Concern for the Dead, Condemnation for the Living

INDIRA JAISING

While ruling that women were increasingly misusing Section 498A of the Indian Penal Code, the Supreme Court ought to have been more conscious of the prevalence of domestic violence, and the difficulties women face in approaching the police. When faced with evidence of a poor conviction rate, instead of inquiring whether the prosecution was poorly conducted, the Court assumes that the "disgruntled wives" filed false cases. Ironically, while the courts convict husbands and their families in cases of dowry deaths, the woman's invocation of Section 498A when she fears for her life or demands her share of the matrimonial home, earns her the accusation of being a "disgruntled wife".

Indira Jaising (*indirajaising@gmail.com*) is Senior Advocate, former Additional Solicitor General for India, and Executive Director, Lawyers Collective Women's Rights Initiative.

In the mid-1980s, the legal category of "domestic violence", which we use today to describe violence in the intimate sphere, did not exist. The expression first found its place in Indian law in 2005. This is not to say that domestic violence did not exist before 2005, but rather, that an injury was not an injury until it had a legal name and definition. This was also the case with sexual harassment at the workplace. It was not until the 1970s when Catherine Mackinnon conceptualised the first sexual harassment claim as an action under the Civil Rights Act, 1964 as being a form of discrimination against women based on sex, that it became an actionable wrong. Such is the defining power of the law.

In the mid-1980s, there were cases of women dying in the matrimonial home in what came to be described as "stove bursts" in the kitchen. The polyester king, Reliance, contributed the nylon saree which clung to the body resulting in instant death. These deaths were routinely recorded by the police as "accidental". It was the foresight and historic campaigns of the mothers of these women who died which led them to demand the reopening of the "closed" police files and call for an investigation of these deaths as murder. Satyarani Chaddha was one of the foremost among those brave mothers who refused to accept that her daughter, Kanchanbala, had died an accidental death within months of her marriage. It is ironic that the judgment of the Supreme Court in *Arnesh Kumar vs State of Bihar & Ors*[1] (henceforth *Arnesh Kumar*) was delivered on the very day that Satyarani Chaddha died, 2 July 2014. Her son-in-law had just been convicted of abetting the suicide of his wife but he absconded on the very day the judgment was delivered, never having seen the inside of a jail. This fact will have to be borne in mind when discussing the subtext of the judgment in *Arnesh Kumar*, which is quite plainly in response to the cry "women misuse the law" which is heard from the "save-the-family" lobby. Indeed, there are observations in the judgment which are a giveaway; for instance even before commencing a discussion on legal provisions, the Court states that "(t)he institution of marriage is greatly revered in this country".

Bold Provision

Alarmed by the daily headlines of women dying of "stove bursts", in 1983 the then Congress government of the day introduced Section 498A into the Indian Penal Code (IPC). It was a bold and brave provision, introducing the offence of cruelty by a husband and his family against a wife as an offence. It was bold for several reasons. One, that it introduced criminal offences in intimate relationships, which thus far were considered beyond the reach of the law, and two, because cruelty was not confined to the demand for dowry alone nor confined to physical mutilation or injury but extended also to mental cruelty. Cruelty is defined as any wilful conduct which is likely to drive a woman to commit suicide, or cause grave harm or injury to or danger to her life or health, mental or physical. It includes harassment of a woman with a view to coercing her or anyone related to her from meeting an unlawful demand. It is obvious that the threshold of behaviour required to constitute cruelty is high and hence there is an inbuilt safeguard in the Section itself for invoking it.

The offence is not confined to the giving and taking of dowry, but extends to all conduct which causes mental or physical injury of a high order to the woman by a husband or her family members. The word "harassment" itself refers to a continuous coercive conduct, which causes mental anguish to the woman. However, although it made several innovations, it made the threshold of cruelty required to invoke the law too high. While the conduct which qualifies as

cruelty is of a grave nature, to place it so high as to expect police intervention only when there is an actual attempt at suicide by the woman would be to defeat the purpose of the law. Hence, the Section is and must be invoked when women are oppressed in the matrimonial home behind closed doors, to the extent that they find it impossible to live a life of dignity. Denial of food, locking up and preventing communication with the outside world, and repeated threats to drive her out of the matrimonial home, will all qualify as mental cruelty, especially so in the case of women who are stay-at-home housewives with no independent income of their own. Another very common reason for harassment is to call a woman a *baanjh* (infertile) or blame her for not producing a male child, a reflection of the pronounced son-preference in our society. Apart from these circumstances, the proverbial demand for dowry is ever present in Hindu marriages, and has now spread to other communities as well.

Section 498A includes cruelty by a husband's relative, and although the word "relative" is not defined, it is obvious that the mother-in-law and the father-in-law would be included in this definition. Grandmothers and grandfathers of the husband, be they "bedridden", are very much contemplated by the Section as being responsible for cruelty towards a married woman. Given that the primary form of living in most homes is a joint family this should not surprise anyone. Moreover, the pervasive domination of the mother over the son in most Indian households is also a phenomenon that the Court should have taken note of while delivering the judgment in *Arnesh Kumar*.

What is noteworthy, however, is that the cruelty by a husband or his relatives was made an offence punishable with imprisonment for a period of upto three years, and the offence was made cognisable. A cognisable offence is one for which an arrest can be made without a warrant from a magistrate. Ordinarily, offences punishable with imprisonment of less than seven years are non-cognisable, but if the legislature feels that an offence is sufficiently significant to curb a social evil, such offence is made cognisable even though punishable with imprisonment of less than seven years. Offences against women fall into this category. Outraging the modesty of a woman, using obscene words and gestures, and now, after the amendments to the IPC in 2013, voyeurism, stalking, acid attacks and sexual harassment are all cognisable offences, though punishable with less than seven years imprisonment.

In 1986, the IPC was once again amended to introduce Section 304B, which provided that if the death of a married woman occurs in unnatural circumstances within seven years of the marriage, and it is shown that just before her death she was treated with cruelty in relation to a demand for dowry, it shall be presumed that her husband or his relatives caused the death. We must appreciate that the two sections are part of a composite scheme; one is invoked before the woman dies and is preventive in nature (Section 489A), the other after she is dead (Section 304B). Surely, the purpose of law must be to keep the woman alive, and if Section 498A were properly invoked at an appropriate time, we would not see the number of dowry deaths that we continue to see till this day.

Difficulties of Filing an FIR

While rendering the judgment in *Arnesh Kumar,* the Court ought to have been more conscious of the prevalence of domestic violence, and the difficulties women face in approaching the police. Filing a first information report (FIR) is indeed an ordeal as the police invariably try numerous techniques to avoid registering one, ranging from sermons to reconcile, to threatening the abuser – everything but filing a FIR! Hence, it is hard to imagine that the police are registering frivolous FIRs leading to acquittals. There is no reliable data on prevalence of domestic violence, and whatever data is available varies widely owing to the differences in research methodologies. The estimates from community-based studies vary from 18% to 70% while National Family Health Survey (NFHS)-3 indicates a lifetime prevalence rate of domestic violence to be 35% among women of reproductive age. The NFHS is a large survey conducted across India in a representative sample of households throughout the country and so, arguably, these rates are only the tip of the iceberg. According to NFHS-3 data, 25% of women experienced physical or sexual violence in the 12 months preceding the survey. Among those women who reported physical violence by their husbands, 36% experienced injuries in the form of cuts, bruises or aches, while 18% suffered from severe injuries in the form of sprains, dislocations, broken bones and severe burns.

As per the National Crime Records Bureau (NCRB), which is relied upon by the Court, in 2011 a total of 1,14,372 cases were registered under crimes against women in matrimonial homes. However, the estimate derived from NFHS-3 data indicates that in the same year there were at least 59 million women who experienced some form of physical or sexual violence in the preceding 12 months. As per NFHS, a mere 2% of these women may have sought police support, which translates into 2.8 million women. This number is 2.5 times more than what the NCRB reports.

This is evidence that a large number of women experiencing domestic violence are not reaching the police. Further evidence of reluctance on the part of women to register police complaints emerges from analysis of service records of a public hospital-based crisis intervention centre, Dilaasa.[2] Of all the women registered at the centre between 2001 and 2010, a total of 1,675 married women were considered for the purpose of this analysis. The findings are illuminating:

- 47% of the women had sought police support against violence before coming to Dilaasa; of these, almost all had only registered a NC. Merely 2% had filed a FIR.
- 53% of the women had never gone to the police. Among women who did not seek police support, one-third had experienced violence for three to five years; 64% of them reported violence during pregnancy; 32% reported that they had attempted suicide in the past as a consequence of the ongoing abuse; 39% experienced physical violence in the

form of pulling of hair and banging of head while 29% were abused by punching in the chest, face and abdomen.

Sexual violence was also experienced by 27% women in the form of forced sexual intercourse. Additionally, 26% of them were abused with instruments which include hitting with blunt and sharp objects, use of belt and inserting objects into vagina.

A Curious Phenomenon

Considering the severity of abuse reported by women, it is evident that these women may have sought treatment for the injuries caused but they had not filed a police complaint. The contact of these women with the hospital helped them to access a crisis intervention department for psychosocial services, thus underscoring the need for health systems to recognise domestic violence as a public health issue and offer services to them to mitigate consequences of violence.

Even in the case of dowry deaths, there is a discrepancy. The NCRB reports a sharp rise of 6.4% in dowry deaths from 2007 to 2012, when the figure stood at 4,946 deaths. But a study reported by *The Lancet* estimates over 1.63 lakh annual fire deaths in India, 2% of all deaths in the country. Of these, 1.06 lakh occur among young women. The authors conclude that death due to burns is not only behind most deaths among women between 15 and 34 years of age, the number is six times higher than the official national statistics in India, compiled by the NCRB.[3]

Yet in our courts we see a very curious phenomenon. Courts are quick to convict for dowry death. Our law reports are replete with cases of husbands and their family members convicted for dowry death under Section 304B. No court has ever suggested that the dead woman lied, or misused the law, as indeed the dead body is proof of the cruelty she faced when alive and dead women tell no lies. Judges, when convicting under Section 304B, are quick to condemn the institution of dowry and bemoan the fact that it exists till today. Yet when it comes to the invocation of Section 498A, the first suggestion is that "disgruntled wives" are misusing the law to put "bed-ridden grandfathers and grandmothers" behind bars. Hence the misuse of Section 498A consists of putting people behind bars. But is that not the essence of all crime? Are all cognisable offences not such that arrests are made for custodial interrogation?

How does one explain this concern of the courts for the dead and condemnation for the living? Could it be that dead women exercise no rights nor claim a right to reside in the shared household? And what does one understand by the expression "disgruntled wife", a wife claiming her right to reside in the shared household?

We must turn to the Protection of Women from Domestic Violence Act, 2005 (PWDVA) for an answer to this question. The Lawyers Collective has been analysing judgments and orders passed under the PWDVA consistently since 2007, the very first year of its implementation. The Act itself was enacted to provide a civil remedy for domestic violence, a legal category which emerged in our jurisprudence for the first time in 2005. As one scholar has noted, it is surprising that a country which has non-violence as its founding faith took over 60 years to get a definition of violence included in the law. The PWDVA defines domestic violence as follows:

> 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.
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> Explanation I – For the purposes of this section –
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> (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.

The PWDVA was exceptional in that it not only defined domestic violence to capture the experience of women in intimate relationships without narrowing the scope of the law, but it also put in place public-supported protection officers whose role it was to assist women to access the law. The theory behind the law was that it is part of the due diligence of the state to support women facing violence through assistance in legal proceedings. The Act tried to introduce multidisciplinary personnel to assist a woman, as a protection officer would be a qualified social worker with appropriate experience. She would not only assist the woman but also provide much needed assistance in collecting evidence, to which the woman would have no access, on behalf of the Court. It was thus an attempt to depart from the ordinary adversarial approach of the judicial process when applied to domestic relationships.

The PWDVA was successfully operated in the first year of its existence in Andhra Pradesh. The police were sensitised to the law and they made referrals to the protection officers who were in turn recruited and trained as public servants to assist the woman from the commencement to the conclusion of the case. These protection officers met the woman, filled in the domestic incident report, filed applications before the Court, and argued cases, providing the perfect public model for justice delivery. In accordance with the role visualised for them under the law, they were functioned as mirror images on the civil side of the public prosecutor in criminal cases. Unfortunately, the Advocates Act, 1961, which gives only advocates the right to address the Court, cut their progress short. In all other parts of the country, the system did not function simply due to non-appointment of protection officers. Those that were appointed had to contend with the traditional hostility of judges while dealing with non-lawyers, and the protection officers found themselves marginalised.

Significantly, thanks to the Supreme Court, the Lawyers Collective has had access to judgments and orders passed under the PWDVA in different states. It has been presenting its analysis in the form of annual monitoring reports. In the sixth such report[4] while analysing the orders, we found that courts were denying relief by interpreting the words "domestic violence" in a restrictive way, and contrary to the definition in the Act itself. One judgment, for example, said that refusal to maintain a wife was not economic violence. The expression "domestic relationship" was also restricted to current relationships by ignoring the clear definition in the law which indicated that former relationships are also covered. This ensured the elimination of divorced women on the ground that they were not in a domestic relationship. The judgment of the Supreme Court in *Batra vs Batra*[5] is too well known to invite further comment. The single most important contribution of the law was a clear and specific mandate that every woman in a domestic relationship has a right to reside in the shared household. The shared household was defined as the household where the persons lived or had lived and the definition specifically excluded all consideration of ownership of the property as being irrelevant to deciding whether the right existed. In *Batra vs Batra* the Supreme Court reinstated the right to property with a vengeance in the law of matrimony and said that the right of a woman to reside in the shared household only existed if the husband owned the property in question.

Do we see here the concern once again for "bedridden grandfathers and grandmothers"? We will return to this theme later. What we noticed in subsequent years was that the courts were reluctant to reinstate a woman in the shared household if she has left as a consequence of the violence or has been thrown out of the shared household. This became a "heads I win, tails you lose" situation.

'Property' Cases

Slowly a picture started emerging. Courts were basically implementing personal laws with marked determination in proceedings under the PWDVA, forgetting that this is a secular law applicable to all communities regardless of religion. One of the most important provisions of the Act, the right to reside in the matrimonial home, lost its lustre. You had it if you had it; if you did not have it, you did not have it. Slowly but surely, we started getting orders which stated, in many different ways, that women were misusing the law, and the old argument made previously in the context of the criminal law resurfaced. But this time, the nature of the misuse was a demand for a share of the matrimonial home. Courts started characterising the cases under the PWDVA not as cases of domestic violence, but as cases of "property". A woman demanding the right to reside in the matrimonial home became a "disgruntled wife" demanding property.

As a result, whether women invoke the criminal law or the civil law, they are said to be misusing the law! Hence, use of the law per se becomes misuse; the impact of this argument is that access to justice is denied.

This brings us finally to an analysis of the judgment in *Arnesh Kumar*. The judgment offers statistics of the high rate of acquittals as evidence of the fact that these wives have misused the law. When faced with evidence of a poor conviction rate of 15% (juxtaposed with a high rate of charge-sheeting at 93.6%) the Court ought to have been alerted to the fact that the prosecution has not been properly conducted during the trial. Instead, by an inverted logic, these statistics are offered as evidence that an overwhelming majority of these cases, since they result in acquittals, were false cases brought by "disgruntled wives".

Court's Sympathy Misplaced

A high rate of acquittal can result from a botched investigation, the benefit of the doubt being given to the accused, or plain bias against women accessing the law. Add to this the fact that the Supreme Court itself has encouraged settlements under Section 498A, thereby making a non-compoundable offence into compoundable one. A good deal of these acquittals could also be women turning "hostile" and not giving evidence against their husbands at critical stages of the case, due to pressure from

the family or due to such "settlements". The point is, without analysing the cause of acquittals, the sympathy of the Court for the husband's family is misplaced, as is its deprecation of the police in arresting them.

It is true that the police notoriously misuse their powers, and had the judgment come in the context of any other crime, it would have been welcome. The factors mentioned in Section 41 of the Criminal Procedure Code (CrPC) warranting arrest are the same for all offences – likelihood of interference with evidence, pressurising the woman to give up the case, to enable a proper investigation, and to prevent absconding. All these are even more likely to occur in intimate relationships rather than in traditional crimes, hence warranting an arrest of the accused.

Women are not particularly fond of the criminal law, nor interested in sending their in-laws behind bars, any more than any other aggrieved person. The law of bail is the same for offences punishable with imprisonment below seven years and above. It is also the same for "disgruntled wives" and those who are cheated, beaten or murdered. Hence one fails to comprehend why the Supreme Court casts wives as vindictive in the fact of accessing the criminal law. Civil law is notoriously expensive to access, and is often inherited by subsequent generations. If anything, the statistics point to a dysfunctional and moribund legal system, and the judges would do well to look within.

The issues that the *Arnesh Kumar* judgment raises are profound. When is a crime a crime? When is a civil wrong a wrong? What kind of legal system are we entitled to expect? When will women's rights be treated as women's rights?

Accountability for Judges

Throughout the implementation of the law, the judges are in search of a perfect victim, a woman who dutifully follows the *pati parmeshwar* (husband is god) tradition, tolerates violence, produces male children, and makes no demand for her rights. But why would such a woman need any protection from the law? On the contrary, it is the woman who is an "imperfect victim" – the divorced woman, the separated woman, the woman in a live-in relationship, the widow who is cast out of the shared household, the woman who fails to bear a male-child – who is most in need of protection of the law.

What then is the solution to the problem? One answer is obvious. Judges must be held responsible for their misogyny and made accountable for their judgments. Also, the recognition of full-fledged equal and economic rights for women within marriage is a must.

NOTES

1 Criminal Appeal No 1277 of 2014, Supreme Court of India, decided on 2 July 2014 by Justices Chandramauli Kr Prasad and Pinaki Chandra Ghose.

2 Dilaasa is a joint initiative of the Centre for Enquiry into Health and Allied Themes, Mumbai (CEHAT) and the Mumbai Municipal Corporation. The CEHAT team provided these findings based on their ongoing analysis of service records.

3 P Sanghavi et al (2009), "Fire-related Deaths in India in 2001: A Retrospective Analysis of Data", *The Lancet*, Volume 373, Issue 9671.

4 Staying Alive: Sixth Monitoring and Evaluation Report of the PWDVA (2013), Lawyers Collective.

5 *S R Batra & Anr vs Smt Taruna Batra* (2007) 3 SCC 169.