Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence

INDIRA JAISING

This paper visits the issue of domestic violence in India and explains why the Protection of Women from Domestic Violence Act, 2006 was enacted, what ends were intended to be served and what gaps in the existing legal framework it was intended to plug. It gives a brief background to the feminist campaigns that led to revisions in criminal law, thus forcing the State to intervene in cases of violence in the home and the problems in the criminal law regime that led to the conceptualisation of a civil law to deal with domestic violence. It also discusses the post-enactment developments and the monitoring of the law.

Indira Jaising (*indirajaising@gmail.com*) is with Lawyers Collective – Women's Rights Initiative and additional solicitor general, government of India.

On 26 October 2006, the Protection of Women from Domestic Violence Act (PWDVA) came into effect, with the stated objective of providing "for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family".[1] This invocation of the Constitution in the preamble of a law on domestic violence is significant, for the application of constitutional principles to the private domain of the family and the home has often been resisted by the lawmakers and the judiciary. As the Delhi High Court (in)famously stated, in *Harvinder Kaur vs Harmander Singh,*[2] "introduction of Constitutional Law in the home is the most inappropriate. It is like introducing a bull in a china shop. … In the privacy of the home and the married life neither Art 21 nor Art 14 have any place".

While the legislature has enacted the law with a view to bring equality into the home, its success depends on the extent to which the required support services are put in place by the State, on how the law is interpreted by the judiciary and the extent to which women are able to invoke the protection of the law or at least, internalise the view that violence in intimate relationships is something that cannot be tolerated. The PWDVA is informed by the vision that the "home" is a shared space even if there is no shared ownership, and hence, it imagines the "domestic" in a different manner. In the last three years, the appellate judiciary has delivered a number of important judgments under the Act which have upheld this vision. However, there have also been judgments that betray a lack of appreciation of the purpose and function of this Act.

For instance, in *S R Batra & Another vs Taruna Batra,*[3] the Supreme Court considered the question whether the wife had a right to reside in the premises owned by the mother-in-law, where she had been living with her husband after marriage. First, the court interpreted the term "shared household" in the Act and held that since the house was owned by the mother-in-law, the wife could not claim a right to reside in that house. Despite the Act stating clearly that a woman has the right to reside in the shared household, "irrespective of whether the respondent or the aggrieved person has any right, title or interest" in the same,[4] the judges felt that the concept of ownership of property was the only factor decisive of the right to reside in the shared space. Second, the judges held that the phrase "lived or has lived" in the definition of "shared household" would lead to absurd results, with the woman claiming several places as her "shared household" on the ground that she had lived there at some point of time or the other. Such a view completely negates the fact that as per the scheme of the Act, the term "shared household" is tied to the concept of

"domestic relationship" which again has a specific meaning in the Act. Additionally, there is a difference between living in a house as a cohabitee and living as a visitor/guest; in relation to the cohabitee, the expression "lived" ought to have been given the same interpretation as "reside" which has a recognised legal meaning.[5] Given that the object of the provision was to prevent dispossession of women from their matrimonial homes, interpreting the phrase "lived or has lived" as "resided" would prevent against absurdities from taking place, as feared by the judges in this case.

At the heart of the decision in *Batra* is a deep-rooted commitment to the right to property, which trumps all other considerations. This narrow conception of property and ownership is the foundation of capitalist societies, not shared by other systems of jurisprudence. In Hindu law, for example, the notion of the coparcenery quite clearly vested the right to ownership of property and the right of usage in a multiplicity of users, who were entitled to use it by virtue of being in the domestic relationship. While ownership was vested with three generations of males, the women of the coparcenery married into the family, in their capacity of mothers and daughter-in-laws, had the undisputed right to reside in it. The coparcenery was quite literally the "shared household"; a joint family was defined as being "joint in food and worship". The PWDVA built on these notions and secularised this concept, thus making the right to reside available to women of all religious communities. The broad definition of the "shared household" in the PWDVA is in keeping with the family patterns in India, where married couples continue to live with their parents in homes owned by the parents. All this and much more was ignored by the court.

Against this background, it is important to revisit the issue of domestic violence in India and explain why the law was enacted, what ends were intended to be served and what gaps in the existing legal framework it was intended to plug. It needs to be appreciated, particularly by the judiciary that every provision of the PWDVA was meant to address a particular need. Thus, this article is partly meant to be a chronicle of the campaign for the law on domestic violence and partly an occasion to reflect on how best the law has been able to serve the purpose with which it was enacted. Section 1 gives a brief background to the feminist campaigns that led to revisions in criminal law, thus forcing the State to intervene in cases of violence in the home, while Section 2 details the problems in the criminal law regime that led to the conceptualisation of a civil law to deal with domestic violence. Sections 3 and 4, offer a detailed chronicle of the campaign for the PWDVA, the drafting history and the legislative process that it went through. This is followed by a discussion on the post-enactment developments and the monitoring of the law that, Lawyers Collective (LC) has been a part of. The article ends with some reflections on the current challenges that the law is faced with.

1 Feminist Campaigns against Violence in the Home

While the PWDVA itself was the culmination of a sustained campaign spanning over a decade, broadly speaking it was also part of a longer history of feminist engagement with violence against women, beginning in the 1970s. The campaign against dowry and related violence, in the mid-1970s was possibly the first time the issue of violence at home was discussed in public. The agitations by feminist groups across the country were able to attract the attention of the State to the growing incidents of the so-called death-by-fire. Such incidents were (and even now are) seen as accidents and not investigated properly. The campaign highlighted the difficulties in invoking the law in cases of dowry-related violence, for a range of reasons. For instance, dying declarations by women were seldom treated as evidence against the husband and in-laws; and even cases that were registered on the basis of dying declarations were later dismissed by the courts on the ground of inadequacy of evidence. Thus, charges of murder or abetment to suicide could not be successfully invoked. Similarly, police would be reluctant to intervene, arguing that it was not the task of the police to intervene in "family quarrels".

The campaign led to the Criminal Law (Second Amendment) Act in 1983, which introduced Section 498A in the Indian Penal Code (IPC). Under this provision, "cruelty" to the wife by the husband or his relatives was made a cognisable, non-bailable offence punishable with imprisonment up to three years and a fine. Cruelty was defined as including both physical and mental cruelty, *or* any harassment associated with demand for dowry. Similarly, Section 304B was introduced in the IPC in 1986 which created a new offence of "dowry death". This provision made it possible to prosecute the husband and in-laws of a woman, if she died as a result of burns or any other injury within seven years of marriage, under suspicious circumstances and if it could be shown that she was subjected to cruelty or harassment by the husband/in-laws in relation to demand for dowry.

However, it was only after the new provisions were sought to be activated in the courts, that the women's movement realised that the focus on dowry related violence and death had been rather narrow, for it ended up distracting attention from the other numerous instances of violence that women were faced with in the home, which were not necessarily dowry related. While it was still possible to bring cases of everyday violence against women in the home within the scope of Section 498A, it was not possible to use 304B, if the violence and the eventual death were not linked with dowry. And also, only married women facing violence at the hands of the husband or their families could claim relief under 498A. Thus a lot of other forms of violence faced by unmarried women, old women and children could not be brought under this section. It did not protect women from violence in natal relationships or in relationships that have not received the legal sanction of marriage.

The other problematic aspect of this provision was the definition of "cruelty" itself. Cruelty was defined to mean any wilful conduct which could have driven the woman to commit suicide or caused grave injury to her or posed a danger to her life, limb or health (either mental or physical). The definition was worded in such vague terms that it was difficult to bring issues of sexual violence, economic violence or even threats of violence within the ambit of the section. The experience with using this section in cases showed that the threshold of the impact of violent conduct on the woman, required to be proved was so high that many forms of cruelty fell through the net. A woman had to prove that

she was driven to contemplate suicide, or that her life was in danger before she could access the law. Ultimately, it was entirely on the discretion of the police as to whether the conduct of the husband was of such a nature as mentioned above. Section 304B came into play only after the woman was dead, and Section 498A which was meant to protect her from harassment and violence was assailed by the problems discussed above, thus making the relevance of law for women facing violence at home rather limited.

2 The Need for a Civil Law on Domestic Violence

It is relevant to note that criminal law is geared towards the prevention and deterrence of the crime. While classifying certain practices detrimental to women as "crimes" is relevant from the point of view of putting the issue on the agenda of the State, criminal law itself has little to offer with respect to taking care of the woman's immediate needs of protection, shelter and monetary relief. Also, relying on criminal law remedies alone to address domestic violence does not fully recognise the responsibility of the State towards the victims of violence.

On the other hand, existing civil law remedies were unable to provide effective and timely reliefs to women facing violence. A persistent problem in cases of domestic violence is that women are thrown out of the homes and then the house is sold or rented to dispossess the women indirectly. Although sometimes, the court can be convinced to give injunction orders to prevent women from being thrown out, proceedings under civil law are slow-moving and time-consuming. Even when injunction orders are available, the enforcement is weak due to absence of penalties for violation. Additionally, there is no provision for granting injunction orders or protection orders on an emergency basis, with the result that the women do not have any relief during the course of the proceedings. Often the remedy can only be exercised when it is coupled with a petition for divorce.

All these considerations made it imperative to conceptualise a law on domestic violence that would be a combination of both civil and criminal law elements. A civil law that would, on the one hand, restrain the abuser from committing violence, and on the other, provide for the other needs of the woman faced with violence. At the same time, punitive provisions would ensure the enforcement of the orders of the courts. The following sections describe in some detail the process of framing such a law, and some of the key issues that were encountered on the way.

3 The Campaign

The involvement of LC with the process of formulating a law on domestic violence began when the National Commission for Women (NCW) requested LC to prepare a draft bill on domestic violence in 1993. The first draft for a civil law on domestic violence was prepared and presented to the NCW in 1994. But, a more focused campaign for the law began only in 1998. It was realised that the first step should be to give greater visibility to the issue of domestic violence and introduce the legal community to the issues at stake. For example, it was essential to create a consensus among the lawyers and the judges that domestic violence was indeed a serious issue, but without effective legal remedies. It was essential for the legal community to appreciate the realities of domestic violence, the inadequacies in the then existing discourse of cruelty/dowry harassment/dowry death and the demands of the women's movement with respect to a specific law on domestic violence. This led to a national-level colloquium on domestic violence, involving lawyers, academics, activists, and most importantly, the appellate judges. The colloquium entitled "Empowerment through Law" was an important milestone as there was a wide acknowledgement that what set apart domestic violence from other forms of violence against women was that it occurred within the framework of intimate relationships in a situation of dependency, making reporting and access to legal aid and other support services difficult.[6] Moreover, the fact that domestic violence exists was not even recognised by the law. The bill drafted by LC was extensively discussed at the colloquium and given a more concrete shape.

3.1 The Lawyers Collective Bill on Domestic Violence

The draft bill was visualised as an emergency law providing immediate and effective relief to a woman facing domestic violence. When a woman is faced with domestic violence, the primary aim of any intervention – legal or otherwise – should be to stop the violence and provide for ways to protect her from further violence. Additionally, she would require shelter, medical aid, legal aid, monetary relief, etc, that will help her to build a life away from an abusive relationship. In the absence of violence, a woman may be encouraged to think of her long-term options including divorce, maintenance, reconciliation or criminal prosecutions. The following were some of the salient aspects of the LC Bill.

(a) Definition of Domestic Violence: The bill had a fairly broad definition of what constituted domestic violence. The experience with using Section 498A in cases of domestic violence showed that it was extremely difficult to convince judges of the existence of violence in a relationship. Although the term "cruelty" in 498A encompassed both physical and mental cruelty, it was difficult to bring the subtleties of everyday violence in intimate relationships within the ambit of the law. Even when the judges were convinced of the existence of "cruelty", they tended to play down the possible impact of it and often asked the women to "forgive and forget". In order to address the judicial subjectivity in determining what constituted as violence and to counter the trivialising discourses that downplay the severity and seriousness of violence at home, the LC Bill included the unnamed aspects of everyday violence. Thus, the definition of domestic violence named a range of harms, injuries and threats that degrade and terrorise women. The definition included physical, sexual, verbal, emotional and economic abuses, with each aspect further defined with illustration. The point of providing such an expansive definition was not to put a seal on the conceptualisation of "violence", but to indicate that certain forms of behaviour must be seen as exercise of sexual power, and hence, must be condemned. It is surprising that for a country that has non-violence as its foundational faith, it took more than 50 years to put in place a definition of violence against women.

(b) Domestic Relationship: The bill was an innovation over the traditional understanding of domestic violence, in that it did not

limit the protection against violence to marital relationships alone. Thus, it introduced the concept of "domestic relationship" which included all relationships based on consanguinity, marriage, adoption and even relationships which were "in the nature of marriage". Including relationships outside the marital context within the scope of this law was necessary in view of the absence of compulsory registration of marriages in India, which leaves a majority of women outside the domain of legal protection. Hence, the term "matrimonial relationship" was replaced with "domestic relationship". The site of violence, the home, being the private domain was intended to be brought within the purview of the law. Daughters who are thought to 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 vulnerable to abuse in the home, and hence, were included within the purview of the law.

(c) Shared Household and the Right to Residence: The most important aspect of the bill was the concept of right to residence. Usually, this right either vests in those owning the premises or those in whose name the premises are leased. As it happens in most cases, it is the male members of the family who have an effective control over the premises. The unequal power relations in the private sphere increases the vulnerability of women, who continue to be in violent relationships for fear of dispossession and destitution. As has been observed, when a woman is thrown out of the house, there is little that she can do in the absence of her formal legal title to the house or a stated right to reside in the house belonging to the husband, partner, in-laws, etc. In fact, married women have less protection against being thrown out of the house than tenants have against being evicted. While tenants and trespassers can only be evicted by "due process of law", women could simply be pushed out of the house. The objective of the law was therefore to provide the "due process" protection to the women in domestic relationships.

Given that women in non-matrimonial relationships were to be covered by the law, the term "matrimonial household" was replaced with "shared household". The bill gave the women the right to reside in the "shared household", even in the absence of a formal title over it. What makes it the "shared household" is not the ownership pattern of the home, but the fact of residence in the home in a conjugal or family relationship. This does not create a substantive right over the property, but is a safeguard against dispossession. Unfortunately, the intent behind this provision has been undermined in the *Batra vs Batra* judgment discussed earlier.

(d) Protection Officers: In the feminist campaigns to have more and more laws to address violence against women, what was entirely missed was the fact that the entire justice delivery system – the police and the courts – were largely inaccessible to the women. Prior to the enactment of the PWDVA, the women faced with domestic violence could either approach the police or their natal families. Because of the strict divide between the public and the private spheres, and the deference that the "family" has traditionally enjoyed as a "private space", the police would be reluctant to intervene. Even the natal families would often persuade or coerce the women to return to the abusive home. Recognising this to be a major barrier between the women seeking justice and the legal remedies, the bill provided for protection officers. It was proposed that the protection officers would play the role of being the link between the aggrieved women and the legal system. The role of the protection officer was envisaged as assisting the woman in accessing the court and other support services (such as legal aid, medical facilities, shelter homes, etc); assisting the court during the course of the proceedings; and in the enforcement of orders. The protection officers were to be the "eyes and ears" or in other words, the "outreach arm" of the court who would help the aggrieved women gather evidence to support her case in the court.

(e) Reliefs under the Law: In keeping with the objectives of the law and the rights recognised, the bill provided civil reliefs in the form of protection orders or "stop violence' orders, residence orders including orders restoring her to the shared household, preventing dispossession, restraining the respondent from entering the shared household, etc, orders for monetary reliefs including maintenance, compensation orders that are aimed at providing damages for the mental injury suffered by the aggrieved person, and temporary orders for custody of the children. The civil nature of the reliefs was deemed appropriate in recognition of the fact that a woman facing domestic violence requires a holistic support, which cannot be met through a criminal proceeding or a divorce petition.

3.2 Consultations on the Bill with Women's Groups

Between 1998 and 2001, LC began a dialogue within the women's movement on the draft proposal. The dialogue involved a series of consultations and meetings with different women's organisations in various parts of the country on each aspect of the law. The draft bill was also widely circulated among lawyers for their feedback and criticisms. The draft proposal was thus revised after every such consultation. It is instructive to visit some of the debates that ensued at these meetings and the questions and doubts that were raised. For one, it helps to understand the context of the law better and brings greater clarity vis-à-vis the nature and scope of the law. It also attests to the fact that the law has emerged from a wide process of debate and deliberation within the women's movement.

A much debated issue was whether the proposed law should be gender-neutral and extend its protection to men faced with violence in the home, as well. The wide consensus from all groups involved was that the bill had to be gender-specific in nature since the objective was to protect women due to the pervasive problem of gender inequality. The violence faced by women is a gendered phenomenon that reproduces and reinforces gender inequality, and hence, a gender-neutral law would defeat the purpose of a law on domestic violence. And given the power relations in the home, the men could use a gender-neutral law to dispossess women from the homes. It is in recognition of this gendered power imbalance, that the Constitution enjoins upon the State to

make "special provisions" for women and children in its pursuit of prohibiting discrimination on grounds of sex.

Keeping in mind the fact that often children are also victims of domestic violence, one of the initial drafts of the law allowed a child to bring an application under this law, if represented by a parent or guardian. Accordingly, there was a definition of "applicant" in the draft. There were, however, concerns raised by women's groups, that if such power of representation of a minor child is given to both parents, there may be a possibility of the father (if he is the abuser) using this law against the child's mother. The father could tutor the child to depose against the mother. He could indirectly achieve what he is forbidden under the law to do – i e, depriving the woman of her right to reside in the house. Therefore, as a safeguard against misuse in the law, the draft was amended to provide that only a mother who was herself an aggrieved person under the law could bring an application on behalf of her minor child who has also faced domestic violence.

Another major area of contestation was whether women could be made respondents in a case of domestic violence? Initially the bill had defined the "aggrieved person" as a woman, and the "respondent" as a man. However, it was felt that the new law had to be consistent with Section 498A which allowed a criminal complaint for cruelty to be filed against all relatives and the husband including female relatives. Hence, a proviso was added to the definition of "respondent" by which the aggrieved women were enabled to bring action against a "relative" of the husband/male partner so that both men and women committing violence could be made respondents and relief sought against them. The intention was to allow married women to file applications under the law against their mother-in-law or sister-in-law or other female relatives through marriage, if they were responsible for the violence.

Similarly, an earlier draft of the bill allowed dispossession orders to be passed against both men and women, if they are abusers. However, a concern was expressed that a man might set his mother up as an aggrieved person under this law to dispossess his wife of her residence – thereby indirectly achieving what the law had sought to prevent. And also the opposite, with the dispossession of old mothers by their sons through their wives or sisters. At the same time, it was important to ensure that the protection of the law was not weakened in any way. The intention of this law was not to classify offenders according to their sex. It emerged, however, that an effective compromise would be if the order directing the respondent to remove himself from the shared household was not made available against women respondents. After extensively debating the issue of possible misuse of the law vis-à-vis reliefs against women offenders, it was agreed to include a proviso, which limited the effect of dispossession to men alone,[7] while all other reliefs would equally apply against both men and women.

4 The Legislative Process

After going through a series of consultations and meetings, the final version of the bill was submitted to the National Commission for Women, the department of women and child development and other government agencies.

4.1 The Government Introduces Its Own Bill

On 8 March 2002, the National Democratic Alliance (NDA) government, introduced a separate bill entitled, "Protection from Domestic Violence Bill, 2001" (hereinafter, GOI Bill) in the Lok Sabha. At one level the GOI Bill was an acknowledgement that domestic violence was a serious issue requiring specific legal intervention. There has been a consistent denial of the existence of domestic violence against women and a refusal to address the issue. To that extent, the introduction of the GOI Bill was a significant victory. However, in terms of content, the GOI Bill not only fell short of what the women's movement had been asking for, but it was feared that if enacted, it might have dangerous implications for women facing domestic violence.

The emphasis of the GOI Bill, it appeared, was the preservation of family rather than preventing violence against women and protecting their right to a life free from violence. The scope of the GOI Bill was much narrower than the LC Bill, in terms of categories of aggrieved persons and limited with respect to the nature of reliefs available. The definition of domestic violence in the GOI Bill, among other things required the conduct/assault of the respondent to be "habitual" or what made the "life of the aggrieved person miserable by cruelty". This was totally unacceptable as every single act of violence degrades the woman even if the abuser is not "habitual" in his behaviour, and she should be entitled to seek legal redress against the same. The other elements of the definition were also vague as the bill did not define what would constitute "cruelty" or how to assess "misery" of the aggrieved person. As per the GOI Bill, the respondent was required to be a "relative" of the aggrieved person, the term "relative" defined as persons related by blood, marriage or adoption. The implication of this was that women who were in relationships other than legally valid marriage were excluded from the purview of the law.

Section 4(2) of the bill allowed the respondent to take the plea of self-defence in cases of domestic violence. Normally, the plea of self-defence is available to the victims of a crime; however, the GOI Bill gave the defence to the alleged perpetrator of the crime. The respondent thus could get away even after brutally assaulting a woman on the pretext that such conduct was meant for his own protection or for the protection of his or even another person's property.

A major shortcoming of the GOI Bill was that there was no declaration of rights of the aggrieved person. There was no provision indicating that the woman in a domestic relationship had the right to reside in the shared household. One of the major lacunae in 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.[8] As explained earlier, this is the root cause of the vulnerability of a woman in her matrimonial home. To provide against such situations, the LC Bill had conceptualised the right to reside in the shared household coupled with the stop-violence orders. The GOI Bill, however, did not have any provision of immediate relief to the woman.

It also did not provide a time frame within which to complete the proceedings. It is important that interim relief is provided immediately on application, by the magistrate, pending the hearing.

This may or may not be confirmed after the hearing. However, the GOI Bill followed the usual practice as per the Code of Civil Procedure and thus it meant that women will get relief only after summons was served to the respondents. As a result, it could take months for the women to get relief as most often the respondents devise ways to avoid service of summons. Thus, the critical importance of providing immediate interim relief was not addressed by the GOI Bill.

The GOI Bill also had a provision requiring mandatory counselling for the aggrieved person and the alleged abuser. This was unacceptable as it put the abuser and the victim on the same plane. Counselling is definitely one of the methods of correcting abusive behaviour. But why empower the magistrate to insist on "mandatory" counselling of the aggrieved person as well? Clearly the mandatory nature of the counselling was not meant to help the woman address the trauma of violence. Rather it could easily be a means to convince her to "adjust" to her situation and continue in an abusive relationship.

4.2 The Parliamentary Standing Committee

In response to the obvious outrage expressed by women's groups against the GOI Bill, it was referred to the Parliamentary Standing Committee on Human Resource Development to examine the provisions of the bill. Between May and December 2002, the committee heard the views of the department of women and child development, invited memoranda from individuals and organisations and also received oral evidence and presentations by different women's groups. LC put forth its submissions before the committee, wherein it pointed out the flaws and omissions in the GOI Bill and contrasted them with provisions of the LC Bill. It was impressed upon the committee that arriving at settlements and salvaging marriages should not be the function of a law on domestic violence. The report of the standing committee, submitted in December 2002, reflected that most of the suggestions made by LC were accepted by the committee.

On the issue of not including women falling outside the narrow scope of the term "relative" within the ambit of the Act, the response of the State was that "such women as have been living in relationship akin to marriage without legal marriages were not included simply because the prevailing cultural ethos of the nation did not encourage such relationship". The committee in its report stated that there were, in fact, numerous cases of men and women living together without valid marriages and yet having social sanction. Besides, the primary issue in providing relief to women faced with domestic violence was the recognition of the woman's human right to a dignified life and not the propriety of the relationship she was in. Thus, it concluded that providing relief under the bill to a woman whose marriage is not legally valid will not be in conflict with the existing laws and will not give any legal sanction to illegal marriages.

The committee also opined that there was no need to enable the respondent to take the plea of self-defence in the bill, and hence, the clause should be deleted. Similarly, the committee accepted the suggestion that the bill ought to carry an unambiguous declaration of the women's right to reside in the shared household and the magistrate should be obligated to pass orders accordingly. In addition to accepting the major demands of the women's groups, the committee also asked for better enforcement mechanisms to be incorporated in the bill and asked the State to address the issue of violence against women through other means in addition to the law.

However, the campaign was not able to achieve anything substantial in the two years following the recommendations of the standing committee, as there was no initiative from the government to reformulate the bill in accordance with the report of the standing committee. LC continued with its efforts during this time, simultaneously trying to emphasise the need for this law with the government and sustaining the consensus on the issue among the women's groups. Petitions were sent to the minister of human resources development by different women's groups, urging the government to introduce the bill in the Parliament with amendments suggested by the standing committee. However, in February 2004, the Lok Sabha was dissolved and with it the bill also lapsed.

4.3 Lobbying with the New Government

In May 2004, the United Progressive Alliance (UPA) coalition came to power after the election. It was regarded as a progressive step and a new beginning when the enactment of a civil law on domestic violence was included in the Common Minimum Programme of the UPA coalition. This was an important step as it gave a political significance to the issue of domestic violence. In July the same year, a final draft of the bill, after extensive consultations, was presented to the minister of human resources development, which was then accepted and referred to the department of women and child development. For the next one year (July 2004-June 2005), the bill kept moving back and forth between government departments, and as a result, certain things got left out from the final bill that was presented to the cabinet. One such instance was the definition of the "applicant" that was removed from the bill. The implication of this deletion is that it is still unclear as to how applications on behalf of minors can be moved under the Act.[9] Similarly, there were certain additions that were not in keeping with our demands. For instance, the provision for joint counselling of the parties in Section 14 and Section 15 authorising the magistrate to take help from persons involved in "promoting family welfare" in any proceeding under the Act is a provision that could lead to coerced reconciliation, that we had been opposed to from the very beginning.

In June 2005, the draft Protection of Women from Domestic Violence Bill received cabinet approval and the bill was tabled in the Parliament in July. Members of LC, along with a number of other women's organisations were present in the Parliament when discussions on the bill took place. Surprisingly, no questions were asked about the need for a law on domestic violence by any political party. One did not know if it was a reflection of a gradual social recognition of domestic violence as an issue of immediate concern or was it a plain apathy towards a law which was being enacted simply to fulfil an election promise. Certain members of the house expressed reservations regarding the inclusion of "relationships in the nature of marriage" within the purview of protected categories of women under the law. It was

said that we were introducing concepts alien to *Bharatiya Sanskriti*, which would send across the wrong message to the society. However, the bill was unanimously passed by the Lok Sabha on 22 August 2005, and by the Rajya Sabha on 24 August 2005. On 13 September, it received the accent of the president and the Protection of Women from Domestic Violence Act, 2005 entered the statute book.

5 Post Enactment Developments

The PWDVA provides for an inbuilt mechanism to facilitate the entire system of access to justice. It identifies specific functionaries such as the protection officers and services providers whose primary duty is to assist women in accessing reliefs provided under the law. A crucial step towards ensuring the success of any law is monitoring its implementation. Monitoring a law is essential in order to put in place the basic infrastructure required to guard against non-implementation and also to assess whether the law is able to the fulfil the objective that it was enacted for. LC has taken the initiative to monitor the implementation of the Act, in the absence of any such initiative from the State. One hopes that eventually, this role would be taken up by the government to monitor the progress of its own duties and obligations under the law.

5.1 First Monitoring and Evaluation Report (2007)

The first monitoring and evaluation (M&E) report analysed the performance of the PWDVA, in the first year of its existence. The primary inquiry of the report was to what extent the State had put in place the necessary infrastructure needed for the implementation of the Act, like appointment of protection officers, service providers, medical facilities, etc. And we also wanted to know how the law was being used by lawyers and interpreted by the judiciary, particularly what kind of orders were being passed by the lower courts. Knowing fully well that it was too soon to make an assessment of the law, we decided not to arrive at conclusions but only to document some of the trends that could be observed with respect to the implementation of the Act.

Looking at the available data, we observed that the implementation of the Act was not uniform across the country. In most states, the protection officers were appointed at the district level, and in fact, existing administrative officials were doubling up as protection officers. There were states like Rajasthan, Punjab and Haryana, where protection officers had not been appointed. Protection officers have a specific role to play in facilitating the women's access to courts and a range of other services that the Act refers to. The absence of protection officers and negligible state-provided infrastructure meant that the aggrieved persons had to rely on the police and the existing machinery of the courts for activating the law. In most of the other states, women who could afford to hire lawyers approached the courts directly, while the others approached the protection officers first. Sometimes the courts sought the assistance of the protection officers, if the situation demanded. However, the lack of general information about the existence of protection officers and/or their inadequate numbers was seen as a serious handicap to women accessing the law. Andhra Pradesh seemed to have the best system in place, where the police, protection officers, service providers and legal aid service authorities coordinated their services to facilitate women's access to courts. The police, which continue to be the first port of call for women in distress, were trained to set the Act in motion.

Data from the orders of the lower courts showed that primary users of the law were married women, although in a small number of cases, the petitioners were widows and unmarried daughters. As of 31 July 2007, 7,913 cases were filed across the country, under the PWDVA. Rajasthan had the highest number of cases filed under the Act (3,440) although protection officers had not been appointed in the state. Also, it was found that the most commonly granted relief was for maintenance followed by residence orders and protection orders. This was possibly because magistrates are familiar with granting maintenance orders under Section 125 of the Code of Criminal Procedure (CRPC). But the overall pattern of orders sought and granted was too diverse for drawing broad conclusions.

5.2 Second M&E Report (2008)

In the second M&E report, LC asked the same questions as the forst one. In addition, LC wanted to know the extent to which gaps identified in the first report were being fulfilled; whether the "best practices" recommended in the first M&E report still stood; how effective was the infrastructure in facilitating women's access to court and other services; and what was the jurisprudence that was being evolved by the high courts and Supreme Court on the PWDVA.

By the second year of its existence, there were 22 reported judgments under the Act delivered by various high courts. Significant among these was a judgment of the Delhi High Court upholding the constitutional validity of the PWDVA on the ground that the gender-specific nature of the law does not violate the guarantee of equality as it is a "class legislation" aimed at protecting women as a class that is disproportionately vulnerable to violence.[10]

A judgment of the Madhya Pradesh High Court showed that the question of whether women could be respondents under the law, which was a hotly debated issue prior to the enactment, had continued to be a contentious issue even after the law had come into force. The case, *Ajay Kant & Others vs Alka Sharma*[11] arose in the context of an application filed by a wife against her husband and mother-in-law after she was dispossessed from her matrimonial home, following dowry-related harassment. Based on a literal interpretation of the provision, the court held that a proceeding under the Act can only be initiated against an adult male person. The rationale provided by the court makes it clear that the interpretation of the term "respondent" is actually based on what the court perceives to be essential for safeguarding women's interests. Interestingly, however, in its attempt to provide protection to women, the court failed to recognise the specific gender-neutral language of the proviso to Section 2(q), which uses the term "relative of husband or male partner". Thus defined, a relative can be a male or a female, and consequently, the Act also protects women from violence perpetrated by the female family members of a male respondent.

Significantly, a Madras High Court judgment held that the Act could be invoked even in cases arising before the Act came into force. In *Dennison Paulraj & Others vs Mrs Mayawinola,*[12] the wife was forced to leave the matrimonial home following continuous harassment and dowry demands by her husband and in-laws. Although she left the matrimonial home prior to the enactment of PWDVA (2005), she claimed that the threat and harassment continued. The court concluded that the respondent had suffered part of the abuse after the commencement of the Act in the form of anonymous phone calls threatening violence. The court pointed out that in any case, the issue of retrospective application of penal statutes does not hold true in the case of PWDVA as Section 31 penalises the breach of a protection order rather than the act of domestic violence itself.

In the first M&E report, it was noted that in a number of cases the magistrate had refused to grant residence orders to the aggrieved women based on the *Batra* judgment. The second M&E, however, found that a few high court judgments had interpreted "shared household" based on the factual context and not on the basis of semantics. In *P Babu Venkatesh & Ors vs Rani*[13] the Madras High Court held that the ratio laid down by the Supreme Court in *Batra* could not be applied as the facts clearly demonstrated that the husband had transferred the household into the name of his mother with the intention of defeating the rights of the wife, after the matrimonial dispute arose. In arriving at its conclusion, the court recognised the fact that before the wife's dispossession, both parties resided jointly in the said household. Similarly, in *Vandana vs Mrs Krishnamachari,*[14] the Madras High Court held that a narrow interpretation of the provisions would leave many women in distress and without any remedy. The judgment held that the question is not whether the woman had "lived" in the shared household, but whether she has a right to live in the same. In another case appearing before the Delhi High Court,[15] although the marriage was solemnised, the wife was not allowed to enter the matrimonial home. She filed a suit claiming the right to reside in the matrimonial home. The husband argued that she had no such right as she had not "lived" in the matrimonial home. Although the judge concluded that the woman did not have a right to reside as the house was owned by the mother-in-law, it was held that she could be dispossessed only with "due process" of law and cannot be physically thrown out. This judgment actually shows a keen appreciation of the rule of law and respect for rights, and thus makes available to the woman, safeguards that are otherwise granted to tenants and trespassers.

6 Concluding Thoughts

While "domestic violence" has now become a legally recognised category, violence against women in domestic relationships still persists. We are often asked how law can protect a woman from facing violence, inside the home as the home cannot be policed all the time. The question, however, fails to understand the nature of rights and the role of law in negotiating relationships. Law performs a normative function, whereby it indicates what behaviour must be deemed unacceptable. Having a law on domestic violence has the merit of putting in place a norm that violence against women is unacceptable, and such a norm is backed by State sanctions. But having a norm will not by itself end violence. It is also necessary to facilitate access to justice by the endowment of material resources. Although the institution of protection officers had been created for this purpose, no permanent cadre of protection officers has been created, thus substantially diminishing the utility of the institution. Courts are unaccustomed to deal with agencies such as the protection officers and treat them in a hierarchical manner, not realising that it takes more than judges to protect women from violence.

The other area of concern is that in a number of cases the courts refer the matter for counselling as a first resort, with the objective of reconciliation. Caution must be exercised in adopting the view that conciliation is the first and most viable approach that the court should take, before initiating legal proceedings. Cases where the issue at hand is domestic violence, an approach prioritising conciliation could adversely affect the safety and security of the woman facing violence. Even in this respect, there is lack of clarity regarding the role of the protection officers. Some protection officers (also the police and magistrates) have the mistaken impression that their role is to mediate between the parties in a dispute, rather than to prevent violence from occurring and safeguarding the interests of the aggrieved women.

By far the greatest challenge is to change the mindset of men in domestic relationships who continue to believe that a man's home is his castle. The inevitable backlash is upon us. We are told that women "misuse" the law. Decoded, this means that women are actually using the law. When the disadvantaged use the law after centuries of exclusion from the legal system, they are charged with "misusing" the law, as there was never meant to be a law for them at all. What the backlash tells us is that society has not accepted the fact that women's rights are human rights, that women have equal rights in the home and that the "man's home" may not always be his impregnable castle. In that sense, the battle may not have been won, but a major beginning has definitely been made.

NOTES

1 Preamble to the Act.
2 AIR 1984 Del 66.
3 (2007) I DMC 1 (SC).
4 Section 2(s).
5 See the discussion on the concept of "residence" in *Jeewanti Pandey vs Kishan Chandra Pandey*, (1981) 4 SCC 517.
6 The proceedings of the colloquium was subsequently published as *Domestic Violence and Law: Report of Colloquium on Justice for Women – Empowerment through Law.*
7 Proviso to Section 19(1).
8 Although, such a right has been developed through case law. See, *B P Achala Anand vs Appi Reddy*, (2005) 3 SCC 313.
9 While the minor female child can be argued to be an "aggrieved person" herself, the position of the minor male child under the PWDVA is still ambiguous, owing to this deletion.
10 *Aruna Pramod Shah vs Union of India*, Writ Petition (Crl) 425/2008 (Unreported case, on file with Lawyers Collective).
11 I (2008) DMC 1.
12 MANU/TN/0525/2008.
13 MANU/TN/0612/2008.
14 OA No 764 of 2007 in CS No 548 of 2007 (Unreported case, copy on file with Lawyers Collective).
15 *Smt Shumita Didi Sandhu vs Mr Sanjay Singh Sandhu and Ors* MANU/DE/8160/2007.