

**Lawyer's Collective, WRI**  
**Campaign for a Civil law on Domestic Violence**

Background to the Campaign on a New Civil Law on Domestic Violence:

Our campaign for a new law on domestic violence has reached a very critical stage and an important milestone. On the 11<sup>th</sup> of December 2001, the Government of India, through the Ministry of Human Resource Development, published and circulated a bill, to be introduced in the Lok Sabha, (Bill No 133 of 2001), titled:

**THE PROTECTION FROM DOMESTIC VIOLENCE BILL, 2001.**

The Bill (hereafter "GOI Bill") has not yet been introduced in the Parliament. As we all know, there was an attack on Parliament on the 13<sup>th</sup> of December and much of legislative business was put aside. This perhaps explains the fact that the GOI Bill was not introduced in Parliament in the winter session. It is now to be introduced in Parliament in the budget session, which will commence on the 18<sup>th</sup> February 02.

This delay in the introduction has proved to be a blessing in disguise for it gives us all an opportunity to discuss the same and its implications.

A copy of the GOI Bill is annexed.

As you all know, the Lawyers Collective, Women's Rights Initiative ("LCWRI") initiated a campaign for a new law on Domestic Violence sometime in December 1999. Since then a series of nation wide consultations were held with women's groups all over the country to discuss the proposal that was formulated by us. The response was very encouraging and there was a consensus over the fact that there is a need for a civil law on domestic violence.

The bill as reformulated by the LCWRI after the consultations (hereafter "LCWRI Bill") is annexed.

*Comparison between the GOI Bill and the Bill as proposed by the Lawyers Collective after the consultations.*

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On a comparison of the two bills, we find that the GOI Bill, not only falls far short of our expectations and of indeed what is required to be done, but may actually turn out to be dangerous in its implications for women who are victims of domestic violence.

To begin with, we are happy that the government has finally recognized that domestic violence exists and that women need to be protected against it by law. This is the political significance of tabling of the bill. There has been a consistent denial of the existence of domestic violence against women and a refusal to address the issue. To that extent, we have made gains.

Although we are very happy that the government has finally found its way to recognizing the existence of domestic violence, we are extremely disappointed with the content of the law as proposed and this note is intended to share with you our concerns.

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*Rationale behind a Law on Domestic Violence*

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At the outset, it is necessary to give a brief outline of the nature and function of any law on domestic violence. Simply put, the function of any law on domestic violence is to stop violence against women in intimate relationships. These women who are subjected to violence normally stay in a shared household, which in the case of married women has come to be described as the “matrimonial home”. The home may be owned by the husband, by her parents-in-law in the case of joint families, jointly by her and by her husband, entirely by her, or may be rented. What makes it the matrimonial home, is not the ownership pattern of the home, but the fact of residence in the home in a conjugal and family relationship. The home, for many women has become the site of violence against them. The situation is akin to being a captive in the home. The relations of power being unequal, the woman is literally held hostage in a violent home in conditions akin to torture in custodial situations. Given that women often have no options to escape this situation, they suffer violence with no support from society, relatives and friends. Perhaps the only support that such a woman has is from her parental family, to whom she can turn in situations of distress. However, given the pervasive belief in society that a woman’s place is in her husband’s home, parents often push women back into violent relationships rather than encouraging their daughters to break loose from violent matrimonial relationships. There exists no social security for such women. Shelter homes are few and far between and are often run in a prison like fashion, with no freedom of movement and autonomy. Many of them do not allow children to accompany the women. There is a sense of shame associated with the breakdown of a marriage and the woman is seen as the person responsible for the breakdown. Even when shelters exist, few women see them as an option as there is discrimination against women who have come out of a bad marriage.

The abuser, recognizing the vulnerability of such a woman, hits her where it hurts most. He and his family often ensure that she is thrown out of the matrimonial home or make her life so miserable that she has no option but to leave the home. The harassment ranges from:

- physical beating
- emotional torture
- mental abuse
- sexual abuse
- threat of violence
- denial of basic necessities such as food and maintenance
- Where there are children, there is the additional blackmail that custody of the children will be denied to her if she does not fall in line.

It is no solace to be told that she can go to court for custody as going to court itself is a long drawn out torture (given that in court also she is perceived as an offender rather than a victim) and besides the process is very expensive. Often, she is simply abandoned and deserted with no means of sustenance. Another very common form of violence is the

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taking of a “second wife”. It makes no difference that bigamy is a crime, many men continue to believe that they have a right to have extra marital affairs.

Statistics indicate that women in this country do not own property or the matrimonial home which belongs either to the husband or to his family members. The man is therefore literally the lord and master of the home.

So far we have talked only about married women. However, other women in intimate familial situations are also vulnerable to abuse. Daughters who have little or no rights in ancestral homes or in any event are seen as “outsiders” and waiting to be married off, widows who are seen as having no right to continue to live in the house after the death of the husband, mothers and old parents, seen as a nuisance by children are all such victims of abuse in intimate relationships.

There is another very common problem, and that is the problem of the woman who believes that she is married to a man and is then told when the relationship breaks that there was no marriage at all as essential ceremonies of the marriage were not performed when the marriage took place. There are also situations in which people have lived together in what has come to be described as common law marriages for several years and such women too face violence within the relationship.

It is therefore clear that any law on domestic violence, which seeks to prevent it, must address all these problems and very fundamentally, must protect the right to reside in the “shared household”.

The term “shared household” is preferred over “matrimonial home” since the relationships protected are beyond matrimonial ones. It is the fact of living together in a common space, the intimate nature of the relationship, the privacy of the home and the unequal relations of power that provide the opportunity for the abuse of the woman.

*Factors which determine the success of a domestic violence law*

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It should therefore be clear to us that the success of any law on domestic violence depends on the following factors:

1. A declaration of basic intent of the law, namely, the object of preventing domestic violence.
2. A clear and unambiguous statement of the right to be free from domestic violence and the recognition of domestic violence as a violation of the human rights of women.
3. The definition of domestic violence, which captures women’s experience of abuse with some degree of precision.
4. The definition of the shared household so that rights can be protected within that household.
5. The relief that can be given to protect the woman from violence.

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6. The infrastructure available to victims of violence that can make the remedy accessible.
7. Clarity and simplicity of court procedures.
8. Monitoring of the functioning of the law, is it serving its intended purpose?
9. Providing a coordinated response to domestic violence by recognizing the role of other agencies such as NGOs, the medical profession, shelter homes and the police in assisting the prevention of domestic violence.

Judged by all these criteria, we find that GOI Bill has failed to meet the aspirations of women, rather, it might make their situation worse.

Experience has shown that one of the biggest enemies of women facing violence is the ideology prevailing in all organs of the State that a woman's place is in the matrimonial home and nowhere else, notwithstanding that she is facing torture in that home. There is no acceptance of the fact that she has a right to be free from torture in the matrimonial home. This ideology motivates the parents of the women as well, thereby denying her any long-term solution to her ability to move out of a violent relationship, if she so chooses. Very often women themselves internalise this ideology and wish to continue to remain in abusive relationships, as they see no life beyond such relationship.

Law makers and law enforcement agencies however, cannot afford to succumb to this ideology and laws must reflect the constitutional values of a country that are intended to create and protect rights. Any law of domestic violence must, therefore, contain a clear and unambiguous statement that a woman in an intimate relationship has a right to be free from violence, must define the violence and must provide remedies against the situation.

It must be clearly understood that domestic violence laws are not marriage laws, nor are these laws intended to protect the sanctity of marriage. They, in fact, are intended to address a variety of situations including those in which the marriage has broken down due to the violence. They should recognise that in most of the cases, the conjugal relationship has broken down and that the woman is approaching a court of law to seek protection of her life and liberty against the perpetrator, who was meant to be her life partner and her support. How can then, such a law be implemented on the premise that the marriage must be preserved at any cost? That is absurd and any such attempt to do so will end in re-victimising the woman.

Domestic violence laws serve a different function from marriage laws. Marriage laws are meant to define the manner and method of entering into a marriage, rights on marriage and the manner and method of dissolving a marriage. It is very easy to suggest that if a marriage has broken down due to the violence of the man, why does a woman not then seek a divorce under a marriage law? This question can only be answered by the woman in question; the choice is entirely hers. Many women do choose that path. Each woman

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decides for herself what is in her best interest, given her situation. Violence shatters a woman's world, her economic situation, her relationships with the family, with her children, her sense of security and well being and every thing she held dear. She is in no position to decide what to do next. She needs the time and space to come to her own decisions after weighing all her options. On the other hand violence is used by the abuser as a tool of blackmail, as a method of coercing her to give up her claims to her property, to her assets and to her children, all of which are often in the control of the man. Given the repeated violence, the abuser will have achieved his aim of getting rid of his liabilities by driving the woman to such a point that she will agree to walk out of the house in destitution and desperation, giving up all claims only to be free from the violence.

The purpose of a domestic violence law is to prevent such a situation and to restore a woman to a position of equality within the marriage so as to give her the time and the space to decide what she wants to do with the rest of her life. The absolute precondition for that is to stop the violence promptly. If the law does not serve that function, it serves no function at all. This analysis would not be complete without mentioning that the matrimonial laws of this country do not contain any significant rights to matrimonial property for women, so that on the breakdown of a marriage, the woman has to literally leave with empty hands. Given that there is often no record of her own property such as stridhan or gifts, she often has to leave without her own belongings as well. This is very often the reason why women stay on in bad marriages, knowing that on exit they must go with empty hands.

Violence against sisters by brothers, and against the mothers in the family is also directed at the same purpose, namely to compel them to leave the shared household.

*Critique of the GOI Bill*

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**DOMESTIC VIOLENCE**

Judged in this perspective the proposed law betrays the rights of women to be free from violence. There is no proper definition of domestic violence.

The GOI Bill defines domestic violence as follows;

***Domestic Violence.***

- (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 or for the protection of his or another's property.

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The UN framework for model legislation on domestic violence states:

*“All acts of gender-based physical, psychological and abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal use, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed “domestic violence”.”*

As a signatory to CEDAW and the Beijing platform of Action we have accepted the following definition of violence:

*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:*

- a. 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 related to exploitation;*
- b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*
- c. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.*

The General Assembly Resolution adopting the Declaration on the Elimination of Violence against Women (A/RES/48/104, 20 December 1993) also defines violence against women in similar words as the CEDAW and the Beijing Declaration and Platform for Action.

The LCWRI proposal defined domestic violence as follows:

***"domestic violence"** means any act, omission or conduct which is of such a nature as to harm or injure or has the potential of harming or injuring the health, safety or well-being of the person aggrieved or any child in the domestic relationship and includes physical abuse, sexual abuse, verbal and mental abuse and economic abuse.*

Explanation -

- i) “physical abuse” includes any act or conduct which is of such a nature as to cause bodily pain, harm or danger to life, limb, or health or impair the health or development of the person aggrieved, and includes assault, criminal intimidation and criminal force.*

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- ii) *“Sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of the person aggrieved and includes sexual intercourse against the will or without the consent of the person aggrieved and refusal to co operate in contraception when the person aggrieved may reasonably require.*  
*Provided that where the person aggrieved is below the age of sixteen, any sexual intercourse, whether or not against her will or without her consent shall amount to sexual abuse;*
- iii) *“sexual abuse” of a child includes any act or conduct of a sexual nature that abuses, harms or violates a child in a domestic relationship.*
- iv) *“verbal and mental abuse” includes*
  - insults, ridicule, humiliation, degrading or name calling, including insults, ridicule or name calling specially with regard to not having a child or a male child, or ;*
  - repeated threats to cause physical pain to any person in whom the person aggrieved is interested .*
- v) *“economic abuse” includes -*
  - a) *deprivation of any or all economic or financial resources to which the person aggrieved is entitled under law or custom whether payable under an order of court or otherwise or which the person aggrieved requires out of necessity, including but not limited to household necessities for the person aggrieved and her children, if any, stridhan, property, jointly or separately owned by the person aggrieved, payment of rental related to the shared household and maintenance;*
  - b) *disposal of household effects, any alienation of assets whether moveable or immovable, valuables, shares, securities, bonds etc or other property in which the person aggrieved has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the person aggrieved or her children or her stridhan or any other property jointly or separately held by the person aggrieved; or,*
  - c) *prohibiting or restricting continued access to resources or facilities which the person aggrieved is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.*

Why then has the government chosen a definition, which hides rather than reveals the true dimensions of violence against women? The answer given is that all forms of violence will be covered by the expression in Section 4(1) (c) of the GOI Bill *“Otherwise injures or harms the aggrieved person”*. That leaves everything to the imagination of the judge and to his/her individual perception of what is violence and what is not. The purpose of a law is to provide the framework of guidelines within which judges are to make decisions. This is the trend in all modern law making. There are certain acts which must be considered acts of domestic violence and it is for the law to lay down what these acts are. This is how all laws are framed. Residuary clauses are meant to cover unforeseen acts of domestic violence, which fall into a pattern similar to the one defined.

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The proposed law fails to define domestic violence and washes itself off the responsibility of defining it and leaves it to judges to decide. This leaves too much to the mercy of the judge and too little to rights of the person aggrieved. The definition does not use the language of rights and uses instead the outdated concept of conduct making “the life of an aggrieved person miserable”. It does not even define cruelty.

An analysis of the definition adopted by the LCWRI shows that it not only follows international legislative trends but also that it is based on the UN framework for model legislation on domestic violence and on the definition of violence adopted by CEDAW. There is in the GOI Bill, a persistent denial to recognize that domestic violence exists and the need to articulate its various forms. This definition will defeat the very purpose of the law and will render it meaningless for women, if not make their position worse.

It might foreclose the possibility of arguing that sexual abuse, economical abuse, child sexual abuse are forms of domestic violence. Anyone who has argued cases on behalf of women in abusive situations will know what an uphill task it is to convince a judge that violence exists and what are its manifestations. Even when convinced, judges tend to think that their role is to “preserve the marriage” by condoning the violence and asking the woman to “*forgive and forget*”. Success for a judge or for the law is seen as the ability to “*patch up the marriage*” and hope for a fairy tale situation in which the man and the woman are suddenly transformed in a manner that the violence disappears. The root cause of the violence is neither seen nor addressed. We have often heard judges say, “*I succeeded in persuading the husband to take her back*”. How many of them have monitored what happened to the women after she went back? How many of them know that condoning violence leads to more violence? How many of them have seen cases where the condonation of the violence and acceptance of it has led to further violence and in some cases, even death of the woman in the matrimonial home?

The role of the law is to condemn domestic violence in all its form unambiguously. Lawmakers must realize that the best guarantee of successful marriage is the unconditional condemnation of violence by one partner against the other and the declaration of the right to be free from violence in all its various forms. The definition fails in this respect.

### **RELATIVE**

The GOI Bill does make it possible to file a complaint against a “*relative*”. This means that sisters, daughters and mothers will be in a position to file a complaint against the abuser. However, it is debatable whether a woman who has been led to believe that she is married to a man but is not actually married for want of compliance of essential ceremonies will be able to use the law. In all probability she will not be considered a “*relative*”. This will also be the case in bigamous marriages as the husband who enters a second marriage will not be considered a “*relative*” of the second wife, leaving such a woman vulnerable to abuse without a remedy.

Section 4(2) seems to suggest that a plea of “*self defense*” will be available to a man

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when faced with a complaint of domestic violence. This is a ploy to undo the main provision as a man can always say that he was trying to get out of a scuffle, a fight between himself and his wife or between his wife and his mother and caused the injury complained of, not intentionally, but in order to protect himself. Such provisions have been used in many other countries against women. Often in criminal law, the police, when they arrive on the scene of violence arrest both the man and the woman, leaving them to fight it out in a court of law as to who was to blame. This provision must be dropped if the woman is intended to be protected from violence

## OMISSIONS

We now come to the most important omission from the Bill.

The Bill contains no declaration of rights. There is no section indicating that the woman in a domestic relationship has the right to reside in the shared household. Absence of such a provision makes the entire exercise an attempt at pulling wool over our eyes. The most significant omission from our matrimonial laws is the fact that none of them, whether Hindu, Muslim, Christian or Parsi, contain any such declaration of a right to reside in the matrimonial home. As explained earlier, this is the root cause of the vulnerability of a woman in her matrimonial home. This is the one major factor, which makes it possible to drive out a woman on to the street and blackmail her into agreeing to an unfair settlement. In today's context when the courts talk of a "settlement", what is offered to a woman is either a return to the violent home and acceptance of the violence or a divorce by mutual consent giving up the right to any share in the matrimonial assets or a decent alimony. Often the woman is willing even for divorce on the mere return of her own stridhan, or custody of the children which she fears that she is in danger of losing, considering that the father is the natural guardian of the children under the law of the land. In other words, the woman is faced with the choice of bargaining away her rights in return for the dubious benefit of a divorce and her children and sometimes her stridhan. Awards for alimony are notoriously miserly and depend on the continued payment month after month. They are also dependent on the continued "chastity" of the divorced wife and the fact that she does not remarry. What a bargain!

The one remedy required against this situation is an unambiguous declaration that the woman has the right to reside in the shared household. We live in a constitutional regime, in which rights are guaranteed and most importantly, the right to life and liberty, the right to be secure in one's person. Any nation that cannot guarantee that right to its people cannot be considered civilised at all. If the GOI Bill does not give any indication that the commitment to securing the right to life and liberty of women in this country was its driving force.

For most women, life is where the matrimonial home is and today the situation is that death is also where the home is. The biggest threat to life and liberty for a vast majority of women comes from the matrimonial home. The recognition of this fact is the basis of all domestic violence legislations across the world. The declaration of the right to reside in the shared household is the best guarantee to ensure that violence will be prevented. It

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must exist in the law, failing which, this law must be rejected by the women's movement.

**RELIEFS**

Corresponding to the omission on the part of the drafters to grant substantive rights to the victims of domestic violence, there is an omission in the section dealing with the relief that can be granted.

Section 14 of the GOI Bill deals with 'Protection Orders' enabling a Magistrate to pass three kinds of orders against the respondent:  
refrain from committing any act of domestic violence;  
pay such monetary relief as the magistrate deems just; and  
pass such other directions as may be considered necessary.

If the purpose of any law was to be brief, then this drafting would get full marks. Indeed, it could have only said that the magistrate may pass any order as he/she deems fit!

As against this, the LCWRI Bill had proposed the following orders:

***Protection order—***

*a) The court may pass a protection order prohibiting the respondent from:*  
*committing any act of domestic violence;*  
*aiding and abetting in the commission of acts of domestic violence;*  
*entering the place of employment of the person aggrieved or, if person aggrieved is a child, its school, or any other place frequented by the person aggrieved;*  
*entering the residence of the person aggrieved;*  
*attempting to communicate in any form whatsoever with the person aggrieved, including personal, oral or written, electronic or telephonic contact;*  
*committing any other act as specified in the protection order;*  
*alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both parties, either singly or jointly; including her stridhan or any other property held either jointly or separately by the person aggrieved;*  
*causing violence to the dependants, other relatives and persons who give the person aggrieved assistance from domestic violence.*

*The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety of the person aggrieved or any child.*

*While passing an order under Section 5(a) or (b), the Court may also pass an order directing the police to give protection to the person aggrieved or to assist her or the petitioner in the implementation of the order.*

*The court may direct the respondent to return to the possession of the person aggrieved her stridhan or any other property or valuable security to which she is entitled to either singly or jointly.*

*The court may direct the Protection Officer or any other authority to remove the person aggrieved to a place of safety such as any short stay home run by any accredited service provider.*

*The court shall, in all cases where it has passed a protection order under this section, order that a copy of such order be given to the protection officer in charge of the area and to any accredited service provider located within the local limits of the jurisdiction of the Court.*

***Monetary Relief-***

*The court may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the person aggrieved and any child as a result of the domestic violence and includes but is not limited to-*

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*loss of earnings;*  
*medical expenses;*  
*loss caused due to the destruction, damage or removal of any property from the control of the person aggrieved;*  
*maintenance for the person aggrieved as well as her children, if any;*  
*compensation for the domestic violence inflicted upon the person aggrieved*

*Copies of an order for monetary relief shall be forwarded by the Court to the concerned protection officer and to the Station House Officer of the police station within whose jurisdiction the respondent resides. The respondent shall pay monetary relief to the person aggrieved within the date specified in the order made in terms of sub-section (a) and in accordance with the terms there*  
*The protection officer may, upon the failure on the part of the respondent to make payment in terms of sub-clause (c), by an order, direct an employer or a debtor of the respondent, to directly pay to the person aggrieved or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.*

**Residence order-**

*The court may pass a residence order to:*  
*restrain the respondent from alienating or dispossessing the shared household or encumbering the same;*  
*restrain the respondent from renouncing his rights in the shared household except in favour of the person aggrieved;*  
*require the respondent to permit the person aggrieved to enter and remain in the shared household or part thereof;*  
*prohibit, suspend or restrict the exercise by the respondent of his right to occupy the shared household;*  
*restrain the respondent from dispossessing the person aggrieved from the shared household and*  
*direct the respondent to secure alternate accommodation for the person aggrieved or to pay rent for the same, if for sufficient reasons, the court is of the opinion that it will be harmful or injurious for the person aggrieved to live with the respondent in the shared household, having regard to the circumstances of the case.*

*While making an order under this section, the court may impose on the respondent obligations relating to the discharge of rent or other payments, having regard to the financial needs and resources of the parties.*

**Custody Order** – *Notwithstanding any other law in force, the court may, at any stage of the hearing of the petition for protection order, grant temporary custody of any child or children to the person aggrieved or the petitioner and specify, if necessary, arrangements for visitation by the respondent.*

Provided that in any case where a complaint of sexual abuse of a child has been made, and the court is prima facie satisfied that such allegation is true, the court shall grant custody to the person aggrieved or the petitioner and no such order for arrangements for visitation by the respondent shall be made.

**Compensation Orders –**

*In addition to other reliefs under this Act, the court may on an application by the person aggrieved, pass an order directing the respondent to pay compensation and damages for the injuries caused by the acts of domestic violence committed by the said respondent.*

*The person aggrieved may make an application for compensation and damages under this section without any prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.*

*Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the person aggrieved, the amount, if any, paid or payable in pursuance of the order made by the*

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*court under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance, if any, left after such set off.*

These are standard features of any domestic violence legislation the world over. We can only conclude that the absence of these provisions is intentional.

Domestic violence law is in the nature of an emergency legislation and is intended to give immediate relief from violence. Often the violence is directed not only against the woman but is intended to cut off all her support structures, deny access to essential services and to withhold a woman's own property or children in an attempt to blackmail. The most obvious way of achieving this aim is to throw the woman out of the household. Unless the power of restoration exists or the power to remove an abusive spouse exists, there is no purpose in having this law at all. Indeed, it is even possible for judges to argue that the absence of such provisions was intentional by the legislature and hence, no such orders can be given. It is just not good enough to argue that such orders can be given under the provisions "pass any other direction as may be considered necessary". Considered necessary by whom? We know what are the necessities of women who face domestic violence, why are those necessities not spelt out? What is the reluctance all about?

The omission of the power to restore a woman to the matrimonial home is justified on the ground that women who have been treated with violence do not want to go back to the matrimonial home. Here is a classic case of the woman's victimisation being taken as the basis for further victimisation. A woman who faces violence does not want to go back because of the violence, the solution she seeks is not homelessness but a right to live in the home free from violence. It is then argued, "where is the guarantee that if a woman is restored to her matrimonial home, the violence will stop. A mandatory law directing a woman to be restored to matrimonial home will not work for the woman". The answer to that is that if the abuser knows that the woman does have a right to be there in the first place, he will be less likely to feel that he can get away with the violence. That is the primary guarantee; the existence of her right! Moreover, why is it not possible to direct a repeatedly abusing spouse to leave the matrimonial home? It is nobody's case that all the women must be mandatorily put back into the matrimonial home. That is a decision that will be taken from case to case. What the law must provide is the power to pass such order if the situation so requires. What, then, is the reluctance to pass such a law? It seems at the root of the reluctance, is the male supremacy, the desire to safeguard the property of the man, even over the life of the woman. First, we need clarity that through this law, the women's movement does not seek to transfer property from the man to the woman, but only seek a guarantee of the right of a woman in a domestic situation to live in the home free from violence. Her long-term rights will have to be worked out in matrimonial litigation as and when it is commenced. This grave omission must be viewed in the light of the fact that none of the marriage laws in this country provide for an equitable distribution of the matrimonial property on the breakdown of a marriage. The breakdown of a marriage in our society with its attendant discrimination means virtual civil death for a woman. She is often left with the responsibility of bringing up children, with no guarantee that her children will be able to claim their rights at an appropriate stage in life. Her children acquire no rights at birth (except Hindu male children in joint

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Hindu family property) and a matrimonial dispute can lead to a total disinheritance of rights. When children grow and their needs multiply, she is left to fend for herself and her children. To take a decision to obtain a divorce is a decision, which not only has emotional consequences, but also is almost like choosing between violence and civil death. This makes out a very strong case for changing our matrimonial laws by introducing a law of matrimonial property.

However, given the experience of the law making process in relation to the domestic violence legislation, we do not see that happening in the near future. In the absence of such legislation on matrimonial property rights, a proper law on domestic violence is a must.

The present law is a complete sell-out of the rights of women. We must resist the attempt and demand that the State perform its most elementary duty, the duty to protect the life and liberty of its citizens in an effective way consistently with its Constitutional and International obligations.

### **PROTECTION OFFICERS AND THEIR ROLE**

The GOI Bill provides for the appointment of Protection Officers. They have very important functions. It is the duty of Protection Officers to inform women of their rights under the Act to obtain orders under the Act. There is no point in having protective laws of which women are not aware. Few women care to know their rights when entering into a marriage or a relationship. However when disputes arise, they want to know their rights. They are often left to their own resources, often private lawyers. In the last few years, NGOs have fulfilled that role, but given the magnitude of the problem, they cannot fulfil the unmet need. The State has the responsibility to meet that need and Protection Officers have that function to perform. They are also intended to assist a woman in filing a complaint and perform all such functions as may be delegated to them by court orders. The Protection Officer, on the request of the aggrieved person, is also supposed to assist her in bringing about a settlement. Once again, much will depend on the sensitivity of the officer and what he/she understands by "settlement". If no settlement is arrived at, he/she will file an application to the court, if so desired by the woman.

One very welcome feature of the GOI Bill is in Section 10, on "service of notice", the Protection Officer is required to serve the court notice on the respondent, taking care of a major problem that women face in serving proceedings on the respondent.

### **OTHER FEATURES OF THE BILL**

#### **Mandatory Counselling**

Section 11 contains a very dangerous provision providing for the woman to undergo mandatory counselling with the abuser. This goes against all accepted principles of counselling. The victim and the abuser are in an unequal situation and no joint counselling is possible in that situation. It can only lead to further disempowerment of the

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unequal party. The section uses the word “mandatory counselling”. Mandatory counselling is one of the methods of correcting abusive behaviour. It is ridiculous to enable the Magistrate to insist on “mandatory” counselling of the innocent party. Such counselling can only end up ‘convincing’ her to accept her situation of disempowerment as being normal and to continue in a violent marriage. Counselling for the innocent part can and should only be voluntary. This is especially dangerous given the fact that even under the existing dispensation, judges and Crimes Against Women Cells of the Police constantly goad women into so-called “reconciliation” sessions where they are made “agree” to “settlements”.

Section 12, which permits assistance of experts. This is a welcome provision. However, the section goes on to say that such an expert can be a person who is engaged in promoting “family welfare”. This latter provision must be dropped, as the welfare of the family does not mean the same thing as the welfare of the abused women. It reflects the same mindset of patching the family together as any cost, most often at the cost of the woman.

### *Service Providers*

This is a welcome recognition of the role of NGOs who are described as service providers and at any stage the Protection Officer can seek the assistance of such service providers or ensure the access of the aggrieved person to service providers including medical services and shelters. A Protection Officer can seek the services of a service provider in discharging his/her functions. Any person who is aware of domestic violence can give information to a Protection Officer of such violence. The Protection Officer can then assist the aggrieved woman in reaching a settlement.

### *Offences and Penalties*

Under Section 18, breach of a protection order can lead to a conviction and imprisonment for a period up to one year or with fine up to Rs 20,000 or with both. It is important to understand that this law is in addition to and not in derogation of any other law, which basically means that the remedy under Section 498A of the Indian Penal Code will continue to exist.

The LCWRI Bill in Section 22, had provided for the issuance of a warrant of arrest while issuing a protection order. However, this warrant of arrest was to remain suspended. It could be implemented if there is a breach of the condition of the order to which it is attached. If a woman files an affidavit to the effect before the police station that the order has been violated, the police officer will activate the warrant and make the arrest. This provision is intended to prevent the woman having to go all over again to the court and complain of the breach, virtually having to reargue the case before the judge. It is also based on the fact that a competent court has already come to the conclusion that domestic violence had been committed, that is why the protection order is being issued. Strangely enough, the GOI Bill makes no provision for cognisance of the offence under section 18, that is breach of the protection order. This is a very serious omission. It must either contain a provision for a suspended warrant of arrest or mention that an offence

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under section 18 is cognisable and non-bailable. A woman who complains that a protection order has been violated must have the right to approach a police station and have the offender arrested to be produced before the court for violation of its orders. Failing such a provision, a man can violate the order with impunity, secure in the knowledge that there will be no immediate consequences to be faced.

### **JURISDICTION OF THE MAGISTRATES**

Unlike the LCWRI Bill, which envisioned an application to be made to a civil court, the GOI Bill enables an application to be made to a Magistrate's Court. It is suggested that the Magistrates' Courts are more accessible. This may not be an advisable move as domestic violence issues are often connected with long-term matrimonial disputes which are decided by civil courts. The LCWRI Bill suggested, relief under this domestic violence law should be granted in any other proceedings that a woman might commence. Thus, for example, if a woman has filed a suit for partition of the matrimonial property which is jointly owned, or for divorce or separation, she can, in addition, claim relief under the domestic violence law. Similarly, in a criminal proceeding initiated by the person aggrieved such as, a Section 498A IPC complaint, orders under the domestic violence law can be obtained. Conferring the jurisdiction under the GOI Bill exclusively to Magistrates and that too, in separate proceedings would result in multiple litigation, an onerous burden for a victim of violence. However, even if the object of accessibility is to be resolved, it is essential to ensure that the jurisdiction to grant protection orders to the Magistrate within whose jurisdiction the person aggrieved resides temporarily or permanently or where the respondent resides or carries on business or where the cause of action arose. The GOI Bill does not specify the Magistrate who will have local jurisdiction to try such cases. In such a case, it is not clear whether a woman can make a complaint to a Magistrate from her place of residence, even if the respondent does not reside within the local jurisdiction of such Magistrate.

### **IMMUNITY TO PROTECTION OFFICERS**

Section 21 of the GOI Bill contains a provision for the protection from civil or criminal action against a Protection Officer for any action taken in good faith by him/her. This protection must be extended to service providers. We have handled several cases of women's organizations that have been prosecuted for kidnapping, when assisting a woman in getting her children out of an abusive home, for defamation when saying that the abuser may have been a child molester etc. Such groups performing a very valuable social function must be protected against the harassment of the law, which is often used as a tool to shield and cover up abuse.

One of the most problematic aspects of the appointment of Protection Officers is the qualification for the appointment of such officers and the method of appointment. During previous consultations on the Bill, an apprehension was expressed that the government of the day would simply appoint protection officers from amongst the members/supporters of the party to which they belong, or in any event make arbitrary appointments. Since the Protection Officers do play an important role, a fear was expressed that they would

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degenerate into another bureaucracy and that some mechanism should be put in place to prevent this from happening. One safeguard that we suggested was that these Protection Officers will function under the supervision of the courts.

The GOI Bill in Section 19 provides for the prosecution of Protection Officers for failure to discharge duties as directed by the Magistrate. This must be changed to “directed to discharge of duties under the Act”. We suggested two very major safeguards. One, that anyone must have a right to be appointed as a Protection Officer and the other, that the process of appointment should be transparent. This could be ensured if the post of Protection Officer was filled by advertisement inviting applications. Since Protection Officers are meant to inform women of their rights against violence and their rights to access the law and the services of the service providers, they must be qualified to do so. The question was therefore debated, what should be the qualifications of Protection Officers? One view was that they should be qualified social workers. Most of us felt that this would be an ideal situation but that it was possible that social workers may not exist in all situations, more particularly in rural areas and that it may be better to appoint women who have had a certain number of years of experience in dealing with women’s issues and a proven track record of working for women. Others suggested that *Mahila Panchas* should perform this role in rural areas. The general feeling was that the State Governments should prescribe the qualifications depending on the situation in the State. Perhaps the best situation would be to insist that the person is a qualified social worker but also make provision for appointment of a person who has worked in a women’s organization for a certain number of years and has the experience of dealing with domestic violence. Whatever be the qualifications, the Bill must state very clearly that the appointment will be through public advertisement with an opportunity to every qualified person to apply for the post.

**MECHANISM OF THE IMPLEMENTATION OF THE LAW**

The creation of a post of Protection Officer presumes the Government is willing to commit resources to the making of this law a success. There is no such commitment in this law at all. There is no “*FINANCIAL MEMORANDUM*” accompanying this law. Where will the Protection Officers come from? Who will appoint them? Who will pay for their salaries and expenses? How will they assist women? Who will pay for the drafting of the applications that they are supposed to present to the court? Who will provide for their transport or the transport of a woman to a place of safety?

**MONITORING**

We must realize that Governments have fallen into the habit of passing laws without any intention of making them a reality. The monitoring of the implementation of the law is as crucial as having the law itself. We had therefore suggested that setting up of a Coordinator for the Prevention of Domestic Violence, whose function would be to investigate into the functioning of the law, make annual reports, review the existing law plans and execute training programs.

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It has often been said that there is no shortage of laws in the country, what is lacking is the implementation of these laws. The will to implement is lacking. In the case of domestic violence, there is a lack of political will to even address the problem and the same is evident from the fact that till date, there is no law addressing domestic violence. Our effort is to bring such a law into existence, but one that will truly serve the function of preventing and addressing the problem of domestic violence. But the law itself must contain the mechanisms for implementation and monitoring.

### **THE WAY AHEAD**

The appointment of Protection Officers is meant to be a recognition of the fact that not only must a democratic State, committed to the principle of equality and protection of the right to life, guarantee the same by law, but must also, by affirmative action, provide the means by which the right can be actualised. Our laws must recognize that the woman is not in a position to exercise her rights unless she is provided with the means to do so. It is said that ignorance of the law is no excuse. If that be so, it is equally the duty of the State to publicise the law, to send the signal that domestic violence is not acceptable, that women have rights against it and that the State will make available its resources to the woman to exercise her rights. That is the concept behind providing protection officers who perform outreach functions, beyond the confines of the courtroom, and who will help to make the court orders meaningful. Affirmative action and special provisions are required where parties are in an unequal relationship of power and this is one such situation.

Legislative mindsets have to change, a law must not only be passed but its implementation monitored, hence the need for a Coordinator for the prevention of domestic violence. Public interest messages against domestic violence must be broadcast through public interest media and this too must be the mandate of the law. Training is also mandatory, not only for protection officers but also, more importantly, for Judges. This too must find a place in the law, rather than be left to the whims and fancies of decision makers. Lastly, the law itself must contain budgetary provisions, as indicators of the commitment of the Government, for the use of prevention of violence against women. Examples of such laws exist in the field of domestic violence legislations across the world. The Prevention of Violence Against Women Act, 1994 passed by the Clinton Administration mandated the US Congress to commit large funds for the prevention of violence against women. These funds have been used for providing social workers attached to police stations, research and documentation, training, setting up of separate shelters, public education campaigns, training of the police and various associated purposes.

We, in the women's movement have a long battle ahead of us. Getting the government to politically commit itself to pass a law on domestic violence is a victory no doubt but an incomplete one.

In a democratic country citizens have a right to participate in the framing of legislation. We must insist that:

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“*Domestic violence*” is defined in accordance with the UN framework for model legislation on Domestic Violence;

The right to reside in the shared household is included;

The law should enable judges to pass orders of residence, restraining dispossession, restoring possession;

Law should enable grant of monitory relief, custody and compensation;

There should be no provision for mandatory counselling for the woman;

Protection Officers are appointed through an open process of inviting applications from all qualified persons through advertisements in a transparent manner;

A suspended warrant of arrest is attached to the protection order or in the alternative, violation of a protection order is an offence which is cognisable and non bailable;

The government commit substantial funds for the appointment of protection officers and for the implementation of the Act;

Widest possible publicity of the law is given;

The government provide for training of the law enforcement machinery;

A Coordinator for the prevention of domestic violence is appointed;

Legal Aid to victims of domestic violence should be readily available.