

The Protection of Women From Domestic Violence Act: The Current Situation

*Since almost four years since the PWDVA's enactment in 2005, its implementation needs much improvement, writes Northeastern University School of Law (Boston, MA, U.S.A.) student **Rakhi Lahiri***

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India's first prime minister, Jawaharlal Nehru, proclaimed that a nation's condition could be surmised from the status of its women. If indeed this is true, then this paints a very bleak picture for nations across the globe where women remain in subordinate societal positions and face violence and oppression at the hands of dominant males. Nehru would be particularly upset to see the country that he once led has far to go in advancing women's fundamental rights, including the right to live life free from violence. Though through the combined efforts of social workers and NGO's some progress has been made, particularly with passing the Protection of Women from Domestic Violence Act in 2005 (hereinafter known as "PWDVA" or "the Act"), as much of the legislation passed in India, the Act has fallen prey to a lack of enforcement. Perhaps focusing on improvements using international law and human rights discourse may support activists' efforts to alleviate the country's current and long-standing domestic violence epidemic.

Domestic Violence in India

According to the 2005-2006 National Family Health Survey in India, thirty-seven percent of married women reported experiencing some form of domestic violence on at least one occasion during their marriage. What is even more disconcerting, however, is the fact that these statistics do not include the vast majority of cases which are unreported. In addition, a large proportion of Indian men and women justify this abuse. According to the survey, fifty-one percent of seventy-five thousand men surveyed believed hitting their wives is acceptable for various reasons including disrespect of their in-laws, refusing sex, and bad cooking, while fifty-five percent of women believed that spousal abuse at times may be warranted.¹ These pervasive cultural perceptions, partially driven by India's largely patriarchal society, are one of the major obstacles to the successful implementation of the PWDVA.

The PWDVA

Despite cultural justifications for spousal violence, some women still try to turn to the justice system for assistance. However, prior to the passing of the PWDVA in 2005 and its enforcement in October 2006, women could only seek criminal sanctions for domestic violence under Section 498A of the Indian Penal Code (the "Anti-Cruelty Act") or Section 304B (the "Dowry Death Act"), or face the social stigma of getting a divorce.² These two pieces of legislation could be used only in very limited circumstances: 498A only punishes husbands or relatives of husbands for acts of harassment or violence that would likely drive a woman to commit suicide or cause grave danger to her life, limb or health; 304B may only be used post-mortem to punish violence against a woman when the cause of her death can be shown to be related to dowry demands.³

¹ National Family Health Survey 3 Key Findings Report, available at: <http://www.nfhsindia.org/NFHS-3/NKF/Report.pdf>.

² Amy Hornbeck, Bethany Johnson, Michelle LaGrotta, Kellie Sellman, *The Protection of Women from Domestic Violence Act: Solution or Mere Paper Tiger?*, 4 Loy. U. Chi. Int'l L. Rev. 273, 277-78 (2007).

³ *Id.*



Recognizing these significant gaps in the law excluding numerous women victims, the National Commission of Women approached the Lawyer's Collective in 1993 to draft legislation to close these loopholes. After years of work and with the combined efforts of the Lawyers Collective, other women's rights groups, and input from government officials, the PWDVA was born.⁴ It was seen as a landmark step in improving the situation of women in India, broadening existing definitions of domestic violence to include not only physical but verbal, emotional, sexual, and economic abuse, and allowing women civil and/or criminal recourse for violations of the Act.⁵

These remedies consist of ex parte, interim, and permanent orders including: (1) **protection orders** under Section 18 prohibiting the abuser(s) from continuing the abuse, aiding or abetting the commission of domestic violence, entering employment premises or school grounds of the victim's children, and alienating the victim's access to assets held jointly or separately; (2) **residence orders** under Section 19 that can remove the abuser(s) from the shared household, restrain the abuser(s) from entering premises of the shared household in which the victim resides, restrain the abuser(s) from alienating the victim from or disposing of the shared household, and/or direct the abuser(s) to secure equal and alternate accommodations for the victim if staying in the residence is not a viable option; (3) **monetary relief** under Section 20 including medical expenses and loss to property as well as maintenance for the victim and her children; and (4) **custody orders** under Section 21 of the Act whereby the court can grant custody of children to the victim while an application for relief is pending, and can deny visitation rights to the abuser(s) if deemed harmful.⁶

Apart from this, the PWDVA provides protection officers in each state district to assist women victims through the court process by filing domestic incident reports to inform the magistrates deciding the cases of their circumstances, helping prepare complaints, informing and assisting victims with their right to obtain free legal and medical aid, counseling, and option of staying in shelter homes for safety, and ensuring compliance of the orders passed in their favor and the relief granted.⁷ Service providers consisting of various governmental and non-governmental organizations registered under the PWDVA can play a supportive role in offering these services to domestic violence victims.⁸

Problems with the PWDVA

Cases brought under the PWDVA have been a mixed bag of successes and failures. A May 13th, 2009 report by the Times of India wrote how a Mumbai woman subjected to twelve years of abuse by her husband was assisted by the PWDVA to reside in his house, barring his entrance.

⁴ *Id.* at 279.

⁵ *Id.*

⁶ HRLN Delhi's Women's Justice Initiative, *The Protection of Women from Domestic Violence Act 2005 Handbook*, (2007).

⁷ *Id.*

⁸ *Id.*

She was also granted monthly compensation from him, and obtained custody of their daughter.⁹ Furthermore, several landmark decisions have granted women justice under the Act. The Rajasthan High Court in *Smt. Sarita v. Smt. Umrao* 2008 (1) R. Cr. D 97, held that complaints filed against relatives of a husband or male partner included all relatives, irrespective of gender, thus including abusive female in-laws.¹⁰ In a July 4th, 2008 decision in *Aruna Parmod Shah v. Union of India WP (Crl.)*, the Delhi High Court dismissed the victim's mother-in-law's contentions that the PWDVA was unconstitutional because it did not provide a remedy for men as well as women, and that holding relationships in the nature of marriage at par with marital relationships in Section 2(f) of the Act derogated the rights of legally-wedded wives. The Court held that the gender-specific nature of the PWDVA was a reasonable classification in view of the Act's object and purpose, and thus it was constitutionally valid. The Court further held that "like treatment to both does not, in any manner, derogate from the sanctity of marriage since an assumption can fairly be drawn that a 'live-in relationship' is invariably initiated and perpetuated by the male."¹¹ The Madras High Court also upheld the constitutionality of the PWDVA in a March 4th, 2009 decision, *Dennison Paulraj and Ors. V. Union of India and Ors. WP*, expounding that the PWDVA was enacted as a special legislation for women consistent with Article 15(3) of the Indian Constitution.¹² In addition, the Madras High Court found a way around the Indian Supreme Court's decision in *S.R. Batra v. Taruna Batra*, (2007) 3 S.C.C. 169. The Indian Supreme Court in *Batra* found that under the definition of "shared household" in section 2(s) of the PWDVA, a wife could not claim residence or receive an injunction from dispossession of property where the mother-in-law owned the house. However, in *P. Babu Venkatesh & Ors. v. Rani*, MANU/TN/06/12/2008, the Madras High Court upheld a residence order on behalf of a wife. The Court found that her husband transferred the house under his mother's name, intending to defeat his wife's right to reside there, and prior to his wife's dispossession, both parties resided jointly in the household. The Court also held that pending divorce proceedings did not affect grants of relief under the PWDVA.¹³

Other successes include the Allahabad High Court's dismissal of a husband's challenges to his wife's PWDVA application in *Milan Kumar Singh & Anr. v. State of U.P. & Anr.*, 2007 Cri LJ 4742, holding that there is no bar to directly filing a complaint with a magistrate, and the use of the word 'or' in section 12(1) of the PWDVA shows that it is the aggrieved person's choice if she wants to approach the protection officer first. The Court further explained that the PWDVA is a social legislation with the purpose of helping the aggrieved person, and thus imposing strict procedural requirements would directly contradict its objective.¹⁴ Finally, in *Suresh Khullar v. Vijay Kumar Khullar*, AIR 2008 Delhi 1, the Delhi High Court held that a husband's second marriage was legally valid for the purposes of his wife's maintenance claim during divorce proceedings under section 18 of the Hindu Adoptions and Maintenance Act of 1956, even if the

⁹ *Tortured wife gets hubby's house, thanks to new law*, The Times of India, May 13, 2009, available at: <http://timesofindia.indiatimes.com/NEWS/City/Mumbai/Tortured-wife-gets-hubbys-house-thanks-to-new-law/articleshow/4524726.cms>

¹⁰ *Id.*

¹¹ Lawyers Collective, *Landmark Judgments and Orders*, available at: <http://www.lawyerscollective.org/wri/projects-activities/domestic-violence-landmarks>

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

husband's ex-parte divorce from his first wife had been set aside. The Court relied on sections 2(a), 18, 20, and 26 of the PWDVA, and found that the divorce decree was in operation on the day the second marriage was solemnized, making the parties' second marriage legally valid, thus allowing for the wife's recovery and denying the husband immunity for defrauding her.¹⁵

These success stories, however, are the exception, not the rule, and improvements with the Act and its enforcement within India's legal system are still greatly needed. Information gathered from various HRLN offices across the country indicated serious problems in the implementation of the PWDVA. Numerous advocates pointed to the lack of training of police officers and magistrates regarding the Act's requirements and its purpose, as well as a lack of sensitivity training towards the issue of domestic violence, an old evil but newly recognized concept in Indian society. This lack of training has led to the re-victimization of women within the justice system, either through police non-response to calls for help, sending women back home to their abusers by branding their victimization as mere domestic disputes, or magistrates allowing for numerous continuances of cases, prolonging the court process and forcing victims to come to court to face their trauma time and again.

For example, police officers in various stations in West Bengal often demonstrated a lack of awareness that the Act existed, one claiming the PWDVA was not implemented in the state, thus labeling most of domestic violence cases as 498A complaints. However, because 498A has an extremely high threshold of cruelty for a woman to satisfy in order to warrant a criminal offense, most of the officers felt that 498A was misused by women complainants because their mental torture, for instance, was not likely to drive them to suicide. One female client in West Bengal spoke of the insensitivity she faced at the hands of officers who believed her abuser's stories that she was a prostitute, and dismissed her pleas for aid and told her she should be ashamed when she sought the officers' help. An advocate in Punjab expressed her frustrations at the difficulty in obtaining substantial relief such as permanent orders, as opposed to interim relief, from the courts.

Other problems cited by advocates and protection officers working to help women under the PWDVA included issues with serving notice of hearings to abusers, often necessary in order to continue the process of granting protective orders as well as residency orders. Furthermore, very few NGO's have registered themselves as service providers under the Act, the registered service providers as well as protection officers' lack experience with domestic violence work, too few protection officers are assigned in each district to handle the caseload, and government service providers provide poor services to those in need. One recent June 20th, 2009 article in the Times of India reported a Pune protection officer's failure to conduct a detail inquiry ordered by the magistrate regarding a woman's allegations of abuse by her husband. The officer noted that the incident took place out of her jurisdiction, but this explanation was not accepted by the judge.¹⁶ This bureaucratic way of handling domestic violence complaints illustrates the lack of

¹⁵ *Id.*

¹⁶ *Notice to protection officer in domestic violence act*, The Times of India, June 20, 2009, available at: <http://timesofindia.indiatimes.com/Cities/Pune/Notice-to-protection-officer-in-domestic-violence-act/articleshow/4678094.cms>

understanding that untrained protection officer's have regarding the urgency of domestic violence situations, and it is fortunate that the magistrate was well-versed on the issue. Furthermore, domestic violence is an issue that not only requires quick action, but it also needs those who are helping victims to 'think outside the box'. Thus, simply giving a list of options to a domestic violence victim from a pamphlet or script will not suffice; a conversation with the victim regarding pros and cons of her various options in order to best protect her safety should take place.

Advocates and protection officers have noted additional inadequacies of the PWDVA, including the Act's failure to mandate criminal penalties for abuse along with its civil measures, its failure to explicitly provide a maximum duration of appellate hearings which delays women's grant of relief, the residency orders' failure to give women substantive property rights to the shared household (only giving them the right to reside there), and a basic lack of infrastructure linking law enforcement officials, officials under the act, and service providers together in order to best and most efficiently serve domestic violence victims. As one protection officer in West Bengal mentioned, the lack of communication between the individuals and organizations required to aid the victim make it very difficult to follow up on the victim's status, as well as to monitor each other to make sure each function is being carried out properly. Needless to say, this lack of follow up can endanger victims' safety as well as allow for corruption and inefficiency within the organizations intended to help them. In addition, a Times of India July 19th, 2009 article reported the PWDVA's lack of retroactivity, citing the Mumbai High Court's decision to set aside an order permitting an abused woman to reside in her husband's flat since his eviction attempt occurred prior to the PWDVA's enactment in 2005. However, the article noted that courts may grant restraining orders for acts of violence occurring prior to 2005.¹⁷

International Domestic Violence Initiatives

Considering the infrastructural problems that have left the PWDVA's force anemic, it may be helpful to take guidance from domestic violence initiatives abroad to use as models for restoring the teeth back into the Act.

In the United States, the Violence Against Women Act (VAWA), a federal public law authorized initially in 1994 and reauthorized in 2005, has provided over three billion dollars to improve the plight of women facing violence within the nation. Funds have gone towards sensitivity training programs for law enforcement, lawyers, the judiciary, and court personnel on domestic violence issues and in the importance of responding to domestic violence calls and civil protection order violations, as well as training medical staff on detecting signs of domestic violence. Funds have also been allocated to various initiatives helping domestic violence victims receive legal aid, maintain housing and employment, retain confidentiality, assist rural populations, older women, immigrant women and children, and women with disabilities in accessing victim services, and

¹⁷ *Domestic Violence Act can't be applied retrospectively: HC*, The Times of India, July 19, 2009, available at: <http://timesofindia.indiatimes.com/NEWS/City/Mumbai/Domestic-Violence-Act-cant-be-applied-retrospectively-HC/articleshow/4793927.cms>

maintain a national domestic violence hotline.¹⁸ In addition, the Office on Violence Against Women (OVW), a branch of the U.S. Department of Justice, has established the “VAWA Measuring Effectiveness Initiative” to collect qualitative data on victim services, staffing, criminal justice case processing, and other VAWA program services in order to determine the law’s progress, enable long-term planning to combat violence against women, and to report these results to the U.S. Congress.¹⁹ Although organizations such as the Lawyers Collective and National Commission of Women have played a monitoring function for the PWDVA, their important role needs to be supported and strengthened to create more accountability.

The OVW also administers government funding for the Family Justice Center Initiative, which brings together NGO’s, victim service providers, law enforcement officers, forensic medical professionals, lawyers, and community-based organizations under one roof in order to make victims’ quest for justice within the criminal justice system more efficient and effective.²⁰ A one-roof system for service providers in India may enable increased monitoring and effectiveness of the Act.

Furthermore, VAWA provides funding for victim witness assistance programs²¹ whereby trained staff aid victims and witnesses of crime to navigate the criminal justice system, inform them of court proceedings and court dates, provide crisis intervention and safety planning, ensure their specific rights under specific victim rights bills are met, and assist them in accessing other service providers for economic security, protection, housing, counseling, and post-conviction services. Although this role is similar to that of protection officers, some key differences include the compartmentalization of the victim advocates’ roles in order to allow them to complete their job to the best of their ability. For example, in the Suffolk County District Attorney’s Office (SCDAO) in Boston, MA,²² many victim advocates are located directly in the courthouses, and interact with lawyers, police officers, judges, and court staff day-to-day, as well as attend monthly training sessions and community outreach programs in order to interact with members of the community they serve as well as with service providers to whom they refer their clients. This structure facilitates greater communication among those protecting victims’ interests and allows victims greater access to their services.²³ Perhaps protection officers should be located

¹⁸ U.S. Department of Justice, Office on Violence Against Women Facts About VAWA, available at: <http://www.ovw.usdoj.gov/docs/vawa.pdf>

¹⁹ U.S. Department of Justice, Office on Violence Against Women Special Initiatives, available at: <http://www.ovw.usdoj.gov/vawa.htm>

²⁰ U.S. Department of Justice, Office on Violence Against Women Special Initiatives, available at: <http://www.ovw.usdoj.gov/pfjci.htm>

²¹ U.S. Department of Justice, Violence Against Women Act, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h3402enr.txt.pdf

²² The author of this article, Rakhi Lahiri, worked for the SCDAO in Boston, MA as a victim witness advocate for three years prior to entering Northeastern University School of Law.

²³ One setback in the advances VAWA has provided women came from the Supreme Court case of *United States v. Morrison*, which deemed as unconstitutional VAWA’s civil provision allowing victims to claim civil rights violations of sex discrimination under federal law if prosecutors did not go forward with their cases.



directly in Indian courthouses as well, and duties should be divided among officers to promote specialization and prevent overburdening.

Other schemes in the United States that the PWDVA may benefit from include the scope of protection orders themselves: in all states, protection orders can be sought by both men and women,²⁴ in many states can be sought against same-sex partners, and certain states including Massachusetts and Minnesota, cover individuals who have not lived in the same household but have had a substantial intimate or dating relationship. In addition, in twenty-one states in the U.S., mandatory arrest of the aggressor is required for domestic violence incidents, including breaches of protection orders. Problems with upholding the mandatory arrest laws will be discussed in *Castle Rock v. Gonzales* in the “International Case Law” section below.

Breaking up the number of responsibilities into different subgroups of individuals, while maintaining lines of communication between the groups, seems to play a positive role in the effectiveness of domestic violence reform. In England and Wales, the government has developed a Domestic Violence National Action Plan in response to the domestic violence epidemic. The goals of the plan for governmental as well as nongovernmental agencies include reducing the prevalence of domestic violence, increasing abuse reporting rates and the number of cases brought to justice, ensuring adequate protections for domestic violence victims nationwide, and reducing the number of domestic violence-related homicides.²⁵ Subgroups work toward achieving these goals is managed by a Domestic Violence Virtual Group consisting of government officials who submit quarterly progress reports to an Inter-Ministerial Group for Domestic Violence. These two countries’ governments also call for Multi Agency Risk Assessment conferences where key agencies, law enforcement, probation officers, and those in the education, health, housing, and voluntary sectors share information about their cases. In addition, in 2005 the Home Secretary launched the Corporate Alliance Against Domestic Violence, bringing together a group of companies and organizations in order to address the impact of domestic violence in the workplace and to identify and protect staff from their perpetrators.²⁶

Australian governments have created similar initiatives in order to combat domestic violence. Furthermore, Australia launched a national multimedia awareness-raising campaign, *Violence Against Women—Australia says no* in 2004, which advertises a twenty-four-hour confidential helpline for domestic violence and sexual assault victims.²⁷ The American Civil Liberties Union (ACLU) and other advocates have commended these various governments for instituting a national response which is more holistic in nature and emphasize responses and communication between governmental and nongovernmental actors as opposed to what they call the United States’ ‘legislation-centric’ approach to combating domestic violence.²⁸ India’s “Bell Bajao”

²⁴ Although in India, due to the particularly low-status of women in the country and the fear that men may make false claims of abuse in retaliation to women’s claims, the PWDVA might be best left to provide a remedy for women only. Separate legislation may be enacted for male domestic violence victims.

²⁵ Amici Curiae Brief In Support of Petitioner in *Jessica Gonzales v. U.S.A.*, Petition No. P-1490-05, available at: http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=16676

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*



campaign launched in August 2008, similar to Australia's media endeavor, is a positive step in the right direction.

International case law

In addition to legislation and governmental initiatives, advocates, law enforcement, and service providers in India may find using international case law useful in achieving justice for domestic violence victims within the legal system.

Enforcement of Protection Order Cases

There have been several jurisdictions within the United States that have recognized special duties owed to protection order holders. One such case is *Baker v. City of New York*, 269 N.Y.S.2d 515 (1966) in which plaintiff Sandra Baker sued the City of New York because its law enforcement officials failed to honor her protection order and protect her from her mentally-disturbed estranged husband. The police told Ms. Baker that her restraining order was "only a piece of paper" when she called the police for help when her husband created a disturbance at the family home. When she went to court to tell a probation officer what happened, she saw her husband in the corridor and asked to wait in the probation officer's office due to fear, but the officer told her to wait in the waiting room. Minutes later, her husband shot and wounded her. The New York State Supreme Court Appellate Division held that the city failed to fulfill its obligation to protect Ms. Baker and found that she was "...a person recognized by the order of protection as one to whom a special duty was owed...and peace officers had a duty to supply protection to her." Since both officers were state actors, Baker had a right to sue the city and both officers were found guilty of negligence.²⁹

In *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), the estate and family members of a wife murdered by her estranged husband brought a wrongful death suit against the Sonoma County Police Department in California and the Deputy Sheriff, claiming inadequate police protection in violation of the Equal Protection Clause. After the U.S. District Court for the Northern District of California dismissed the case on a motion for summary judgment by the defendants based on lack of evidence between the connection of Macias' murder and the sheriff's department's response to her complaints, plaintiffs appealed. The U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal and held that the matter should be able to proceed. The court declared that "It is well established that there is no constitutional right to be protected by the state against being murdered by criminals or madmen. There is a constitutional right, however, to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons." The suit ended in a one million dollar settlement.³⁰

²⁹ See *Domestic Violence—The Laws and the Courts: Landmark Legal Decisions*, available at: <http://www.libraryindex.com/pages/2074/Domestic-Violence-Laws-Courts-LANDMARK-LEGAL-DECISIONS.html>

³⁰ See *Id.*



In *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.C. Conn. 1984), police officers repeatedly ignored Ms. Thurman's requests for protection against her estranged husband's threats to her and her children's lives, ignored her attempts to file complaints against him, refused to enforce a judge's order prohibiting him from coming near her home, and refused to enforce her protection order against him. The officers only arrested him after he violently stabbed her repeatedly around her neck, chest, and throat and then attempted to attack her again while she was on a stretcher awaiting medical treatment. Ms. Thurman used her rights under the U.S. Constitution to file a claim under the Equal Protection Clause of the Fourteenth Amendment providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws." Thus, if Ms. Thurman could prove that a police department had a gender-based policy of refusing to arrest men for abusing their wives, she could claim violation of her constitutional right to the equal protection of the laws. The U.S. District Court for the District of Connecticut held that:

City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship as well as to all other persons whose personal safety is threatened, including women not involved in domestic relationships. If officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. [A] police officer may not knowingly refrain from interference in such violence, and may not automatically decline to make an arrest simply because the assailant and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws.

Ms. Thurman was awarded 2.3 million dollars in compensatory damages and almost immediately thereafter, Connecticut law was changed calling for mandatory arrests of abusive spouses, resulting in the doubling of arrest rates in the state.³¹ The Equal Protection Clause in the U.S. Constitution is very similar to the Indian Constitution's guarantee of equal protection of the laws under article 14, and thus similar reasoning to enforce protection orders by officers may be employed by domestic violence victims.

However, in *Castle Rock v. Gonzales*, the United States Supreme Court declared that there is no constitutional right to police enforcement of a protection order, sending a huge blow to domestic violence victims and advocates. In June 1999, Jessica Gonzales' estranged husband abducted her three young daughters, all between the ages of seven and ten years old. Gonzales repeatedly called the Castle Rock, Colorado Police Department to report the incident, and had made domestic violence calls to the police numerous times in the previous three months. Her calls were ignored, despite Colorado's 'mandatory arrest' law, and ten hours later when her estranged husband opened fire at the police station and was killed, the officers discovered the dead bodies

³¹ See *Id.*

of Gonzales' three children in her husband's car trunk. Gonzales filed a lawsuit against the police, alleging due process violations of the Fourteenth Amendment of the U.S. Constitution, which the Supreme Court rejected.³² Nevertheless, undeterred in her quest for justice, Gonzales filed a petition with the Inter-American Commission on Human Rights (IACHR), claiming that the United States itself was responsible for human rights violations resulting from the police department's inaction and the Supreme Court decision.³³ This case, *Jessica Gonzales v. U.S.A.*, is the first case brought by a survivor of domestic violence against the U.S. before an international human rights tribunal. The case continues to be heard by the Commission.

Dowry Cases

In the landmark case of *Andhra Pradesh High Court v. Punniah*, crl. L.J. 2330 (1989), the Indian Supreme Court supported the purpose of the Dowry Death Act under I.P.C. 304B, declaring that when an abused woman commits suicide, there is a presumption that it is a dowry death. However, the language of what is considered dowry within the Dowry Death Act and the Dowry Prohibition Act, which is the language used in the PWDVA, remains vague and can be considered to only cover expected gifts and collective gifts to the groom's family. Thus, a legal loophole exists still allowing for dowries to be extracted from women's families in India.³⁴

In England, unlike in India where the exchange of dowry is prohibited, a dowry contract may be valid and its ownership passes individually to the bride or groom. This gives women an absolute property right to the dowry that is bestowed upon them and thus they have a legal remedy for its recovery. For example, in *Samson v. Samson*, 1 All E.R. 654 (1960) (Eng.), after separating, a wife made a claim for half of the wedding presents in chattels and money received by her and her husband for their wedding under the Married Women's Property Act of 1882. The Court of Appeal rejected her claim holding that ownership of property and monies received passes individually to the bride or groom by drawing inferences about which side the presents were intended for.³⁵ Furthermore, dowry that is given involuntarily may be recovered through an action for restitution.³⁶ In *Maskell v. Horner*, 3 K.B. 106 (Eng. C.A. 1915), a produce dealer brought a claim against the owner of the market for extracting payments for dealing in the market under threat of seizure of his goods. The Court held that "if a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received."³⁷ This decision ties in with ideas to expand the economic abuse provision incorporated in the PWDVA, to be discussed more fully under the section entitled "International Human Rights Treaties."

³² Caroline Bettinger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence Human Rights Advocacy in the United States*, 21 Harv. Hum. Rts. J. 183, 183-84 (2008).

³³ *Id.* at 185.

³⁴ See Purna Manchandia, *Practical Steps Towards Eliminating Dowry and Bride-Burning in India*, 13 Tul. J. Int'l & Comp. L. 305, 320 (2005).

³⁵ *Id.* at 325.

³⁶ *Id.*

³⁷ *Maskell v. Horner* at 118.

Apartment Eviction Cases

The Department of Housing and Urban Development, a United States national agency, has already incorporated the VAWA in order to prohibit public housing authorities from discriminating against domestic violence victims by evicting them when an incident occurs in public housing due to their abuser. More recently however, a lawsuit filed by the American Civil Liberties Union to prevent such discrimination in private housing, in the case of *Lewis v. North End Village, et al.*, reached a groundbreaking settlement in February 2008. After Tanica Lewis' abusive ex-boyfriend broke the windows and kicked in the doors to her apartment in Detroit, Michigan, the property manager issued her a 30-day eviction notice, and Lewis was forced to move into a shelter with her two young daughters. Under the settlement reached, the property management company agreed not to discriminate against individuals in the terms, conditions, or privileges of their tenancy due to their victimization by domestic violence, dating violence, sexual assault or stalking, whether or not the abuser resides in the tenant's household. Furthermore, the company also agreed to offer early lease termination and relocation to tenants who have been the victims of such abuse and need to leave their homes to ensure their safety. Finally, the company acquiesced to paying Lewis' monetary damages and attorneys' fees.³⁸ Similar agreements may be reached with apartment owners in India using this example.

Witness Intimidation Cases

Though the Lawyers Collective's First Monitoring and Evaluation Report on the PWDVA in 2007³⁹ noted that most courts in India do not require the aggrieved woman's presence on every court date, some courts or specific magistrate judges in states such as West Bengal, Andhra Pradesh, and Bihar still hold the respondent's right to confront his accuser in high standing, forcing the victims, in often precarious positions, to continue appearing in court without any compensation for her transportation expenses. These courts also fail to consider the abuse and intimidation the victim faces when she comes to court. One women's rights lawyer in West Bengal spoke of the constant threats her client received from her husband and his family when she appeared in court, and how the next time she appeared she had bandages wrapped around her face because her nose was cut off. Clearly, the high costs of coming to court for the victim not only include monetary damages but include physical harm. Consequently, Indian courts may want to consider the practices of some courts abroad that balance respondents' right of confrontation with the rights of the victim.

³⁸ *Lewis v. North End Village, et al.*, American Civil Liberties Union, February 21, 2008, available at: <http://www.aclu.org/womensrights/violence/33989res20070221.html>

³⁹ Lawyers Collective, *Staying Alive: First Monitoring and Evaluation Report 2007 on the Protection of Women from Domestic Violence Act*, (2007), available at: <http://www.lawyerscollective.org/sites/default/files/staying-alive-report.pdf>



For example, in the case of *Doorson v. Netherlands*, Eur. Ct. H.R. (1996), heard by the European Court of Human Rights (ECHR), the respondent was convicted of drug trafficking based on the evidence of two anonymous witnesses who were not present in court and whom he did not have the opportunity to question due to fear of reprisal for their testimony. The ECHR examined Article 6(1) on the right to fair trial of the European Convention on Human Rights and declared that "...principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses and victims called upon to testify." The court cited relevant interests of victims and witnesses as their life, liberty, and security.⁴⁰

International Human Rights Treaties

In addition to using international case law and initiatives, and the rights and protections bestowed by the Indian Constitution, Indian litigators, individuals, and third parties can use international human rights treaties of which India is a party in order to file Public Interest Litigation petitions (PILS) in support of the PWDVA. These PILS can encourage the Indian central and state governments to enforce the provisions of the PWDVA, making them aware of the gaps between the Act and the reality on the ground. Enforcement measures can include greater budgetary allocations to service providers and domestic violence victim assistance programs, and recognition of monitoring systems already in place. Furthermore, individual complainants can use international treaties for litigating their claims after they have exhausted all their remedies under Indian domestic laws, like those under the PWDVA and the IPC.

The Indian Supreme Court has repeatedly recognized its obligations regarding international law in its decisions. In *Kesavananda Bharati v. State of Kerala*, 4 S.C.C. 225, the Court held that international covenants and conventions could inform the scope of certain fundamental rights.⁴¹ Again, in *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. at 3015, the Court explained that recognizing international conventions and norms construing domestic law whenever they were not inconsistent with each other and domestic law did not address the issue, was an accepted rule of judicial construction.⁴² The Court in *Sheela Barse v. The Secretary, Children's Aid Society*, A.I.R. 1987 S.C. 656, 658, went one step further and opined that India's international obligations be incorporated into its domestic legislation.⁴³ Regardless of international laws' incorporation, state parties to various international treaties pledge to uphold certain fundamental rights including the right to equality, equal protection before the law, freedom from torture, the right to life, and the right to physical and mental health.

⁴⁰ Lindsay Hoopes, *The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium*, 32 *Hastings Int'l & Comp. L. Rev.* 305, 324 (2009).

⁴¹ Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 *Mich. J. Gender & L.* 177, 196 (2006).

⁴² *Id.*

⁴³ *Id.*

Right of Equality and Equal Protection before the Law: Article 1 of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in December 1948 and which all UN members, including India, are expected to honor, specifically states: “All humans are born free and equal in dignity and rights.”⁴⁴ Article 2 states that all are entitled to these rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.”⁴⁵ In addition, Article 7 states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.”⁴⁶ Thus, in addition to using the Indian Constitution’s recognition of equal protection before the law, arguments for equal protection from police officers for domestic violence complaints can be made under these provisions, similar to the arguments made under the 14th Amendment in the enforcement of protection order cases in the United States. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), as well as other international treaties, include provisions advancing the right to equality of both men and women.

One treaty that is particularly significant in advancing this right for women and shielding them from domestic violence is the Convention Eliminating All Forms of Discrimination Against Women (CEDAW), ratified by India on July 9th, 1993, with some reservations to its articles. Although the CEDAW does not explicitly prohibit violence against women, the CEDAW Committee has incorporated gender-based violence within the treaty’s ban on gender-based discrimination within General Recommendation No. 19.⁴⁷ General Recommendation No. 19 explains that the definition of discrimination in CEDAW article 1 includes gender-based violence, violence perpetrated against women because of their sex or that affect women disproportionately. Violence can include acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, or other deprivations of liberty, and such acts may breach specific provisions of the CEDAW regardless of their express mention of violence.⁴⁸ Moreover, following CEDAW’s entry into force, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women in December 1993, which all members of the UN are expected to follow. The declaration reiterates women’s entitlement to the equal enjoyment and protection of all human rights and fundamental freedoms, and defines the term “violence against women” more precisely than the CEDAW, characterizing it as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.’⁴⁹ Such acts include: physical,

⁴⁴Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR 3d Sess., U.N. Doc. A/811 (Dec. 10, 1948) [hereinafter UDHR].

⁴⁵ *Id.* at Art. 2.

⁴⁶ *Id.* at Art. 7.

⁴⁷ Andreea Veesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 Am. U. J. Gender Soc. Pol’y & L. 309, 326-27 (2004).

⁴⁸ See *Id.*; See also *CEDAW General Recommendation No. 19*.

⁴⁹ *Id.* at 330-31.



sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation.⁵⁰

Right to be Free from Torture: Article 5 of the UDHR and article 7 of the ICCPR both state “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵¹ The standard international definition of torture comes from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which requires three main elements: (1) severe physical or mental pain or suffering; (2) intentional infliction for certain purposes including punishment, coercion, intimidation, and discrimination; and (3) involvement of a public official.⁵² The first two elements should not be too difficult for domestic violence victims to show: evidence of egregious domestic abuse including severe and repeated beatings, sexual assaults, and repeated insults and mental abuse may satisfy the first element, and the intentional infliction of this abuse may be shown through examples of the abuser demonstrating or referencing his control over the victim. In the U.S., in order to satisfy the third element, the victim must be in the control or physical custody of the offender, and a public official must have awareness of the torture prior to the fact and has breached his legal responsibility to intervene to prevent the torturous activity.⁵³ It is not clear how the Indian legislature would interpret this third element but arguments have been made that custody should include psychological custody, which would relate to the constant fear domestic violence victims have of leaving their abusers, often times literally leading to their imprisonment within their homes. Physical control can be contended to not just mean imprisonment or detention but also as overpowering or domination of the body. Moreover, a police officer who receives abuse complaints from domestic violence victims and does not intervene to prevent future abuse may meet the involvement of a public official criterion.⁵⁴ Thus, even though India has yet to ratify the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), provisions regarding torture in the UDHR and ICCPR which generally adopt CAT’s definition of torture, and both under which India has obligations, can be used to support Indian domestic violence claims.

Right to Life, Liberty, and Security: Article 3 of the UDHR designates the inherent “right to life, liberty, and security of person.” This can arguably be used to support domestic violence claims in which victims are in constant fear for their lives, and are perpetually under the control of their abusers. Furthermore, just as the European Court of Human Rights cited victims’ interest of life, liberty, and security when interpreting respondents’ right to fair trials, so can this provision be used to protect domestic violence victims from witness intimidation inside and outside the courtrooms. Articles 6 and 9 of the ICCPR also support the right to life, liberty, and security of all persons.

⁵⁰ *Id.*

⁵¹ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; UDHR, *supra* note 40.

⁵² Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 Am. U. Int’l L. Rev. 895, 925-26.

⁵³ *Id.* at 925-31.

⁵⁴ *Id.* at 929-31.



Expanding Rights Via International Treaties

International treaties may be used not only to protect rights already in existence, but they can be artfully employed to expand those existing rights. For example, Pami Vyas argues that the Protection of Women from Domestic Violence Act must be progressively interpreted and broadly applied in order to cut through the patriarchal blanket smothering women in India.⁵⁵ One way to do so is by expanding the interpretation of economic abuse encompassed in the PWDVA to include not only a deprivation of economic or financial resources such as basic subsistence, but also deprivation of women's control over their economic resources, such as limits to their right to work outside the home, or forced relinquishment of women's earnings to their husband or in-laws.⁵⁶ According to the PWDVA, economic abuse is defined as 'a deprivation of financial resources to which the victim is 'entitled by law' or which she 'requires out of necessity,' thus signaling the use of both domestic and international law in interpreting what constitutes deprivation of women's financial resources.⁵⁷ Vyas persuasively contends that the Indian Constitution's guarantee of equal protection of the law, the right of all citizens to equality in matters relating to employment opportunities, and the duty to renounce practices derogatory to the dignity of women, all suggest that Indian domestic law entitles women to the financial resources to which men are entitled and denial of women's control over their finances amounts to a constitutional violation.⁵⁸ Furthermore, the provisions of international covenants like the CEDAW (articles 11 & 16 in particular) and the ICESCR mandate India's affirmative duty to correct inequalities that women face inside and outside of the marital home including those concerning their economic survival, to eliminate social and cultural practices oppressive to women, support women's right to work and independently choose their employment, and to advance their fundamental right of self-determination.⁵⁹ Consequently, international law also supports the proposition that economic abuse be viewed broadly, and thus both domestic and international law, in promoting the expansion of this term in the PWDVA, may provide a greater remedy for victims of domestic violence; granting women the right to control their economic resources will empower women, and punishing men for exerting control over their spouses will contribute to changing men's attitudes concerning gender equality and domestic violence in the future.⁶⁰

Human Rights Courts

Lastly, the Protection of Human Rights Act passed by the Indian government in 1993⁶¹ provides for the establishment of human rights courts for the purpose of providing speedy trials for offenses arising out of human rights violations. The state government may, with the concurrence

⁵⁵ Pami Vyas, *supra* note 11, at 180.

⁵⁶ *Id.*

⁵⁷ *Id.* at 192-93.

⁵⁸ *Id.* at 193-95.

⁵⁹ *Id.* at 198-99.

⁶⁰ *Id.* at 201-04.

⁶¹ *Protection of Human Rights Act, 1993 (No.10 of 1994)* [India], No.10 of 1994, 28 September 1993, available at: <http://www.unhcr.org/refworld/docid/474e89cf2.html>



of the Chief Justice of the High Court, specify for each district a court of session to be a human rights court in order to try such offenses. However, these courts have yet to be created. Such courts, like the European Court of Human Rights and the Inter-American Court of Human Rights, could be invaluable in achieving justice when all else fails.

Conclusion:

It will take more than ringing a bell and asking for a cup of milk in order to prevent the occurrence of domestic violence nationwide. The PWDVA's enactment is an important first step for India, but there is much more to be done regarding the Act's effective implementation. It must now be used not only to interrupt abuse, but to stop domestic violence permanently by opening the door and entering the fight.