Support is being provided in various forms and includes confronting violent husbands or retrieving a woman's belongings<sup>137</sup>. A few associated themselves with the police and law enforcement system to ease access to justice while others negotiated with the husband and his family on behalf of the woman. The initiative to create more shelter homes or to provide economic opportunities or other support facilities for victims has not appeared on the list of issues taken up by the 'welfare' state. This is tragic. It is a well-known fact that the deeply entrenched capitalist patriarchy can only be challenged through creating conditions for women's

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<sup>132</sup> NCW (1992) Family Courts - Report on Working of Family Courts and Model Family Court Rules, Delhi.

<sup>133</sup> 'Resolving Disputes Uniting Families' and similar such posters are found hanging in every family court where much emphasis is laid on protecting families and not to provide justice to women victims of violence.

<sup>134</sup> Singh, Kirti (2013) Separated and Divorced Women in India, Sage, New Delhi.

<sup>135</sup> Gangoli, Geetanjali and Martin Rew (2015) Strategic Co-option and Feminism in India, Understanding Gender Based Violence: National and International Contexts, Eds Aghtae Nadia and Gangoli G, Routledge NY p. 196.

<sup>136</sup> Gangoli, Geetanjali (2007) Indian Feminism: Laws, Patriarchy and Violence in India, Ashgate Publication, UK

<sup>137</sup> Forum Against Oppression of Women (1990) Moving...But Not Quite There, FAOW, Bombay.

liberation in economic and material terms<sup>138</sup>. Sivaraman<sup>139</sup> way back in 1975 wrote that “The lack of economic independence of women in our society is reflected in their much-publicized docility, timidity and compliance. The negative base of so much of the chastity, virtue, and proverbial toleration of the Hindu wife – financial dependence on the man – is bound to be brutally exposed with the mass entry of women into productive work”. However, this has not happened in the modern India where the neo-liberal economy has fuelled and reiterated the feudal patriarchal tendencies and has acted to further oppress women rather than liberate them<sup>140</sup>. Many young women entered the workforce lately, yet countless remain socially, financially and morally dependent on age-old traditions and customs while the domestic abuse continues unabated<sup>141</sup>.

Later, in 2005, the Protection of Women Against Domestic Violence Act (PWDVA) was enacted after a decade long sustained campaign. It provides for civil remedies and protective injunctions like Protection Orders, Custody Orders, Maintenance Orders, Residence Orders, Interim Orders, Compensation orders and so on, besides expanding the definition of domestic violence and broadening the scope of the law. Based on a convergence model, the PWDVA with its lofty aspirations provides for expeditious remedies and is located within Magistrate courts with criminal consequences for violation of orders. The law expanded the definition of ‘domestic relationship’ and introduced the new contingent consisting of Protection Officers and Services Providers to provide sensitive gender friendly services to women while minimizing the role of police. While presenting the Bill before the Lok Sabha the then Minister of State for Human Resource Development stated on 23.8.2005 that, “Presently lakhs of women in the country are subject to domestic violence. Various kinds of violence like gender discrimination, domestic violence, dowry related violence and sexual exploitation of women are rampant all over the country. The reason behind this trend is the discriminatory approach of the society towards women. This phenomenon is not confined to a particular caste, religion or community, rather

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<sup>138</sup>Dr Ambedkar in 1952 in a meeting organized in Belgaum district Branch of Schedule Caste Federation in Kohlapur claimed “On wealth defines independence and a woman must be very particular to retain her wealth and rights to retain her freedom”. Rege S supra.

<sup>139</sup> Sivaraman Mythily (1975) Towards Emancipation, *Social Scientist*, 4 (40-41) p.76-103

<sup>140</sup> For details, see Karat, Brinda (2013) Gender Concerns and Strategies in the Resistance to Imperialist Globalization, *The Marxist*, XXIX 2, p. 23-43 Also, Ghosh, Jayati (2003) Globalization, Export-Oriented Employment for Women and Social Policy: Case Study of India, Mimeo, Jawaharlal Nehru University, New Delhi.

<sup>141</sup> The situation at work place is not rosy and further even those who entered the free market economy to earn their livelihood could not liberate themselves because of many socio-economic and cultural factors. Nigam, Shalu (2014) From the Margins: Revisiting the Concept of Marginalized Women, *Countercurrents* September 3.

it is pervading in every section of the society"<sup>142</sup>. Yet, again, nothing is being done by the state to address 'the situation of discriminatory approach of the society towards women'. The solutions are again sought within the limited domain of violent marriage and unsafe family structure. No viable long term social or economic alternatives are being offered to the battered women survivors by the state<sup>143</sup>. Little is imagined outside the patriarchal set up where a woman survivor of violence could explore options beyond the domain of *maika* or *sasura*<sup>144</sup>. The irony lies in the fact that denial of basic dignity and freedom to women survivors continues even after persistent battles against violence within homes have been fought at macro as well as micro levels. Moreover, today, hostility towards a women friendly approach is depicted by many of the stakeholders who erroneously opine that the law against domestic violence is misused, and this is perilous.

### **III Loopholes in The Law Further Endorsed by Backlash**

Section 498A is being tarnished and maligned by a few policemen, lawyers, judges and the executive officials besides media. This malicious propaganda against the law has boomeranged and cases are not being registered under 498A easily today<sup>145</sup>. Instead of being seen as a tool to remedy a violent domestic situation it is erroneously portrayed as a measure 'used by educated elite women to torment their husbands and in-laws to seek revenge'. In fact, a well-organized group of men has launched an attack on this law while glorifying the family and downplaying violence within it. These men are making repeated, loud, boisterous noises that this legal provision is slaying the institution of marriage and destroying the family. Allegations are wrongly being made to dilute the provisions of the law as it is seen as a disastrous socially engineered tool used by women to trap husbands and their families, rather than as a law to secure domestic order or to provide freedom from violence to women as a human right. In fact, some of the proponents of such changes have gone a step further to argue that the women who file false cases should be prosecuted or penalized.

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<sup>142</sup> Lok Sabha Debates 2005

<sup>143</sup> Nigam, Shalu (Forthcoming) In Search of Justice: A Socio Legal Analysis of PWDVA, In Process.

<sup>144</sup> The number of women headed households is on increase while the debate on housing and economic rights of women has been going on for long. Different positions are taken by various groups. For example, in terms of housing rights, few organizations demanded women's right to housing independent of male ownership and control while others view that majority of poor masses cannot manage to own property thus focus should be demanding joint *pattas*. The state has not yet taken any major step in this direction.

<sup>145</sup> Singh Kirti (2006) Post Independence Era, Law And Women's Movement in Seminar on Women's Movement Engagement with Law: Existing Contradictions and Emerging Challenges organized on March 20-21, CWDS, Delhi



These assertions are made without any empirical data or research findings that could substantiate the alleged misuse of the law. Most of these opinions are not based on in-depth investigation, informed debates or proper application of mind. These ill-informed claims of misuse arise from patriarchal anxiety which sees this law as an instrument that destabilized the power structure in the hierarchical arrangements. Insecurities arise because of the fear of relocation of locus of control as 498A apparently empowers women while enabling them to negotiate their claims while challenging male domination and patriarchal authority. Apparently, a group of 'disgruntled' men and husbands who may have been jailed or wish to evade arrest and punishment have angrily launched an influential campaign about the 'injustice' they suffered and ordinary men and women, lawyers, judges and the executives joined them gradually demanding 'justice' against 'rise in number of false cases'. This sexist, misogynist approach is being used not only to oppose the women friendly laws but also seeks to undermine the policies and programmes which have been formulated to empower women such as the Women's Reservation Bill because it is believed that once women are emancipated, the entire oppressive system built over the generations will stumble and those in command will lose their authority once the power is redistributed. When several other laws are being misused<sup>146</sup>, a few men pick on only 498A as it affects them the most<sup>147</sup>. Resentment occurred because of self centered uneasiness that has stirred the fragile masculinity.

The misogynist propaganda has gradually expanded to the extent that the police, judiciary, law makers and the executives have started working on it and the courts have in several decisions pronounced that Section 498A is being misused and abused by women. Low conviction rate in such cases is cited as a proof of its misuse. Rather than looking at the difficulties in obtaining the conviction, the state agencies added fuel to the fire by propagating such baseless myths<sup>148</sup>. The Malimath Committee in its report noted, "In less tolerant impulsive woman may lodge an FIR even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job. The offence alleged being non-bailable, innocent persons languish in custody. There may be a claim for maintenance adding fuel to fire, if the husband cannot pay. She may change her mind and get into the mood to forget and forgive. The husband may realize the mistakes committed and come forward to turn a new

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<sup>146</sup> AIDWA (2009) Statement on Advisory Regarding Section 498A IPC, November 3, AIDWA, New Delhi

<sup>147</sup> Rajalakshmi TK (2008) The Real Victim Frontline 25 (15) Also, there are many laws like AFPSA, Sedition law, Section 377 and similar such anti-people law which are being misused yet the state has not shown its keenness to dilute the provisions of these laws.

<sup>148</sup> Malimath Committee Report, Shinghal's report, Law Commission Reports, all voiced this concern

leaf for a loving and cordial relationship. The woman may like to seek reconciliation. But this may not be possible due to the legal obstacles. Even if she wishes to make amends by withdrawing the complaint, she cannot do so as the offence is non compoundable. The doors for returning to family life stand closed. She is thus left at the mercy of her natal family". Further it says, "This section, therefore, helps neither the wife nor the husband. The offence being non-bailable and non-compoundable makes an innocent person undergo stigmatization and hardship. Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliations. It is therefore necessary to make this offence (a) bailable and (b) compoundable to give a chance to the spouses to come together"<sup>149</sup>. The Committee failed to recognize the fact that firstly, cruelty under 498A is a crime and has to be dealt with accordingly. Secondly, salvaging the marriage is not a viable option once the relationship becomes violent and has a harmful impact on women and children. Thirdly, the bitterness in relationship already starts once a wife is being abused and therefore suggestions should have considered preventing such torture. Fourthly, the police is not overzealous to arrest the accused in such cases. Rather studies have shown that women undergo a lot of hassles in filing the complaint. Fifthly, making the offence compoundable or bailable will not serve the purpose as this will not deter the perpetrator nor it will help to salvage the relationship. Experience shows that violence escalates in situations when women go back. Lastly, the Committee failed to raise concerns relating to provisions of shelter homes, medical, psychological or legal aid or other facilities for the survivors as its only apprehension was to save the family. This indicates its biased approach.

Recently, the Supreme Court in the matter of Arnesh Kumar v State of Bihar<sup>150</sup> while pronouncing its decision stated that "The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested. 'Crime in India 2012 Statistics' published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in

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<sup>149</sup> Ministry of Home Affairs (2003) Committee on Reform of Criminal Justice System, Volume 1, Government of India, page 191

<sup>150</sup> Criminal Appeal no. 1277 of 2014 with SLP (Cri) 9127 of 2013

2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code". Though it is a simple case relating to bail application yet the 'utterly sympathetic Court could not stop itself from issuing guideline to prevent unnecessary arrest and casual and mechanical detention'<sup>151</sup>. The Court failed to realize that the rate of crime is increasing because more women are raising their voices against violence and that the share of 6 percent arrest is not high as compared to the number of reported cases. Conviction rate is low because most of the cases are compounded and applications are filed to quash the FIRs. Also, the Court ignored the fact that the NFHS-3 data indicated that around 59 million women experienced violence and a mere 2 percent of these may have sought police support which implies that more women have experienced violence who are not coming forward to register their complaint<sup>152</sup>. In fact, women's organizations claim that, "In a socio-cultural milieu that encourages a culture of silence as far as women are concerned, where getting married and staying married are extolled values, and where marriage is perceived as providing security and social respect, the possibility of a large number of women faking and falsifying incidents of violence and harassment against them is not only remote but almost improbable"<sup>153</sup>. The Court overlooked the fact that a discrepancy between the number of chargesheeted cases and convictions arose because of the apathetic approach of prosecution and the police. Further, under Section 41 CrPC, the reasons of warranting arrest are the same for all the offences and include interfering with evidences, pressurizing the victim and to prevent absconding. All these possibilities are more likely to occur in domestic violence cases where the accused has more opportunities to do so as compared to violence by a stranger.

The apathy of the apex court is also reflected when it dismissed the curative petition filed by the National Commission for Women<sup>154</sup> to reconsider the decision in the Arnesh Kumar's case on mere technical grounds. It is not for the first time that the Supreme Court has expressed its opinion about the misuse of the provisions of Section 498A. Even earlier, in the case of Preeti Gupta v. State of Jharkhand<sup>155</sup> the Court has expressed its anxiety over misuse of this law. In Sushil Kumar Sharma v. Union of India<sup>156</sup> the Court while dismissing the petition

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<sup>151</sup> Jaising (2014) Concern for the Dead Condemnation for the Living, EPW XLIX 30 July 26 p. 34-36.

<sup>152</sup> Ibid.

<sup>153</sup> Rajalakshmi TK (2011) Oppressor's Case, Frontline 28 (7)

<sup>154</sup> National Commission for Women v Arnesh Kumar and Others Curative Petition (CrI) No 39 or 2016 in Review Petition CrI D No. 37780 of 2014 in CrI Appeal No. 1277 of 2014.

<sup>155</sup> (2010) 7 SCC 667; AIR 2010 SC 3363

<sup>156</sup> 2005 (6) SCC 281

that challenged the constitutional validity of Section 498A observed that “by misuse of the provision, a new legal terrorism can be unleashed”. In *Savitri Devi v Ramesh Chand*<sup>157</sup> similar views are propagated. In *Mohammed Arif v State of UP*<sup>158</sup>, the court has pointed out that there is a tendency to rope in the entire family of the husband in dowry harassment case. The Delhi and Madras High Courts<sup>159</sup> have also arrived at similar conclusions. The courts thus have directed the police to take precautions while filing FIRs, making arrests or granting bail and have urged to focus on mandatory conciliation in such cases. Specific orders were made to direct the Women’s Commissions, Legal Service Authorities and CAW Cells to emphasize on ‘conciliation and possibility of reunion’. Also, in *Ramgopal v. State of MP*<sup>160</sup>, *B S Joshi v State of Haryana*<sup>161</sup>, *Manoj Sharma v State*<sup>162</sup>, *Madan Mohan Abbot v State of Punjab*<sup>163</sup>, *Rajeev Verma v State of UP*<sup>164</sup> the courts have recommended making the offence compoundable. However, before making such generalized statements regarding the misuse of law, neither the male dominated Supreme Court nor the High Courts, asked for the details of reports or surveys or recommendations from the Women’s Commission or the Department of Women and Child Development. While pronouncing such decisions, no efforts have been made to call upon the documents or records of public bodies or the Ministries documenting the data on women’s issues. Also, no attempts have been to look at the historical or social contexts in which this law has been made. Besides, the courts, as facilitators of justice have failed to consider the impact of such statements at the ground level where women survivors of violence are facing trouble in getting their complaints registered. Thus, it may be inferred that it is the traditional patriarchal discourse based on gender stereotypes which is dictating, shaping and influencing the mainstream actions<sup>165</sup>. Subjective assertions guide the conduct of state actors including the police, the judiciary and the executive, because this law threatens the existing power equations where women assert their rights and challenge the patriarchy.

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<sup>157</sup> CrI. R 462/2002

<sup>158</sup> 1999 (2) Crimes 240

<sup>159</sup> *Chandrabhan v. State* (order dated 4.8.2008 in Bail application No.1627/2008) Also Court on its own in *Motion v. CBI* reported in 109 (2003) Delhi Law Times 494 Also *Tr. Ramaiah v. State* (order dated 7.7.2008 and 4.8.2008 in MP No.1 of 2008 in CrI. OP. No.10896 of 2008).

<sup>159</sup> SLP (CrI.) No. 6494 of 2010; 2010 SCALE 711; (2010) 13 SCC 540

<sup>160</sup> SLP (CrI.) No. 6494 of 2010 (Order dt.July 30, 2010); 2010 SCALE 711; (2010) 13 SCC 540

<sup>161</sup> AIR 2003 SC 1386

<sup>162</sup> 2008 SC [Suppl] 1171

<sup>163</sup> AIR 2008 SC 1969

<sup>164</sup> 2004 CrI LJ 2956

<sup>165</sup> Just as *Khap panchayats* try to legitimize their actions by quoting traditions, customs or antecedents, similarly, the Courts in 498A cases, have attempted to justify their decisions on the basis of hearsay opinions and ill-informed claims.

Also, recently, the Court<sup>166</sup> explained that in serious offences like rape, murder, dacoity etc amicable settlement between parties cannot be legally sanctioned though in civil matters such as matrimonial disputes the case can be compounded. However, the Court has failed to draw a distinction between domestic violence and matrimonial disputes wherein the former is more serious in nature with its criminal repercussions than the latter where the couple may decide to part amicably.

Not only the courts, but also the Law Commission in its 154<sup>th</sup> Report as well as in 237<sup>th</sup> Report has suggested that this law should be made compoundable. Further, in the recent years, the Ministry of Home Affairs has issued strict advisories to `avoid unnecessary arrests in 498A cases to curtail the misuse of the law'. As per the Advisory issued in 2009<sup>167</sup> the state governments have been asked to comply with the procedures laid down by the apex court in *D.K. Basu v State of West Bengal*<sup>168</sup> and to make arrests after reasonable belief and `to settle the disputes by counseling, mediation, and conciliation between the parties'. In 2012<sup>169</sup> it is further reiterated that arrests should be made only after the written orders of DCP or officer of equivalent level and for `acceptable reasons'. Ironically, it further states that the counseling in the Women's Cell must screen the `frivolous cases at initial stages and the Section 498A can be invoked in rare cases'. It is argued that, "the recourse to Section 498A of IPC or arrests there under should not be taken before making an attempt for reconciliation through the assistance of professional family counselors". In 2014, another Advisory<sup>170</sup> while referring to the decision in *Arnesh Kumar's* matter, advised the state governments to enforce the directions relating to arrests. Thus, over the years, the state has been blindly repeating the fact of misuse of 498A without considering the statistics, facts or situation at the ground. No recommendations or reports are being sought from the Social Welfare or Health Departments or the concerned Ministries or the institutions working and collating the data relating to the situation of women and children. Neither the NFHS data has been used nor has any other form of corroboration process been carried out to verify the facts before issuing such advisories. Domestic violence is a vast issue where a comprehensive approach requires coordination of various sectors like health,

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<sup>166</sup> *Narinder Singh v State of Punjab* Cri Appeal 686/2014 of SLP Cri 9547 of 2013 decided on March 17, 2014

<sup>167</sup> Ministry of Home Affairs (2009) Misuse of Section 498A regarding, No.3/5/2008 Judl Cell, October 20, Government of India

<sup>168</sup> (1997) 1 SCC 416; AIR 1997 SC 610

<sup>169</sup> Ministry of Home Affairs (2012) Advisory on Measures to be taken by States and UTs to curb misuse of Section 498 A No.3/5/2008 Judl Cell, January 16, Government of India

<sup>170</sup> Ministry of Home Affairs (2014) Advisory on Measures to be taken by States and UTs to curb misuse of Section 498 A, IPC regarding No.3/5/2008 Judl Cell, July 10, Government of India

law, medicine, psychology, gender, economics, social care and welfare among others. When convergence as a norm is followed in all other aspects, on the issue of domestic abuse no such approach is being adopted. In fact, the patriarchal state never took the steps to address the systemic inequalities because of `fear of upsetting economic and political power of classes to which it was tied'<sup>171</sup>. Or as Palriwala put it, "When existing power equations were threatened, those who were least able to use, let alone misuse the law, were accused of malfeasance by those whose position and assertion of right was being questioned"<sup>172</sup>.

### **Who are these `Disgruntled Women' and Why are they `Disgruntled'?**

As mentioned above, the Court<sup>173</sup> has stated that this law is misused by `disgruntled women'. However, it has failed to define who these `disgruntled women' are. The term `women' in itself is not a homogeneous or a constant category rather it is a social construct which cuts across the division of caste, class, religion, age and other factors in a diverse, layered, hierarchical society<sup>174</sup>. The discourse on intersectionality<sup>175</sup> rejects single axis framework and construes `women' as a heterogeneous entity with its multiple constituents. Further, in a casteist, hierarchical, stratified, patriarchal society inequalities, hierarchies and power politics operate in a manner that dominant voices gain advantage in terms of authority and control over those who are not so privileged;<sup>176</sup> therefore the term `women' needs to be contextualized in such a framework. Even earlier, the courts, in many cases, have utilized this construct of heterogeneity and have construed a woman not as a neutral citizen or a bearer of rights, but have derived or denied women's rights using the framework of religion, caste or class<sup>177</sup>. It is a common understanding that the personal laws discriminate against women yet, when it comes to assigning entitlements to women, gender biased laws are used to filter the constitutional provisions of equity and justice.

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<sup>171</sup> Agnihotri and Palriwala supra

<sup>172</sup> Palriwala supra

<sup>173</sup> Arnesh Kumar v State of Bihar supra.

<sup>174</sup> Women's movement in India has made this point in several representations. See AIDWA's website. Also Vindhya U. (2007) Women as Emblems of Culture and Nation: Conception of Hindu Right and Democratic Women's Movement In Urban Women in Contemporary India: A Reader Ed Ghadially Rehana, Sage, New Delhi

<sup>175</sup> Crenshaw, Kimberlé (1991) Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color, *Stanford Law Review*, 43(6) 1241–99

<sup>176</sup> Nigam, S. (2016) The Privileges of being a Hindu, Upper Caste and Elite Class Male in India, *Countercurrents*, February 10, <http://www.countercurrents.org/nigam100216.htm>

<sup>177</sup> Decisions in Shahbano's case, Bhanwari Devi's case, Mathura rape case and numerous others show how the caste, class, religion and other backgrounds operate in the courtrooms to deny justice to women

However, while building a case against 498A, generalized sweeping statements are made while referring to 'disgruntled women' by the Court.

The Census of India 2011 shows that more than 58 million citizens are women out of which 33.9 million are ever married women. Out of total number of women, 48.1% are living in urban areas and 48.6% are surviving in rural areas<sup>178</sup>. The literacy rate among urban women is 79.92% and among rural women it is 58.75%<sup>179</sup>. 29.4% women in urban areas and 48.7% in rural areas marry before they attain the age of 18 years. The work force participation rate in 2009-10 is 26.1 for females as compared to 54.7 males in rural area and in urban sector it is 13.8 for females and 54.3 for males<sup>180</sup>. A total of 20.4% women are employed in the organized sector in 2010. 17.9% are in public sector while 24.5% are in private sector. The female share of total Central Government employment stood 10.0% in 2009. Also, as per NFHS-3 data, in the rural sector only 26.1% married women take decisions regarding obtaining health care for self as compared to 29.7% in urban areas. Moreover, only 7.6% rural women and 10.4 % urban women have a say in purchasing a major household item. Merely 10% rural women and 12.2% urban women take decisions in respect to visiting their families or relatives. For a country as a whole, 59.6% women have no access to money. In such a scenario, where most women in both urban and rural areas are denied their basic rights, needs as well as their fundamental freedoms such as right to take decisions about their own life on a day to day basis, to say that these 'disgruntled women' abuse the law seems unreal, pointless and unacceptable.

Further, the justice delivery system in India is not free from problems. More than 2 crores cases are pending before district courts in the country<sup>181</sup>. Of these, only 20 lakhs or only 9.6% are filed by women<sup>182</sup>. This clearly indicates that not many women are approaching the courts for justice as compared to the number of men who litigate. Furthermore, common people are being denied justice because

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<sup>178</sup> Website of Ministry of Statistics and Programme Implementation (MOSPI) accessed on 15<sup>th</sup> October, 2016

<sup>179</sup> National Institute of Rural Development, (Undated) Rural Development Statistics, Accessed on 4<sup>th</sup> October 2016 <http://www.nird.org.in/Rural%20Development%20Statistics%202011-12/data/sec-11.pdf>

<sup>180</sup> NSS 64<sup>th</sup> Round

<sup>181</sup> Anand Utkarsh (2016) More Than 2 Crores Cases Are Pending In India's District Courts: Report, The Indian Express, June 9.

<sup>182</sup> All of these are not 498A or marriage related cases surely.

of various ills plaguing the justice system<sup>183</sup>. Therefore, considering the data available<sup>184</sup>, it may be inferred that the statement that a few 'disgruntled women' are enjoying privileges of finding easy access to courts to file 'false cases in order to retaliate' is unjustifiable. Moreover, for a woman complainant dealing with the patriarchal police, to get her complaint registered is a daunting task. Thus, in the given context, when common people find it difficult to access justice, merely making generalized statements about misuse of the law hardly makes sense.

Another hypothetical argument raised is that educated and elite women use 498A to harass husbands. However, this is again an illusory assumption not authenticated by facts, data or research. Even if it is assumed that this law is 'misused' then there is a need to understand the co-relation between the facts as to why these women marry in first place, and once they have entered into marital relationship, what are the reasons that motivate them to use 498A after spending a huge amount of money on the celebration of lavish weddings<sup>185</sup>. It is a clear fact that law offers limited solutions to a woman who resists the patriarchal institution of marriage. The law provides only for the retrieval of *stridhan* besides providing for maintenance<sup>186</sup>. Also, alimony settlements are frequently made under conditions of compliance to social norms of being a 'good' wife<sup>187</sup>. A woman is thrown out of the matrimonial house once she files a complaint, and therefore in order to survive and stay, she is compelled to find alternate option<sup>188</sup>. There is no legal process through which the money being

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<sup>183</sup> Mohanty Debabarta (2016) We require more than 70,000 judges to clear the pending cases: CJI TS Thakur, The Indian Express May 9 Also Law Commission of India (2014) Arrears and Backlog: Creating Additional Judicial (wo)man power Report No. 245, Government of India

<sup>184</sup> National Judicial Data Grid [http://164.100.78.168/njdg\\_public/main.php](http://164.100.78.168/njdg_public/main.php) accessed on September 1, 2016

<sup>185</sup> Das Usha Rani (2016) The Big Fat Wedding Industry in India: Recap of 2015 and Outlook for 2016, The Business Insider February 16. It estimates the cost of a wedding between Rs 5 lakhs to 5 crores in today's scenario. Currently the industry is 100,000 crores and is growing at 25 to 30% annually. It adds over 3 lacs jobs a year during the season

<sup>186</sup> Under Section 125, CrPC or under personal laws, a woman can apply for maintenance. However, studies have shown that the courts are not generous enough to order adequate amount to the wife. The PWDVA provides for remedies such as monetary or compensation order, however again the courts have zealously guarded this turf and the analysis of recent cases under PWDVA shows that this law has been used to deny women of their rightful claims.

<sup>187</sup> Mukhopadhyaya Maitrayee (1988) Legally Dispossessed: Gender, Identity and Process of Law, Stree, Kolkata

<sup>188</sup> Experiences reveal that often the property, if it is in the name of her husband, is transferred in the name of her in laws, the valuables are taken away and any bank accounts or nominations in any financial matters are reassigned to deprive women of their rights or possession. Even, the children are not spared; their school fee or related expenses are denied. The violent husbands, if in private jobs, business or are self employed, deploy all possible tactics to hide their real incomes and suddenly become 'unemployed' with no or little earning to avoid paying any maintenance to women and children. The courts frequently turn a blind eye to such manipulative strategies and compel



spent on the wedding celebrations could be recovered by the bride or her parents. Additionally, under no personal laws, a woman can demand equal division of matrimonial property or assets<sup>189</sup>. Further, the women who exhibit audacity to complain against a patriarchal family are stigmatized by the society. So, economically or socially, these 'disgruntled women' are not in an advantageous position, in case, the marriage breaks up. They neither receive any economic benefit by filing the case, nor are their rights protected by the law or the society. In fact, they end up being beleaguered, dispossessed and deprived of their dignity, respect, status and 'advantages' themselves in 'the process of harassing their husbands'. An analysis, therefore, is required to find out as to what are the factors that promote these 'disgruntled women' to register a complaint under 498A. Additionally, it has often been said that for the purpose of 'revenge' women retaliate and file a case under this law. In such a condition, then one has to examine the situational context that compels women to seek 'revenge'. There is a need to ascertain fact that whether it is a mutual dispute that arose between the parties that is so vengeful or is it because the patriarchal families or men as husbands could not tolerate that a woman is raising her voice, questioning and challenging the familial patriarchal authority. These are significant issues that require attention before making such assumptions.

### **Is Domestic Violence A 'Women Only' Problem?**

Victim blaming is an excuse that is often utilized to justify violence. Reasons such as social or psychological problems, or an attitude that 'she must have done something wrong to provoke her husband, her nagging behaviour, her style of cooking, not doing household chores, disobedience, her character, or that she couldn't bear a male child', all are used to portray a woman as culprit who needs to be 'chastised', 'disciplined' and 'controlled'. What is overlooked in this line of argument is woman's identity as a human being, her dignity and her self-respect. Society or the law do not blame a man for his wrongs but use a different social or a moral parameter to evaluate women's image, her reproductive capacity, her ability to do household or other work, her integrity and her character. An icon of a perfect woman as a daughter in law, as a wife and as a mother is created,

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women to produce proofs of income of self and the husband despite the knowledge that women in such situations cannot do so.

<sup>189</sup> Matrimonial assets or property refer to that assets that both husband and wife accumulate during the marriage because of their visible or non-visible contribution regardless of what title say. In UK, US, Europe, Singapore, Tanzania there are specific laws that deal with distribution of marital property. However, in India, a woman who walks out of a marital relationship even after spending years in marriage, could not demand her share in the matrimonial home or asset because the personal laws provisions based on patriarchal assumptions deny this.

idolized and propagated by the media as well as society and a woman is expected to fit into such an ideal and perfect description without recognizing the fact that each human being is distinct, has a different identity and that there is a need to respect diversity. Also, what is ignored is the fact that domestic violence is a typical 'ongoing' abuse where a woman victim may seek help multiple times. Instead, the service providers stigmatize the victims who continuously request support.

Furthermore, it is often said that domestic violence occurs because of a conflict between a mother in law and a daughter in law. A common assumption that is wrongly made is that 'a woman is another women's worst enemy'. However, by evoking such devastating arguments and by dubbing wife abuse as a 'women's problem', the male dominated patriarchal system often pits a woman against another woman. Women in such arguments appear either as helpless victims or controlling mothers or sisters who force men to inflict violence on wives. Men are absolved completely from the crimes they perpetrate. This argument ignores the social hierarchies and the power dynamics that operate within the family and kinship<sup>190</sup>. It also overlooks the fact that a woman, given no economic or social independence in a patriarchal family, derives her power solely from men – be it as his mother or as his wife. The power struggle between two women in such a structure therefore becomes inevitable. A mother in law by the virtue of her years of marriage or by producing a son enjoys an authoritative position in comparison to a new entrant. She acts as a carrier of culture, legitimizing and preserving patriarchy while training young women to accept their inferior position within the household<sup>191</sup>. She often feels socially and financially insecure when a new wife enters the same household and because of the internalization of patriarchy, she may abuse her daughter in law for lust of power or for desire of subordination of the weak. Kishwar noted that an ideal family in India venerates the mother-son relationship where a woman's status as a mother or a maternal figure is considered more important than that of a wife who represents a sexualized image of a woman and therefore deserves less respect<sup>192</sup>. This power struggle does not take place in the relationship between a father in law and a son in law because their spheres of operation are different from each other by the virtue of the fact that they live in separate households<sup>193</sup>. Moreover, in a

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<sup>190</sup> Chakravarti, Uma (1993) Conceptualizing Brahmanical Patriarchy in Early India: Gender, Caste, Class and State, EPW, 28 (14) 579-585.

<sup>191</sup> Yuval Davis, N. (1997) Gender and Nation, Sage, London.

<sup>192</sup> Kishwar M (1997) Women, Sex and Marriage: Restraints as a Feminist Strategy, Manushi 99 23-36.

<sup>193</sup> Menon Nivedita (2012) Feminism and the Family – Thoughts on International Women's Day, Kafilā March 8.

patriarchal set up, a mother trains her daughter to accept patriarchy through rigid social and sexual control, yet such authority is accepted as normal and desirable in a misogynist set up and no voices are raised when women as daughters are abused within the natal family. Also, women in an oppressive structure do exhibit a resistance against power in one way or the other – they either refuel patriarchy or rebel against it. Both are the victims of patriarchy, yet those who accept it either live in denial of oppression or become partners and collaborators with patriarchy, and those who dare to rebel against it are labeled as ‘destroyers of a family’. However, this argument of pitting a woman against another feed into patriarchy by reinforcing male power and colludes with the male interest of oppressing young women within families<sup>194</sup>. The need therefore is to re-examine the patriarchal structure and power relations within the family and transforming the social institution while economically empowering women, thus reducing their dependence on marriage.

#### **IV Analyzing Statistics relating to Cruelty and Dowry Deaths**

Today, the situation is that neither the police nor the judiciary considers the issue of domestic violence as a serious crime. The analysis of studies by women’s organizations point out that cases are not registered easily or at the first instance<sup>195</sup>. This is despite the fact that merely 1 out of 1000 victims air their grievances and the average minimum period for which women suffer before making a complaint is three years, as per a study<sup>196</sup>. Nevertheless, the Report ‘Crimes in India’ by the NCRB shows that the number of cases registered under the Section 498A and 304B have been increasing over the years. The report for the year 2014 indicates that at least ten criminal acts are reported every one hour under Section 498A<sup>197</sup>. This data does not include the cases where complaints are not registered as women are being made to run around the police stations of counseling centers or CAW cells. Another alarming fact that surfaced is that in 2014 one woman was murdered every hour by her husband and in laws for dowry. Again, this figure does not include the data on wives who have been murdered for reasons other than dowry by their husbands. Further, more than 10 women are forced to commit suicide every day. Surely, this data represents the tip of an iceberg since for every such woman murdered, forced to commit suicide or who faced cruelty, there are others who may not have reported such

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<sup>194</sup> Gangoli (2007) supra

<sup>195</sup> Singh Kirti (2015) supra

<sup>196</sup> CSR (2005) supra

<sup>197</sup> Mallapur Chaitanya (2015) Crimes against Women reported every two minutes in India, September 5, Scroll.in.

crimes for various reasons. It is also well known that not all the incidents are reported and of those reported not all are recorded<sup>198</sup>. Thus, it may be said that in the wake of ever-increasing crimes, any dilution of 498A is neither desirable nor warranted.

**Table 1 Data Available on Crime Against Women in Marriage during the Year 2014**

S. No.	Crime Head	Year					
		2010	2011	2012	2013	2014	2015 <sup>199</sup>
1.	Cruelty by husband and his relatives	94,041	99,135	1,06,527	1,18,866	1,22,877	1,13,403
2	Dowry Deaths	8,391	8,618	8,233	8,083	8,455	7,634
3	Abetment to Suicide	NA	NA	NA	NA	3,734	4,060
4	Dowry Prohibition Act	5,182	6,619	9,038	10,709	10,050	9,894
5	Protection of Women From Domestic Violence Act	NA	NA	NA	NA	426	461

Source: NCRB<sup>200</sup>

While analyzing the trend for past five years, from the Table 1 it may be said that the crimes against women in their matrimonial household is increasing. The analysis of data reflects that on one side where the Indian society glorifies women as mothers or creators and has created temples to worship women as 'Devi' or 'Goddess', on the other hand, it subjugates and humiliates women within homes. In spite of enacting or framing laws, policies or schemes to empower women, the violence against women within homes has not reduced. The crimes against women in the matrimonial household has increased sharply from the year 2010 to 2014. In the year 2015, a slight decline is registered in number of cases reported under the heading Cruelty Against Married Women, Dowry Deaths and Dowry Prohibition Act. This decline could be attributed to the inaction by police who refuse to register the matrimonial cruelty cases easily. After the Courts as well as the Ministry of Home Affairs have issued guidelines regarding arrests repeatedly over the years, based on the myth of the misuse of law, the police may have become more lackadaisical in their approach while registering these cases. Also, the apathy of police and judiciary guided by the patriarchal approach has started making an impact on the ground and therefore,

<sup>198</sup> Abhay (2016) Why a Decrease in Crime Statistics is not Always a Good News, The Wire, September 25

<sup>199</sup> From the National Crime Record Bureau (2015) Crimes in India, Tables Section as appear on its official website

<sup>200</sup> National Crime Record Bureau (2014) Crimes in India, Ministry of Home Affairs, Government of India

perhaps, fewer number of cases therefore have been registered in the year 2015 as compared to previous five years.

The NCRB report for the year 2014 highlights that cases of cruelty have increased by 3.4 percent as compared to those in 2013. Most of the cases have been reported from West Bengal (23,278), Rajasthan (15,905) UP (10,471) and Assam (9626). These four states together accounted for 48.2% of cases. Similarly, the records show that cases of dowry deaths have increased by 4.6% over the previous year. The data thus reflects that violence against women is rising day by day in the cities as well as in rural areas. Despite various programmes, schemes and policies launched for women's safety and security, the rate of crime has not reduced because most of these respond superficially to the symptoms rather than preventing the crimes or countering the structural inequalities prevalent in society. Contentiously, the report further pointed out that cases registered under the Dowry Prohibition Act have decreased by 6.2% during 2014 and a maximum number of such cases are reported in Bihar (2,203), Uttar Pradesh (2,133), Karnataka (1,730) and Jharkhand (1,583). The data on the PWDVA has been collected for the first time in 2014 though the law has been in existence since 2005. The report states that 426 cases have been registered in 2014 and 461 have been registered in 2015 under this law. The figures thus reconfirm the fact that violence against women within the institution of marriage has been on rise at alarming rates in both urban as well as rural areas. Also, only a few women succeed in getting their complaint registered because of the lackadaisical approach of the police to register the cases and guidelines repeatedly issued by the state to send such cases for reconciliation or settlement.

**Table 2 Disposal of Cases of Crime Against Women in Marriage by Police during 2014**

		Dowry Deaths	498A	Dowry Prohibition Act	Abetment of Suicide Among Women	PWDVA	Total Crime Against Women
Persons in Custody during the stage of investigation at the beginning of year	Male	5247	1468 7	4039	65	3	42382
	Female	253	1177	150	4	1	1877
Persons on Bail during the stage of investigation at the beginning of year	Male	3465	3844 3	3166	527	33	81968
	Female	617	8354	623	74	3	10655

Total number of persons	Male	8712	5313 0	7205	592	36	124530
	Female	870	9531	773	78	4	12532
Persons Arrested during the year	Male	18720	1814 30	17294	4420	625	451299
	Female	4867	4421 8	4254	759	68	61681
Persons released or freed before trial for want of evidence or other reasons	Male	3198	1612 5	1793	340	1	42141
	Female	626	3148	503	17	0	4775
Number of Persons chargesheeted during the year	Male	15554	1577 00	15355	3498	569	379859
	Female	3916	3919 3	3170	636	70	53158
Persons in custody during investigation at the end of year	Male	4001	1364 9	2871	241	49	43228
	Female	335	1865	208	15	0	2827
Persons on bail during investigation at the end of year	Male	4679	4708 6	4480	933	42	110421
	Female	860	9543	1146	169	2	13453

Source: NCRB<sup>201</sup>

The NCRB Report, 2014 also indicates that 6 percent of total arrests made under Section 498A. The category 'Other' IPC crimes reported 38 percent arrests. 10.4 percent were arrested for rash driving, 6.8 percent for thefts and 8 percent are arrested for riots<sup>202</sup>. Thus, even for the crime of rash driving, thefts and riots more number of persons are arrested than for those arrested under 498A. These figures refute the baseless allegations made by the state that the 'innocent people are arrested under 498A'. Also, the statistics indicate that more people are released on bail under 498A in comparison to those who are arrested. Numerically speaking, this may imply that it is easier to get bail in such cases as the police is not investigating properly or public prosecutors are not defending these cases appropriately or that judges are biased or lenient towards the accused persons. Curiously, the data in Table 2 reveals that a total of 181430 males and 44218 females were arrested during the year 2014 for the offence under Section 498A out of which 157700 males and 39139 females were charge-sheeted. In the matter of *K Veeraswami v Union of India*<sup>203</sup> the Supreme Court has explained that charge sheet is a final report of the police officer ascertaining the fact that he has conducted investigation of the cognizable offence and has

<sup>201</sup> Adapted from Crime in India 2014 published by the National Crime Record Bureau

<sup>202</sup> Ibid. Table 12.1

<sup>203</sup> 1991 SCR (3) 189, 1991 SCC (3) 655

been able to procure sufficient evidence for the court to conduct trial. This implies that once the police officer has found sufficient evidence the matter must be tried before the court and even in the cases where the bail has been granted to the accused, the trial goes on and in case the accused is found to be guilty s/he is supposed to be penalized. The NCRB report for 2014 showed that 47086 males and 9543 females were released on bail at the end of the year and only 13469 males and 1856 females remained in custody at the end of the year. Thus, while the number of persons charge sheeted are high, yet the number of persons in custody at the end of the year remains low. This reflects that it is easier to take bail in such cases and that the law takes no stringent action against those who are charge sheeted under 498A.

Interestingly, the report states that, "A total of 8,144 cases of cruelty by husband or his relatives, 6,497 cases of kidnapping & abduction of women, 4,641 cases of assault on women with intent to outrage her modesty and 2,540 cases of rape were such cases in which final report were submitted by police showing the cases as false"<sup>204</sup>. The report nowhere mentions as to the manner or method by which it has arrived at such a conclusion. Such statements reflect the lack of sensitivity with which cases of crimes against women are dealt with. No attempt is made to explain the reasons for such few convictions in 498A cases. Is it apathy on the part of the police that they write incomplete FIRs or because they conduct shoddy investigations or that complainants are forced to withdraw the complaint? No explanations are provided. Further, the NCRB report mentioned that the, "Highest conviction rate was observed under the Immoral Traffic (P) Act (48.6) and the Indecent Representation of Women Act (46.7) whereas low conviction rate was observed in cases under the Dowry Prohibition Act (10.2) and cruelty by husband or relatives (13.7)"<sup>205</sup>. The report does not explain the contradiction relating to number of persons charge sheeted under 498A and those convicted by the courts. This data also does not indicate the fact pertaining to the number of years a case is dragged in the court or the number of cases in which 'compromise' or 'settlement' has been reached by the parties. However, experiences reflect that the conviction rate is low because many cases are compulsorily and forcefully 'settled' between the parties and the FIRs are quashed to prevent breakup of marriage<sup>206</sup>. The phenomenon of witnesses turning hostile is common and therefore conviction rate goes down. Often, complainants withdraw the matter. Additionally, many women may not come

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<sup>204</sup> Ibid.

<sup>205</sup> Ibid page 92

<sup>206</sup> Ekta Resource Center for Women (2011) A Study of 498A in Tamilnadu, Madurai

forward to give evidence against perpetrators because of fear, compulsion or due to pressure from the families to settle the case. Moreover, the eagerness of the law enforcement agencies to arrive at a settlement is one of the reasons which results in high acquittal rate. Also, for the cases which are tried in the court the acquittal becomes easier because of the tardy reporting and investigation conducted by the police. Jaising<sup>207</sup> explains that the high rate of acquittal is the result of shoddy investigation, benefit of doubt given to the accused or plain bias against women. Subjectivities and biases, gender stereotypes, zeal to save family, giving chance to `young men and women' to move on', all, club together to influence trials under 498A. The reasons of acquittal are nowhere compiled in the report.

The statistical data represents the tip of the iceberg as there are many cases of violence which go unreported because the victims never come forward to report the case. Under reporting of crime is a well-known fact and is dependent on many variables including willingness or the unfavourable situation of victims to report a crime or denial by the police to register a crime. Further, a huge discrepancy may be noted in the data obtained from the NCRB report and the data presented by the NFHS<sup>208</sup>. As per the NFHS-3, 44.3% of married women in rural areas and 36% of women in urban areas have experienced some form of spousal violence. The law has in no manner been able to reduce the incidence of domestic violence. In fact, the number is escalating and in the patriarchal, consumerist, neoliberal society, the dowry wish list has been monstrously expanding. The pomp and show with which weddings are celebrated has acquired a new dimension where atavistic culture has been fuelled in the globalized world where exorbitant amount of money is being spent to maintain a lavish style. By indulging in the debate on misuse of law an attempt has been made to divert attention from the larger issues relating to the seriousness of the crime, structural realities that are fueling patriarchal tendencies and the responsibility of the state to provide for social and economic alternatives to women survivors as well as to the victims of violence. Ironically, the Law Commission in its 243<sup>rd</sup> Report<sup>209</sup> in para 7.1 remarked that, "The object and purpose of Section 498A cannot be stultified by overemphasising its potentiality for abuse or misuse. Misuse by itself cannot be a ground to repeal it or to take away its teeth wholesale. The re-evaluation of Section 498A merely on the ground of abuse is not warranted..... The allegations of misuse do not however

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<sup>207</sup> Supra

<sup>208</sup> Though no actual comparison can be made between these two different data sets yet the picture that emerged from these two sets of reports is different and perhaps, conflicting. Yet one aspect is common and that is that violence against women is increasing.

<sup>209</sup> Law Commission of India (2012) Section 498A, Report No. 243 Government of India



mean that the Police should not appreciate the grievance of the complainant woman with empathy and understanding or that the Police should play a passive role". Interestingly, it further commented, "Section 498–A has to be seen in the context of violence and impairment of women's liberty and dignity within the matrimonial fold. Mindless and senseless deprivation of life and liberty of women could not have been dealt with effectively through soft sanctions alone. Even though values of equality and non-discrimination may have to gain deeper roots through other social measures, the need to give valuable protection to vulnerable sections of women cannot be negated".

**Table 3 Disposal of Cases of Crime Against Women in Marriage by the Courts in 2014**

		Dowry Deaths	498A	Dowry Prohibition Act	Abetment of Suicide Among Women	PWDVA	Total Crime Against Women
Persons in Custody during the stage of trial at the beginning of year	Male	33217	173251	20472	847	8	384375
	Female	1824	12785	231	81	0	16488
Persons on Bail during the stage of trial at the beginning of year	Male	42197	521223	24789	8989	205	1004125
	Female	8653	94345	3740	1967	8	118688
Total number of persons in trial during the year	Male	90968	852174	60616	13334	782	1768359
	Female	14393	146323	7141	2684	78	188334
Persons Against Whom Cases were Compounded by Courts	Male	192	9976	557	12	3	16638
	Female	44	2512	83	3	0	2744
Persons Against Whom Cases were Withdrawn	Male	74	1804	158	6	0	3030
	Female	9	252	46	3	0	331
Persons in whose cases trial was completed during the year	Male	11261	98742	8037	1343	57	216162
	Female	1924	17811	1206	289	0	23998
Persons Convicted	Male	3416	14048	862	189	13	43447
	Female	642	2312	135	22	0	3698
Persons	Male	7403	80283	6972	1154	33	164911

Acquitted	Female	1183	14482	1006	267	0	19072
Persons Discharged by the Court	Male	442	4411	203	0	11	7804
	Female	99	1017	65	0	0	1228
Persons in Custody at the end of year	Male	23489	147280	11488	1283	82	329974
	Female	2601	14872	664	188	3	20111
Persons on Bail at the end of year	Male	55952	594372	40376	10690	1862	1202555
	Female	9815	110876	5142	2201	309	141150

Source: NCRB<sup>210</sup>

### **Are the Jails Filled with Saas Nanads<sup>211</sup> and Other Relatives of Husbands under 498A?**

Media has raucously reported<sup>212</sup> that the Tihar Jail No. 6<sup>213</sup> is mostly occupied by the relatives of husbands framed under 498A making the news overtly sensational. However, a glance at the website of the Tihar Jail<sup>214</sup>, a well-known prison complex located in Delhi reveals that as on 31<sup>st</sup> December 2015 the number of persons lodged in the jail is 13604 males as compared to the sanctioned capacity of 6250 and 579 females as compared to the sanctioned capacity of 400 inmates. Almost 71% males and 77% females are residents of Delhi and 47% males and 43.5% come from families earning Rs, 50,000/- or less annually. Around 87% males and 86% females are in the age group of 21 to 50 years while the rest 15% are above 50 years of age. The assumption that old frail relatives of the husbands are put behind bars is therefore refuted from this data. Interestingly, the data further highlights that only 0.08 percent undertrials have been lodged inside the jail for offences under Section 498A and 2.4 percent are being tried for dowry deaths. Only 0.7 percent are being tried under the Dowry Prohibition Act. Most under trials are tried for offences like murder (22.3%), rape (16.4%), thefts (14.6%), dacoity (9.1%), attempt to commit murder (7.6%) cheating (4.2%), kidnapping and abduction and so on under various sections of the criminal law. This data disproves the assumption that 498A is misused by urban, elite and educated women as the Tihar jail is not filled with *Saas* or *Nanads* arrested under 498A. Surprisingly amongst the population of the convicts only 2.5% are convicted for dowry deaths and 0.68% are convicted for offences under the Dowry Prohibition Act while none is convicted

<sup>210</sup> Adapted from Crime in India 2014 published by the NCRB

<sup>211</sup> Saas in Hindi is Mother in Law and Nanad implies Sister in Law

<sup>212</sup> Manra Mahinder Singh and Tewari Mansi (2014) Tihar Overflowing with Dowry Cases: How Infamous Delhi Jail is Crammed for to Bursting With Women Accused of Harassment. Mail Online India, July 6

<sup>213</sup> Special section reserved for women prisoner and is also known as Women's Jail

<sup>214</sup> [http://www.delhi.gov.in/wps/wcm/connect/lib\\_centraljail/Central+Jail/Home/Prisoner+Profile](http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile) accessed on August, 3, 2016

for an offence under Section 498A. Hence, the assumption that jails are 'crowded' with husbands and their relatives is erroneous and faulty. Rather, the percentage variation of convicts and undertrials as compared to the previous year for the offence under Section 498A shows decline by -0.08% and the decline of 0.06% for those convicted or tried under the Dowry Prohibition Act. These figures point to the fact that the police and courts are non-serious about the crimes that affect women. Many cases are reported under 498A yet not many offenders are penalized. Domestic violence is clearly treated as a lesser crime though studies have shown that it has a serious impact on the health and lives of women and children.

These findings are further corroborated with the data furnished by the Prison Statistics India, 2014<sup>215</sup>. The analysis indicates that out of total 1,387 jails all over the country, as on 31<sup>st</sup> December 2014, a total of 96% males and only 4% females are lodged inside these prisons. The report adds that the maximum number of persons have been convicted for the offence of murder, rape and attempt to murder. Murder alone accounted for 60.9% of the total convicts. Crime wise analysis of the data indicates that of the number of convicts by the offence type at the end of 2014, only 1272 have been convicted for offence under Section 498A out of a total 114584 convicted which is only 1.11% of total convicted persons. Only 493 out of 16775 (2.9%) are convicted under the Dowry Prohibition Act at the end of 2014, of all convicts under the Special and Local Laws (SLL). Under this category, the highest percentage of convicts were reported under the Narcotic Drugs and Psychotropic Substance Act (53.2%), the Arms Act (19.1%), the Registration of Foreigners Act (11.5%), Excise Act (4.7%) and the Railways Act. Thus, the percentage of convicts under 498A or dowry related offences remain are negligible.

Also, a total of 2,31,962 under trial prisoners from different parts of the country were lodged in jails for committing various crimes. Out of these, 27% are lodged for committing murder. Theft and attempt to murder were the two crimes that account for the large number of under trial prisoners. Only 2.3% are lodged under the offence of Cruelty Against Married Women and 5.8% for the offence of dowry deaths. Under the category, SLL, 4.7% are tried for offences under the Dowry Prohibition Act. The fact remains that not many under trials are lodged in jails under Section 498A contradicting the reports by the media and the courts decisions. The myth that 498A has been misused or abused is contradicted and

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<sup>215</sup> National Crime Record Bureau (2014) Prison Statistics India, Ministry of Home Affairs, Government of India

negated by the analysis of the data from the NCRB report as well as statistics from the prisons. Clearly, the jails are not filled by arrests made under 498A. Rather it is a travesty of justice that while so many cases are reported under 498A yet only a few are imprisoned during trial and none are convicted under the law. The data reveals that crimes committed within marriages are not taken seriously by the law enforcement officials<sup>216</sup>.

### **Analyzing the Context in which a Complaint is Filed**

An erroneous though common perception being circulated is that women are eager to approach the police and therefore the courts are flooded with the cases. Often, the officials mistakenly lament that women are no longer compliant and are not 'willing to adjust' as they are getting ambitious and are not willing to make compromises over minor issues. However, these faulty hypotheses overlook the fact that frequently women bear the violence for years before taking any action. They make a complaint when in despair and use law as the last resort after exhausting all possible channels when left with no other remedy or option<sup>217</sup>. Even when they pick up the courage to enter the police station to file a complaint, gender biases, corruption and inefficiency hinder them to do so<sup>218</sup>. Also, research studies have shown that registering a complaint under 498A is a monumental task<sup>219</sup>. Disclosing personal problems and sharing one's private life is not an easy task and women frequently spend years mulling over the issue of resolving their troubles through various other methods. Embarrassment, stigma and guilt in sharing one's hardship prevent many women from voicing their concerns. A woman knows that she may be further tortured and her life and liberty may be endangered when the accused know of such complaint and the police fails to act swiftly and sternly. Often, the overreaction to the 'misuse of law' ignores these realities of a woman's life. Also, a survivor is compelled to face a double jeopardy – one in handling violence at home and helping herself and her kids to come out of the turbulent phase and secondly, she faces further troubles because of the attitude of the kin, police, courts and the society, which condone violence and 'condemn' the survivor for raising her voice. These factors are not considered while adjudicating the domestic violence cases.

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<sup>216</sup> The Crime in India Report NCRB for 2015 states that the conviction rate is 34.7% for Dowry Deaths and 14% for crimes under S 498A, 18.5% under Dowry Prohibition Act and 47.8% under PWDVA

<sup>217</sup> Humsafar (undated) A Comprehensive Study on Efficacy of 498A IPC in State of Uttar Pradesh

<sup>218</sup> Singh Kirti (2015) supra

<sup>219</sup> Palkar V. (2013) Failing Gender Justice in Anti-Dowry Law, South Asia Research, Vol. 23(2): 181–200; 041121

## V Is Domestic Violence Merely a `Domestic` Dispute?

Dispute arises when two parties, on an equal footing, argue over a matter. Domestic violence, on the other hand, entails abuse that may be physical, mental, emotional, financial, sexual or psychological and occurs in a situation where one party exerts power and control over the weaker one. Yet, often, violence within a domestic situation is dubbed as a routine marital dispute or conflict by the state and the society, without recognizing the gravity of the circumstances and its impact on the victim. The predominant presumption is that matrimonial discord is the key for filing cases under the law and in the process, violence is negated<sup>220</sup>. Society, the legal system, the social mores and practices, cultural norms, all, collude with batterers and conspire against the victims. Religious teachings, norms and practices, all preach to condone violence within homes or rather, permit it while valorizing the image of an ideal woman who silently bears ill-treatment. The ideology of repression compels women to compromise with the violent situation and this is a strategy deployed by many counsellors as they believe that legal recourse will `break the family`. Also, the state assumes that its role is to protect the marriage and salvage the family from being torn apart by arriving at a compromise or a *samjhauta* between the parties, often forcefully using intimidation or related tactics. It is in the process of arriving at a compromise that pervasive violence is normalized and is regarded as ordinary and mundane. Violence, here is seen as an act of enforcing discipline rather than an act of intimidation or terror and is therefore justified. It is not only the establishment that interprets domestic violence in a narrow sense rather it is a common perception that domestic abuse entails a dispute between a husband and a wife and therefore a symptom of collapsing marriage relationship which can be salvaged by counseling. Many of the counseling centers therefore compel women to `adjust` within marriage and `reconcile` even in cases where women wish to take legal recourse. Mandatory mediation is pushed without considering the fact that in most cases mutual agreement tactics are deployed by the accused to delay the case and to escape criminal litigation while discouraging the survivor. Through the use of such tactics, victims who withdraw the case often lose their hard-earned legal ground. More so because of oppressive trial procedures, interminable delays, emphasis on efficiency of law rather than its effectiveness, complex legal language and complicated legal and social culture, the legal discourse relating to 498A is erroneously distorted by a few. Crime can in no way be addressed by mediation while negating bodily integrity of the victim

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<sup>220</sup> Trivedi PK and S Singh (2014) Fallacies of a Supreme Court Judgement: Section 498A and Dynamics of Acquittal. EPW XLIX 52 90-97

and turning a blind eye to violence. The current dispute resolution system transmits the hegemonic ideas and promotes dominant cultural norms while supporting the established social order and in the process, creates legal culture that protects the interest of the prevailing patriarchal order.

What is used is the Alternative Dispute Redressal system as an approach to 'resolve' conflicts rather than the rights based approach to provide justice to the victims of violence. The goal is to pacify emotions and this is done without addressing the power discrepancies within the relationship. For this purpose, counseling centres have been created under different names like Crimes Against Women Cells, *Sulah kendras* or family centres. All these centres deal with 'domestic violence' or 'disputes between a husband and a wife' in order to save the institution of 'marriage' through active negotiation or mediation. The purpose is to avoid complicated legal process to reach simple 'compromises' and thus to swiftly 'resolve' the cases while apparently reducing the amount of litigation on the already overburdened courts, no matter that this is done at the cost of denying justice and even entails harm to the victim. Coercing women to go back to violent situations without any promises of security or safety is not a viable solution. Mediation or conciliation avoids questions relating to power, property and violence within a relationship. Use of such coercive process in a situation when two parties are not at par creates more problems rather than resolving them. This process of 'coercive harmony' as explained by Laura Nader destroys rights by limiting discussion of the past<sup>221</sup>. It is opaque, prohibits anger, curtails freedom, eliminates choices and removes protection of law. It overlooks 'victim' status and compels women to settle the matter even if this is done at the cost of her health, life or limb. Mediation within marriage does not address the structure of power located within the relationship and ignores the fact that parties in conflict in no way operate within the universe of 'balanced bargaining equity'. Mediation in no way satisfies the survivor's need for justice. Rather it normalizes and trivializes the violence in everyday lives and compels survivors to curtail their emotions and hide their resentments that arise when they face abuse. During the process of mediation, a woman is vulnerable to threats and harassment and is under extreme stress and pressure, yet the reconciliation procedure does not consider these facts. Mediation overlooks legal entitlements and ends up in denying justice to women who have less bargaining power and perhaps lack the capacity to negotiate.

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<sup>221</sup> Nader Laura (1994) Coercive Harmony: the Political Economy of Legal Model Presented at the opening session of the National Association of Brazilian Anthropologists, March

## **Negating Brutal Violence, Trivializing Severe Abuse**

Below is a verbal transcription of dialogues exchanged at the counseling session in December 2015 which the author observed. In a room in a counseling office in South Delhi, there was an expert counselor, a frail looking woman survivor with her aunt and the perpetrator with his elder brother besides the author who was present there as a researcher after she had gone through the records of the complainant and after speaking with her for a while before the session<sup>222</sup>.

Counselor to the survivor: So what do you want? (the survivor remained silent)

The aunt of the survivor intervened: Sir, she has suffered a lot. (showed scars and burn mark on survivors' hands)

Elder Brother of the perpetrator: Sir, this is a common dispute between a husband and a wife and these are usual things that happen in every such relationship...

Perpetrator intervened: Sir, these are self inflicted marks...she has done it herself to make a story...to falsely implicate me and my family...

Counselor: Hmm...(to the perpetrator) but why have you allowed her to do that? She is your wife after all. Don't you know how to treat a wife?

Perpetrator: Sir, I am willing to keep her but she is refusing.

Counselor to the Survivor: Why are you refusing?

Survivor: Still sobbing...

The aunt of the survivor: Sir she is willing to go provided he (the husband) stops abusing her....

The elder brother of the perpetrator: Sir he will stop that...

Perpetrator (intervened): She should behave nicely...After all it is her duty to take care of the family.

Counselor: But she is your wife you are supposed to take care of her

Perpetrator: Sir but she must respect me and my parents...Also she does not know how to cook food, to take care of kids, not to argue with my parents on small issues.....

Counselor: For six years she has been with you taking care of your family...is she not doing everything? What do you do?

Perpetrator: Umm.....Sir I have a small business.....

Counselor to survivor: Do you want to give him another chance?

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<sup>222</sup> All the names and identities are hidden here with the intent of protecting the identity of the victim

Survivor: Silent.

The aunt of the survivor: Yes sir she will... provided he gives in writing he will not beat her...

Perpetrator: Will she behave nicely...she she never listen and argue with my family...

Elder Brother of the perpetrator: Sir what in writing...these are usual things...happens in every family...This is not a crime...He is not a criminal...She is his wife...Isn't it is common to discipline and control a wife and ...*agar haath utth bhi gaya toh kaunsi badi baat hai?aisa toh har ghar me hota hai..* (Even if he has raised his hand what is the big deal about it? It happens in every household.)

Author could not stop herself from intervening here: *Haath utth gaya...*Is he not a criminal? She has undergone six abortions, more than eight miscarriages over a period of six years, undergone treatment for broken bone and broken jaws three times...her right eardrum was damaged...the skin of her back has been ruptured and is charred... she was admitted for a fractured hand a year later and had to stay in hospital for eight days....three years back an attempt has been made to burn her alive...there are instances of other forms of abuses... and her two daughters are also being beaten regularly, elder one not being sent to school....Is it all true? Isn't all that a crime? Just because she is his wife, is he entitled to treat her this way? If one hurts any stranger s/he is jailed for every single act of brutality, but here just because she is his wife he is entitled to commit such actions without even thinking of repercussions? Are men entitled to own and brutalize the bodies of their wives just by the virtue of marriage? What form of enslavement is this?"

(The rest is omitted as it is irrelevant for the purpose here)

These are the common dialogues often repeated in almost every counseling session. These arguments hide severe violence behind the garb of everyday domestic disputes while upholding entitlement of men over women's bodies and are commonly being raised in situations of bargaining domestic violence. What is negated and omitted in such negotiations is the coldblooded history of brutal ruthless injuries and the intolerable pain women undergo silently for years. No one in a counseling session or otherwise keeps track of the multiple injuries and manifold harm women continuously face over a prolonged period before they seek help. Even otherwise, the law enforcers hardly contemplate the harm or the injuries women undergo. Frequently, questions have been raised that when a man abuses his wife it is an act of discipline and that when he apologizes later it is not to be counted as violence; or why did she not resist; or he is 'progressive' therefore he could not commit violence, or that she has not raised her voice therefore she accepts it as her fault, or she has provoked him; or because he



loves her and is therefore entitled to rage or because it is a man's right to control and discipline his wife and children and so on. These strings of myths have been used to justify and condone violence. The attempt is to pretend that there is nothing wrong with such behavior denying the fact that every such act is a crime and the cumulative effect of such acts over a period may seriously hamper the victims' social, physical and mental health. Violating a woman's integrity and safety needs to be dealt with as per the provisions of law, yet this is consistently disregarded. Such a tendency to ignore the daily act of violence strengthens the sense of impunity of the perpetrator of the violence. An act of aggression, threatening, intimidation, hurt, cruelty, and so on, remains violence and cannot be shielded under the garb of the marital relationship or the location where it is committed. Holding the offender accountable and fixing his responsibility is important and this aspect has been overlooked by both the state and the society. Also, the scenario depicts the manner in which the situational context as well as individual notions of various actors involved, such as violent husbands, dependent battered wives, the socio-economic background of the parties, the subjectivities of counselors and other factors are brought into play to determine the legal outcomes. This is problematic because justice apparently is invisible in such interaction.

### **Compounding the Non-Compoundable: Trivializing the Legal Process**

Section 498A is technically a cognizable and a non-compoundable offence. However, the manner in which the law is implemented by the courts, the police, the counseling centres and the attitude of the society is such that enormous pressure is put on the woman survivor of violence to compromise – either to go back to a violent situation again with a little assurance that the violent act will not be repeated in future or to 'settle' the case, take her dowry, withdraw the legal case, apply to the court to quash the criminal proceedings and 'move on'. The focus is laid on saving the institution of marriage per se, rather than providing a violent free environment to the survivor or to meet the ends of justice by penalizing those who commit the crime of violating a woman's mind, body and the soul. As the *Khap Panchayats* issue *diktats*, similarly, the formal, informal or quasi judicial fora force women to see violent marriage as a lovable zone and compel them to adjust into it. Some women's groups too, working on the issue, see 498A as a tactical strategy or a tool to arrive at a negotiation with the accused rather than seeking justice through convictions of the culprits. At each subsequent stage of the criminal justice system – from pre-litigation to trial, the approach followed is to settle the case. Providing justice to a woman is not a concern. Law hardly punishes the perpetrator of violence. Even in cases where a

trial continues, the complainant is often compelled to give up the legal battle because of reasons like paucity of funds, delay and complications in the system, lack of support and so on. Personal law provisions relating to restitution of conjugal rights, fake custody battles, denial of maintenance, divorce applications, are all strategically deployed as tactics to harass the complainant. Applications are filed to delay the matter with the sole aim of pressurising the woman to give up litigation. Implicating the complainant and her family in false cases is also one of the techniques deployed in the legal battle besides blaming the victim. The purpose is to forcefully compound the non-compoundable. Proceedings are quashed whereby the complainant is compelled to file an affidavit or make a statement stating that all her grievances are resolved or amicably settled and acquittal is sought on the ground that the complainant has turned `hostile' thus the case should be closed. The courts, police, society, all compel women to give up the path of litigation and discourage them in their attempt to seek justice.

### **The Shield of Language Game**

Violence is an act of terror whether carried out in public or in a private. A violent act committed by a stranger has similar physical impact as compared to a violent act committed by the person known to the victim. An act of violence committed by a man on another man or by a man on a woman requires similar penalty. However, the legal language trivializes the seriousness of violence inflicted in the home by attaching the label `domestic' before it. The spatial location as well as relationship element is utilized to reduce the gravity of the criminal act. Law `normalizes' the violence when it is inflicted at home by the man whom a woman trusts. The relationship between the abuser and the victim is deployed to deny the vulnerability of the victim while overlooking the imbalance of power. Though violence is a strategy of control and terror, it loses its value when the term `domestic' is attached to it. `Domestic' therefore has spatial consequences. It also determines the political and legal boundary of the relationship and status of each person involved. The term segregates between public and private spaces and thus limits the role of the state in the later. Based on the common doctrine of the law of coverture<sup>223</sup> it denies independent legal identity or protection to a married woman. By situating an act of violence in its locational context, and by recognizing the subordinate relationship of the victim with the abuser, the gravity of an abusive experience is bargained. By attaching emotional value to the

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<sup>223</sup> Propounded by Blackstone in 1765, the law of coverture assumes that the legal identity of a married woman is merged with her husband upon marriage

context of violence, the significance and relevance of abuse is devalued<sup>224</sup>. Therefore, such an act of violence is condoned or calls for lesser punishment. It allows the perpetrator to act without fear or deterrence. The legal system therefore connives with the men to control women while reiterating the belief of 'rightness' of male power and 'entitlement' of men within domestic sphere<sup>225</sup>.

It is worth mentioning here that in the international law and human rights context, the term 'domestic' has been used as a shield by governments to disallow any scrutiny or review of the allegations of violence against it. Under the garb of resolving internal or domestic conflicts, human rights violation is often perpetrated by the state on the common people, as is happening across several states in India<sup>226</sup>. 'Domestic' here protects a pin pointedly nationalist agenda and promotes regressive and oppressive ideology. It signifies the locus of preservation of power and oppressive traditions<sup>227</sup>. Such practices shield violence in private spaces from common scrutiny while using the defense of 'domestic' or 'internal' to avoid any political or legal implications of unjustified actions. Ironically, such ideologies also see women as preservers, keepers and promoters of traditions where as control over their actions lies with the males.

### **Public Law, Private Spaces**

The law and the legal system are public whereas the family is treated as a private institution. Therefore, when a 'private', 'family' matter is brought in the public domain, it is seen as an act of defiance or an act of rebellion by a woman who is disobeying the social rules and norms. The law and society, assumes, that a man, and his home needs protection from the defiant woman who otherwise, if allowed, may create chaos within the social order. Much emphasis in patriarchal societies is laid on preserving the family. The law, culture, the religion and the business, propagate and thrive on the idea of keeping the institution of the family intact because it serves various purposes including strengthening of casteist, imperialist, sexist and patriarchal regime. A girl from her childhood is taught to see marriage as the sole purpose of her existence. This belief is deeply entrenched. Therefore, even when a daughter is brutally tortured in her marital

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<sup>224</sup> Marcus Isabel (1994) Reframing Domestic Violence: Terrorism in Home, In *The Public Nature of Private Violence: Women and the Discovery of Abuse*, Editors Fineman Martha A. and Mykitiuk Roxanne Routledge, New York

<sup>225</sup> Ibid p 18

<sup>226</sup> In India, violence is being perpetrated by the state in Kashmir, North Eastern region and the so-called Maoist areas where oppressive laws like AFPSA have been used while pitting people against each other.

<sup>227</sup> Marcus Isabel supra n 127 p. 27

house, she is forced to remain in the violent situation<sup>228</sup>. Even if one daughter is murdered, the parents hope that second one will remain safe in marriage<sup>229</sup>. To be controlled by men is the ultimate destiny of women, is an idea that is deeply embedded and guides the legal as well as the social discourse. However, when a woman questions such structures, she is seen as a menace, putting family and the social order into crisis. Men therefore, are seen as victims who need protection from the 'draconian' and the 'monster' laws. Preserving marriage becomes a crucial goal because the entire political economy is organized around the family. Paradoxically, the fact that many women suffer in marriage – violated, humiliated, tortured and abused, and, yet are compelled to 'stay' and 'adjust' to the violence, is considered as normal.

Law uses a gendered notion of citizenship while adjudicating the cases of violence against women. Different parameters are utilized to adjudicate women's complaint despite constitutional provisions that guarantee equality and positive discrimination. Equality on the basis of sex is a constitutional provision under Article 14 while under Article 15 it is promised that the state ought to make special provision for women, children and other marginalized sections. Article 21 guarantees the right to life with dignity and Article 51 A (e) directs the state to renounce practices derogatory to the dignity of women. The state is duty bound to comply with these provisions, yet when it comes to implementation of the laws, a woman's identity is often reproduced and mediated through the fabric of patriarchal heterosexual family norms. For example, the Delhi High Court in *Harvinder Kaur v Harminder Singh Choudhary*<sup>230</sup> has held that the "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 any place. In a sensitive sphere, which is at once most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond". Sanctity attached to marriage is a reason that is linked to unwillingness to intrude therein. This verdict was upheld by the Supreme Court in *Saroj Rani v Sudarshan Kumar*<sup>231</sup> while overruling the decision of the Andhra Pradesh High Court in T

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<sup>228</sup> Despite amendments made in the Hindu Marriage law which render marriage as a contract, the sacramental aspect still dominates the social psyche and parents prefer to send a daughter back to her matrimonial house rather than risk having a divorcee at their own home even if it entails risk of her being killed or being driven to commit suicide.

<sup>229</sup> Menon Nivedita (2012) *Feminism and the Family – Thoughts on International Women's Day*, Kafil March 8

<sup>230</sup> AIR 1984 Delhi 66; ILR 984 Delhi 546 para 33

<sup>231</sup> 1984 AIR 1562; 1985 SCR(1) 303

Sareetha v T Venkata Subbaiah<sup>232</sup>. Courts in such cases take the view that it is essential to preserve the institution of marriage and that marital privacy implies that the state must refrain from entering the private domain of the home. The public-private dichotomy is thus used to deny women their rightful entitlements under the law. The reasoning of law simply seems to have been stuck in the colonial period as when deciding about Rukmabai's case Justice Pinhey evoked pristine moral past and the logic of native customs to decide a case of a young woman who refused to join the company of her husband Dadaji who pleaded the provision of restitution of conjugal rights<sup>233</sup>. The discourses on the law and morality, justice and emancipation, civilization and barbarism, masters and slaves, colonial justice and local customs, were used then to sift justice through the labyrinth of hegemonic reasoning to arrive at a dominant logic. It is similarly used now to justify the pathological stand while assimilating the thread of justice with that of morality. Different standards and scales of justice are utilized by the state to deal with the cases when the complainant is a married woman. Sarkar<sup>234</sup> noted that while adjudicating the matter of Phulmonee in 1890 who was raped to death by her husband, the English judge exonerated the accused without questioning the husband who insisted on sleeping with the child of age ten, or the custom which allowed him to do so without impunity because colonial rulers did not want to meddle with the customs of the natives, even if they were barbaric for the reasons of political expediency. In a similar tone, the state today does not wish to interfere with the private violence inflicted within the sanctity of home, thus obliterating the differences between the colonial hegemony and the present autocratic patriarchal regime.

### **The Exploitative Patriarchal Agenda**

The police are the first line of contact in most of the cases for the victims of domestic violence. They act as the gatekeepers of the criminal justice system. Their behavior, sensitivity, attitude and understanding towards such cases are important. However, police often work against women in such cases<sup>235</sup>. Registration of the FIR is not done at the first instance, either victim is sent back or the response is delayed. Police often refuses to register the case if it cannot find a component of dowry demand in the complaint or because `bringing

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<sup>232</sup> AIR 1983 AP 356

<sup>233</sup> Chandra Sudhir (1998) *Enslaved Daughters: Colonialism, Law and Women's Rights*, OUP, New Delhi

<sup>234</sup> Sarkar Tanika (2001) *Conjugal and Hindu Nationalism: Resisting Colonial Reason and Death of Child-Wife in Hindu Wife Hindu Nation: Community, Religion and Cultural Nationalism* Permanent Black, N Delhi p119-225

<sup>235</sup> Karlekar Malavika (1998) *Domestic Violence*. *Economic and Political Weekly*. XXXIII (27)

bedroom affairs in public is not good'. The police and the courts use their own sense of patriarchal morality to decide upon the rights and wrongs within marriage thus forcing a reconciliation to maintain family integrity<sup>236</sup>. Low priority is attached to domestic violence incidents. Complainants are often compelled to make repeated trips to the police station. Arrest is rarely done. Often, the enforcement agencies fail to act against family members involved in crime as Agnihotri and Parliwala<sup>237</sup> explained that the "Stereotypes of the "Indian family" cast it as a haven from the travails of a materialist and modern world, an arena in which women - mothers, sisters and daughters - were respected and honoured. Family is seen as an epitome and the crucible for the love and spirituality on which Indian civilisation rested. These stereotypes played an important part in raising the apathy of the neighbours and the government, and guide the attitude of the police and the in-laws to cover up the crimes". Also, it has been observed that neither do the police make attempts to recover the *stridhan* in a timely manner nor do they support the victim in any other way. Investigation is not done properly and evidences are not gathered therefore many cases are dismissed on the ground of inadequacy of proofs. The extent and the nature of domestic violence is not determined and legally no steps are taken to redress the abuse, injuries, hurts, burns and other forms of violence women face. Medical evidences like lacerations, wounds, injuries, or scars are hardly considered while dealing with such cases though they play a significant role in proving the crime. Frequently, the statements of the complainant and other crucial witnesses including the family members or relatives are not recorded. Often, the abuse in such cases is perpetrated behind closed doors, with no one to witness it. Those family members who witness the brutality are apprehensive about or shy away from testifying because of fear or their loyalties to the accused. The police or the courts do not take these factors into account. Also, police in its zeal to prove its efficiency attempts to register less number of cases in a particular area of jurisdiction. Police apathy is a reason that less cases are reported, or if reported, results in low conviction. In police culture, intervention in domestic situations is not perceived as a "real" police work. Often, domestic abuse cases are viewed as unglamorous and unrewarding and therefore few personnel are interested in dealing with the same. The 243<sup>rd</sup> Report of the Law Commission observed that, "the correct advice of legal professionals and the sensitivity of police officials are very important, and if these are in place, undoubtedly, the law will not take a devious course. Unfortunately, there is a strong feeling that some lawyers and police personnel have failed to

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<sup>236</sup> Karlekar M(1995) No safe spaces, Report of a Workshop on Violence Against Women, March 27-28 CWDS, Delhi

<sup>237</sup> Supra

act and approach the problem in a manner ethically and legally expected of them”.

### **Distorting Criminal Law Provisions while Dealing with 498A Cases**

According to the provisions of 498A, cruelty against a married woman is a crime that is committed against the state. Therefore, the police is duty bound to conduct investigation and the prosecution is supposed to support the victim. However, charges under 498A are not tried in a similar manner as is done for any other crime listed in the IPC. For dealing with all other crimes, the law follows a strict legal course under the Criminal Procedure Code to punish the guilty. Even, in case of a dispute between neighbours or violence by the stranger, or a fight between family members for property or other reasons, a standard procedure is followed because all these crimes are considered to be crimes against the state. Conversely, when a woman reports a case of cruelty within marriage under 498A, all the procedures are defied. While framing the charges under 498A, the other Sections in the IPC such as those relating to hurt, grievous hurt, conspiracy, wrongful restraint or confinement, criminal force and assault, causing miscarriage so on and so forth are not invoked. Even in cases where the crime is complicated and includes components beyond day to day acts of `physical or mental cruelty`, or when women approach a police station with serious injuries, broken bones, bleeding bruises, crippled, charred or scarred bodies, no other criminal provisions are invoked while filing FIR or framing charges. The police refuse to take the so called `family disputes` seriously. Perhaps, crimes against women's bodies are not recognized as worthy enough to be penalized<sup>238</sup>. What is created is confusion and perplexity around domestic violence while mixing it up with civil remedies and bringing women's survival issues into the picture. `Cruelty` therefore goes unnoticed and unpunished. Policies provide that law enforcement officials like police and judiciary to be trained and sensitized to deal with such cases of violence. However, the content of training is questionable as these officials are being trained to make the crime invisible. What is pushed is counseling and the irony is that neither the police nor the judicial officials are competent to provide the same<sup>239</sup>. No training is given to collect evidence like details of victim's injuries, trauma or her physical and mental health, which plays a critical role in establishing a crime. Violation of bodily

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<sup>238</sup> This has been major observations made by the women's groups that even during communal riots, conflicts or any other such incidences, it is women's bodies that are being raped, tortured and brutalized.

<sup>239</sup> Ekta Resource Center for Women (2011) A Study of 498A in Tamilnadu, Madurai

integrity of the women victims is not prioritized and no law enforcing agency seriously takes up this issue.

The report 'Staying Alive' notes that the criminal agencies are responsible to initiate the trial and prosecute the accused "hence, more often than not, the law was defeated by sheer inaction which soon came to be institutionalized all over the country, along with the policy of counselling, conciliation and mediation"<sup>240</sup>. In fact, section 498A has become a curious mix of law, mediation and marriage as it promotes the conservative family ideology. No attempt is made to address issues arising out of an inequitable social structure. Clubbing a crime against a woman with the question of her daily survival is a flawed strategy and in no way, could reduce the culpability or seriousness of a crime. Violence against a woman within or outside home is an offence and therefore should be treated seriously as per the provisions of law. Utilizing a matrix or a web of relationship or the fact of economic dependency of a woman to deny the seriousness of an offence itself amounts to a mockery of the law. The short-term advantages of 'protection' within marriage erase the concept of gender equity and justice in long run and ignore the oppressive aspects and structural vulnerabilities within marriage. In the cases pertaining to 'cruelty against a married woman', arguments are raised like 'pursuing the criminal case will not help as it may only satisfy woman's vengeance' or that '498A is a hindrance in life of both men and women'. However, these flawed assumptions overlook the fact that it is essential to maintain law and order, to further the cause of justice and to prevent the crime from reoccurring. The aim of criminal law is deterrence and the same is applicable for the wife battering cases. The element of deterrence can work only when the perpetrators are tried, convicted and punished. An accused under 498A therefore must be tried irrespective of its repercussions on the relationship between the victim and the accused<sup>241</sup>. Trial or sentencing based on a relationship between the victim and the perpetrator is biased and does not meet the ends of justice. Though the criminal law does not provide any relief to battered women like material security or a roof over their head, yet, the purpose of criminal law is to punish the guilty as per the severity of the crime. The reason relating to the 'needs' of the survivors cannot be used to detract the course of litigation merely because the crime happened inside a household.

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<sup>240</sup> Lawyer's Collective (2012) Staying Alive, New Delhi

<sup>241</sup> People's Democracy (2011) AIDWA flays Petition Seeking Dilution of Dowry Law, January 5



## Procedural Lapses

Whereas women approach the legal system as a last resort, yet the police, the judiciary and the law enforcers are unsure of the fact as to treat an assault in domestic relation as a criminal act or is it merely a normal acceptable way of disciplining and controlling a wife in a house. Also, the criminal justice process has been designed to be reactive and to respond to cases only when the complaint is made and the witnesses, including the complainant, cooperate and perform the roles expected of them. In this traditional legal system, victims of domestic violence are often labeled as “uncooperative” when they fail to follow the process and/or reunite with their abusers. The system undermines the subjectivities, pain and suffering of the women survivors and allows the accused to shift onus and minimize his responsibility. Inaction and passivity towards domestic violence cases is a routine and the perpetrators also realize that assaulting women is not a serious crime. Rather than holding perpetrators accountable, the system ends up allowing them to abuse with impunity. Even when the case is tried in the court, the integrity of the victim is put at stake. A survey by AIDWA of the decisions in cases pertaining to 498A shows that the courts have penalized the accused only in cases where grossest violence is reported and has interpreted the provisions in a narrow manner<sup>242</sup>. Frequently, the abusers are more powerful than the survivors and use all their might to make their voice heard. They have the capacity to hire an expensive lawyer, use their money or muscle power and utilize all means to channelize the process in their favor, whereas the survivor is left at the mercy of the police who may conduct shoddy investigation, the public prosecutor who is overburdened or is not interested in such cases and the judge who may have his or her own subjectivities and biases that may turn against the victim. The law foresees a female litigant as one, who is devoid of agency, is sexually naïve and lacks ability to manage or own property and that her benefit lies only to remain in marriage even if she faces violence in lieu of such ‘advantages’. Such reasoning completely ignores women’s contribution, their capacity or ability to contribute as an independent citizen and sees sex as a commodity which a woman can sell in the marriage market. Such narrow constructions of women’s agency are perilous and do not consider the complexities of human lives.

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<sup>242</sup> AIDWA (2003) Expanding Dimensions of Dowry, Indian School of Women Studies and Development, Delhi

## Painful Trials Agonizing Prosecutions

Several studies have shown that courts are not comfortable places. Rather these act as hostile territories for the women litigants as they encounter traumatic experiences<sup>243</sup>. A research study noted that, "While the men can pay off people in the court and sometimes give alcohol bottles to many employees, these people refuse to cooperate with the complainants. Some respondents have also claimed that their lawyers are not presenting the cases properly in the court. Few of them claimed that there were many allegations made against their character in the court which scared them from appearing in the court again. Another problem faced by the respondents is that the cases go on for too long and get adjourned.... This creates added stress and tension of coming back to the court more times than they expected. Overall, most of the respondents found their experience in the court extremely stressful and frustrating, while at the same time it is financially beyond their means to keep the cases going on for years. Some respondents have also complained that the stress of both court and police officials is on pushing both the parties to compromise. Only 4 percent respondents have reported that their experience in the court has been satisfactory and that they are expecting a favourable judgement"<sup>244</sup>. Also, little research has been conducted on judges' behavior in the courtroom or their manner of communication with the parties in litigation. However, experiences reveal that specifically in the domestic violence cases, judges vary in the messages they send to accused and the survivors. Many, who try these cases are often not familiar with the dynamics of intimate violence, are biased or they are not aware of victims' compelling reasons and situations in which they mobilize the system, file charges or withdraw cases. Basu and Jaising<sup>245</sup> observed that often, women are viewed with suspicion. While examining Justice JD Kapoor's book on `Laws and Flaws in Marriage'<sup>246</sup> the authors show the manner in which prejudices operate within the courtrooms. Also, recently in the matter of *Narendra v K Meena*<sup>247</sup> decided by a two-judge bench of the Supreme Court it was held that, "It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family. A

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<sup>243</sup> Singh K (2015) Also, Nigam S (2005) supra

<sup>244</sup> Singh Kirti (2015) supra

<sup>245</sup> Basu Asmita and I. Jaising (2005) *Violence Against Women: A Statistical Overview, and Challenges, Gaps in Data Collection* Expert Paper presented at *Violence Against Women: A Statistical Overview, Challenges And Gaps In Data Collection And Methodology And Approaches For Overcoming UN Division for Advancement of Women*, Geneva

<sup>246</sup> Justice J.D Kapoor ,(2002) *Laws and Flaws in Marriage: How to stay happily married*, Konark Publishers Delhi

<sup>247</sup> Civil Appeal No. 3253 of 2008 decided on October 6, 2016

son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income.... As stated hereinabove, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and customs of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the Respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the family would be torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'". The text points out the way in which pre-conceived traditional notions, biases and prejudices operate within court rooms. The narrow repressive mentality is reflected when the court upheld male privilege and reinforced subordinate position of women in a Hindu family while reiterating women as second class citizens. It considers a woman as an appendage to a man. The court upheld women's traditional conservative roles while reinterpreting hegemonic understanding of Hinduism<sup>248</sup>. These are merely illustrations of the way women are portrayed in the court rooms as second grade citizens. There are many such decisions which see women as 'good' wives, mothers or daughters in law and uphold conservative sexual morality.

### **Who is Judging the Judges?**

In many cases, the judiciary is found reluctant to punish or convict men even when there is enough evidence to indicate that he is guilty<sup>249</sup>. In the matter of *Birdichand Sarada v State of Maharashtra*<sup>250</sup> the wife was visualized as an extremely 'sensitive' person who made unreasonable demands to seek undivided attention of her busy husband<sup>251</sup>. In *Waghmare v State of Maharashtra*<sup>252</sup> a woman was emotionally and physically abused by her husband and his family. They regularly beat her and harassed her for a motorcycle, and, after two

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<sup>248</sup> Kapur Ratna (2016) Hindu Divorce Case: Retrograde Gender Politics on the Bench, *The Wire* October 8

<sup>249</sup> *Wazir Chand v State of Haryana*, 1989 AIR 382

<sup>250</sup> AIR 1984 SC 622

<sup>251</sup> The court constructs the victim as an overtly sensitive woman who made unreasonable demands for undivided attention from her husband. The women's group in Maharashtra initiated a signature campaign and a poster exhibition against it titled '*Mein Ek Manjushree*' was initiated. From Haksar, N. and Singh A. (1986) *Demystification of Laws for Women Lancers*, New Delhi

<sup>252</sup> 1990 Cri LJ 407

months of marriage, her brother-in-law poured kerosene on her and set her on fire. She eventually committed suicide. The Bombay High Court, however, held that these incidents of violence were not sufficient to lead her to commit suicide and that the demand for a motorcycle was not a dowry demand. The court while linking Section 498A to death and dowry acquitted the guilty as the court was influenced by the 'conventional' pattern of wifely behavior and could not find her 'consistent' because 'she withdrew the complaint of being burned by her brother in law two months after her marriage'. The court ignored the fact that there is intense pressure on the woman to withdraw the complaint to preserve marriage. Courts measure the 'rightness of women's action by applying stringent rules of wifely behavior as set by religion or traditions and condone violence by men<sup>253</sup>. In another case, a trial court judge based on technical defects in recording the dying declaration of the victim exonerated her husband from all charges<sup>254</sup>. This was later set aside by the High Court. In yet another case<sup>255</sup>, the High Court reduced the sentence of abusers who had mercilessly beaten a victim with a wooden stick and planned to burn her alive to a small fine of Rs. 1000 without providing any reason as to why the sentence should be reduced. In *Krishan Lal v Union of India*<sup>256</sup> it was held that "With the passage of time after marriage and birth of children, there are remote chances of treating a married woman with cruelty by her husband or his relatives..." In *Raj Rani v State*<sup>257</sup>, the Court held that the allegations must be of a very grave nature and should be proved beyond reasonable doubt. In *Girdhar Shankar Tawade v State of Maharashtra*<sup>258</sup>, it was observed that "'cruelty' has to be understood having a specific statutory meaning and there should be a case of continuous state of affairs of torture by one to another". Hence, cruelty per se is hardly punished. Cruelty as a crime is acknowledged only in serious cases when a woman dies. A perusal of several judgments under this law reveals that there was hardly an instance in which the accused were held guilty under 498A on its own. Rather in the well-known *Naina Sahani Tandoor Murder case*<sup>259</sup>, the apex court commuted the death sentence to life imprisonment "because murder was the outcome of strained personal relationship. It was not an offence against the society". Hence, at times, even gruesome murders and cases of ruthless violence are not taken seriously because of the relationship between the parties. The legal system takes

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<sup>253</sup> Gangoli 2007 supra

<sup>254</sup> *Kamalakar Nandram Bhavsar v. State of Maharashtra*, (2004) 10 S.C.C. 192.

<sup>255</sup> *Narsingh Prasad Singh v. Raj Kumar*, (2001) 2 S.C.R. 984.

<sup>256</sup> 1994 CrLJ 3472

<sup>257</sup> AIR 2000 SC 3559

<sup>258</sup> AIR 2002 SC 2078

<sup>259</sup> *Sushil Sharma v State NCT of Delhi SC Cri Appeal No. 693 of 2007* decided on October 8, 2013

recourse to a conservative myopic vision while scrutinizing women's claims within marriage.

### **Law Should Address the Broader Concerns of Patriarchal Society**

Karat<sup>260</sup> in a public hearing on domestic violence explained, "The violation of the Line of Control and our territorial integrity brought forth national outrage, as it should have. But every day the LoC that preserves basic humanitarian concerns in interaction between human beings is violated, and we are silent." Domestic violence is not a personal problem or an individual issue. An act of violence, control or subjugation of women reinforces sexual inequalities in a larger social context. Wife battering therefore involves a complex situation which is surely more than a man versus a woman issue. The law is not against men. Neither can a woman be blamed for it. Law is against the oppressive system that subjugates men and women. Pitting women against men or women against women is not the agenda of the law. The purpose of law is to act against the oppression women face within the four walls and to transform the behavior of perpetrators. The hypothesis that 498A is misused ignores the fact that the law has been formulated to protect women from violence and to transform the structural, systemic, historical and cultural roots of family violence. Domestic violence is a social phenomenon that needs to be dealt with from multi-dimensional perspectives with the focus on the hegemonic regressive culture that induces and allows such abuse. It has been stated that, "To see domestic violence in terms of man woman relationship would be to miss the essence of the problem, which is the institutionalized nature of female second class citizenship...".<sup>261</sup> The law is enacted to deal with the system of abuse of power against the powerless. At a broader level, the aim of the law is to contest patriarchy within homes, eliminate violence and create democratic family structures where women's autonomy is enhanced.

### **Contradictory Role of State**

Global and national policies as well as laws around domestic violence support women's experience of violence. The Indian State has ratified major international instruments like the Universal Declaration of Human Rights and Convention on Elimination of Discrimination Against Women among others. At the Fourth World

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<sup>260</sup> As reported by Menon Parvathi (1999) Focus on Domestic Violence, The Frontline, 16 (18)

<sup>261</sup> Women Speak: United Voices Against Globalization, Poverty and Violence in India

Conference<sup>262</sup> held at Beijing in 1995, the Indian government along with 186 UN Member States adopted the Beijing Platform for Action that specifies that actions must be taken to eliminate violence against women. Domestic violence is condemned by all global policies and laws. The Constitution of India guarantees equality and positive discrimination in favour of women and children. Thus, legally and theoretically the state is bound to abide by such laws and treaties and needs to create conditions favorable to women's rights and social justice which includes challenging patriarchal norms relating to marriage, family, property and authority. The state is accountable to punish the perpetrators of violence, to provide remedies to the victims and to take preventive measures to stop abuse. However, it ends up reinforcing patriarchal norms. By providing multiple avenues and informal modes of resolution of complaints of domestic violence and mutually contradictory options, the state creates chaos for a victim of domestic violence. Frequently, at all these multiple fora, marital reconciliation is offered as a default option. Even those who resist conciliation are forced to align with it either by coercion and compulsion or by non-availability of other options. State sanctions the mandatory compromise rather than providing justice to the survivor of violence. No other optimal viable solutions are being offered either in terms of material or economic assistance like housing, shelter homes, preferences in economic opportunities or financial assistance. In order to mend broken families ironically, the optimal solution, the authoritative state offers is to coercively erase the history of violence out of it. It orders women to condone violence while overlooking their hardships and directs them to find love in violent situations. The discourse of hegemonic masculinity protects the conjugal tie while completely ignoring the criminal violation. Thus, the focus is not on ending violence rather the aim is to forcefully mute the voice of survivors under the garb of reconciliation or settlement. The courts, the counseling centres, the police, the CAW cells, all assert patriarchal control over women while pushing the boundaries of violence and restricting the possibilities of providing support to women outside the domain of marriage or kinship. Imagining possibilities beyond violent marriage while challenging the structural gender, power and property arrangement has never been thought of.

### **Miles to go....**

"I am Chandrika

I am Gayatri

I am Fatima, Banu, Uma,

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<sup>262</sup> United Nations (1995) Report of Fourth World Conference on Women, Document A/conf177/20 New York

I am Jayalakshmi, I am Saraswati.

I am one of those faceless women who die every day in your morning newspapers and go on to become a crime number in the Police Station and then a file to be pushed around in the courts...<sup>263</sup>

From the individual painful struggles as well as from collective experiences and actions, emerged the critique of law and the legal system. Law plays a crucial role in providing a platform for women survivors of domestic violence to raise their concerns yet, at times, it in itself becomes a concern. The legal system acts to bring stability and order and transform the society based on the principle of justice, equality and democracy; however, intermittently it also acts adversely to impede the interests of those at margins. It may be said that theoretically the law positively favors women yet practically the law enforcement does not. For a woman victim of domestic violence, justice implies more than merely negotiating for survival of self and her children and law has not helped her so far to achieve this goal. The stereotypical attitude of the law enforcement machinery, the emphasis on reconciliation, the misogynist approach of pushing women back into violent situations, all are problematic and require reconsideration. In fact, the family, society and the law all mirror the regressive views while subjugating women and asserting male domination. However, women victims of domestic violence do not operate as silent victims of patriarchy. Rather they act in their different capacities to negotiate within the given social order utilizing different ways and means. There are those who accept the diktats of patriarchy and become part of the system, while others negotiate with the power structures using subtle means and there are those who fight for justice with the patriarchal system using law as a strategy. Law therefore has to provide democratic spaces to such women who negotiate within the legal domain to assert their citizenship claims rather than denying them justice on the pretext of misuse of the law.

Also, far from being misused, the provisions under Section 498A remain underutilized. Rather a mishmash of family and criminal law has created a strange situation which is helping none – neither is it providing justice to the women survivors nor is it deterring or preventing the crime. Tremendous pressure on women to reconcile or settle the case is enhancing the women's vulnerabilities to violence. Hence, there is a need to separate the two fields – the construct of family or marriage and the crime. Negating violence while negotiating economic interests of women is problematic and this strategy needs

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<sup>263</sup> A Poem published by Vimochana (undated) "I Cry For Help, No One's There..." A Community Campaign to Safeguard a Woman's Right to Live, Vimochana, Bangalore

to be reconsidered. Often women survivors are trapped in *sasural/maika* mesh and left with no other option expect to bear brutality or to go back to natal home or to sink deeper into poverty because of unfair social and legal practices which economically penalize them for the violent behavior of their husbands. The situation therefore calls for more than the reform of the criminal justice system in order to end domestic violence. Also, the law must clearly send the message that the violence within the families is neither desirable nor tolerable. The purpose of the law is to contest patriarchy and to address larger structural inequalities while transforming the social order. Besides, dealing with individual cases of injustice, the object of the law is to understand the way in which gendered patriarchal notions are being reproduced in the society and to transform the unequal social structure by making interventions that are instrumental in creating a just society. At a broader level, there is a need to prioritise safety and the well being of victims within the family before preserving the traditional institution of marriage. There is a need to look at the various components of adjudication including police and prosecution while dealing with domestic violence cases, besides providing psycho-social, material and economic support to women. Importantly, intervention programmes for batterers is the need of the hour instead of counseling women. Dilution of law is not a solution. What is important is to consider the cruelty against women as a serious crime. Law should follow the rights based approach to meet the ends of justice.

Spivak<sup>264</sup> cautioned that law is an introductory strategy rather than a solution and that societal changes and legal reforms are mutually linked and together constitute a continuous ongoing process of social and political negotiation. At the pragmatic level, therefore there is a dire need to move beyond law to create shelter homes where qualitative services are provided in terms of medical aid, psychological and emotional support and legal aid. Providing financial support, employment security and economic support to survivors becomes essential to emancipate women with a focus on the fundamental premises of dignity and autonomy. Short term solutions such as short stay homes to house abused women need to be created besides advocating for long term solutions like reorienting gender roles toward equality between the sexes and establishing socio-cultural and legal reforms. In addition, there is a need to direct attention to the asymmetry of power in relationships besides challenging barriers to women's rights and equality. There is a need to critically scrutinise the institution of marriage and family with a gender lens. The dominant social arrangement that

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<sup>264</sup> Spivak Gayatri C (2010) Situating Feminism, Beatrice Bain Research Group Annual Key Note Lecture, Program In Critical Theory, University Of California At Berkeley, 26 February



creates different realities for men and women needs to be questioned. The institution of marriage or family as a picture-perfect institution without any dignity or respect for women is merely an abomination. No society can call itself democratic or just, when the so called basic units of society – ‘the families’ become undemocratic and violent – a place of misery and anguish to women. Challenging the notions of masculinity and femininity is crucial. At a larger level, the solution may lie in rethinking the situation of women’s dependency on marriage, women’s value in labour market and transmission of property and other resources to women. Enhancing women’s autonomy through education and employment may help besides ensuring women’s control over resources. Or as Wendy Brown<sup>265</sup> insisted that sharing of power and not regulation, freedom not protection, is a true affirmation of democracy which may end social and legal marginalization of women within families while pursuing the goal of egalitarianism as prescribed by the Indian Constitution.

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