



ADMINISTRATION OF JUSTICE TO THE VICTIMS OF SPOUSAL VIOLENCE

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Introduction:

Prejudices are not confined to individuals and nations but attach themselves also to certain stages in the development of human civilization. Surprisingly each age in history is described by its people as modern. A small margin is consequently dedicated to these people to the elucidation of primitive elements that might help to know the plight of woman and the conditions around her in each age. However, whatever little information trickle down to us from history reaffirm the woeful story of a woman. 'The equal half of man' and despite the splendid raiment of civilization being woven by the mankind utilising her bone and blood and what an ignominy that while displaying the same on the world's cultural tapestry her name continues to remain missing from the epigraph. But the ordinary logic may leave us convinced that the twilight of civilization opened up with the female at the centre. The social anthropologists because of this very fact have been vigorous to weave all elaborations around female. Perhaps without the full participation of the female it could have failed to unite in itself a vision of nature, an aesthetic awareness, a fresh opening of man towards hopeful future..... and a mystical insight into the horizon beyond the rising light. With the development of human civilization and its passing from one generation to another, three distinct strands namely the desire for domination both of the animate and inanimate, development of the religion or faith, and subjugation of the woman became visible. To control the animate world man used both trickery and physical force where it was needed. With the bringing under his control, a desire to emerge supreme in the animal world grew in him. The noble soul was gradually lost to matter; an animal passion carried the day. This is what Watt sums up where he observes:

There is much to suggest that human beings acquired the powers of conscious attention and rational thought. They became so fascinated with these new tools that they forgot all else, like chicken hypnotised with their beaks to the chalk line. Our total sensitivity became identified with these partial functions....We lost to feel nature from the inside...to feel the seamless unity of ourselves and the world.¹

As such shrewdness further worked and man successfully convinced the woman that timidity, plumpness, delicacy and precocity are the inherent characteristics of female sex, therefore, female needed security, protection and sustenance which only man could guarantee. Unknowingly woman accepted vassalship of man against a very heavy price, notwithstanding the fact that woman is born a companion of man with the same faculties of mind, energies and the strength as does the man himself. This in ultimate gave birth to social differentiation so much so that the woman was robed differently in dress, behaviour, habits and roles to make her personality appear different.² The condition of 'eternal feminine' thereafter continued to deteriorate at every point of time in the course of historical evolution of the society and the state until her status changed from woman to wife hence giving birth to the institution of marriage. The very word 'woman' writes Kidwai³, etymologically meaning a wife, presents a long history of dependence and subordination. Yet she has ungrudgingly contributed to the growth of grand human civilisations down from Greeks to Islam though her name continues to be missing from the epigraph of world's cultural tapestry. In this process she has stifled her body and soul being least rebellious to the world around and joined the majestic procession of human civilisation with the hope that new dawn may break on her and her shackles may one day automatically fall down. But in defiance to her aspirations the man devised different techniques to avenge Eve's daughter and the gender inequality multiplied day in and day out. With the change in times her condition has changed the least, except that the sufferings she is seen being slovenly butchered but at contemporary times the fineness of mere a stroke separates her head from the body none the less leaving it standing at its place. The changes occurring in contemporary society on account of modernisation are a kind of its own. The society is under tremendous stress and strain because group solidarity and traditional values are torn apart, inflicting troublesome costs like breaking down the traditional political and social constructs. This is paving way for the imposition of new

¹A.E.Watt: *Nature, Man and Woman*

²Robert Bierstedt : *Social Order* p 359 (1979).

³Generally See : Shaikh M.H.Kidwai, *Woman Under Different Social and Religious Laws (India, 1976)*.

institutional patterns and accepting new roles.⁴ The loss of plausibility of old values and beliefs are pushing an individual into a condition like anomie.⁵ In particular where the forces of disorientation operate against female the latter is bruised in body and humiliated in her spirits that sends shivers down her spine. A new dawn breaks open upon her no sooner she realises rootless and lonely existence in the world –stranger in her own home and at the same an alien even in her parental home. Is this not a state of anomie she is pushed into?

The condition like this has become more visibly mostly in industrially advanced economies of the world like United Kingdom. It appears as if economic development is at the root of this anomie into which a spouse is pushed into on account of being exposed to humiliation and disgrace that finally ends up in violence against the spouse. The use of expression ‘spouse’ is deliberate because the traditional family is gradually but definitely losing meaning and virtually in the process of passing down like a shibboleth into the literature on familial jurisprudence. Family law idealised in the film, fiction and even law is not the family that prevails in our society.⁶ Traditional married family visibly is in decline as empirical research on the family supports the proposition that even within the realm of heterosexual partnerships radical family structuring is apparent. The number of marriages in UK is falling drastically and dramatically. Between 1971 and 1991 it fell by 24 %.⁷ Still one in every three ends in divorce. One third of non-married men and women in their mid –twenties choose to cohabit (compared with less than 10 % in 1979).⁸ A significant and raising proportion of children are no longer born or raised in married families; in 1993, 32 % of all children born were born to unmarried parents and one in five mothers with dependent children were lone mothers.⁹ However no data are routinely kept on other (lesbian & gay cohabitation relationships). It seems to be undeniable that unsuccessful industrial revolution has brought new fortunes besides giving birth to new institutions but at the same time it has created an environment wherein sex of the spouse, conditions of marriage, prohibited degrees and the conditions *ejusdem generis* sound irrelevant. The acts like teenage marriage, adultery, fornication and homosexuality are even losing their meaning because the same are protected in the name of right to sexual pleasure.¹⁰ In 1980 about 90 % in teenage group between 16-19 had engaged in

⁴ Generally See: Berger, Peter L and Hansfried, *Sociology Re- interpreted: An Essay On Method and Vocation* (N .Y; 1981) 148.

⁵ *Id.*

⁶ O'Donovan, Katherine (1993) *Family Law Matters* (London: Pluto Press).

⁷ *Social Trends* (1995), P 6.

⁸ 1993 *General Households Survey* (1995), p- 26.

⁹ 1993 *General Households Survey* (1995), p- 29 and 34.

¹⁰ D' Emilio John and Estelle B .*Freedom, Intimate Matters: A History of Sexuality in America*, N.Y; 1998) 327.

sexual activity.¹¹ This apart, the gay and lesbian marriages are no longer abomination and deemed to be opposed to the general policy of law.¹² Where social forces fail to prevail, the situation may aggravate beyond any repair. It is no more a female who may be a victim of violence nor is perpetrator of violence necessarily the husband. If institutions keep on falling at the present pace domestic violence is likely to change its parameter. It is hard to see exactly where the State interest lies in protecting people from the consequences of the personal relationships they undertake. Do we think it necessary in terms of desirability and realism to grant licences for relationships and how far the deterring or delaying the ending of relationships becomes necessary? The traditional answers in the positive can no longer be taken for granted especially in a world where people cannot be prevented from living together outside marriage and are increasingly to do so in the wake of restrictions and consequences which marriages entails.¹³ As such the modern economies may have some day to grapple with a different phenomenon squarely rooted in modern science and technological development. Until that stage comes, it appears, man might prefer to deal with traditional problems traditionally. Still women are excluded as full legal subjects despite legal changes from the mid –seventies. This is amply demonstrated by the recent work on political philosophy,¹⁴ and on Jurisprudence.¹⁵ Ngairé Naffine¹⁶ documents the primacy of men in the legal profession, nature of legal education and a particular style of legal definitions with men in mind.¹⁷ Equality demands equal respect for individuals within the conception of law. Persistence of discrimination and its emergence in new forms are a challenge to the social model, fundamental values and social justice. The fight against discrimination does not cost much. It costs less than the social breakdown which results from discrimination. As such inequality is prejudicial to growth and discrimination is expensive.¹⁸ But as in the words of

¹¹ *Elise F. Jones et; Teenage pregnancy in Industrialized Countries (London, 1986) 104.*

¹² For Hart and Devlin Controversy on the subject see Stark, text Book – Jurisprudence (1978).

¹³ *Brenda Hoggett; "Family Law Reform", in King's Law Journal (1992) p-77.*

¹⁴ See for example *C. Pateman and E. Gross (eds), Feminist Challenges: Social and Political Theory, North – eastern University Press, 1987; J.B.Elshtian, Public Man , Private Woman : Women in Social and Political Thought, Princeton University Press, 1981; S.m.Okin, Women in western Political Thought, Princeton University Press, 1979, cited in Katherine O'Donovan ; 'Is The Legal Individual Male?' in Women's Rights : Human Rights ed Alice YotopoulosMarangopoulos, Hestia Publishers Athens (1994) p- 75.*

¹⁵ See for example, *C.Mackinnon, Feminism Unmodified, Harvard University Press, 1987; Katherine O'Donovan, "Engendering Justice: Women 's Perspectives and The Rule of Law", University of Toronto law Journal, Vol. 39,(1989), p- 127.*

¹⁶ *N.Naffine, Law and The Sexes: Explorations in Feminist Jurisprudence, Allen and Unwin (1990).*

¹⁷ *Katherine O'Donovan; 'Is The Legal Individual Male?' in Women's Rights : Human Rights op.cit at p- 77-78.*

¹⁸ *A Report On The Forum and Working on European Social Policy, 27-30th March (1996). Some members argued that investing in equality is investing in research and development as it creates new wealth and contributes to culture and humanity.*

Katherine O'Donovan, 'What do we have at present? Upholding of biological differentiation as essential to marriage and the heterosexual dyad as the justifiable and traditional form of marriage'.¹⁹ The recent decisions of the European Court of Human Rights have denied that right to marry (Art .12 of the European Convention on Human Rights) extends to transsexuals. Based on the reasoning advanced by the court there remains little doubt that the right will similarly be denied to same sex partners. What the court said in *Cossey v. UK* assumes significance for consideration. "Although some contracting states would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the development which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the court does not consider that it is open to take it a new approach to the interpretation of Article 12 on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purpose of marriage, this being a matter encompassed within the exercise of the right to marry."²⁰ However a strong dissenting opinion from Judge Martens is based on the classic humanistic values of equality and freedom as he observes that human dignity and human freedom imply that a man should be free to shape his fate in the way that seems best fits his personality. A transsexual does not use those very fundamental rights. The individualistic approach towards matrimony assumes a meaning because the market forces since the first industrial revolution have supported it. The peace in matrimonial home is impossible without spouses liking each other which in return squarely depend upon the extent of autonomy a person primarily enjoys to choose a person of his choice in matrimony. Should this autonomy be guaranteed to spouses beyond this point, especially when marriage does not go smoothly? The very prelude to right to life is that a person, be that in matrimony or otherwise, shall have at all the material points in time exclusive control on his or her own body and decision making. A person should be independent and free to take decisions affecting his or her liberty because an impaired autonomy may ultimately destroy the dignity of a person. Any situation or act that encroaches upon the individual dignity is violation of the right to life as the protection of the human dignity in general is the *ultima ratio* of law. It is true, so is it a reality, that in the past two decades much of the legal literature and its elaborations have been woven around women and their problems in a bid to enumerate their rights , seemingly to

¹⁹ *Op. Cit; n.17 at p 80.*

²⁰ *Cossey v. UK, Series A No. 184; also Rees v. UK, Series A No 106 (1987), Fam. Law 157; and Corbett v. Corbett (1997) p-83.*

protect the same. The major aim inter alia has been to reverse conventional trends prevailing against women, in the literature²¹ and art,²² besides the roles they have historically played at social and political levels.²³ The need has therefore arisen to redefine the roles of women at various levels of social reality including the matrimony. As a sequel to it, the people engaged in policy planning at different levels have been responsive to the same as the rights of women in general are laid down in the important international documents. The same have been incorporated by the States of the world invariably in their national charter of rights. But the reality as discernible from the literature shows that, notwithstanding the plethora of legislations aiming at vindicating femininity and feminine cause, the application of law has been minimal so have the achievements of the state in this regard been very poor.

It was believed that the international law guarantees and promises like equality before law and equal protection of law read with equality of opportunity shall obliterate the very concept of differentiation in its subjective sense. But the gaps between the sexes have been left wide open by the fathers of the constitution. The problem of violence against women hence, is an admixture of jurisprudence dilemmas, constitutional ambiguities, social and cultural pitfalls involving criminal undertones and consumer sovereignty. Violent encounters arise in socially constructed situations. Given to it a careful consideration of the nature of social settings and situations is desirable to a greater understanding of the diversity in family reality. Investigations that attempt to abstract physical violence out of its social setting and focus primarily on the backgrounds or personal characteristics of individuals are not likely to lead to an elucidation of interpersonal violence. As Toch says, "Violent acts, and violent interactions, do not make sense when viewed in isolation".²⁴ Social scientists are beginning to recognise that certain institutions encourage or provoke the use of physical force for specific socially constructed purposes. What might first appear as random or senseless behaviour begins to make sense when placed in its social and cultural context. This approach can be

²¹Generally See: S.Freud, *Three Essays On Sexuality*, 8: 219 (London.1953); In Literature the woman is generally pictured by writers to be wicked, foolish, untrustworthy and selfish in nature, for example see: W.J.Craig, ed. *Complete Works of William Shakespear*.

²²In art woman is always shown naked as if something important is missing from her body. This kind of treatment of a female is not only hurting but derogatory as well. For example Otto Weininger who shared much with Freud summarizes his own perceptions of the people in his times with respect to femininity: Any absolute nude female figure(in art) in life leaves an impression of something wanting, an incompleteness which is incompatible with beauty....The signs that appeal to woman are signs of a developed sexuality..... See Otto Weininger, *Sex and Character*, 236-241 (London 1906).

²³"The modern individual family is founded on the open or concealed slavery of wife", See Friedrich Engels, *The Origins of the Family*, 79 (London, 1943); Constance Rover, *Women's Suffrage and Party Politics in Britain, 1886-1914*, 226 (London, 1967).

²⁴Hans Toch, *Violent Men: An Enquiry into the Psychology of Violence* (Chicago : Aldine, 1969) : 6, cit in Dobash and Dobash; *Violence against Wives; (1979) Free Press, MacMillan Publishing Co; New York p-14.*

profitably applied to the investigation of violence directed at women within homes or outside. The need has therefore arisen to study the correctional measures adopted by the developed world to deal with domestic violence not necessarily the spousal violence because the traditional married family is visibly in decline. The legal measures adopted so far by the developed world need to be evaluated in terms of its success and the shortcomings for simple reason that divisive societal forces if left unchecked may let loose the forces of destruction. The consequences shall be much worse if women lose their interest in sex and men their patience. Allowed this to happen, it may be that whatever has so far been achieved in the cause of liberation of women may end up in fiasco because transition from one stage to another is never smooth and successful without a price.

The present study is likely to alert and prepare the policy planners in developing countries to fight the destructive forces coupled with the dream of achieving economic development. They may raise appropriate defence mechanisms to discourage the forces of disorientation to take over traditional constructs and enable it to protect group solidarity without sacrificing better economic pursuit achieved through industrialisation and technological advancement. How does a pluralist society like UK grapple with this phenomenon is the *raison d'être* for this study. The choice is deliberate because the demographic structure of UK is not different from most of the Commonwealth Countries particularly India. Apart from the same there are other reasons as:

Firstly, UK is categorised as modern both in terms of industrial and technological pursuits. On account of its successful industrialisation it is looked as model economy and most of the Commonwealth countries prefer to follow its experiences in the area of industrialisation and economic development. But along its secrets of economic developments have flashed some peculiar societal constructs like nuclear family replacing the traditional joint family.²⁵ The possible conflict between the old solidarity and new institutional pattern may pose ethical dilemma, which is least taken into account in the course of exercising the choice by the developing world.²⁶ It is therefore desired to have a brief but definite societal picture of the developed economies and the extent of presence of family breakdown occasioning on account of domestic violence.

²⁵ LalitaDhar, "Indian Family and ethical Dilemmas of Human Right to Development" in B.P.Singh Sehgal, (ED.), *Human Rights in India: Problems and Perspectives*, 130-135 (Deep and Deep Publication New Delhi, India, 1995).

²⁶ Generally see: Gerstel Naomi R, "The feasibility of Commuter Marriage", Peter J Stein et al; (ed), *Family : Functions , Conflicts and Symbols* (N.Y 1990) 243-247.

Secondly, the developed economies like America and Britain explain marriage, motherhood and family from consumer point of view. They accept sexual pleasure as a legitimate and necessary component of life, unbound by older ideals of marital fidelity and permanence. As a result of this the whole society is practically sexualised.²⁷ This assertion may be attested by the result of the fact that in 1986 The National Academy of Science Panel on Adolescent Pregnancy and Childbearing reported that the number of unmarried girls aged between 15 – 19 years who had experienced sexual intercourse increased from 28 percent in 1971 to 42 percent in 1982.²⁸ The 1986 poll of American boys and girls aged between 12-17 years reveal that more than half of the respondents had engaged in sexual activity by the age of seventeen years. The most important findings has been that the sexual activity outside marriage rapidly increase with age, 4 to 57 % of 12 to 17 years age. The net outcome of this unregulated sexual activity has resulted in teenage marriages which are mostly performed because of premarital pregnancy. The rate of underage pregnant brides has been on constant increase. For example the percentage of brides who were under 18 years and were pregnant at the time of marriage increased from 14 percent in 1950 -54 to 21 percent in 1960-1974 to 33 percent between 1975-1979 as such the ratio continues to increase.²⁹ The experiences like these are an outcome of societal conditions. Demographic change, the transformation in family and social methods, work organisations and the competitive profile of Europe in the global economy all point to the need to consider the aims of social protection and in particular to readjust its institutions. Amid these traumatic changes in the societal order the radical feminist schools have been unexpectedly more active in these countries than in the developing world. They having emerged as the torch bearers the women organisations in the developing world have fixed their eyes on them. Inter alia for this reason we feel impelled to study the phenomenon of domestic violence in Britain.

A. British Scenario

It is difficult to say with certainty when did the west reduce woman to the status of a vassal to man. Acceptably it may be traced to distortions found in the scriptural literature. In secular literature, philosophical jargons and the art the western man has comfortably followed double standards. Impressed by the inherent qualities possessed by a female, they have never been hesitant to portray their gods in feminine figure. May be the Greek tradition got grafted on

²⁷ *Supra Note, 10 at 327.*

²⁸ *Maxine Baca Zinn and D.S.Eitzen, Diversity in Families (N.Y 1990) 243-247.*

²⁹ *Elise F. Jones et al; Teenage pregnancy in Industrialized Countries (London, 1986) 104.*

western culture.³⁰ But the reverence to goddess of justice may not be denied in the class room, Bench or the Bar.³¹ The other extreme is the renaissance literature wherein the genius of the time's like Shakespeare paints the female in wicked nature as and when he discusses transvestism.³² Milton holds her responsible for fall of Adam albeit misery of man and succeeds in sowing the seeds of vengeance or atleast refreshes the lost memory of the people.³³ To John Pope she is licentious and a foolish object. The women, in his opinion, sedulously practise coquetry but being fickle minded, inconsistent, unreliable, dissimulate and hypocrite – Pretention and levity are their common characteristics.³⁴ In art she is portrayed in such form as if created to satisfy the hidden licentious male perceptions.³⁵ All these factors may have together worked to the disadvantage of western woman and an appropriate legal mechanism namely doctrine of covertures was evolved to keep her under proper check and control. The renaissance attitude did not help her much to change or improve upon what she already had undergone. She continued, as such, to be the victim of domestic chastisement because it was not incompatible with the mud and mortar prepared from art, scriptural and secular literature. It was a state of her slavery in her own home regarding what Engles is sure about and hence prepared them to revolt.³⁶

However the rising public consciousness and feminist campaigning in 1850 produced some favourable results. The legislation, still, could not do much because of the inadequate criminal law provisions; and the failure of the matrimonial legislation to reinstate the victim in matrimonial home necessitated some further statutory coverage. The remedies to be awarded were divided among different jurisdictions each with it's own forum and procedure. Apart from the main jurisdiction Domestic Violence and Matrimonial Proceedings and Magistrates Courts Act, 1978; and the jurisdiction ancillary to a petition under Supreme Court Act, 1981, and Country Courts Act, 1984. The variety of these laws dealing with injunctive reliefs were made necessarily complex with the potential to diminish effectiveness in practice.³⁷ In the United States, England and Wales battered women often are required to

³⁰ *Generally See; Shaikh M.H.Kidwai, Women Under Different Social and religious Laws (India, 1976).*

³¹ For example see : John Salmond, Jurisprudence (UK.; 1964)Ch, on Administration of Justice.

³² W.J.Craig, (ed) Complete Works of William Shakespeare (Oxford, 1959).

³³ *John Milton, Paradise Lost- 1 (India, 1984).*

³⁴ *Alexander Pope, The Rape of the Lock (India, 1976).*

³⁵ *Generally See: Otto Weininger, Sex and Character (London, 1906) 236-241.*

³⁶ *Friedrich Engles, The Origins of Family, (London, 1943) 79.*

³⁷ *Applications under Domestic Violence and Matrimonial Proceedings Act, 1976 will usually be made in the County Court, although such applications may also be made in the High Court. Both High court and County Courts have the power to make orders under the Matrimonial Homes Act, 1983. If the proceedings are launched for an injunction ancillary to a petition then the court in which petition is proceeding has the power to*

pursue their complaints directly with the courts because police refuse to take action. Such refusal may be interpreted as the test to assess the strength and resolve of the women to go to court, often with her bruises from the previous night, deprived and terrified children and the very fear of recurrence of attack. The response of Court officials does little to allay her fear and anxiety. Filing a complaint may prove to be tedious and time consuming as signing a complaint in itself, does not necessarily mean the issuing of arrest warrant. Understandably as Field and Field discovered, women tend to take this drastic step only after they have exhausted all other sources of help (e.g; doctors and social workers).³⁸

The recent legislation namely the Family Law Act, 1996 seems to be a significant advance upon the former legislations being much more victim and child centred. Apart from it for non-molestation purposes, the Act introduces new terminology including former cohabitants, associated persons and relevant child. The expressions like ‘Harm’ and ‘Significant harm’ have been obviously imported from the Children Act, 1989. Section 62 (1) (b) provides that “former cohabitants” is to be read accordingly but does not include cohabitants who have subsequently married each other. This represents a substantial improvement upon the former legislation as previously while an application could be brought after the termination of relationship³⁹ and had to be brought forth promptly. Under the new law relief can be sought against such acts of molestation long after the termination of relationship. The word ‘household’ has been held to have an abstract meaning rather than referring to something physical.⁴⁰ In some cases the property would be so small that distinguishing two separate

make appropriate injunction. Looking to the civil courts for a remedy becomes necessary for a victim as the police have been often found reluctant to bring prosecutions unless serious physical injuries have been inflicted. Wife's inability to secure conviction for lack of evidence coupled with the police opinion that due to fear of stigma and reprisal she may change her mind make the matter further complicated. Family Protection orders are made only by the Magistrates Court Act, 1978. Matrimonial Homes Act 1983 has a different purpose than providing an injunctive relief although the Act enables the court to regulate the occupation so that, even that spouse may have no legal or equitable interest in the property, nor any rights as a tenant. She cannot be evicted without a court order. On its own, the Matrimonial Homes Act, 1983 is inadequate as it does not allow for the control of molestation nor can it be used to exclude a spouse from an area in which the home is situated. Non-molestation orders are made in the County Court and High court and when there is serious risk to the applicant or the children, orders are made in the first instance in the absence of respondent. In this case they will only last for few days. Husband will be prepared to agree not to molest her and she may accept this in lieu of an injunction. Indeed in some cases undertaking may be prepared to an injunction as it is given voluntarily, and more likely to be complied with. In case of defiance the same may be enforced by proceedings for contempt of court and is therefore in theory, as good as an injunction, although unlike an injunction no power of arrest can be attached to it. Though in case of the undertaking being broken, the court on being asked to enforce, may grant an injunction.

³⁸ Martha H. Field and Henry F. Field, “*Martial Violence and the Criminal Process: Neither Justice nor Peace*”, *Social Service Review* 47 (2) (1973): 221-240 cited in *Dobash and Dobash; Violence Against Wives (1979)* p 217 Free Press, New York.

³⁹ *Mclean v. Burke (1980) 3 F L R 70, CA.*

⁴⁰ *Santos V. Santos (1972) Fam 247, 2 All E R 246, C A.*

households rather than one unhappy one be impossible.⁴¹ The expression ‘Associated Persons’ has been defined to include spouses and former spouses, common householders, relatives, engaged couples, parties to family proceedings, parents and those with parental responsibility. A person is associated with another person if, in relation to any child, they are both persons who are parents or who have had parental responsibility (S 62 (3) (f)). 4. Other natural persons who have parental responsibility have set out in the Children Act, 1989 S 5 (7) (a) and (b) S 8 (1) and S 5 (1). One consequence of this provision being that a man and woman who have had a child without marriage, engagement or cohabitation would be associated for the purpose of the Act where their child was a minor. Thus this provision would enable a rape victim (who had given birth to a child conceived as a result) to obtain an injunction against the perpetrator in summary proceedings.⁴² With regard to ‘the relevant child’ the definition is very much wider than any previous law. The Domestic Violence and Matrimonial Proceedings Act, 1976, S 1 (1) (b) referred to a ‘child living with the applicant’, while under the Domestic Proceedings and Magistrates Courts Act, 1978, S 16, child has been referred as ‘a child of the family’. Perhaps the widest provision was contained in the Matrimonial Homes Act, 1983 which referred to the ‘needs of any children’. In a way greater applicants which were firmly available to spouses under the Matrimonial Homes Act, 1983. Under the category ‘Associated persons’ homosexual couples can be included provided they share the same household.⁴³ In the same way the latest legislation covers lesbians and gay cohabitants. Although the Law Commission did not feel able to include them within the definition of cohabitants and indeed specifically excluded them within the definition of cohabitants and indeed specifically excluded them they do fall within the more general category of those who have lived together in the same household other than on a commercial basis (cl 56 (3) (c)). However, one important vulnerable group such as persons in a romantic relationship (whether or not involving sexual intercourse) have been denied protection, though the Law commission recommended that such persons should be included within the

⁴¹*Adeso v. Adeso (1981) 1 All E R 107.*

⁴²*Rayden and Jackson; A Guide to the Family Law Act, 1986, p-40 Special Bulletin (Sept 1996) London Butterworths.*

⁴³*Section 62 (3)(c) lays down that a person is associated with another person if they live or have lived in the same household, otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or boarder. The Law Commission in its report (No. 207, para 3.21) indicated that this would include people who live or have lived in the same household other than on a purely commercial basis. Thus the word merely in S 62 (3) (c) is very important. For example in the case of homosexual parties living or having lived in the same household where one party is the tenant or owner and the other is a lodger, boarder or sub-tenant, can the contractual relationship be constructed to be confined to just commercial one?*

category of associated persons.⁴⁴ However, these persons do not fall within the category of associated persons in the Act hence no protection. Similarly the persons who had relationship without having cohabited, agreed to marry or had a child together (including a couple expecting a child) are without any domestic violence remedy. The extension of domestic violence remedies to unmarried heterosexual couples show that the family law is clearly expanding while at the same time its extension to lesbian and gay couples and others sharing the same household has the potential of revisiting radically the jurisprudential scope of family law. Still the tradition of family law has not been abandoned because the cohabitation has been emphasised to be central focus of family relationship. How far this ideological allegiance has allowed it to offer a rational and cohesive set of solutions to the domestic violence and needs of children can be ascertained only from the court decisions and composite case study.

B. Indian Scenario

Indian woman has historically been on the horns of intractable dilemma because of being caught between the religion and custom. The Vedas decorated her in the best apparels and pearls. She is expressed in the best of expressions as a daughter and wife. In scriptural literature she has been described as a source of spiritual solace to her husband⁴⁵ and the religious epics like Ramayana and Mahabharata spoke of her dignity and strength as ardhangini (equal half of a man). Grafting of Shiva on Shakti has had the similar connotations. Prior to Manusmriti a female child was named after the goddess Laxmi and after her marriage she was treated to be the friend/sakhi and queen of the household/grahlaxmi. But no sooner religion became the monopoly of the learned the Rigveda Shalokas were ascribed such meanings and interpretations which neither the Lord nor Rishis through whom the divine book was received might have dreamt.⁴⁶ As a result woman became the worst casualty of the new culture. The titles she enjoyed on marriage became meaningless because on the authority of Manu she lost it to her husband. As in Manu's opinion she lost her freedom to her father and after him to her brother⁴⁷. The spirit of Manu's text that father

⁴⁴Law Comm. No. 207, para 3. 26 proposed that those who 'have had a sexual relationship with each other (whether or not including sexual intercourse)' should be a specific category of associated persons. This was not accepted by the government on the score that courts would be confronted with problems of definition and proof. See the speech of Lord Chancellor, on the Family Homes and Domestic Violence Bill, HL 2R, 23 February 1995, col 1257. On homosexuals see Proceedings on the Family Homes and Domestic Violence Bill in the Special Public Bill Committee HL Session 1994-95 no. 55. Lord Chancellor, 9 March 1995 at p-6; and Hale J15 March 1995 at p-12.

⁴⁵Kane, P.v.History of Dharamshashtra, Vol. 11, Part 2 9Second ed; 1974).

⁴⁶Paras Diwan, Hindu Law (1996) 8-32.

⁴⁷The Laws Of Manu, Vol. 25 : The Sacred Books of The Esat Series (Tr. Buhler ed; 1964) Max Muller.

protects her in childhood, husband in her youth, and a son in her old age generally dominated the Hindu ideology with regard to status and rights of women. The patriarchal values of our society get nourished and supplanted by this very often misquoted text of Manu while the text follows immediately after this has been brushed aside. As Altekhar, A.S, in his book, *The Position of Women in Hindu Civilization*, 338 (1959) gives the text which reads as follows “The father would be blamed if he does not marry his daughter in proper time, the husband, if he does not look after her properly and the son, if he does not protect his mother during the old age.”⁴⁸ The visible and invisible forces in each age have exerted constant pressure on woman until she might have finally surrendered to male dominance as her fate accompli. As such she continues down to this day to occupy a subservient position in the family and outside it on account of custom envisaging unity of souls and legal proverbs like doctrine of covertures.

The advent of British in India opened a new era of technological and legal advancement which continues till this date. It worked a metamorphosis; in particular it influenced a change in the perception of being a wife and brought a change in the relationship of man and woman both at personal and impersonal level. This apart, the conventional joint family is today at the verge of total disintegration because the nuclear family is today gradually taking it over. Emphasis on education and exposure to career world has on one hand forced into operation totally a new equation between the husband wife and on the other hand between the parents and children. Marriage has practically become a cooperative venture that revolves round the elements like, mutual trust, flexibility to adjust and compatibility of temperaments than frame to cover lesbian and homosexuals unions like in the west.

Within this structural outline, violence, through which the family may express itself, is not less than a danger signal that might speak more about the persons locked together in wedlock than about the wedlock itself. In recent years the incidence of violence against females has increased in geometrical progression as if it is co- terminus with the institution of family itself. In this regard the economically undeveloped east does not lag behind the west but with a difference that is, unlike west it occurs both at vertical and horizontal levels in the east, though the factors of violence may be squarely different. For example the social menace like dowry causing perpetual violence in matrimonial home which in some cases finally ends up in bride burning or rampant sexual assaults to which females are generally subjected to, religious superstitions causing the widow to ascend the funeral pyre of her husband still

⁴⁸ Lotika Sarkar and B Sivaramayya (ed.); *Women and Law : Contemporary Problems (1996)* p-24 Vikas Pub.

prevailing in some parts of Rajasthan and child marriages though prohibited continuing to remain legal prompt the socially threatened and psychologically weak parents to get rid of female foetus through amniocentesis. However this may be only a tip of the iceberg not that these are the only forms of domestic violence.⁴⁹ The menace remains unchecked notwithstanding the statutory provisions and the presence of some stray pieces of legislation to combat these socio cultural maladies. Has legislation failed if so, why this failure?

Lack of National Policy

How to ameliorate the lot of women in India? The answer to this may be investigated at two levels. First, the founders of constitution did not show greater sensitivity towards the problems faced by women and as a result they failed to incorporate appropriate provisions in the constitution. The same has resulted into the neglectful attitude towards women by the policy planners. The infirmities become more than explicit where the constitution makers seem to have adopted a cautious attitude towards women welfare. They have with studious care clubbed women with children under article 15(3).⁵⁰ Thus while granting special protection under the constitution the framers have lined up women and children into an unpalatable union. What made their chests so obdurate? Is it because there was no female representation in the constituent assembly⁵¹ to make the members realise the plight of ordinary women or the framers did not dare go against the social current, hence women welfare failed to receive a fair deal at their hands. Had the women welfare been close to their chests, these people might have envisaged a viable policy for the same and worked out schemes and put the same into operation along the lines as they devised for people other than women that is, scheduled castes and scheduled tribes as listed in Article 15 (4).⁵² Had the women been clubbed with socially and educationally backward communities under the Article 15 (4), the law might have served a better purpose, for there has been a sufficient functional follow up mechanism available to monitor periodically the progress made by such communities in a bid to justify continuing the discriminatory legislation. As, in so far, women are educationally and economically weak they cannot be socially strong. Not to speak of a promise to keep the achievements under constant review as in the later case, there are no

⁴⁹For further details see: Lalita Dhar, et al; *Women Cry from Beijing : World Has Lost Soul- Stop Female Feticide*, *Journal of Objective Studies* (1996), New Delhi, 32-65.

⁵⁰Art 15 (3) lays down that "Nothing in this article shall prevent the State from making any special provisions for women and children".

⁵¹Despite the fact that women constitute 48 per cent of the electorate in the country their representation in the parliament has never increased above 3 to 4 percent. Even in the legislative assemblies and other institutions their representations varies from 6 to 10 per cent. For details see K.D. Gangrade, "Women and Children Battles to Fight" in Sushma Sood (ed) *Violence Against Women*, Arihant Publishers, Jaipur (1989) p- 146.

⁵²Ibid.

constitutional guarantees in favour of the former who surprisingly out number the scheduled castes and scheduled tribes besides suffer worst than them at all levels of social reality.

Secondly, the failure of Law Commission⁵³, an arm created to enable state to cater to emerging socio-legal problems and update laws, to propose a new legislation in line with the English Domestic Violence statues, on an issue of great magnitude like this is intriguing because since independence India has generally followed the British position in matrimonial laws. Why has the legislations like Domestic Violence and Matrimonial Proceedings Act, 1976 or the Matrimonial Homes Act, 1983 or other legislations on the subject, not influenced the legal sensibility of the law commission or else failed to attract its attention? As a sequel to the absence of law to control the malady and rehabilitate the victim, surprisingly some laws ranging from marriage to inheritance derogatory to the very human existence albeit womanhood continue to remain on the statute books to regulate the lives of women⁵⁴. This apathy continues despite the appointment of National Commission regarding human rights. However the indifference of the Law Commission towards issues involving women welfare and genuine legal grievances of women soliciting immediate attention is a problem in itself which is beyond the scope of this project.

Role of Judiciary

A half hearted servant is dangerous to his master and a judiciary reluctant to interpret literal legis in the light of social and political conditions is anathema to democratic process because it brings stagnation to law and ends up in causing misery by denial to the very basic rights to laity. Whether or not this holds good vis a vis Indian judiciary in India remained contended voicing the concern that women need a special care on account of their biological structure and maternal roles is appreciable.⁵⁵ Even the ruling of the court that fair sex has preference over males cannot be lost sight of though it could not produce the desired result.⁵⁶ The courts did not go beyond this because only fools go where the angels do not tread. This position did

⁵³The Law Commission in India in its 71st report did not appreciate the magnitude of the problem needing prompt legislative intervention despite the fact that it considerably devoted itself to the breakdown principle of divorce.

⁵⁴For example the right to equality and liberty of women has been thrown to cold storage by the provisions like 'Restitution of conjugal rights' contained in section 9 of the Hindu Marriage Act, 1955. Under section 10 of the Indian Divorce Act, 1869 unlike men and women have to couple man's adultery with cruelty, desertion etc to seek the matrimonial relief. Even the Law Commission in its 90th report (1984), para 6.2 recommended that Section 10 of the Indian Divorce should be amended and also pointed out that divorce laws being violative of the fundamental rights, if challenged, will definitely be struck down in the court. However in this regard pronouncements of Kerala High Court in *Mary Zachariah v Union of India* (1990) 1, K.L.T; 130 ; and *Ammini.J.v Union of India* (1995) A.I.R 245 are highly important and encouraging.

⁵⁵*Dattarvav .TState, A.I.R (19520 Bombay, 446.*

⁵⁶*Anjili v. State of west Bengal, A I R (1952) Cal. 825*

not change even though attempts were made by judiciary at lower level to streamline the laws and remove anti women and discriminatory elements from the same as the benign attempt was thwarted by the Apex Court in matrimonial arena.⁵⁷ Whether or not Justice Iyer of the Indian Supreme Court was sure at the role of judiciary and summarised ineffectiveness of the courts to protect genuine rights of the women but he certainly wrote a caveat and left it at the door steps of Indian parliament where he indecisively observed: “Sex prejudice against Indian Womanhood pervades the service rules even a third of the decade after freedom”.⁵⁸ This is per se sufficient to prove the kind of perception the Indian judiciary espoused vis a vis women and the parliament seems to be ill prepared to allow to womanise the house because recent attempts to give adequate representations to women in the parliament has met a dead end and may be never realised.

Rise of women’s Movement in the United Kingdom: Orientations and Issues

In both the Britain and United States, the women’s movements of the late 1960’s provided the base of membership and over all perspectives from which numerous issues could be addressed and actions organised. In Britain original emphasis, rested on political analysis. The importance of the class, trade union organisations, labour and left party politics were emerging stronger and attempts to involve women into radical left movements gave impetus to leftist feminism. It provided a platform for early influential works that served later the basis to sustain this movement.⁵⁹ Although radical feminism also became the mainstay in Britain, the influence of socialist –feminist thought an the general environment of labour and left politics have been more influential in the overall nature of the movement. The socialist feminists use the term ‘liberation’ in quite distinctive sense emphasising class relations and a socialist society while radical feminists emphasise gender and cultural transformations.⁶⁰ In Britain, National Women’s Liberation Conferences were held from 1970 to 1978 and seven demands were worked out at successive conferences. They focussed on equal pay, education and job opportunities freedom, child care, financial and legal independence, sexual

⁵⁷ A landmark judgement of the Andhara Pradesh High Court in *T. Saretha v. VenkataSubbiah* (1983) A I R A.P.356 declaring unconstitutional the decree of the restitution of conjugal rights being violative of the fundamental right of personal liberty and privacy was negative by the Supreme Court decision in *Saroj Rani v. Sudarshan Kumar* (1984) S.C. 1562 preferring the view of the Delhi High Court in *Harvinder Kaur v. Hramander Singh* (1984) Del.86 in upholding the remedy of restitution of conjugal rights.

⁵⁸ (1979) 4 S.C .C; 260

⁵⁹ Generally see: Juliet Mitchell, “The Longest Revolution”, *New Left Review*, Nov- Dec; (1966); Sheila Rowbotham, “ Women’s Liberation and the New Politics”, *Spokesman Pamphlet*, No. 17, (1969).

⁶⁰ R .Emerson Dobash and Russel P. Dobash: *Women Violence and Social Change*, p-24 Routledge London Published, 1992.

preference and most important for present concern violence against women. The seventh demand adopted in 1978 reads: Freedom from intimidation by threat or use of violence or sexual coercion, regardless of marital status; and an end to all laws, assumptions and institutions which perpetuate male dominance and men's aggression towards women.⁶¹ This in effect prepared women to resort to action because a composite thought fixing goals and destination was behind them. It did not only give birth to shelter groups but gathered more sympathy and caused an increase in their group membership. In Britain founding the first refuge was the result of pioneering efforts of group of women who opened Chiswick Women's Aid. The significant feature about this group was that it started with a campaign to protest against stopping of free milk in schools and ended with establishing refuge for battered women. Five hundred women and children and one cow marched through an English town in support of their claim. The cow apply served as a symbol of their cause and the amiable spectacle brought considerable attention. Though not a direct success, it initiated a successful attempt to set up a community meeting place for local women and served as an inspiration for a social movement.

The Vision: Goals of the Movement

There are three general goals: assisting victims, challenging male violence and changing women's position in the society. But all the three goals are not adopted equally or in same fashion throughout the movement. The first goal namely providing assistance to the victims of violence is, however, universally endorsed within the movement. Provision of women and addressing male violence often involves efforts directed at the criminal justice system. However, in order to work towards achieving their goals, a variety of tactics have adopted. In the beginning public marches and rallies were more common. In Britain there were also a few instances of squatting houses for use as refuges. Then most prominent tactics followed as now, that include inter- alia lobbying legislators and negotiating with local agencies such a s police and social work departments and the housing department as well. The importance of media as an important tool for disseminating information of women in assistance cannot be undermined. It has also played an important role in highlighting the agencies in need of change and general public in need of enlightenment.

⁶¹A .Coote and B. Campbell, 2nded; *Sweet Freedom: The Struggle of women's Liberation*, Oxford, basil Blackwell, 1987, p-18; J.Hanmer, "Violence to Women from Private Sorrow to Public Issue", in G.Ashworth and L.Bonnerjea (eds), *The Invisible Decade : UK Women in the United Nations Decade 1976- 86*, Aldershot, England, 1985, pp-141-54.

Shaping the National Organisation

A new phase in movement began with some women expressing disagreement over the philosophy and approach adopted by Chiswick. This led to the birth of national movement that quickly separated Chiswick from other women's aid groups who became the National Women's Aid Federation. The newly formed women's aid groups were drawn from England, Scotland and Wales and started working in 1974. Thereafter distinct national organisations were established in each of the area besides in Northern Ireland and the Republic of Ireland. The National Women's Aid Federation has national office at Bristol and it is spread over national co-ordinating group, an employment group, finance group as well as special interest groups. In Britain national women's organisation are named in terms of aiding women (Scottish women Aid etc.). The funding has by and large been on at the national and local government level and has been much more modest than in U.S.A. In financial terms the movement seems to be poorer than American cousins but the lack of funds to pay salaries to professionals has also led to the retention of activists albeit underpaid and volunteers committed to the original principles and vision. No doubt lack of corporate funds may mean a loss of material wealth but usefully avoids a powerful source of external pressure on principles and practice.

A pluralist society has the problems of its own, like that of race and ethnicity. In the United States such issues were raised as early as 1978 when strong debate emerged at a conference in Denver, Colorado sponsored by the Department of Health, Education and Welfare to consider findings of their sponsored research and demonstration project on various models of shelter provision. The first national conference on Third World Women and Violence was sponsored by the Washington D.C, Rape Crisis Centre in August, 1980 and in December a national network of 100 women of colour was formed through the efforts of the Coalition's women of Colour Task Force. In Britain, the issue of race was not originally recognised nor built into the early organisational structure. Somewhat later a separate group was formed within WAFE for a brief period. A group for Asian and Afro- Caribbean women has been recently been convened.⁶² For the most part, Asian women became active before Afro-Caribbean women, and then primarily to set up separate refuges in order to deal with very distinctive cultural differences surrounding language, food and religion, as well as racial prejudice.⁶³ England and Scotland have now separate refuges for Asian women as a whole.

⁶²A . *Mama, The Hidden Struggle*, London, London Race and Housing Research Unit) 1989) 285.

⁶³L.Harvey, *Unpublished Manuscript on Asian Women and Violence in Glasgow*, University of Sterling, Scotland, cit in Dobash and Dobash, *op.cit*; p-51.

Magnitude of the problem of violence against black women becomes amply clear through the responses of voluntary and statutory agencies and their place in the movement in Britain.⁶⁴ The hard fact remains that women of colour both those living and working in refugees, experience a double oppression based on gender and on race and to many, racial oppression is a more pervasive and serious problem than sexual/ gender oppression. Men of colour resort to violence of men of colour by placing its cause beyond his control, outside his sphere of motivations and in a way exonerates him of his responsibility, like that of the white working class man excused because of his oppressed, albeit in another arena, then the activists fear the loss of public sympathy and understanding of racism. But whatever the parameters, hard fact remain that the woman of colour faces impossible choices: she may escape the man's violence but at the cost of family and community membership and solidarity, or she may remain ensconced within family and community but at the cost of her personal safety and well-being.⁶⁵

Tackling Domestic Violence and Asian Women: The Role of Counselling

Having visited and interacted with different centres and refuge homes it becomes imperative to place their commendable work within the context. Inter alia there are Tower Hamlets Domestic Violence Counselling Centre in conjunction with Women's Aid and Multi Agency Forum on Domestic Violence who have prioritised development work on establishing a safe refuge in London Borough specifically accommodating Asian Women to complement the existing one. Besides, the Nawham Action Against Domestic Violence also provides the counselling and emotional support. The Association of London Government in partnership with inner London Probation Service and London Action Trust has secured funding for a Domestic Violence Co-ordinator for London. The ALG has already established some networks on Racial Harassment and Disability Discrimination, the Lesbian and Gay equality network was launched on April 14th, 1997. In London again, a group of women namely Southhall Black Sisters was established in 1979 and has been since then engaged in providing service and legal help to victims of domestic violence. It started with the local women of Borough of Ealing in London and shouted to prominence after relentless efforts to secure the release of Sara Thornton serving a term of imprisonment for homicide, got released on the plea of diminished responsibility. Now since almost two decades the major concern of the

⁶⁴Generally see: A.Mama, *op.cit*; On the issues of race see K.BhavanindM.Coulson, "Transforming Socialist – Feminism : The Challenge of Rcaism", *Feminism Review*, (Summer, 1986)23: 81-92; A.Mama, 1989 32, p-30-48; also see: A. Mama, *A Hidden Struggle "Spare The Rib"*, (Feb 1990) CCIX: 8-11

⁶⁵Dobash and Dobash, *op.cit*; pp- 52-53

council has been reform of homicide law, immigration regulations and police practices.⁶⁶ At present the centre is fighting for the release of Zoorah Shah currently serving life sentence for poisoning her husband to death who with underworld connections reportedly abused and exploited her physically and economically for twelve years.

Women's response to events and incidents that would ultimately have an impact on their existence and life style finds expression in their ability to put their heads together. They irrespective of their colour, creed, ethnicity, rise above their organisational autonomy to fight the fundamentalist menace, Their awareness regarding the need to analyse the impact of local and international events on feminine existence and their hard struggle attest to their dedication to women's cause. The alliance of South Hall Black Sisters, Brent Asian Women's Refuge and Iranian Women's Organisation in Britain in 1989 in the wake of death threats against Salman Rushdie serves the best example of the same.

The women crusade against domestic violence and sex based discriminatory legislation does not enjoy full support from all groups and governments. At the Women conference in Beijing Lesbianism was reportedly one of the hot potatoes because the Chinese government saw to it that Lesbian groups should not be accredited and the known out ones were harassed at the conference itself. But most human rights scholars and activists are optimistic about the future of a global women's rights movement after having lived through a series of inspiring events: The U.N End of Decade Conference on Women in Nairobi in 1985; the Global Tribunal on Violations of Women's Human Rights at the World Conference on the Elimination of All Forms of Discrimination Against Women. Perhaps much of the optimism stems from the commendable role that non-governmental women's organisation have played at the grassroots level in promoting and protecting the women's rights and moving them forward.

Asian Women: A Case Study

Asian women are doubly trapped in the predicament of their socio –cultural dynamics and the legal system, in particular- the immigration laws. Through the immigration legislation women are condemned and deserted to a life of violence and degradation or they run the risk of deportation. The applicant's initial leave to enter in UK on the basis of marriage is conditional upon remaining within the marriage for one year in order to have an indefinite stay. This one year rule has caused grave hardship to women and children as the settled spouse use this potent weapon to exploit the vulnerable and insecure dependent spouse. In such trials as the case study shows, married women are tortured physically and mentally on

⁶⁶*On the functioning of Centre SBS see :Kiranjit Ahluwalia; Light of the Circle (1996).*

trivial reasons and condemned as undesirable and blameworthy. The condition of women who lack legal awareness, have no recourse to refugees or public funds (on account of condition of one year rule), suffer from language impediment to obtain an appropriate employment, face a prolonged ordeal of misery and humiliation. The “One- Year” rule often entraps women in violent and unhappy marriages. They are confronted with a stark choice: Living in abusive or violent situations invite risk of being deported if they leave or are deserted. Such women and their children are forced to live in total destitution as being vulnerable, economic and sexual exploitation is their *fate accompli*. Services for abused women in the Indian Sub- Continent are few dependent on charity rather than state assistance. Some prominent women organisations of Delhi inter alia are –All India Democratic Women’s Association, Saheli, YWCA of India, Centre for Women Development Studies, Kali for Women, National Federation of Indian Women, Action Indian Women’s Programme, Jagori, Delhi State JanwadiMahila Federation, Shaktishalini and Peoples Union for Civil Liberties. These women Organisations though effective at individual level, have not been effective enough to change the power structure in the community as a whole. Many women are afraid to approach the police for help because of a common problem of custodial rape and ill treatment by the corrupt police officers. The British legal system seems to suffer from unique contradiction – the English law on the one hand as Lord Denning put it, regards man’s liberty of movement so highly that it is not prevented or hindered except on surest grounds.⁶⁷ Yet frequently it hinders not only liberty of movement but the re union of parents and children.

Criminal Justice System and Family Law Act, 1996: Procedural Pitfalls and Ethical Dilemmas

Whether the matters under the Act should be treated as civil or criminal in nature, is in itself an issue to be addressed and deliberated upon. The general belief prevails that these matters are stuff of the civil rather than criminal law since what is in issue is primarily relationship between the individual parties involved rather than between a particular individual and the community as a whole. In its Report on Domestic Violence and Occupation of the Family Home, the Law Commission pointed out⁶⁸ that the main aim of the civil law (in contrast with the criminal law) in this context is to regulate and improve matters for the future- in particular by making orders about the future use of property or the future behaviour of the parties- rather than making the judgement upon or punishing past behaviour. Civil legal remedies are extremely complicated and unintelligible to most of their users. The law relating to injunctive

⁶⁷*Ghani v .Jones (1969) 3 W.L.R 1158 at 1169.*

relief has been made complex and there is substantial regional variation in the extent to which powers of arrest are attached to injunctions (London Strategic Policy Unit, 1986). Their effectiveness depends on the willingness of police to use these powers in the event of a breach. Above all in civil law woman is faced with the arduous task of being initiator of the action at a time when notwithstanding the presence or absence of physical violence the psychological pressure of collapsing relationship may be too great to continue living with the same partner. However, where police intervenes, the procedure is quicker and desirable that is, woman feels safer and secure with the police protection.

Apart from this the classical criminal propositions continue to rub salt on bleeding wounds of a battered woman. The law of provocation and self defence continue to be based upon standards of male behaviour and reasoning and furthermore limited to male way of seeing. This means women's difficulty in fitting into the pre-existing legal definitions with men in mind.⁶⁹ The Australian Courts began redressing this bias some years ago but despite the rigorous calls for reform Britain continues to lag behind. For instance the idea of cumulative rage, the slow burn, has not been accepted in English Law, although it has some purchase in California⁷⁰. In New South Wales an increased awareness of domestic violence is gaining ground as the law relating to provocation has been changed in order to keep pace with the prevailing context. The Crimes (Homicides) Amendment Act 1982 allows any past conduct of the deceased towards the defendant to be the basis of provocation. The events immediately prior to the killing de-emphasised.⁷¹ The willingness of the British Courts as in Kiranjit Ahluwalia's case, to accept evidence of diminished responsibility suggests to seek a favourable judicial response through medical excuses rather than partial justification of provocation. It is likely to move the issue from the moral and legal to the medical rink where the testimony of psychologists and psychiatrists is likely to become crucial. The courts may change into battle fields of experts who shall supplant rather than supplement the voice of battered defendants⁷². But doing the same is inevitable if the purpose of law and the courts is to do justice. More so it is accepted because it falls in line with legal tradition laid down in Mc Naughten Case.

⁶⁹Katherine O' Donovan, "Defences for Battered Women who Kill", *Journal of Law and Society*, (1991) 18:219 at 222.

⁷⁰*People v. Borchers* 50 Cal.2nd 321, 325, p-2d 97 (1958); *People v. Berry* 18 Cal.3d 509, 556, p.2d 771 (1976). Curiously these cases concerned male defendants. They are relied on in the literature as examples of a broadened concept of provocation, Katherine O'Donovan op.cit.

⁷¹N.Lacey, C.Wells, and D.Meure, *Reconstructing Criminal Law* (1990) 229, cit in *Ibid*.

⁷²Donald Nicolson and Rohit Sanghvi, *R.R.Sanghvi & Co: Battered Women and Provocation: The Implications of R v. Ahluwalia* in *Criminal Law Review* (1993) 728.