

Current Developments

INTO THE “PRIVATE” – THE DOMESTIC VIOLENCE ACT, 2005

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With the passing of the Domestic Violence Act, 2005 the Indian legal system has stepped into a social space that has hitherto remained unwilling to lend itself to legislation – the home and family, and the violence faced within the same. This paper is an evaluation of the Domestic Violence Act, 2005, and attempts an analysis on the twofold ground of content and implementation – that is, both on grounds of what the Act provides for, and whether the same may actually be implemented successfully. The note therefore looks at the aims and objectives of the Act, and in this light, examines the concept of domestic violence as enshrined in the Act, the procedures and remedies that the Act provides for, and the issues that may arise in the implementation of the same.

| | | |
|-------------|---|------------|
| I. | INTRODUCTION | 113 |
| II. | AIMS AND OBJECTS OF THE D.V. ACT | 114 |
| III. | DEFINING DOMESTIC VIOLENCE | 115 |
| IV. | PROCEDURAL ISSUES | 118 |
| V. | REMEDIES UNDER THE ACT | 119 |
| VI. | ISSUES OF IMPLEMENTATION | 122 |
| VII. | CONCLUSION | 123 |

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I. INTRODUCTION

The passage of the Domestic Violence Act, 2005 (“D.V. Act”), was the culmination of a long-drawn struggle by the women’s movement for bridging the public-private divide, and eliminating violence against women, inside the four walls of the home. Traditionally, interference into “domestic privacy” has been seen as a greater evil than actual violence inflicted upon a woman.¹ With changing societal perceptions and demands, however, certain additions were made in the Indian Penal Code (“I.P.C.”), and the Indian Evidence Act, 1860 (“I.E.A.”), for dealing with the issue.² However, given the nature of the complex social, economic, and personal relationships involved in this issue, it was felt that ordinary criminal law instruments were not sufficient to effectively check domestic violence.³

The need for a better understanding of domestic violence and specific legislation on the same had been extensively debated in India, much before the D.V. Act was passed. Several women’s organisations prepared recommendations and draft statutes on this issue.⁴ Subsequently, a Bill to address issues of domestic violence was introduced in the *Lok Sabha*.⁵ However, it differed substantially from the draft statutes prepared by women’s organizations, and came under heavy criticism, since its provisions were such as would have resulted in a complete failure of its objectives.⁶ For example, only a woman related to the perpetrator by

¹ See, e.g., *State v. Rhodes*, 61 N.C. 453 (1868), in which the court stated:

Although husbands have no right to whip their wives, nor wives their husbands, courts will not interfere, to inflict on society the greater evil of raising the curtain on domestic privacy, merely in order to punish the lesser evil of trifling violence.

² §§ 304B, 498A, I.P.C.; §§ 113A, 113B, I.E.A.

³ See generally R. E. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 2 (1992).

⁴ NATIONAL COMMISSION ON WOMEN, *THE DOMESTIC VIOLENCE TO WOMEN (PREVENTION) BILL (1994)*, cited from Indira Jaisingh, *Reconsidered: Dangerous Bill*, INDIA TOGETHER, November 2002 available at <http://www.indiatogether.org/women/violence/domvolbill.htm> (last visited January 5, 2006); DOMESTIC VIOLENCE AGAINST WOMEN (PREVENTION) BILL, in, LAWYERS COLLECTIVE WOMEN’S RIGHTS INITIATIVE, *DOMESTIC VIOLENCE AND LAW 255 (2000)* [hereinafter L.C.W.R.I. Bill]. On the L.C.W.R.I. Bill, see generally Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U.J. GENDER SOC. POL’Y & L. 801, 844 (2003).

⁵ THE PROTECTION FROM DOMESTIC VIOLENCE BILL, 2002, available at <http://indiacode.nic.in/incodis/whatsnew/ProtectionDomes.htm> (last visited March 20, 2006) [hereinafter 2002 Bill].

⁶ Jaisingh, *supra* note 4.

marriage, blood or adoption, could avail of remedies under the Bill.⁷ Domestic violence was defined to mean habitual assault or harm.⁸ Single acts of violence, and economic or mental abuse, were not expressly included. The 2002 Bill lay pending in the Lok Sabha. When the U.P.A. government came to power, necessary changes were effected in the Bill, and it took the shape of the D.V. Act, 2005.

The passing of the D.V. Act may be considered as an important step in addressing the issue of domestic violence. It recognizes for the first time, the occurrence of continual violence within the home, which may go beyond mere physical abuse, and seeks to rectify it. The Act is noteworthy for its effort to incorporate the social reality of domestic violence, resulting in a woman-friendly legislation that treads virgin territory as far as law in India is concerned.

This note will examine conceptual and practical impact of the D.V. Act. The first part of the note will look at the aims and objectives behind the Act. The second part will deal with definitional issues and the positive developments made by the Act in recognising the ambit of domestic violence. The third part will explain the procedures to be adopted under the Act, followed by a discussion on the remedies available. The final part will endeavour to identify some loopholes in the Act, which may lead to problems in implementation.

II. AIMS AND OBJECTS OF THE D.V. ACT

The Act aims to provide protection to women who are faced with violence within a domestic relationship. In its Preamble, the Act mentions the rights of women under the Constitution, and the necessity of ensuring that these rights are recognized even in the private sphere of the home and family. The Act aims to provide comprehensive procedural tools and adequate relief measures, to facilitate easy access to justice to any aggrieved party.

The Act clearly identifies who it protects and how, in terms of process and relief. At the start the Act delineates both the problem it seeks to address, and the people who may seek relief under it. Domestic violence is seen to require a combination of civil reliefs backed by criminal sanctions, and these are provided in a detailed manner. It has to be kept in mind that the Act does not create any new offence with respect to domestic violence. It merely aims to provide a palliative to the victims of domestic violence, and to prevent recurrence of the

⁷ § 2(a) read with § 2(i), 2002 Bill.

⁸ § 4, 2002 Bill.

Domestic Violence Act, 2005

same. The objective of the Act is not to punish the perpetrator for acts of violence already committed. This aspect is left to the domain of general criminal law. The only instance in which the perpetrator can be punished under this Act, is when he violates any order of the court, passed under the Act. Therefore the aim of the Act is merely to protect the victims and not punish the perpetrators.

The Act provides for an innovative procedure which aims to be both simple, effective, and victim-friendly. It envisages the participation of a wide spectrum of actors, which includes administrators created by the act, as well as the civil society.

The broader impact that the Act aims to have is multi-fold. It has the potential to become a tool by which women are empowered to move out of circumstances detrimental to their physical and emotional well-being; a medium by which a hitherto untouched social space can be made more gender sensitive and responsive to women's concerns; and, an important step in furthering the agenda of female emancipation in the country.

III. DEFINING DOMESTIC VIOLENCE

One of the strongest features of the D.V. Act is the conceptual clarity and nuanced definitions that it provides. The progressive definition of "domestic violence" in the Act has broadened the understanding of what domestic violence is, who may seek protection under the Act, and what type of protection may be sought. In section 3,⁹ domestic violence is defined in terms of mental, physical, sexual, verbal, emotional and economic abuse. The extent of domestic violence,

⁹ D.V. Act, § 3:

Definition of domestic violence: For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

therefore, extends from physical **hurt**, to emotional and economic **blackmail**, and may be interpreted by the judiciary to include marital rape as well. This is a definite step forward in comparison to the 2002 Bill, which only included habitual assault and "cruelty."¹⁰ It is interesting that the definition of domestic violence in the present Act is not an exhaustive one and specifically mentions the importance of the overall facts and circumstances of the particular case, in determining whether domestic violence has occurred.¹¹ The Act is also noteworthy for expanding the concept of the "domestic relationship" to which it is applicable.

Explanation I.—For the purposes of this section,—

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

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes—

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

¹⁰ § 4(2), 2002 Bill.

¹¹ § 3 Explanation II, D.V. Act.

Domestic Violence Act, 2005

Instead of being restricted to ties of blood, marriage or adoption, it also covers relationships akin to marriage, and joint families.¹² Therefore, people in a live-in relationship, in legally unrecognized marriages, or living in joint families, can be the aggrieved party, in cases of domestic violence. This aspect of the law has borrowed from the L.C.W.R.I. Bill.¹³ This provision goes a long way in recognizing existing social realities in India, where a vast number of marriages are legally invalid due to a number of reasons.¹⁴ The Act now makes it possible for the victims of violence in such relationships to approach the court for redressal.

The definition suffers from certain drawbacks, as well. First, it does not include domestic violence suffered by maids and other hired household help. The Model U.N. Code on domestic violence provides that any legislation on domestic violence must cover, “wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters and mothers) and female household workers.”¹⁵ While an astute lawyer may argue that a maid would form a part of a shared household, the chances of such an argument being accepted are rare.

Second, the definition does not cover domestic violence suffered by members in a family who are not female.¹⁶ The D.V. Act still operates in a framework

¹² D.V. Act, § 2(f):

“domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

¹³ L.C.W.R.I. Bill, *supra* note 4, § 2 (c).

¹⁴ Some reports show that 40% to 50% of marriages are void in India on grounds like the improper performance of ceremonies. See M. Giri, *Marriages of Convenience*, THE HINDU, June 29, 2003, available at <http://www.hinduonnet.com/mag/2003/06/29/stories/2003062900410400.htm> (last visited March 28, 2006); A. Gentleman, *India's Effort To Stop Child Marriage Hits A Wall*, INTERNATIONAL HERALD TRIBUNE, January 2, 2005, available at <http://www.ihrt.com/articles/2005/06/01/news/india.php> (last visited March 16, 2006).

¹⁵ FRAMEWORK FOR MODEL LEGISLATION ON DOMESTIC VIOLENCE, cited from RADHIKA COOMARASWAMY, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES ¶ 7, available at <http://www.sariq.org/downloads/E-CN.4-1996-53-Add.2.pdf> (last visited March 16, 2006).

¹⁶ D.V. Act, § 2(a):

“aggrieved person” - any woman who is or has been a relative of the respondent and who alleges to have been subjected to act of domestic violence by the respondent.

of man-woman oriented domestic relationships.¹⁷ It would therefore, for example, exclude violence by a married couple against an aged male relative, something which should fall under the ambit of domestic violence, and does so in many countries.¹⁸

Hence, while the definitions of “domestic violence” and “domestic relationship” are commendable for being a giant step forward from the archaic laws prevailing previously, there is need for further improvement, so as to bring the Act in conformity with internationally accepted standards.

IV. PROCEDURAL ISSUES

The D.V. Act attempts to simplify the procedure in filing a complaint, along with broadening the scope of who may register a complaint regarding domestic violence, to make it easier for aggrieved persons to access justice. Further, the Act creates a cadre of Protection Officers,¹⁹ who have wide-ranging functions, including providing assistance to the aggrieved party in the processing and completion of the domestic violence suit.²⁰ An effort has been made to ensure that the Protection Officers have the power to provide every form of assistance that an aggrieved person might need.

¹⁷ This is clear from the definition of a respondent in § 2(q) of the Act, which provides:

“respondent” means an adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner.

Thus the Act envisages that the victim of domestic violence is always a woman, and that the perpetrator is always a man, except in cases of a marital relationship, where even the female relatives of the husband are included.

¹⁸ § 2, Malaysian Domestic Violence Act, 1994, which includes a spouse, former spouse, children, mentally incapacitated adults, and any other family member, as aggrieved parties. Similar progressive domestic violence legislations have been passed in Australia [Family Law Reform Act, 1995], United Kingdom [Family Law Act, 1996], and South Africa [Domestic Violence Act, 1998]. See generally Mukul Sharma, *Law against Domestic Violence*, Frontline, July 7, 2002, available at <http://www.flonnet.com/fl1814/18140580.htm> (last visited January 3, 2006). See also R.J. GELLES, *FAMILY VIOLENCE* 168 (1987).

¹⁹ § 8, D.V. Act. According to § 8(2), Protection Officers should, as far as possible, be women.

²⁰ § 9, D.V. Act.

Domestic Violence Act, 2005

The Act also incorporates a role for N.G.O.s. The Act allows the judicial system to tap into the resources available to these organizations. Registered N.G.O.s act as Service Providers, and have the power to receive complaints from an aggrieved person, and forward it to the competent Magistrate and Protection Officer.²¹ Apart from this, such Service Providers are empowered to provide a variety of support services to the victims of domestic violence, including getting them medically examined, and ensuring that they are provided shelter.

The Act allows anyone, including a friend or an N.G.O., who has information of the occurrence of domestic violence, to file a complaint. According to section 5, a duty is then placed upon the authority, which receives the complaint, to inform the aggrieved person of her right to file an application for the different forms of civil or criminal relief, and also to inform her of assistance available from Service Providers, Protection Officers, and Legal Services. The Service Providers and Protection Officers, as well as the aggrieved person herself, are empowered to request for medical facilities²² or shelter homes²³, and a duty is accordingly placed on the persons in charge of the same. The Act, by ensuring assistance from State institutions, reflects the laudable position that domestic violence is not merely a private grievance in the nature of a dispute between a married couple, but is of grave societal concern.²⁴

The Act allows the victim to approach the Magistrate for seeking one or more reliefs under the Act.²⁵ Such applications shall be disposed of by the Magistrate within sixty days from the date of the first hearing.²⁶ All procedures under this Act are governed by the Code of Criminal Procedure, 1973.²⁷ The Magistrate has wide powers with respect to granting of remedies. He is also empowered to punish the respondent in the event of the breach of any order of relief.

V. REMEDIES UNDER THE ACT

A further advance made by the D.V. Act has been in the recognition that domestic violence requires a combination of civil remedies backed by criminal

²¹ § 10(2), D.V. Act

²² See § 6, D.V. Act.

²³ See § 7, D.V. Act.

²⁴ Greenberg, *supra* note 4, at 844.

²⁵ § 12(1), D.V. Act.

²⁶ § 12(5), D.V. Act.

²⁷ § 28, D.V. Act.

sanctions. The adoption of civil measures provides a flexible method, focussed on the protection of the victim from further abuse.²⁸ Relief may be ordered according to the facts and circumstances of each case, unlike a criminal charge where the punishment is rigid, and the focus is on the offender, not the victim. However, the criminal approach also has a certain value in addressing domestic violence, since the methods of arrests and imprisonment have a greater deterrent effect than a civil injunction can achieve.²⁹ Hence the Act provides a variety of reliefs, recognising the differing circumstances in which domestic violence may occur.

In general, the Act provides for Protection Orders,³⁰ Residence Orders,³¹ and monetary compensation.³² A Protection Order is a relief measure through which further domestic violence is sought to be curbed. Such an order restrains the respondent from committing any further acts of domestic violence or harassing the victim in any form. A Protection Order can be passed when the Magistrate is *prima facie* satisfied that domestic violence has either taken place, or is likely to take place.³³ The 2002 Bill provided that such an order would lapse after two years, and would only be renewed if the Court saw fit.³⁴ In the present Act, however, the Protection Order lasts as long as the aggrieved person does not request otherwise, and even if she does so, the Magistrate has to be satisfied that there is need of alteration or revocation.³⁵ This means that an aggrieved person cannot be coerced into applying for a discharge of the Order.

A Residence Order seeks to alter the living arrangements of the offender and the aggrieved, in order to ensure that no further violence is perpetrated. The objective of the Act would not be served if it was not ensured that the aggrieved could remain in her home. Keeping this in mind, the Act guarantees the right of every woman in a domestic relationship to reside in the shared household, irrespective of whether she has a title to the property or not.³⁶ A Residence Order may go further and provide that the respondent is restricted from a certain portion of the house, or from the house itself. Relatives of the respondent may also be

²⁸ C. G. BUZAWA ET AL., *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 113-115 (1990).

²⁹ *Id.* at 84-85.

³⁰ § 18, D.V. Act.

³¹ § 19, D.V. Act.

³² § 20, D.V. Act.

³³ § 18, D.V. Act.

³⁴ § 15, D.V. Act.

³⁵ § 25, D.V. Act.

³⁶ § 17, D.V. Act.

Domestic Violence Act, 2005

restrained from entering those portions of the house where the victim resides. The respondent can also be restrained from alienating or encumbering the shared household. In the alternative, the court may also direct the respondent to secure the same level of alternate accommodation for the victim.³⁷ The purpose behind these provisions is to ensure that the victim is not deterred from seeking justice by threat of ejection from the house.

The third remedy under the Act is monetary relief, which includes damages suffered due to the domestic violence, along with compensation for torture and emotional distress caused to the victim.³⁸ The compensation awarded will cover, *inter alia*, loss of earnings, medical expenses, damage to property, and maintenance for the victim and her children. The Act instructs the court to award compensation that is fair and reasonable, and in keeping with the standard of living of the victim.³⁹

The Act also includes important provisions that were omitted in the 2002 Bill, such as the right to reside in the shared home while the proceedings are underway,⁴⁰ and the provision of relief against economic abuse.⁴¹ It was claimed in defence of the former Bill that the Magistrate had been granted sufficient license to order such measures if he thought fit.⁴² In the Act, however, such rights have been specifically enumerated, which helps to ensure that the basic purpose of the Act is served. Apart from the specific rights and protection enumerated in the Act, the Magistrate is also given the freedom to give any directions which he thinks are necessary.

Other noteworthy provisions of the Act include the one allowing the Magistrate to grant temporary custody of any child to the victim. The court may also deny visitation rights to the respondent, if it thinks that the same would be harmful to the interests of the child.

To ensure compliance with the orders of the Magistrate, criminal liability may be imposed for the violation of such orders. A breach of any of these orders invites penalty of imprisonment upto one year, and fines to the tune of

³⁷ See § 19, D.V. Act.

³⁸ See §§ 20, 22, D.V. Act.

³⁹ § 20, D.V. Act.

⁴⁰ See § 17, D.V. Act.

⁴¹ See § 20, D.V. Act.

⁴² Jaising, *supra* note 4.

Rs. 20,000/- or both.⁴³ The Act makes this offence cognizable and non-bailable.⁴⁴ Interestingly, the court is empowered to conclude that such offence has been committed, upon the sole testimony of the aggrieved person.⁴⁵

Thus the D.V. Act marries civil law remedies to criminal law enforcement, to give teeth to the reliefs envisaged under the Act, and provides protection and justice to the victims of domestic violence.

VI. ISSUES OF IMPLEMENTATION

There was a significant amount of debate during the drafting of this Act regarding the procedure to be adopted, to best serve the purposes of the Act. The provision concerning the settlement of domestic violence cases in the Magistrate's courts, for example, was quite contentious.⁴⁶ The rationale behind this provision was to afford easy access to justice for the aggrieved. The option of Family Courts, wherever they have been set up, was also considered and discarded since a Magistrate's court was thought to be a more effective forum for the speedy disposal of cases.⁴⁷

The authors believe that, provided that the Magistrates are adequately trained and sensitised, the D.V. Act creates a better and more detailed framework within which the Magistrate may operate effectively. First, the conceptual approach of the Act is substantially different from that of the Family Courts Act, in that it does not emphasize an overriding need to preserve the family structure. Secondly, the provision of relief through Protection and Residence Orders, has been well etched out in this Act. This has been done on the insistence of experts,⁴⁸ so as to leave little to the discretion of the Magistrate. As a result, through this

⁴³ § 31(1), D.V. Act.

⁴⁴ § 32(1), D.V. Act.

⁴⁵ § 32(2), D.V. Act.

⁴⁶ § 12, D.V. Act.

⁴⁷ M.J. Rao, *Towards a Law on Domestic Violence*, in DOMESTIC VIOLENCE AND LAW 218 (Lawyers Collective, 2000), noting that the Family Courts are greatly overcrowded due to the channelling of cases under § 125, Code of Criminal Procedure, 1973, to these courts. See also Rajeswari Sunder Rajan, *Rethinking Law and Violence: The Domestic Violence (Prevention) Bill in India*, 2002, 16(3) GENDER & HIST. 769, 771 (2004), noting that Family Courts tend to place cases of domestic violence within the field of family "disputes" and hence condone domestic violence to some extent.

⁴⁸ It had been pointed out repeatedly by the N.G.O.s participating in the drafting of the Act, that leaving definitions or relief measures to the discretion of the Magistrate would be counter-productive. See Rajan, *id.*

Domestic Violence Act, 2005

provision, the aim of easy accessibility is served without jeopardizing the chances of an aggrieved to obtain relief.

However, some directions within the Act provide for possible loop holes which may delay speedy justice. Section 14, for example, allows the Magistrate to direct the parties to undergo counselling. This has the effect of postponing the hearing being by a period, which may extend to two months.⁴⁹ Further, judicial emphasis on preserving the family unit may lead to section 14 being used too liberally in the courts, and being prescribed in situations where an attempted conciliation may be counterproductive to the interests of the aggrieved.⁵⁰

Vesting jurisdiction under the Act with the Magistrate's courts is a positive move, considering that it is likely to lead to quick disposal of cases. However, the view that conciliation can adequately remedy domestic violence is myopic, and needs correction to ensure that effective justice is meted out to victims of domestic violence.

VII. CONCLUSION

The Domestic Violence Act is an important first step in addressing the conceptual and practical issues surrounding the offence of domestic violence. The aim of the legislation, in addressing the problem of domestic violence visited on a woman, in a domestic relationship, has to a great extent been served. The innovative and wide-ranging remedies under the Act have gone far in recognising that there is no one answer to a problem of domestic violence and a number of measures may have to be taken, either singly or in combination. This Act has the potential to do much to breach the public-private divide, in affirming the basic rights of women, and ensuring that women are safer within their own homes. However, it has to be kept in mind that this Act is only the beginning, and much needs to be done to provide effective succour and relief to the victims of domestic violence.

⁴⁹ § 14, D.V. Act.

⁵⁰ S.B. Ghosh, *Contextualizing Domestic Violence*, BEHIND CLOSED DOORS: DOMESTIC VIOLENCE IN INDIA 54 (Rinki Bhattacharya ed., 2004).