

International Commission of Jurists
National Implementation Programme -Gender Injustice in
South Asia

Report on the legislative review project in India

April 2003

The Domestic Violence Bill, 2001: Issues and Perspectives

**Jointly Organised by
International Commission of Jurists, Geneva
and
Indian Social Institute, New Delhi**

A. BACKGROUND OF THE PROJECT

This report documents ICJ's legislative reform project on India jointly held with the Indian Social Institute (ISI). The project has been undertaken within the framework of ICJ's National Implementation Programme. This programme works towards the domestic legal incorporation of international human rights standards through legislation and judicial practise.

The Gender Injustice in South Asia Project seeks to address deficient legislative frameworks and to improve judicial competence and awareness with regard to gender discrimination. It works in particular towards the incorporation of standards of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) into domestic legislation in South Asia and tries to ensure the implementation of recommendations of UN treaty bodies.

Subject of the present review project is the Indian draft legislation with regard to domestic violence. This draft law addresses the issue of protection orders and civil remedies for victims of domestic violence.

Context of domestic violence legislation in India

Like in many other societies, domestic violence is a widespread and rampant phenomenon in India. In recent years attention to domestic violence as a human rights concern has risen in India. A number of local and international Non-Governmental Organizations have documented and monitored this problem. International mechanisms such as CEDAW and the Special Rapporteur on Violence Against Women have also addressed this issue.

The national women's rights movements in India was able to influence the Government of India to enact various legislation and amendments in existing criminal codes to cover dowry-related domestic violence. However, besides dowry-related domestic violence other forms of domestic violence remained neglected. This applies also to direct and indirect violence against children in the domestic sphere. With the awareness on this question rising, there are increasing discussions on the inadequacy of the legislative and judicial responses in India. Among those are, that victims of domestic violence in India do not have specific civil remedies such as injunction or protection orders, interim relief and other support services. In recent years, the human rights and women's rights community has been campaigning for an Indian legislation to provide effective civil remedies to the victims of violence.

India's obligation under CEDAW

India has ratified the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW) and other International Human Rights Instruments. In doing so it has accepted an obligation to act with due diligence in order to prevent violence against women. This has been clearly expressed by the Committee on the Elimination of All Forms of Discrimination Against Women in its General Comment No.19. It considers that discrimination against women includes gender-based violence and furthermore that this form of violence directed against women impairs or nullifies a range of fundamental human rights under international human rights law. The Committee states in Comment 19 of 1992 that discrimination under the Convention is not restricted to actions by or on behalf of Governments. Under general international law States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish actors of violence, and for providing compensation. In this context, it is important to stress that the Committee recommends in Comment 19 that States should take comprehensive measures including develop appropriate legislative framework to deal with domestic violence. Thus, the ratification of CEDAW carries an obligation for India to provide for an adequate and effective legal framework against violence women, including against domestic violence.

While India generally complied timely with its obligation to submit periodic reports to the CEDAW Committee, it failed to implement an effective legal framework relating to domestic violence. In its observations on India's last periodic report to the CEDAW Committee in January 2000, the Committee noted many gaps in the legislative framework and urged India to introduce comprehensive legislative reforms to promote human rights of women. The Committee also expressed its concern over the higher incidence of gender-based violence against women and requested the Indian government to strengthen law enforcement and introduce legal reforms proposed by various women's organizations and activists in particular to domestic violence.

The bill on domestic violence

As a result of cumulative pressure of international and of national woman's rights organizations and influenced by the CEDAW recommendation, the Government of India started to consider a draft bill providing for civil remedies, such as interim measures and protection order to the victims of domestic violence. In this respect, the Ministry of Human Resource proposed a Protection from Domestic Violence Bill, 2001 (the bill) on behalf of the Government of India.

There was serious criticism of the bill by the NGO community. The bill was then referred to a Parliamentary Standing Committee on Human Resource Development (the Standing Committee). The Standing Committee made some positive suggestions to amend the bill and submitted its 124th Report on the Protection from the Domestic Violence Bill, 2002. The Bill including the Standing Committee recommendation was introduced in the Parliament on 22 December 2002. There was widespread concern that the Bill will be rushed through Parliament without sufficient debate that could rectify major omissions.

ICJ Approach and rationale

In November 2002, the International Commission of Jurist's (ICJ) undertook a needs assessment mission to South Asia. A large number of NGOs expressed concern over the Bill during different regional round-table discussions and in bilateral meetings with the ICJ. A number of civil society actors urged the ICJ to intervene in the ongoing national debate on domestic violence. Despite some positive changes recommended by the Parliamentary Standing Committee, the Bill was generally perceived as inadequate to address domestic violence or even harmful to its cause. Furthermore, it was considered that the discussion on the draft bill had reached a stand still.

The Indian Social Institute (the ISI) in particular requested the ICJ to intervene in order to add an international law dimension to the present debate. ICJ was therefore agreed to provide an "authoritative review" on the draft law. Such review should be based on international human rights law and on comparative experience from States that have recently enacted effective legislation. Part of its objective was to open-up the discussions and to prevent the present draft bill from being hastily adopted in its present form. In light of the imminent possibility for the draft to be passed by Parliament without further discussion, the ICJ agreed to a project, that comprises three steps. First, a desk review undertaken by a high level expert on behalf of the ICJ. Second, a national consultations seminar that would discuss the draft law based on the international review and formulate a joint response and third, follow-up interventions by the ICJ and in particular by the Indian Social Institute to lobby for the implementation of ICJ's recommendations.

B. EXPERT REVIEW OF BILL ON DOMESTIC VIOLENCE

The ICJ expert review was conducted in February 2003. The draft bill had been reviewed by Ms. Pramila Patten, member of the UN Committee on the Elimination on All Forms of Discrimination Against Women (CEDAW) and a human rights specialist from Mauritius with long standing expertise in this field. The terms of reference of the review was to examine the draft law with regard to its compliance to international standards, such as General Comment 19, taking into account best practices of countries that have enacted legislation on domestic violence.

The expert review highlighted a range of serious shortcomings in the draft and concluded that it fails to provide effective remedies to the victims of domestic violence and would not conform to women's human rights needs. Major recommendations included the narrow range of cases of domestic violence covered by the draft bill, the limitation to cases of "habitual assaults", critical mandatory mediation provisions and a lacking system for protection orders and other measures. The following is an excerpt of her recommendations, reproduced in full in Annex 3.

1. The ambit of the Bill in the Preamble is too narrow, as it limits the protection to women related to the violator (the so-called respondent) by blood, marriage or adoption. The protection afforded should not be limited to women, for, although violence is mainly perpetrated against women, it is also sometimes perpetrated against the spouse of a woman and often against children. The Bill remains inadequate in terms of protection afforded to victims of domestic violence if it leaves out violence against children.
2. The limitation to relations of blood, marriage or adoption oversee the violence committed against other persons in similar, such as persons living together as husband and wife, persons who do not live together but have common children, or divorced couples. Therefore, the requirement of a bond of blood, marriage or adoption and the need for the parties to live together should be eliminated.
3. The definition of domestic violence is very narrow and is limited to "habitual assaults." It imperative that the definition of domestic violence be broaden enough to cover any conduct, whether actual or threatened, that causes the aggrieved person to fear for or to be apprehensive about her personal safety, constitutes domestic violence. For instance, the definition should include: sexual assault; violence, and the attempt or threats to physically or sexually abuse children of the aggrieved person.
4. A defence afforded to the defendant whereby his violent conduct is condoned if such conduct is for the protection of the respondent's property is highly improper.

5. The Bill does not provide for a centralised mechanism for providing support services rather leaves it into the hands of voluntary sector. An institutional mechanism should be set up to oversee the overall implementation of the Act, such as National Domestic Violence Council or a Domestic Violence Policy Unit responsible for the administration of the Act.
6. There should not be mandatory mediation and counselling as victims of domestic violence find themselves in a situation of extreme inequality towards the perpetrator of violence.
7. The provisions on the Protection Order contain no details on the powers of the Magistrate. The Bill is silent on the factors to be taken into account when deciding about the issuing of a Protection Order. In order to ensure consistency in the application of the bill especially in view of gender bias in courts, it is proposed that there should be clear guidelines for the courts when determining an application be clearly set out.

C. NATIONAL CONSULTATION WORKSHOP

The desk review was followed by an initiative of the ICJ and ISI to convene a national consultation workshop. This workshop received a considerable response from the women's rights NGOs from all over India. At very short notice more than 60 representatives from over 50 NGOs representing more than 14 states in India agreed to participate in the workshop (see A-2). The participants also included leading Supreme Court lawyers, representatives of the National Commission of Women, Proctor of Delhi University and the former Adviser to the National Human Rights Commission, and two women Police Commissioners. The workshop took place on March 13 and 14, 2003. The main objectives of the workshop were to:

- (a). evaluate and discuss the problems in current bill and propose recommendations and changes to the bill;
- (b). integrate international human rights and comparative law perspective to the debate on the domestic violence in India;

- (c). to bring civil society together on a platform and to develop a common position based on the International human rights standards and India's obligations under CEDAW;
- (d). to develop a strategy to influence the Parliamentary process and encourage law makers to revise the bill in line with the recommendations of the national workshop; and
- (e). to encourage the Indian Government to fulfill its obligations under the CEDAW and the international human rights law framework more effectively.

Ms. Pramila Patten, CEDAW Member from Mauritius who had reviewed the bill on behalf of the ICJ, led the workshop discussions. The participants met for two days in four simultaneous working groups. They analyzed and debated each and every provision of the bill and proposed substantial amendments (see agenda A-1). The participants endorsed the expert review and added specific recommendations. The topics of the four groups were divided as follows: Working groups I focused on the evaluation of the Draft Bill. Working group II was asked to discuss the enforcement and procedural aspects and to assess the prosecution and punitive and measures available in the existing legislative framework of domestic violence. Working group III focused on the adequacy of civil remedies in the existing legislative framework on domestic violence. And Working group IV considered prevention and intervention strategies such as education, training, monitoring, crisis, support services and rehabilitation provisions in the draft bill. Each of the working groups was led by an experienced woman's rights defender and presented its report to the plenary.

Conclusions and recommendations of the Workshop

The workshop concluded with a set of recommendations in order to ensure that the draft bill can provide effective remedies to the women and children victims of domestic violence. The participants considered that the bill would in its present form prove counter-productive for women's status in society and lack to provide any effective remedy. For this reason the participants rejected the bill in its entirety. The participants

were of the view that even if the recommendation of the Standing Committee (see above) were to be included, the bill would still remain deficient in many respects. After extensive review of the draft bill and detailed deliberations the workshop participants proposed fundamental changes to the bill. There was a feeling that the bill should either be adopted with major substantial changes or if this proves unrealistic postponed until the next parliamentary elections. The participants adopted the following additional recommendations that:

1. The statement of the objectives and reasons the bill should spell out the obligation of the government to comply with all CEDAW and other international Human rights Instruments and with the constitutional guarantees.
2. The scope of the bill be expanded to include certain categories of women. All women whether they are civil or religiously married to the abuser, whether they live, have lived or have never lived with the abuser be brought within the purview of draft bill.
3. The definition of “aggrieved person” in the bill should include any women or children, who is in an interpersonal relationship, lives or resides in a family or a shared household of the perpetrator.
4. The current definitions of “domestic violence” and “relative” in the bill be deleted.
5. The bill must cover the children who are victims of domestic violence.
6. The definition of interpersonal relationship in the bill shall include a relationship between two persons who live, had lived or been residing at any point in family or shared household or are related by consanguinity, marriage or through a relationship of marriage, adoption or family members living together as joint family.
7. The definition of domestic violence in the bill must cover any conduct, whether actual or threatened that causes the victim to fear for to be apprehensive for personal safety, for examples:
 - Causing or to cause bodily injury including sexual assault;

- Placing or attempting to place the aggrieved person in fear of imminent bodily injury to herself or to her children;
 - Physically or sexually abusing or attempting or threat to abuse children of the aggrieved person;
 - Economic abuse and deprivation of food and basic necessities of life;
 - Engaging in course of conduct which places her person in reasonable fear of injury;
 - Intimidation, harassment, maltreatment, brutality or cruelty;
 - Confining or detaining the aggrieved person against will;
 - Causing or attempting to cause damage to the aggrieved persons property; and
 - Threat to commit any act mentioned above.
8. The bill must specify that the onus of proof in protection order proceedings should be on the perpetrator and not on the complainant.
 9. The bill must provide that upon the submission of an application with affidavit through the protection officer to the Magistrate, latter must issue an interim protection order. That the execution of such protection order should not be stayed pending appeal, if any.
 10. The bill must provide informal, speedy and victim friendly procedure in the court when dealing with the protection order cases.
 11. The provision of monetary relief in the bill must include the interim compensation to the victim of domestic violence including any children at the time she is seeking the protection order from the Magistrate. The monetary relief is meant to cover the immediate expenses incurred, losses suffered and subsistence expenses.
 12. The bill must specify that the service providers to the victims must be from government welfare agencies functioning in collaboration and co-ordination with at least two registered voluntary organisations with the objective of protecting the rights and interest of women and children by any means including legal, medical, and financial and other forms of assistance.
 13. The bill should spell out that the protection officers preferably be women and adequately trained in complex issues of domestic violence, and competent to

- develop the safety plans for the victims of domestic violence. The draft bill should specify qualification, experience, skill and spell out the recruitment process for the protection officers.
14. The bill ensures that the protection officers should have the assistance of law enforcement agencies if requested, while discharging their official duties. That the bill must provide for a institutional mechanism which will provide integrated and comprehensive support services to the victims of domestic violence
 15. The bill must provide for the establishment of a viable and sustainable support system in order to provide various kinds of assistance like housing, medical, financial and other related aspects.
 16. The bill should provide that various components of the all law enforcement authorities such as Magistrates, protection officers, councillors, law enforcement, lawyers, medical professionals and service providers must be continuously trained and sensitised to the various aspects of the domestic violence.
 17. The bill shall provide for shelters with appropriate help line available in each sub division of the country.
 18. The bill should make provision that the service providers as envisaged should receive adequate resources on permanent basis to ensure the proper provision of services to the victims of domestic violence.
 19. The provision of counselling in the bill must be voluntary rather than mandatory. The counselling process must be victim friendly.
 20. The rules making powers to enforce the domestic violence law should be used with a view to include the above-mentioned recommendations.

 21. The bill must establish a National Domestic Violence Council (the NDC) and Domestic Violence Intervention Units (the NDVI) in every district of the country.
 22. The provisions of the bill should be enforced not in derogation of any other existing law but shall be in addition thereto.

D. FOLLOW-UP

An important aspect of the joint activity with the Indian Social Institute was to lobby for the implementation of the recommendations. The goal of this is to either amend the draft law substantially or to postpone its adoption. In order to enhance the impact of the consultation workshop, a number of steps were undertaken, including media outreach, the distribution of the recommendations, the discussion of the conclusions in bilateral meetings with governmental representatives, outreach through publications in law journals. The Indian Social Institute is presently monitoring the situation and the latest indication is that the law may be postponed due to the substantial criticism on the draft bill. The ICJ will consider further interventions should the need arise.

The follow-up activities included *inter alia*:

- An agreement of the participants at the workshop to campaign at different levels by various means such as media outreach, workshops, meetings, writing features, educating and encouraging the law makers on the various dimensions of the domestic violence.
- A joint press conference with the participation of Ms. Pramila Patten, Dr. Vineeta Gupta, Ms. Seema Duranny and Ravinder Joshi was held at the conclusion of the workshop on March 15, 2003, at the Constitutional Club, New Delhi and the recommendations were released to the public and media. Similarly in Northern India, Dr. Vineeta Gupta, Secretary General, *Insaaf* International organised a Press Conference at Chandigarh Press Club on 17 March 2003, in the Capital of Punjab and Haryana states. Preliminary agreement has also been reached with a human rights law journal, *Combat law*, published by the Human Rights Law Network (the HRLN), to publish a special issue on Domestic Violence in August 2003, which will include a report on the National Workshop and its recommendations.
- Bilateral meetings were held to discuss the recommendations and ICJ's concern with the draft law. On March 14, 2003, a three-member delegation comprising of Ms. Parmila Patten, Ravinder Joshi and Dr. Vineeta Gupta met with the Dr. Sanjay

Paswan, Indian Minister of State for Social Justice and Empowerment and apprised him of various concerns of the workshop participants over the bill. Dr. Paswan patiently listened to the delegation and expressed support to the endeavour. He suggested that there is a need to identify “sympathetic” Parliamentarians and organise them into a group so that bill is adopted with appropriate recommendations. The ISI later presented Dr. Paswan with the recommendations in order to engage him in discussion to further the efforts of the workshop participants. Through the efforts of Dr. Paswan a meeting was arranged with Ms. Jas Kaur Meena, State Minister of Human Resource Development.

- Dr. Vineeta Gupta, Ms. Seema Duranny and Ravinder Joshi met with Minister Meena on March 20, 2003. The meeting with Ms. Meena was joined by a senior civil servant from the Ministry of Law and Justice who is responsible for draft bill. The delegation presented the workshop recommendation to the Minister and explained in detail the problems of the present draft. The Minister agreed with the main recommendations on the definitions of “domestic violence” and “relatives” and promised his personal support in this regard. Minister Meena also decided that her Ministry would conduct a gender sensitivity workshop for the members of the Standing Committee.
- Moreover, the ISI electronically transmitted the workshop recommendations to all the members of the Indian Parliament and plans to meet with a selected group of Parliamentarians in order to engage them to support the workshop recommendations. The ISI also plans to hold another NGO event to discuss ways and means to increase the campaign of the recommendations of the workshop.

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AGENDA
The Domestic Violence Bill, 2001: Issues and Perspectives
Two Day National Workshop
Jointly Organised by
International Commission of Jurists, Geneva
and
Indian Social Institute, New Delhi
13th & 14th March, 2003

at
Indian Social Institute

Programme Schedule

March 13th, 2003 [Thursday] -- Day 1

9.00-9.30 Registration

9.30-11.00 ***Welcome Address/Opening Remarks/Introduction***

Welcome Address -- **Dr. Prakash Louis**,
[Executive Director -- Indian Social Institute, New Delhi]

Opening Remarks -- **Ms. Pramila Patten**
[Barrister and Member – CEDAW Committee]

Keynote Address – Ms. **Rani Jethmalani**
[Senior Advocate – Supreme Court of India]

***Introduction to the National Implementation of International
Human Rights Standards***

Mr. Ravinder Joshi, [Legal Advisor -- International Commission of
Jurists, Geneva]

11.00-11.20 Tea/Coffee Break

11.20-1.00 ***Women Rights In India: Open Discussion***

Chairperson: **Ms. Brinda Karat** [General Secretary – AIDWA]

Speakers: **Dr. Anjali Gandhi** [Head of the Department, Social Work
Jamia Milia Islamia]

Ms. Meenakshi Lekhi [Advocate],

Dr. Jyotsna Chatterji [Director -- JWP]

1.00-2.00 Lunch Break

2.00-3.30 ***Experiences and Perspectives: Domestic Violence Bill***

Chairperson: **Dr. Mohini Giri** [Ex-chairperson of NCW]

Speakers: **Kirti Singh** [Advocate, Supreme Court of India]

Vrinda Grover [Advocate, Supreme Court of India]

Sona Khan [Advocate, Supreme Court of India]

3.30-4.00 Tea/Coffee Break

- 4.00-5.15 Discussion of Priority Issues and breakout into working groups on the same issue – Ms. Pramila Patten
Working Group – I: Evaluation of the Draft Bill (Ideological Base, Intent, Adequacy) – Working Group
- Working Group – II:** Enforcement and procedural aspects assessing the prosecution and punitive measures available in the existing legislative framework on Domestic Violence.
- Working Group – III:** Adequacy of civil remedies in the existing legislative framework on Domestic Violence.
- Working Group – IV:** Prevention and intervention strategies such as Education, Training, Monitoring, Crisis, Support Services and Rehabilitation provisions in the draft bill.
- 5.15-5.50 **Session – I** of Working Groups ---
- 5.50-6.00 Wrap up of the Day

March 14th, 2003 – Day 2

- 9.00 --10.00 ***Governmental responses and approaches to the prevention of Domestic Violence.***
Chairperson: Dr. M.C. Sharma [Proctor, Delhi University and former Advisor to National Human Rights Commission].
Speakers: Ms. Vimla Mehra, [Joint Commissioner of Police, Crime Against Women Cell, Nanakpura, Delhi],
Ms. Kawaljeet Deol, [Joint Commissioner of Police [Vigilance]
- 10.00-11.0 **Session – II** of Working Groups ---
- 11.00-11.20 Tea/Coffee Break
- 11.20-12.30 **Session – II** of Working Groups continue
- 12.30-1.30 Lunch Break
- 1.30-3.00 **Session – III** of Working Groups
- 3.00-4.00 Tea/Coffee Break/ Time for Facilitators and Rapporteurs for drafting the reports
- 4.00-5.30 **Session – IV** Plenary Session and presentation of Reports by Working Groups and discussion on the Reports
- 5.30-6.00 Adoption of Recommendations

LIST OF PARTICIPANTS

<i>Name</i>	<i>Designation</i>	<i>Organisation</i>	<i>State</i>
Jasmine Joseph	Senior Law Officer & Head – Dept. Of Gender Studies	Jananeethi	Kerala
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Dr. Ghazala	Director	Care India, Bhopal	Bhopal, Madhya Pradesh
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Maisaioh Bugglo	Executive Director	Society for Rural Development	Nalgonda Andhra Pradesh
Anagha Sarpotdar	Field Action Project Officer	Special Cell for Women and Children [TISS]	Mumbai Maharashtra
Lily Bahen	Executive Director	Lok Chetna Samiti	Varanasi Uttar Pradesh
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Kiran Arora		Mehka Angan	Faridabad
Vijaya Kumari		Womens Organisation for Research & Development	Kerala
Sukla Deb Kanango	Professor	Dept. of Social Work, Visva-Bharati	West Bengal
Amrit Nikore		Centre for Legal Aid for Poor	New Delhi
Narayani Kutty, Chettor	Advocate	People Council for Social Justice [PCSJ]	Kerala
Sr. Stella		Meerut Seva Samaj	Meerut Uttar Pradesh
Shershta Mehta	General Secretary	Indian Council of Social Welfare [ICSW]	Chandigarh
Sangeeta Jund	Coordinator	Indian Council of Social Welfare, [ICSW]	Chandigarh
Shireen Singh		US Embassy	New Delhi
Sangeeta Yadav	Secretary	Bharatiya Siksha Prasar Avam Nagrik Kalyan Samiti	New Delhi
Charu Dwivedi		Navjyoti Police Foundation, Jehangir Puri Centre	New Delhi
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M. Shimray	In-charge of Women's Desk	CARITAS INDIA	New Delhi
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Pramod Sharma		CRIPH	Chandigarh
Vinesh Lata	Joint Secretary	Centre for Social Welfare	New Delhi
Syeda Hamid		Muslim women's Forum	New Delhi
Vineeta Gupta		Insaf International	Chandigarh
Shalini Singh		HumanRights Law network	New Delhi
Raka Sinha			
Namrta Pathak		AFPRO	New Delhi
Romi Sharma		NCW	New Delhi
Madeeha Ashraf		American Embassy	New Delhi
Nirupama Dutt		Hamshira	Gurgaon

Oinam Jayalakshmi			Imphal
B. Shankara		READ	Andhra Pradesh
Shammi David		INSAF	Karnataka
Pramila Patten			Geneva
Sumshot Khullar		INSAF	New Delhi
Swagata Basu		JNU	New Delhi
Saswati Pandit		JNU	New Delhi
Archana Singh		WARLAW	New Delhi
Lotika Sarkar		CWDS	New Delhi
Madhavi Saxena		YMCA	New Delhi
P. Shashidharan Nair			Kerala

A -3

Which Way?

**NATIONAL BIIL ON DOMESTIC VIOLENCE AND
INTERNATIONAL HUMAN RIGHTS STANDARDS**

A Legal Review by

By Ms. Pramila Patten

the ICJ Expert and

Member, UN CEDAW Committee

**NATIONAL WORKSHOP ON DOMESTIC VIOLENCE,
Indian Social Institute, NEW DELHI, INDIA**

13 & 14 MARCH 2003

Legal Analysis of the Protection From Domestic Violence Bill 2001

By Ms. Pramila Patten

I. Introduction

Violence against women and girls constitutes the single most prevalent and universal violation of human rights.

In all societies, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture.

Government and People must understand that human rights are not something to be given or taken away by a government like a subsidy. Human rights are not something to be explained away by cultural specificity. They are intrinsic to the human being.

Women's rights are the responsibility of all human kind; combating all forms of violence against women is the duty of all human kind; and

achieving the empowerment of women is the advancement of all human kind.

II International Standards applicable to violence against women

India is a party to the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It is bound by the standards set forth in this Convention, as they have been interpreted and applied by the Committee on the Elimination of Discrimination against Women. In this context, special important must be accorded to General Recommendation 19 of 1992. Other important documents to be taken into account are the Beijing Declaration and Platform for Action. Furthermore, the international standards on state obligations concerning violence against women have been spelt out by the UN Special Rapporteur on Violence against Women.

The conceptualization of violence against women and girls as a violation of human rights was one of the achievements of the women's movement during the world conference on Human Rights in Vienna in 1993.

Vienna, Cairo, Beijing are important milestones in the struggle of the women's movement although they were preceded by significant achievements.

The Beijing Platform for Action urged Governments to take integrated measures to prevent and eliminate violence against women. Governments are called upon to:

- Condemn violence against women and refrain from invoking any custom, tradition and religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against women;
- Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- Enact and /or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- Implement CEDAW taking into account general recommendation 19 adopted by the Committee at its 11th session;
- Provide women who are subjected to violence with access to the mechanisms of justice, to just and effective remedies for the harm they have suffered and inform them to their rights in seeking redress through such mechanisms;
- Create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from fear of penalties or retaliation and file charge;
- Provide well-funded shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other

counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence.

In her very first report to the UN Commission on Human Rights in 1995, Ms Coomaraswamy, the Special Rapporteur on Violence Against Women, made her position very clear when she observed that:

“perhaps the greatest cause of violence against women is government inaction with regard to crimes of violence against women. There appears to be permissive attitude, a tolerance of perpetrators of violence against women... As a result, in most societies crimes of violence against women are invisible... In the context of norms recently established by the international community, a state that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.”

In its General Recommendation 19, the Committee on Discrimination Against Women has made clear that violence against women is a form of discrimination against women as prohibited in Article 1 CEDAW.

A recent UNDP Human Development report stated that no country treats its women as well as its men. They are safer on the street unprotected than they are at home. In a number of countries the leading

cause of hospital deaths of women of child bearing age is not childbirth or motor car accidents, as one might expect, but rather domestic violence.

The test for the success of any administrative, political or judicial system is the extent to which it effectively provides its people with the security of their person and property, and how well it safeguards their right to life and liberty.

Given the existing international standards, it is now well established that every state is under an obligation not only to abstain from committing violence against women, but also to take effective measures to protect women against any form of violence they suffer from.

The Government of India must be commended for its initiative in introducing legislation, which aims to end the shameful silence and anonymity cloaking domestic violence.

No piece of legislation is perfect and no legislation should remain static. Amendments should be introduced to fill the gaps and pitfalls that become apparent with time.

Whilst endorsing the recommendations of the Parliamentary Standing Committee on Human Resource Development, I wish to make some observations and recommendations with regard to the Protection from Domestic Violence Bill 2001.

III Principle Observations

Before the Bill is analysed article by article (see below-IV), some main observation should be highlighted.

8. The ambit of the Bill in the Preamble is too narrow, as it limits the protection to women related to the violator (the so-called respondent) by blood, marriage or adoption. The protection afforded should not be limited to women, for, although violence is mainly perpetrated against women, it is also sometimes perpetrated against the spouse of a woman and often against children. The Bill remains inadequate in terms of protection afforded to victims of domestic violence if it leaves out violence against children. The Government of India will be failing in their obligations under the Convention on the Rights of the Child.
9. Also, the limitation to relations of blood, marriage or adoption oversee the violence committed against other persons in similar, such as persons living together as husband and wife, persons who do not live together but have common children, or divorced couples. Therefore, the requirement of a bond of blood, marriage or adoption and the need for the parties to live together should be eliminated from the definitions in section 2.
10. The definition of violence in section 4 is very narrow. In particular, it is disturbing that it is limited to “habitual assaults”. It is recommended that wider definition of domestic violence be adopted, so that any conduct, whether actual or threatened, that causes the aggrieved person to fear for or to be apprehensive about her personal safety, constitutes domestic violence. Domestic violence should not only include actual violence, but also the threat or attempt of violence. It should include:

sexual assault; violence, and the attempt or threat to physically or sexually abuse children of the aggrieved person. Any conduct which places a person in a reasonable fear of injury; intimidation, harassment, maltreatment, brutality or cruelty; the confinement or detention of the aggrieved person against her will; damage to the aggrieved person's property.

11. Moreover, the section 4 (2) contains a defence clause excluding from the definition of violence conduct for the protection of the respondent's property. This clause should be eliminated from the text.
12. In its sections 5 to 8 the Bill places the burden of assistance on so called protection officers on the one hand and voluntary service providers on the other, without ensuring the professional skills of these entities. An institutional mechanism should be set up to oversee the overall implementation of the Act, such as Domestic Violence Council and a Domestic Violence Policy Unit responsible for the administration of the Act. Confidentiality must be insured throughout the procedure. Women should preferable be appointed as protection officers.
13. The Bill does not spell out in detail the duties and powers of the protection officers to assist the aggrieved person. Where women seek help from the protection officers, they must be provided with immediate help, such as transportation to a hospital, assistance in finding residence, legal assistance, etc. For further recommendations see p.15.

14. The Bill puts an emphasis on mediation and counselling, even giving the Magistrate the power to direct the aggrieved person to undergo mandatory counselling (section 11 (1)). As victims of violence find themselves in a situation of extreme inequality towards the perpetrator of violence, they should never be forced into mediation proceedings or counselling against their will.

15. The provisions on the Protection Order (section 5 to 8) contain no details on the powers of the Magistrate. The Protection Order should spell out when, by whom and how an application for a Protection Order can be made, the matters to be taken into account by the court in determining the case, and the terms of the protection order.

It should be ordered where the person avers that he/ she has been victim of an act of domestic violence and he/ she reasonably believes that the respondent is likely to commit any further act of domestic violence against her.

Section 14 is silent on the aspects to be taken into account when deciding about the issuing of a Protection Order. In order to obtain consistency in the application of the act especially in view of gender bias in courts, it is proposed that the matters which the court should have regard to in determining an application be clearly set out, so as to create awareness for the situation of victims of domestic violence, such as the welfare of children, accommodation needs, hardship, etc. For further details see below under p. 19.

Section 14 (1) does not adequately spell out the possibilities of the Magistrate on the possible content of the Protection Order. For the sake of preserving consistency in the application of the law, it is recommended that the range of directions be spelt out in further detail, encompassing measures such as the prohibition for the respondent to approach the premises or locality in which the aggrieved person resides, the prohibition of contact, the returning of property, etc. For further recommendations see p. 19.

16. It is recommended that a new section be added under Chapter V. Miscellaneous, with regard to costs, to the effect that notwithstanding any other enactment no costs shall be allowed in any proceedings under this Act, nor shall any aggrieved person appealing against any decision under section 16 be required to furnish any recognition to prosecute the appeal.

The above recommendations are further elaborated in the analysis remarks are made on specific issues of the draft legislation.

IV Analysis of the Draft Bill on an article by article basis

In the following, the provisions of the Draft Bill will be assessed in further detail and additional recommendations will be made where appropriate.

1. Language of the Draft Bill

The Protection from Domestic Violence Bill, 2001 is not drafted in a gender-neutral manner, because in Article 1 (3) (a) the aggrieved person is per definition a woman.

Although women are prime targets of various forms of violence and that in most cases, women are victims of abuse at the hands of their husband/ partner, a gender-neutral language is desirable. Besides there are instances of domestic violence being perpetrated by women against their spouse or other family members.

In its current form, the legislation could be challenged on the ground that it is discriminatory on the basis of sex. The Constitution of India enshrines a philosophy of equality between the sexes.

Recommendation 1:

A gender-neutral language is therefore recommended.

2. Preamble

The object of the Bill is set out as follows:

“To protect the rights of women who are victims of violence of any kind occurring within the family and to provide for matters connected therewith or incidental thereto.”

Violence occurring in a domestic context is generally thought of as taking place between husband and wife or cohabiting partners. Although this is the most common situation, violence can and often does extend also to children and other persons living in the same

household. “To protect the rights of women” has the effect of considerably limiting the scope of the Bill.

Family life has become a battlefield where many women and children become casualties. The tragedy of domestic violence touches of many women and children, weaken families, leave emotional scars as devastating as physical ones and creates a destructive cycle of violence where those who are abused as children may become abusers themselves.

Violence against children in the families takes any form- physical, emotional and sexual. Domestic violence has devastating impact on children even when they are not direct recipients of the violence. Violence against women and children affects the development and well being children and families. It is often argued that children’s socialization into accepting or committing violence starts at home when they witness their father beating their mothers or when they are themselves abused.

The Government of India has to honour its obligations under the Convention on the Rights of the child and is required under Article 19 to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse in the care of

parents, legal guardian or any other person who has the care of the child.

The wording “and to provide for matters connected therewith or incidental thereto” can be used to justify additions in the Bill, power of the Magistrate to make ancillary orders.

Recommendation 2

It is therefore recommended that violence occurring in a domestic context should per definition protect the following persons:

- a spouse or former spouse of the respondent;
- a son, daughter, grandson or grand daughter of the respondent or of the spouse or of a former spouse of the respondent;
- a brother, sister, parent or grand parent of the respondent or of the spouse of a former spouse of the respondent;
- a member of the household of the respondent or of the spouse or of a former spouse of the respondent.

“Spouse” should mean either of a man and a woman who:

10. are or have been civilly or religiously married to each other;
11. are living or have lived together as husband and wife, and
12. whether they have ever lived together or not, are the parents of a common child.

The wording “Victims of violence of any kind should be preserved in as much as it can be used to cover all forms of violence, physical, psychological and sexual.

3. Definitions- Section 2

Section 2, in its relevant parts, reads as follows :-

“In this Act, unless the context otherwise requires:

- (a) “aggrieved person” means any woman who is or has been a relative of the respondent and who alleges to have been subjected to acts of domestic violence by the respondent;
- (b) “domestic violence” has the same meaning assigned to it as in section 4;
- (c) “Magistrate” means the Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the aggrieved person resides;
- (d) “Monetary relief” means compensation which a Magistrate may order at any stage during the hearing of application seeking a protection order, to meet the expenses incurred and losses suffered by the aggrieved person as a result of the domestic violence;
- (e) “Notification” means a notification published in the Official Gazette;
- (f) “Prescribed” means prescribed by rules made under this Act.

- (g) “Protection Officer” means an officer appointed by the State Government under section 5;
- (h) “Protection Order” means an order made under section 14;
- (i) “Relative” includes any person related by blood, marriage or adoption and living with the respondent;
- (j) “Respondent” means any person who is or has been a relative of the aggrieved person and against whom the aggrieved person has sought monetary relief or has made an application for protection order to the Magistrate or to the Protection Officer, as the case may be; and
- (k) “Service Provider” means any voluntary association registered under the Companies Act, 1956 or any other law for the time being in force with the objective of protecting the rights and interests of women by any means including legal aid, medical, financial or other assistance.”

The definition of “aggrieved person” has to be read in conjunction with the definitions of “relative” and “respondent” in section 2 (i) and (j) respectively. It leaves out children altogether, male or female; it also leaves out male family members.

Whilst the aggrieved person can only be a woman, the “respondent” may be man or woman with whom the aggrieved person is related by blood, marriage or adoption and with whom she is living, for example, the

respondent could be the sister in law or mother in law of the “aggrieved person”.

The definition of “relative” with its two pronged requirements namely the relation by blood, marriage or adoption and the need for the parties to live together, has the effect of considerably limiting the scope of the protection afforded to women. It also excludes several, categories of women namely:

- women who are not legally married and who are living together with the respondent, women who are not legally married and are no longer living together with the respondent.
- Women who are legally married and are no longer living together with the respondent.
- Former de facto spouse of the respondent.
- Women not legally married whether they have ever lived together with the respondent or not, but are the parents of a common child.

The cohabitation requirement excludes from protection all women not actually living with their abuser at the time of the assault. This assumption that domestic violence can only occur between an abuser and a woman living under one roof, ignores reality and effectively endangers women’s lives. Women are often stalked, harassed, battered or raped by men with whom they share or have an intimate relationship, whether or not they have ever lived together.

Often, violence continues long after cohabitation has ceased. The true range of relationship in which women may encounter violence must be

recognized and acknowledged. Violence occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence.

In the definition of “aggrieved person”, it is to be observed that the victim may only apply for a protection order if she has been subjected to “act of domestic violence by the respondent”.

The definition of “respondent” is ambiguous and it tends to confuse the procedure when it states that an application for a protection order may be made to the Magistrate or to the Protection Officer.

“Protection Officer” it is recommended that in its definition, it be added that Protection Officer means an interim or permanent order issued under section 14.

“Service Provider” – Under section 6 (1) (b) of the Bill, Protection Officers only have a duty to inform the aggrieved person about a service provider in the area where she resides so that she may seek support and help from such service provider.

Service providers are voluntary associations. Using volunteers sends a clear signal that the problem is not serious enough to warrant proper funding. It is difficult to ensure that quality of service where a person is unpaid. There is no mechanism of accountability in place. Volunteers invariably do not have the same sense of responsibility. There is no highly professional co-ordinator employed to train and supervise the volunteers.

Volunteerism is exploitative of women. It downgrades the issue and devalues women's work. Government's reliance on unpaid labour of women to provide community service, in this case- a specialized service to women, is counterproductive to women's struggle for recognition of the seriousness of the issues that affect them. It reinforces the marginalized status of women and trivializes the issues of domestic violence.

Recommendation 3;

- It is recommended that in the definition of "aggrieved person" the requirement of a bond of blood, marriage or adoption and the need for the parties to live together be eliminated;
- It is recommended that "aggrieved person" be given a wider definition so that certain categories of women are not left out;
- It is recommended that in the definition of "protection order", it is added that Protection Order means an interim or permanent order issued under section 14.
- The definition of "Service Provider" not encompasses the element "voluntary".

4. Domestic Violence- Section 4

Section 4 read as follows :-

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

- (a) Habitually assaults or makes the life of the aggrieved person miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment, or
 - (b) Forces the aggrieved person to lead an immoral life; or
 - (c) Otherwise injures or harms the aggrieved person.
- (2) Nothing contained in clause (c) of sub section (1) shall amount to domestic violence if the pursuit of course of conduct by the respondent was reasonable for his own protection of or for the protection of his or another's property.

The definition of "domestic violence" in section 4 is very problematic and has been drafted in terms which are most unfavourable to women.

In section 4 (1) (a) the wording "habitually assaults" is very disturbing. It is almost an affront to women's dignity and reveals a clear lack of political will to eliminate violence against women. In fact, there is a serious risk that the hard won gains of the women's movement be dissipated. This is a reflection and perpetuation of societal attitudes towards the abuse of women, which indicates acceptance of a certain level of violence in the family.

Under section 4 (1) only actual violence and worse, only "habitual" assault constitutes domestic violence. This definition falls short of the obligations of the government of India under international human rights standards and norms.

The declaration on the Elimination of Violence Against Women, the first international human rights instrument to exclusively and explicitly address the issue of violence against women, affirms that violence against women violates, impairs and nullifies women's human rights and their exercise of fundamental freedoms.

Article 1 of the Declaration on the Elimination of Violence Against Women and the Beijing Platform for Action both define violence against women as “any of gender –based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

The Beijing Platform for Action commits Government around the world to take action to address violence against women whilst stressing that violence against women is the most shameful human rights violation and perhaps the most pervasive.

Paragraph 113 of the Beijing Platform for Action stipulates that the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:

Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence relation exploitation.

Paragraph 117 of the Beijing Platform for Action adds that:

“acts or threats of violence whether occurring within the home or in the community, or perpetrated or condoned by the State, instil fear and insecurity in women’s lives and are obstacles to the achievement of equality, development and peace. The fear of violence, including harassment, is a permanent constraint on the mobility of women and limits their access to resources and basic activities. High social, health and economic costs to the individual and society are associated with violence against women. Violence against women is one the crucial social mechanisms by which women are forced into a subordinate position compared with men.”

Domestic violence takes on all forms of abuse- beatings, verbal, sexual and emotional. The most horrendous is permanent disability or death of the victim. All their victims and their families are left with permanent scars, mostly invisible. Often the victim never recovers. In facts very few ever completely heal; they rather learn to live with their scars. Assault/ battering is not just a matter of physical aggression. It is aggression with the intent

to control, subjugate or intimidate another human being. The two hallmarks of the assault are fear and injury.

Physical abuse is but one tactic, one intentional act used to gain power and control over women. The non-physical tactics used include economic abuse, coercion and threats, intimidation, emotional and verbal abuse, isolation (i.e. alienating her from her family, and friends), using male privilege by treating the victim as subservient, minimizing and denying the violence and blaming the victim.

Recommendation 4:

It is recommended that a wider definition of domestic violence be adopted, so that any conduct, whether actual or threatened, that causes the aggrieved person to fear for or to be apprehensive about her personal safety, constitutes domestic violence.

Domestic violence should include:

- causing or attempting to cause bodily injury including sexual assault; placing or attempting to place the aggrieved person in fear of imminent bodily injury to herself or to her children;
- physically or sexually abusing or attempting or threatening to abuse children of the aggrieved person.
- Engaging in a course of conduct which places a person in reasonable fear of injury;
- Intimidation, harassment, maltreatment, brutality or cruelty;

- Confining or detaining the aggrieved person against her will;
- Causing or attempting to cause damage to the aggrieved person's property a threat to commit any act mentioned above.

As far as the definition contains the element "miserable by cruelty of conduct", it is to be noted that unless Magistrates consistently interpret this provision, gains made in bringing this new legislation will be diminished, if not entirely negated. Women continue to be judged from the male perspective. The task of changing judicial culture is very difficult where the legal norms and the judges/ magistrates are gender biased.

Recommendation 5

The use of such vague terms such as "makes the life of the aggrieved person miserable by cruelty of conduct" is to be avoided.

"Miserable by cruelty of conduct" should cover emotional/ psychological abuse, which serves to keep women intimidated and afraid. Emotional abuse can be even more damaging than physical abuse because the aggressor is always in her face, demeaning, degrading, humiliating, harassing and robbing her of her identity and making her existence a living hell.

In section 4 (1) (c) the wording "otherwise injures or harms the aggrieved person" is problematic. There is no definition of "injures" or "harm" in the Definition section, i.e. section 2. Would the terms "injuries" and "harm" be given a broad interpretation in the absence

of any guidelines to the courts, in terms of matters to be taken into account? Would all forms of violent behaviour be covered e.g. psychological, marital rape, etc.?

Section 4 (2) will have the effect of maintaining women as the most vulnerable members of the family.

There is a need to look at the familial authority relations from which dowry violence is organized and at the property relations, which this authority structure thrives on and maintains. It is worth nothing that gender hierarchy, combined with generational hierarchy, bestows differential powers on the various members of the family vis-à-vis their ability to act as fully independent beings in relation to one another.

Section 4 (2) has to be looked at in this context and from that perspective. Hindu laws of property and ownership of the means of production give women negligible rights, as independent entities to family income, assets and property.

Under English law defence of property is different from self-defence and necessity. A man is of course entitled to take measures to protect his own property and incur no criminal liability where he takes reasonable measures against the property of another in defence of his own. In order to avail himself of that defence, he must believe that the property was in “immediate” need of protection.

Self-defence constitutes a defence where the acts are commanded by an actual necessity of the lawful defence of one-self or of another person, not property.

Under English law only reasonable force may be used in defence of property.

These are defences available under criminal law and which carries an evidential burden different from the one applicable in civil cases. Such a defence in the line of section 4 (2) is uncalled for in a legislation that provides civil remedies, and whose main aim is to preserve the family. Section 4 (2) sends a wrong signal. In several countries in damaging or attempting to cause damage to the spouse's property constitute an act of domestic violence- not a defence. A defence in the form of section 4 (2) gives the signal that the problem is not the violence but the conduct/ behaviour of the women. The respondent who has reason that his property is being damaged or is likely to be damaged may apply for a protection order too.

Recommendation 6:

It is recommended that section 4 (2) be removed from the Bill.

5. Section 5- Protection Officers

Section 5 read as follows :-

- (1) The State Government shall, by notification in the official gazette, appoint such number of Protection Officers in each

district as it may consider necessary and shall notify the area or areas within which a Protection Officer shall exercise his powers and perform his duties under this Act.

- (2) The Protection Officer shall possess such qualifications as may be prescribed.
- (3) The terms and conditions of service of the Protection Officer and other officers subordinate to him shall be such as may be prescribed.

Under the Act, the government shall appoint such number of protection officers in each district and later shall exercise the powers and duties under the Act.

There is a need for a co-ordinated statewise response, a dynamic partnership between the government and non-government sectors. Some institutional mechanism is necessary to oversee the overall implementation of the Act, such as Domestic Violence Council and a Domestic Violence Policy Unit responsible for the administration of the Act. The basic infrastructure for a co-ordinated responsible must be put in place. The legal system will effectively perform its role only within an integrated, cross sectoral responsible to domestic violence.

Protection Officers operating individually will not be able to successfully address the problems faced by women. What is required is a co-ordinated and holistic response to violence through representation, support, education and follow up assistance.

Protection Officers must be trained in the complex issues of domestic violence. Their role is not merely of hand holder- they must assist women in a holistic way- assist women to stop violence that is occurring, by providing access to a support system that can help a woman with all her needs- financial, housing, emotional support and counselling other legal problems.

Unrealistic expectations should not be place on protection officers acting on an individual basis. They cannot be expected to provide solutions without adequate training and resources. The complexity of domestic violence requires a professional response. Protection Officers needs skills and experience in crisis intervention. Unskilled and unprofessional protection order risk causing further damage. Poor intervention is likely to rebound on existing service providers.

Confidentiality- it is important to ensure the confidentiality of the procedure. Going to court to obtain a protection order can be a very stressful experience. Therefore, it is essential that women feel as comfortable as possible through this process.

Experience has shown that women prefer the support of women in discussing personal issues for reasons of comfort and safety. This aspect has to be addressed when appointing protection officers. To engage mostly men as protection officers could serve to reinforce unequal power relationship.

Protection officers will be called upon to deliver a comprehensive service to women. Their role is much more than “hand-holding” and is a complex mixture of support/ advocacy/ information and referral. Women’s expertise in and sensitivity to the areas of domestic violence should be acknowledged and should not have to be justified. The needs of women victims are paramount and should not be compromised in any way.

Recommendation 7:

- That an institutional mechanism be set up to oversee the overall implementation of the Act, such as a Domestic Violence Council and a Domestic Violence Policy Unit responsible for the administration of the Act;
- That confidentiality be insured throughout the procedure.
- That women should preferably be appointed as protection officers.

6. Section 6- Duties of the Protection Officer

Section 6 reads as follows:

- (1) Where the Protection Officer, after enquiry believes either suo motu or on the basis of information received from any person under sub section (1) of section 8 that action should be taken, it shall be his duty to-
 - (a) inform the aggrieved person of right to apply for protection order under the provisions of this Act;

- (b) inform about a service provider in the area where the aggrieved person resides so that she may seek support and help from such service provider;
 - (c) inform the aggrieved person of her entitlement to legal services under the Legal Services Authorities Act, 1987;
 - (d) perform such other duties as may be prescribed or as may be ordered to be performed by the Magistrate.
- (2) It shall also be the duty of the Protection Officer to entertain any request or application made or presented to him under the provisions of this Act by the aggrieved person or by any other person on behalf of the aggrieved person.
- (3) The Protection Officer on receipt of an application under sub section (2) shall, where so desired by the aggrieved person, endeavour to assist the aggrieved person and the respondent in an independent and impartial manner to reach an amicable settlement of the grievance under this Act.
- (4) If no such settlement as stated in sub section (3) is arrived at the Protection Officer shall file an application to the Magistrate under this Act if so desired by the aggrieved person.

Section 6 (1) (b) casts the burden of providing support and assistance to the victims of domestic violence on “service providers”. “Service Providers” under section 2, are voluntary associations whose

objectives are to protect “the rights and interests of women by any means including legal, aid, medical, financial or other assistance.

The Draft Bill is silent on the role of the Protection Officers where there are no service providers in the area where the aggrieved person resides. The role of the Protection Officer is only to inform the aggrieved person of certain matters, e.g. her entitlement to legal services.

A number of issues needs to be raised amongst others concerning the resources available to the “service providers” any help/ grant received from the Government of India.

When one is victim of an act of domestic violence, one is in need of immediate help and time is of the essence. The availability of immediate and effective protection measure is an essential element of state response to violence against women. Victims have a right to rapid redress. There is a need to establish just and efficient legal procedures.

Women victims of domestic violence are often under constant threat or in imminent danger. A victim who succeeds within a reasonable time after the act of domestic violence has been committed on her person, to be in contact with a Protection Officer, will need to wait longer before meeting with a service provider who in turn may or may not be able to meet her needs.

A victim of domestic violence needs immediate help, for example:

- * Transportation to the nearest hospital or medical facility for the treatment of injuries.

- * assistance to collect her personal belongings from her residence where there are further threats of violence and she cannot return to the respondent's place because it is dangerous to do so.
- * transportation to an alternative residence or a safe place of shelter for her and her children.
- * legal assistance where she does not qualify for legal aid under the Legal Services Authority Act, 1987
- * assistance to file the complaint, i.e. make the application for a Protection Officer under the Act.

The Bill does not spell out whether the Protection Officers have the power to search the home (e.g. for dangerous weapons etc.) to arrest and detain a violent respondent. It is also silent on the manner in which Protection Officers are to conduct the enquiry. Will Protection Officers receive adequate training to fulfil their duties and powers under the Act?

Section 6 (3) gives the Protection Officer the power to "endeavour to assist the aggrieved person and the respondent in an independent and impartial manner to reach an amicable settlement of the grievance" where it is so desired by the aggrieved person. This provision carries certain disadvantages.

Under the Bill, it is the protection officer and not the Magistrate who has that function and power.

Mediation and its philosophical foundation of consensus dispute resolution, assume that the parties are willing and able to represent

themselves and their own interests in negotiations with each other. The existence of a power imbalance between the parties can have a devastating effect on the equitability of a mediated resolution to a dispute.

Government may have every reason to promote mediation as a process which provides parties with a better, more civilized, less expensive and emotionally more caring dispute resolution process whilst at the same time relieving magistrates of the burden of long court list and reducing spending on the courts and legal aid.

Unfortunately, conciliation sessions in view of an amicable settlement, impose inappropriate obligations on the victims of violence, divert cases from prosecution and delay victims access to concrete remedies. The amicable settlement reached cannot be enforced and compliance cannot be monitored. Often such amicable settlement could include commitments by the victims of abuse such as to give all her salary to her husband or to take all responsibilities for all domestic tasks. These obligations imply that the problem is not the violence, but rather the victim's behaviour. There is a risk that protection officers prioritise family unity over the women's safety and integrity. There is a danger of a woman being pressurized to opt for an amicable settlement and to preserve the relationship.

Often women are urged to modify their behaviour whilst the abuse itself is explicitly condoned. Victims have reported that they are

reprimanded for being stubborn and not obeying their husbands. Besides women are socialized to be loving, forgiving and to give one more chance.

Mediation is based on an assumption of equality, which is often not present in these relationships. Violence vitiates such equality.

There is no interim protection order pending the amicable settlement. No application is even made to the magistrate.

There is no sanction for not honouring a conciliation agreement.

There is a heavy risk of protection officers preferring to hold mediation rather than enquire/ investigate into a reported case and taking the application for a protection order to court.

Attempts to resolve disputes by alternative methods should not impede the progress of a case to a final determination by the courts.

Recommendation 8: -

It is recommended that the powers and duties of the Protection Officer be extended and clearly spelt out in the Bill; for example it is recommended that their powers include a power of arrest, power to search, power to confiscate dangerous weapons. The duties of the protection officers should go beyond the mere duty of giving information to the aggrieved persons about her right to apply for protection order, her entitlement to legal services and about the availability of service providers in the area.

It is further recommended that victims of domestic violence be provided with immediate help, such as:

- transportation to the nearest hospital or medical facility for the treatment of injuries.
- assistance to collect her personal belongings from her residence where there are further threats of violence and she cannot return to the respondent's place because it is dangerous to do so.
- Transportation to an alternative residence or a safe place of shelter for her and her children.
- Legal assistance where she does not qualify for legal aid under the Legal Services Authority Act, 1987.
- Assistance to file the complaint, i.e. make the application for a Protection Order under the Act.

It is recommended that mediation only take place with the informed consent of the woman and that it should not be an alternative to the legal path. However, if it is the course chosen by the woman, steps must be taken to protect the woman from further violence. The mediation should be undertaken by the Magistrate and not by the Protection Officer.

7. Section 7- Powers of Protection Officers

Section 7 reads as follows :-

- (1) A Protection Officer within the legal limits for which he is appointed shall exercise such powers as may be conferred on him by or under this Act.
- (2) A Protection Officer may take assistance of any person while exercising his powers or discharging his duties under this Act.

- (3) A Protection Officer authorized to discharge functions under this Act shall be deemed to be a Civil Court for the purposes of holding inquiries under this Act.

The power given to the protection officers to “take assistance of any person” in the discharge of his duties is too general.

Recommendation No. 9

It is recommended that the Bill should set the parameters and specify the persons who could be of assistance to the Protection Officers for example doctors, psychologist, family counsellors, the police etc.

8. Section 10 – Service of notice.

Section 10 reads as follows:

- (1) Notice of the date fixed under section 9 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate.
- (2) A declaration in such form as may be prescribed of the Protection Officer regarding service of notice shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

Section 10 casts the burden of service of notice on the Protection Officers.

Recommendation 10

It is recommended that on an application being made, the court should have the responsibility of causing notice thereof to be served on the

respondent who shall be summoned to appear before the court on such day as may be fixed by the court (not later than 15 days of the date of application) to show cause why the order applied for should not be made.

Recommendation 11

It is recommended that where an interim protection order is issued, the court shall immediately take steps to have a copy thereof served on the respondent who shall further be summoned to appear before court on such day as may be fixed by the court to show cause why the said order should not be confirmed, varied or discharged.

It is also recommended that the Bill be amended to provide for substituted service. Where it appears to the court that it is not reasonably possible to serve a copy of application or an interim Protection Order under the Act, personally, the court may make an order for substituted service.

9 Section 11- Counselling

Section 11 reads as follows:

- (1) The Magistrate at any stage of the proceedings under the Act may direct the respondent or the aggrieved person, either singly or jointly, to undergo mandatory counselling with any service provider.
- (2) Where the Magistrate has issued any direction under sub section (1), he shall fix the next date of hearing of the case within a period not exceeding two months.

Considering that the magistrate has the power to direct the respondent or the aggrieved person, either singly or jointly to undergo mandatory

counselling at any stage of the proceedings, it is likely that the counselling will be more in the form of conciliation counselling as opposed to therapy counselling. Besides it must be noted that it is not always easy to distinguish between joint counselling and mediation.

Often women report that the abuser only want them to return in order that he might continue the abuse and maintain power and control. Women also report that counsels focus on reconciliation. Whilst the women don't even want to face their aggressors, latter projects a better image by wanting reconciliation and enhance a perception that they are cooperating in the process.

Safety is another major concern for women victims of domestic violence and who are obliged by the legal system to be in close physical proximity to the men who have abused them. Even individual counselling session can be dangerous for some women as often the abuser has sessions scheduled right after her.

Power imbalances make mediation a potentially unjust dispute resolution process for women. Women victims of violence should never be forced to participate in the process. For women, informal justice is often no justice at all.

Recommendation 12:

It is recommended that the Bill be amended in order to authorize magistrates, only to recommend counseling. Joint attendance should only take place where the woman consents and makes an

informed decision to that effect. There is a need to clarify each step of the legal process and ensure that women who do choose to attend counselling and mediation do so fully informed of their rights and obligations in each situation, including the level of compulsion to attend, to remain and to agree in each session.

10. Section 12- Assistance of welfare expert

Section 12 reads as follows:

In any proceedings under this Act, the Magistrate may secure the services of such person, preferably a woman where available, whether related to parties or not, including a person engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions.

The spirit of this provision can only be to provide the Magistrate with assistance from professionals such as family counsellors and psychologists.

Recommendation No. 13

It is recommended that the following word be deleted ‘
whether related to parties or not.’”

It is apparent to all those who work with victims of domestic violence that very often women need other kinds of support which can only be provided by trained social welfare professionals. The nature and complexity of domestic violence requires a greater level of support and

specialized advice and advocacy than the legal profession is traditionally trained to offer.

11. Section 14- Passing of Protection Order

Section 14 reads as follows :-

- (1) The Magistrate, after giving opportunity of being heard to the parties to the application, and after being satisfied that the aggrieved person is being subjected to domestic violence, may pass the protection order by directing the respondent to,-
 - (a) refrain from committing any act of domestic violence; or
 - (b) pay such monetary relief as the Magistrate deems just, and specify the period in the protection order within which the amount of such monetary relief is to be paid by the respondent to the person aggrieved ; or
 - (c) pass such other direction as may be considered necessary
- (2) Subject to section 11, every endeavour shall be made by the Magistrate hearing the application under this Act to dispose it of within three months from the date of filing of the application.
- (3) All evidence in any proceeding under this Act shall be taken in the presence of the respondent, or, when a personal attendance of the respondent is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons cases in the Code of Criminal Procedure, 1973;

Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service of notice, or wilfully neglecting to attend the court, the Magistrate may proceed to hear and determine the case ex-parte.

- (4) A copy of the protection order shall be forwarded to the Protection Officer and parties to the application.
- (5) Where the Magistrate is satisfied that circumstances stated in the application presented under section 9 are such so as to justify the immediate intervention of the Magistrate to restrain the respondent from committing domestic violence, the Magistrate may issue an interim protection order directing the respondent to restrain from engaging in any act of domestic violence, and the Magistrate may further require the respondent to show cause as to why he should not be ordered to execute a bond, with or without sureties, for maintaining domestic peace for such period as the Magistrate thinks fit.

Recommendation 14:

It is recommended that the section be headed “Protection Order”. It should be spell out:

- When, by whom and how an application for a Protection Order can be made;
- The matters to be taken into account by the court in determining the case;

- The terms of the protection order.

Under section 14 (1) the Magistrate may only issue a Protection Order where he is satisfied that the aggrieved person is being subjected to domestic violence. This may be difficult to prove.

Recommendation 15:

It is recommended that the application should be entertained where the person avers that he/ she has been the victim of an act of domestic violence and he/ she reasonably believes that the respondent is likely to commit any further act of domestic violence against her.

In order to obtain consistency in the application of the act especially in view of gender bias, in courts, it is proposed that the matters which the court should have regard to in determining an application be clearly set out and should include:

- the need to ensure that the aggrieved person is protected from domestic violence.
- The welfare of any child affected or likely to be affected by the conduct of the respondent.
- The accommodation needs of the aggrieved person and her children as well as those of the respondent;
- Any hardship that may be caused to the aggrieved person and other family members including the respondent.

- Any other legal proceedings between the respondent and the aggrieved person, any other matter which the court may consider relevant.

Section 14 (1) (c) stipulates that the Magistrate may pass such other direction as may be considered necessary.

Recommendation 16:

For the sake of preserving consistency in the application of the law, it is recommended that the range of directions be spelt out as follows:

“Where a protection order is issued, the court may further.

1. prohibit the respondent from being on premises on which the aggrieved spouse resides, works, is studying or is undergoing vocational training or an apprenticeship;
2. prohibit the respondent from being on premises specified in the order frequented by the aggrieved spouse;
3. prohibit the respondent from being in a locality specified in the order
4. prohibit the respondent from approaching within a distance specified in the order of the aggrieved person.
5. prohibit the respondent from contacting, harassing, threatening or intimidating the aggrieved person, or any person at a place where the aggrieved person resides, works, is studying or is undergoing vocational training or an apprenticeship;

6. prohibit the respondent from damaging the property of the aggrieved person on property, including furniture and household effects, used by the aggrieved person.
7. prohibit the respondent from taking possession of movable property including furniture and household effects used by the aggrieved person;
8. prohibit the respondent from causing or allowing another person to engage in a conduct referred to in paragraph (a) to (g)
9. direct the respondent to return any movable property specified in the order to the aggrieved person or to allow the aggrieved person to recover or have access to or make use of moveable property specified in the order;
10. direct the respondent to attend such counselling or rehabilitation programs as may be specified in the order;
11. specify conditions subject to which a respondent may:
 - be in a locality specified in the order;
 - approach or contact an aggrieved person at a place where the aggrieved person works, resides, is studying or is undergoing vocational training or an apprenticeship;
12. contain any other condition which the court considers necessary in the circumstances.”

These ancillary orders could also include:

1. An occupational order, i.e. an order that the respondent leaves the residence, the matrimonial home;

2. an order that suitable housing other than the common residence be given to the aggrieved person;
3. dividing the use of the matrimonial home in a manner that the respondent has no contact with the aggrieved person;
4. custody of minor children;
5. child support;
6. possession of furniture and other household goods, other items of the personal property e.g. tools used for work etc.

Under section 14 (1) the magistrate may issue the Protection Order, directing the respondent to:

Refrain from committing any act of domestic violence: or

Pay such monetary relief; or

Pass such other direction as may be considered necessary.

Recommendation 17

The word “or” should be deleted. Where a protection order is issued, the court may further order the respondent to pay such monetary relief.

In section 14 (2) the wording “every endeavour” which shall be made by the magistrate to dispose of the case within three months is on the weak side.

The Act must seek to establish a distinct and expedited procedure for dealing with cases of domestic violence. Unless interim protection orders are granted, three months can be extremely long. A woman who seizes the court and files a domestic violence complaint must not face a justice

system fraught with bias and incapable of affording her effective remedy or redress.

Experience in other countries has shown that there are often cross applications for protection orders by the respondent in response to being served with a complaint against them. A cross application is often used to delay proceedings, or as a way to get even with the victim and to indicate to her once again, through the legal system, who is the boss. In most cases unlike the aggrieved person, the respondent has the means to be legally represented.

Section 14 (5)

Recommendation 18

With regard to the circumstances when a magistrate may issue an interim protection order, the following provisions are recommended.

Where the court is satisfied that there is a serious risk of harm being caused to the aggrieved person before the application may be heard and that the circumstances revealed in the application are such as to warrant the intervention of the court even before the respondent is heard, the court may:

Issue an interim protection order, restraining the respondent from engaging in any conduct which may constitute an act of domestic violence and ordering him to be of good behavior towards the aggrieved person;

Order the Commissioner of Police to provide police protection to the applicant until such times as the interim order is served on the respondent or for such time as the particular circumstances of the case may be justify. Where an interim protection order is issued, the court shall give directions to the effect that immediate steps are taken to have a copy thereof served on the respondent who shall further be summoned to appear before court on such day as may be fixed by the court to show cause why the said order, should not be confirmed, varied or discharged.

An interim protection order shall, unless the court directs otherwise, remain in force until such time as the court pronounces itself on the application of the protection order.

With the above safeguards, the bond to keep the peace may not be necessary.

12. Section 16- Appeal

Section 16 reads as follows:

There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be.

Recommendation 19:

It is recommended that the following be added:

- no appeal shall lie against any decision concerning an interim protection order.

- An appeal against an order shall not have for effect to suspend its operation until the decision of the Appellate Court.”

13. Section 18- Penalty for breach of protection order by the respondent

Section 18 reads as follows :-

A Breach of protection order, or of the interim protection order, by the respondent shall be an offence and shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to rupees twenty thousand, or with both.

Recommendation 20

It is recommended that a clause be included providing for mandatory arrest in cases of breach of Protection Order.

“Any person who commits an offence under section 18 shall be arrested by the police.”

14. Section 19- Penalty for not discharging duty by the Protection officer.

Section 19 reads as follows:

If any protection officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause, he shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to rupees twenty thousand, or with both.

Whilst the Bill contains provisions to punish protection officers who fails or refused to discharge their duties there is no independent mechanism established to monitor and oversee protection officer's treatment of female victims of violence. There is no mechanism to punish protection officers who reject complaints without cause, harass complainants or their families or otherwise block investigations. Section 19 does not deal with failure or refusal to discharge duties generally but only punishes failure or refusal to discharge duties "as directed by the Magistrate in the Protection Order without any sufficient cause". This considerably limits the control mechanism.

15. Section 21- Protection of Action in good faith

Section 21 reads as follows:

No suit, prosecution or other legal proceedings shall lie against the protection officer for any damage caused or likely to be caused by anything which is in good faith done or is intended to be done under this Act or any rule made there under.

The reasoning and recommendations of the Parliamentary Committee are fully endorsed. Service providers too should be exempted from civil or criminal liability for acts done in good faith.

Other general remarks

Procedure

As many women do not want to prosecute or leave their husbands, civil remedies provide a more satisfactory solution.

Protection Orders, to be effective, must offer needed and timely safety mechanisms. The purpose and effect of the protection order must be remove the threat at the point of danger and allow the women space to explore her options. It is critical that protection orders be available expeditiously and without cumbersome court proceedings. In

Access to justice

Women complain of the lack of services to meet their needs, of ineffective legal remedies and of their humiliation by a system of justice that they perceive as trivializing their injuries and disbelieving them. There is an urgent need to improve access to justice as a response to violence against women.

Witnesses

In section 14, it would help if it were clearly stipulated in a subsection, that an application for a protection order shall be heard as a civil case between the parties who shall be free to call witnesses in support of their respective case.

Costs

Recommendation 21:-

It is recommended that a new section added under Chapter V. Miscellaneous, with regard to costs, to the effect that notwithstanding any other enactment no costs shall be allowed in any proceedings under this Act, nor shall any aggrieved person appealing against any decision under section 16 be required any recognition to prosecute the appeal.

Exemption from duties

It is also recommended that a clause be included in the Bill to the effect that notwithstanding any other enactment, all civil, judicial and extra judicial acts, and all documents made use of or produced before the court, in any matter arising out or brought under this Act shall be exempt from registration and stamp duties and from the payment of any fees.

Conclusion

A life free from violence is our right. Our home should be places of safety and comfort. Women can no longer be hostages in their own home. The rights of women not to experience violence is part of the human rights agenda. Whilst we all welcome this legislation, we all refuse to be over optimistic and complacent. No less than strict laws are required to hold domestic abusers accountable for their vile conduct and to bring them to justice. A flawed legislation will not improve the lives of the women in this country and will not shield them from future violence.