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**HARMFUL PRACTICES AGAINST WOMEN IN INDIA:  
AN EXAMINATION OF SELECTED LEGISLATIVE RESPONSES**

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*\* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.*

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## Introduction

Violence against women, of which harmful practices against women is a part, has been acknowledged as “*one of the crucial social mechanisms by which women are forced into a subordinate position compared with men*”<sup>1</sup> and therefore a violation of women’s equality rights. Women face violence due to their position of inequality; their vulnerability to violence being exacerbated due to their positions of dependency as well as prevailing patriarchal attitudes.

The Indian Constitution guarantees women equality before the law and the equal protection of laws under Article 14 and prohibits discrimination on grounds of sex under Article 15. A unique feature of the Indian Constitution is Article 15(3), which empowers the State to take special measures for women and children. Despite these guarantees, the position of women in India remains unequal.<sup>2</sup>

## The legal regime

The Indian State has, however, legislated on many issues relating to women’s equality rights. Currently, there are approximately 44 Central laws<sup>3</sup> that have a direct impact on women’s rights.<sup>4</sup> Some of these are- the 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution that mandates 33% representation of women in elected village (*Panchayat*) and municipal bodies, adoption of special laws<sup>5</sup> and provisions<sup>6</sup> in the employment sector to promote equality rights and to counter historical and social disadvantage.<sup>7</sup> In 1997, the Supreme

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<sup>1</sup> UN Declaration on Violence Against Women, 1993

<sup>2</sup> See Annexure I

<sup>3</sup> Under Article 245 of the Constitution, a quasi-federal system of governance has been adopted, which means that legislative powers are divided between the Center and the states. Various matters of legislation have been enumerated in three lists contained in the VII Schedule of the Constitution- List I (Union or Central List), List II (State List), List III (Concurrent List, which includes subject matters over which both the Union and State Government can make laws on the understanding that a Central/Union law may override a state law in the event of conflict between the two). Hence there are many more laws that impact on women’s rights that have been promulgated by different state governments. This paper limits its scope to the analysis of developments on four issues legislated upon by the Center/Union Government.

<sup>4</sup> See Annexure II

<sup>5</sup> Including the Equal Remuneration Act, 1976- to ensure equality in remuneration between men and women workers and to prevent discrimination on grounds of sex by imposing duties on employers and providing for penalties in cases of breach, Maternity Benefit Act- applicable to all public/ government establishments, this law is aimed at “protecting dignity of motherhood” by imposing duties on employers to not employ a woman in the period of 6 weeks immediately following her pregnancy and to pay average daily rates for the period of her absence.

<sup>6</sup> For a list of laws impacting on women’s rights, see Annexure II.

<sup>7</sup> NB- these provisions primarily apply to the public and/or the organized sector, which represents less than 10% of the Indian workforce. Protection accorded by these laws is limited due to low coverage as 90% of women are employed in the unorganized sector as also due to ineffective implementation.

Court of India laid down guidelines on sexual harassment at the workplace with the objective of realizing women's right to a safe working environment.<sup>8</sup>

Over the years, the Indian State has enacted special laws in addition to gender specific provisions in general criminal laws to counter harmful practices against women.<sup>9</sup> Some illustrations are - the Dowry Prohibition Act, 1961 (DPA) to prohibit the practice of giving and taking dowry, the Commission of Sati (Prevention) Act, 1987 that penalizes those involved in the commission of sati<sup>10</sup> and its glorification, the Prohibition of Child Marriages Act 2006,<sup>11</sup> and the Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC&PDT Act) to prevent the misuse of diagnostic techniques resulting in sex selective abortions. Many of these laws and legal provisions have been enacted as a consequence of active lobbying by the women's movement particularly in the 1980s.<sup>12</sup> Recently, in 2006, the Protection of Women from Domestic Violence Act, 2005 (PWDVA) was brought into force as a result of a nearly decade long campaign by the Indian women's movement, which also played a lead role in the drafting of the law.

### **Factors that impede access to justice**

It is an oft-repeated refrain in India that there are many laws, but little implementation. There are many reasons for this. In many cases, non-implementation is written into the law due to reasons of inaccurate definitions delineating the coverage of the law, which result in obfuscating the objective of the law and low reportage of statutory offences. A glaring lacuna in many of these laws is the absence of an effective statutory mechanism and procedural safeguards that facilitate access to justice. Inadequate allocation of budget and personnel required for the implementation of gender specific laws is also a major impediment in achieving the objectives of these special laws.

The plethora of legislation requiring the appointments of separate implementing agencies lead to fragmentation resulting in the inefficient use of existing resources and the lack of coordination between government departments, service delivery mechanisms and law enforcement bodies. In the context of resource constraints, inequalities of different forms

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<sup>8</sup> *Vishaka v. State of Rajasthan (1997)*

<sup>9</sup> See Annexure II

<sup>10</sup> "Sati" is the ritualistic public burning of a widow on her husband's pyre.

<sup>11</sup> The Prohibition of Child Marriages Act, 2006 (PCMA) repeals the earlier Child Marriages Prevention Act, 1929. However, PCMA is yet to be brought into force.

<sup>12</sup> Notably, the Commission of Sati Prevention Act, 1987 following protests against the immolation of Roop Kunwar as "sati" in 1986, amendments to the DPA, amendments to the Indian Penal Code to bring in provisions on dowry death (Section 304B), cruelty within marriages (Section 498A), custodial rape (Section 376) and corresponding amendments to the criminal procedural law, namely the Code of Criminal Procedure, and the Indian Evidence Act. Finally PC&PNDT Act, which was a result of campaigns, led by the women's and health movements, in the late 80s.

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and competing special interest legislation,<sup>13</sup> it is essential that aspects of coordination and functional implementation be written into the laws that are enacted. This is not to say that laws to counter harmful practices are not required, given that the mere existence of a law on statute books sets normative standards on the forms of behavior that shall not be tolerated by a democratic State, irrespective of long standing cultural traditions. There is, however, an urgent need to understand structural deficiencies in laws and rationalize implementation processes, particularly within the context of the existing criminal justice system.

The criminal justice system in which laws dealing with harmful practices are enforced, is rife with problems such as judicial delays, overburdening of courts, lack of training and gender sensitization of members of the judiciary, law enforcement officials and implementing agencies. Support services to women in terms of providing shelter, medical, legal aid and counseling services, witness/victim protection programs, and other support needed to sustain women in their struggle for justice is far from adequate in meeting the demand for such services.

Finally, there is no tradition in India to monitor the implementation of laws. Orders granted by the lower judiciary are not digitalized or published in any formal manner, thereby making the assessment of whether court orders meet with the objectives of the law, an arduous task. Although the Union/ Central government has enacted the laws mentioned in this section, the implementation of these laws is often times left to the State Governments. State governments may, therefore, adopt diverse approaches in implementing laws and reporting on steps taken for implementation (if at all). This does not allow for easy access to data or enable comparisons between the efficacies of the approaches adopted. Despite these hurdles, some civil society organizations have taken on the challenge of monitoring the implementation of some of the laws in the recent years.<sup>14</sup> However, this needs to be done by State agencies, for the reason that monitoring is a crucial factor in ensuring the effective implementation of laws as it provides the opportunity not only to identify difficulties faced in implementation but also to identify best practices and successful strategies adopted by individual implementing agencies and State functionaries.

The issues raised in this section are not insurmountable. India is the largest democracy in the world with strong constitutional mandates, a functioning judiciary, a vigilant civil society and a vibrant women's movement. The objective of this paper is not to stop with identifying issues of concern but also to suggest the way forward in preventing harmful practices against women within the existing context.

### **Scope of this paper**

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<sup>13</sup> The Indian State has legislated upon other issues relating to *inter alia* rights of children and juvenile justice, caste discrimination, disability rights etc.

<sup>14</sup> For instance, the Lawyers Collective (Women's Rights Initiative)'s efforts in monitoring the implementation of the PC&PNDT Act and PWDVA.

This paper is limited, due to the constraints of space, to the examination of legislative developments in the areas of sex selective abortions, dowry prohibition and prohibition of child marriages to illustrate the points made in the previous section. Additionally this paper shall examine experiences in implementing the PWDVA to the extent of the scope of this legislation in addressing harmful practices against women and in identifying strategies that allow for enhancing the effective implementation of laws.

### **Sex selective abortions**

Declining sex ratios, particularly the alarming decline in juvenile sex ratios to the disadvantage of the girl child, as reported in the Census Report 2001,<sup>15</sup> is the most telling indicator of women's devalued position in society. One of the reasons behind skewed juvenile sex ratios is the misuse of diagnostic techniques, such as widely available ultrasound tests, which are used to first determine sex of the fetus and thereafter abort female fetuses.

Sex determination and sex selective abortions are grave forms of discrimination against women.<sup>16</sup> However, unlike other acts of discrimination, sex determination and sex selective abortions require active medical intervention in that, unless a medical professional reveals the sex of the fetus, neither of the discriminatory acts can take place. This issue brings to the fore concerns of using scientific technology as a tool of discrimination. Yet technology, diagnostic technology in this case, has legitimate uses such as the detection of abnormalities or in monitoring antenatal health of the mother, etc. The law therefore cannot, and indeed should not, prohibit the use of beneficial technology. However, it is essential that the State regulate the use of such technology to prevent its misuse.

The demand for a law to regulate diagnostic technology was first articulated by the women's movement in the late 80s in response to the misuse to genetic tests, such as amniocentesis intended for the detection of sex linked genetic abnormalities in fetuses, for the sole purpose of sex determination.<sup>17</sup> The PC&PNDT Act was therefore enacted<sup>18</sup>

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<sup>15</sup> The Census 2001 reports that juvenile sex ratio (0-6 year age group) has steadily declined from 945 in 1991 to 927 in 2001. Alarming, in some states sex ratios are in below 900 females to a 1000 males, such as of Union Territory of Chandigarh (773), New Delhi (821), Haryana (861), Punjab(874) and Uttar Pradesh(898).

<sup>16</sup> The incidence of sex selective abortion is not a pro-life or a pro-choice issue. The right to abortion for women is needed as a historical necessity, given that women bear disproportionate biological and sociological burdens associated with delivery and childcare. A woman should therefore, have the right to abort *any* fetus as the birth of a child of any gender imposes identical burdens. On the other hand sex determination followed by sex selective abortions, when a fetus is aborted for the sole reason that it is female, are acts of discrimination against women as a social class because girl children or women are not wanted due to their devalued status in society.

<sup>17</sup> The demand for a separate law was a thought out strategy to guard against placing impediments to women's access to abortion services. The reason for this being that the Medical Termination of Pregnancies Act, 1971 (MTP Act) that regulates the provision of abortion services does not recognize a woman's right to abortion but legalizes the conduct of abortions by registered medical practitioners (RMP) on liberal

with the dual objective of regulating pre-natal diagnostic techniques<sup>19</sup> and to prohibit the use of pre-conception methods for sex selection.<sup>20</sup> The PC&PNDT Act therefore allows the conduct of pre-natal diagnostic techniques only for purposes and under conditions specified in the Act.<sup>21</sup> It also prohibits the disclosure of the sex of the fetus to the pregnant woman or any other persons to prevent sex selective abortions.

However, prohibition of disclosure is difficult to enforce as it takes place behind closed doors and can be done verbally. Hence the PC & PNDT Act puts in place a system of registration and monitoring. All units engaged in either advising or conducting pre-natal diagnostic techniques are to be registered under the law. Once registered, the units are mandated to self-monitor by maintaining records of all pregnancy related services rendered. These records are then subjected to the scrutiny of state agencies to check veracity and ensure statutory compliance. The records also put in place a ‘paper trail’ of referrals that can be monitored by state agencies. This is essential as there are various professionals and units associated in the conduct of these techniques, such as the doctor advising the test, the professional conducting the test, etc. and information on the sex of the fetus may be disclosed by any of these professionals or any person rendering services in such units. It is therefore, essential to link the practice of all such entities through a paper trail that is amenable to monitoring by State agencies. The law is based on a presumption that a woman will follow a particular route that is can be monitored in this manner.<sup>22</sup>

At the time of its enactment in the early 90s, ‘genetic’ tests such as amniocentesis were primarily being misused for sex determination. Hence the PC & PNDT Act was designed to regulate genetic tests, defined broadly as “pre-natal diagnostic techniques”, used for the detection of abnormalities in fetuses. Units requiring registration under the

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grounds stipulated therein. A woman who does not meet the stipulations under the MTP Act, can therefore, face potential penal consequences under the Indian Penal Code (IPC). An illustration- a woman availing of abortion services in clinics not recognized under the MTP Act or receiving such services from a person who is not an RMP can be penalized under the IPC even if she meets the conditions stipulated under the MTP Act. State sponsored health services are highly inadequate in India, hence it is likely that many women, particularly in rural and impoverished areas, are not in a position to access recognized clinics or registered RMPs as they are simply not available in their areas.

<sup>18</sup> The PC&PNDT Act was enacted in 1994 and brought into force in 1996. However, there was no implementation of the law until the Supreme Court, in 2001, passed directives for its implementation in a public interest litigation filed by concerned health groups. Pursuant to Supreme Court directives, the law was amended in 2003.

<sup>19</sup> The term “pre-natal diagnostic technology” includes both pre-natal diagnostic tests and procedures.

<sup>20</sup> Pre-conception techniques were brought within the ambit of the law through the 2003 amendment. See *supra* N-18.

<sup>21</sup> Section 4(2) of the PC&PNDT Act

<sup>22</sup> For detailed analysis of the issue and legal developments see Jaising, Sathyamala, Basu; From the Abnormal to the Normal: Preventing Sex Selective Abortions through the Law; Colorprint; New Delhi; 2007

PC&PNDT Act were “genetic counseling center”<sup>23</sup>, “genetic clinics”<sup>24</sup> and “genetic laboratories”<sup>25</sup>. The law monitored the provision of pre-natal diagnostic services by tracing the trajectory followed by a woman in accessing such tests. Ultrasound tests were included within the ambit of the law only to the extent of its being used as an aid in the conduct of pre-natal diagnostic tests.<sup>26</sup>

However, with the development of medical technology, ultrasound technology gained acceptance as an integral part of antenatal<sup>27</sup> care used to monitor normal pregnancies. It is this technology that is being misused for the purposes of sex determination, as it is widely and cheaply available, non-invasive and has no documented adverse side effects. On the other hand, only a limited number require tests for the detection of genetic abnormalities in fetuses. Further, with advancements in technology, pre-conception techniques were beginning to be used for sex selection prior to conception.

Pursuant to the directions of the Supreme Court in 2001, amendments were effected in the law to specifically bring ultrasound tests within the regulatory ambit. However, instead of recognizing the shift in paradigm in the use of technology i.e. from the detection of abnormalities to its use in monitoring normal pregnancies, the regulation of new technologies was inserted into the existing scheme.<sup>28</sup> This meant, for example, any unit conducting pregnancy related ultrasound tests would have to register under the PC&PNDT Act as a “genetic clinic”. As a result, the categorization for registration bears no relation to the actual practice of antenatal and pre-natal care. The devastating consequence of this is that it makes the aspect of monitoring practically impossible.

First of all, it creates confusion in the minds of those providing services and are obligated to comply with legal requirements. For instance, a gynecologist advising a woman to undergo an ultrasound test does not consider this as providing counseling for genetic tests. Hence, gynecologists supervising pregnancies and delivery, including advising on

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<sup>23</sup> A “genetic counseling center” includes any unit that advises a woman to undergo a pre-natal diagnostic test for the detection of congenital abnormalities.

<sup>24</sup> A “genetic clinic” is the unit in which a pre-natal diagnostic procedure is conducted to extract samples for testing.

<sup>25</sup> A “genetic laboratory” is the unit where the samples such as amniotic fluids, etc are tested.

<sup>26</sup> Ultrasound tests were required at the time of extracting amniotic fluids to prevent causing harm to the fetus. Rule 14(2) of the PC&PNDT Act mandates that “*Every pre-natal diagnostic procedure (to extract samples for testing) shall invariably be preceded by locating the fetus and the placenta through ultrasonography and pre-natal diagnostic procedure shall be done under direct ultrasonographic monitoring so as to prevent any damage to the fetus and the placenta.*”

<sup>27</sup> The term “antenatal” care or services alludes to medical supervision of women during pregnancy with an aim to preserve the physiological aspects of pregnancy and labor and to prevent or detect pathological conditions that endanger maternal health. The term “pre-natal”, on the other hand, alludes to services and advice rendered in relation to the detection of disease or condition in the fetus or the embryo before its birth. See *supra* N 23 at P 131

<sup>28</sup> The amendments inserted new indications for which ultrasound tests are allowed instead of distinguishing tests that are used for antenatal and pre-natal care. For further details on the implementation of the PC&PNDT Act see *Supra* N 23.

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and receiving diagnostic test results do not consider themselves bound by the PC&PNDT Act. Persons conducting ultrasound tests do not insist on referrals, as such tests are a standard component of managing all pregnancies. This leads to a complete break down in the paper trail. Secondly, the PC&PNDT Act provides for the registration of units as a whole, and not of individual practitioners. However, with advancements in technology an individual practitioner can carry mobile ultrasound machines to various places that need not be registered, to conduct tests.<sup>29</sup> Monitoring the use of technology in the context of such ambiguities is therefore, next to impossible. Added to this is the fact that implementing authorities under this law are existing government medical officers who are already overburdened and therefore, are unable to spare adequate time for monitoring compliance with the law.

It is perhaps needless to state that without monitoring the PC&PNDT Act is rendered infructuous, but this is particularly true in these circumstances as there is no immediately affected complainant since the fetus is done away, and both the parties i.e. those accessing sex determination and those providing it, are deemed to be culpable under the law. To remedy this situation requires a complete overhaul of the PC&PNDT Act by bringing in definitional changes to shift the focus from monitoring tests conducted for the detection of abnormalities to antenatal tests conducted for monitoring normal pregnancies in the interest of preserving the well-being of the woman and the fetus.

On the whole, the legal regime should be rationalized to take cognizance of advancing technology and to provide a framework to regulate all medical professionals and the provision of medical services, which can be used in guarding against the misuse of any form of technology or unethical medical practices that act to the detriment of women's rights. For instance, due to lack of regulation increasing numbers of Indian women are entering into surrogacy arrangements for monetary benefits. Commercial surrogacy arrangements raise concerns that go beyond issues of sex selection, although the issue of sex selection is implicated. The Indian government is currently in the process of preparing yet another law for the regulation of assisted reproductive techniques, which covers surrogacy arrangements. The promulgation of a separate legislation on assisted reproductive technologies shall lead to fragmentation and competing interests as discussed in the introductory paragraphs. Hence instead of enacting more laws, it is perhaps time to consider a move towards a comprehensive legislation to regulate medical professionals and the provision of medical services.

### **The practice of dowry**

Another significant indicator of the devalued status of women in Indian society is the practice of dowry. The term "dowry" alludes to gifts in cash or kind given to the husband and his relatives by the wife and her relatives in connection with marriage. To prevent this practice, the first law on violence against women enacted in independent India was

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<sup>29</sup> The use of mobile ultrasound machines is permitted by the amendments in the law. However, the method and requirements to be fulfilled in utilizing such machines is not clearly laid down.

the Dowry Prohibition Act, 1961 (DPA). This law has been amended twice in the past pursuant to demands made by the women's movement. Other than providing the legal definition of dowry, the DPA *inter alia* provides penalties for those who give and take dowry as well as mandates the appointment of "Dowry Prohibition Officers" (DPO) vested with the charge of ensuring the implementation of the law. However, despite more than fifty years of its existence, the law has been ineffectual in curbing the practice of dowry.<sup>30</sup> Dowry demands continue to remain a primary cause for domestic violence and in some cases even result in the death of the woman.

In this Act, "dowry" is broadly defined to include property or valuable security given in connection with marriage.<sup>31</sup> The law does not, however, prohibit all exchanges made at the time of marriage and specifically excludes presents given voluntarily i.e. without any demand having been made, to the bride and /or the bridegroom at the time of marriage. In order to ensure that such exchanges are not made under coercion, the law mandates that all items or presents given be entered into a list in accordance with the Rules made under this Act. Further, only such presents that are of a customary in nature are to be given and its value should not be excessive having regard to the financial status of the person by whom such presents are given.<sup>32</sup> However, the law provides inadequate guidance to distinguish between presents that are given voluntarily from those given under threat or coercion. Negotiations at the time of marriage take place in private, therefore, any demands for dowry are covertly made. Hence in the absence of specific guidelines, this term has been given a narrow interpretation by the courts.

The most significant reason behind the low reportage<sup>33</sup> is that the DPA holds both givers and takers of dowry equally culpable.<sup>34</sup> While the culpability of the giver of dowry cannot be negated, both parties cannot be treated as being at par. This formulation ignores the reality in which dowry transactions are made, in that in most cases the woman's family feels compelled to give dowry, even in the absence of overt demands, to secure the happiness and well being of their daughter in her matrimonial home. Further, parents and other relatives may feel also compelled to give dowry due to social and cultural

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<sup>30</sup> Although the practice of dowry remains prevalent, the Crimes In India Report of the National Crimes Research Bureau reports a decline of -10.8% in offences reported under the DPA. In addition to the DPA, amendments to the IPC were effected to include dowry related harassment (Section 498A of the IPC) and unnatural deaths as a result of dowry related harassment (Section 304B of the IPC) as separate offences. Again, due to the space constraints, the analysis in this section is limited to the functioning of the DPA and does not include an analysis of criminal provisions on dowry related harassment.

<sup>31</sup> Section 2 of the DPA defines dowry as "*any property or valuable security given or agreed to be given either directly or indirectly-*  
 (a) *by one party to a marriage to the other party to the marriage; or*  
 (b) *by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;*  
*at or before or any time after the marriage in connection with the marriage of said parties but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.*

<sup>33</sup> See N 31

<sup>34</sup> Section 3 of the DPA

pressures as there is a high level of cultural acceptance of this practice. Additionally, as in the case of disclosure of the sex of fetuses, if both parties are deemed culpable, it is unlikely that either of the parties shall complain of the offence.<sup>35</sup>

Finally, DPOs vested with the responsibility of ensuring compliance with the Act have not been functioning in an effective manner. A major reason for this is overburdening of public /government personnel, as existing public officers have been vested with additional duties instead of creating a new cadre for the implementation of this law.

However, the recently enacted Protection of Women from Domestic Violence Act (PWDVA) brings cause for hope. Unlike the DPA the PWDVA is a civil law.<sup>36</sup> Derived from the UN Model Code on legislation to prevent violence against women, definitions contained in the PWDVA have been indigenized to include some harmful practices that are relevant to India as civil offences, dowry related harassment being one of them.<sup>37</sup> Women in matrimonial relationships have been the primary users of this law and have been successful in obtaining protection orders from courts to address dowry related harassment. Further, Protection Officers, appointed under the PWDVA, who unlike DPOs, function under the direct supervision of criminal courts, have proven effective in retrieving dowry items for women from their matrimonial homes.<sup>38</sup>

However, a civil law cannot substitute the deterrent effect of a criminal law. Hence the DPA is still required, albeit with improvements, to dissuade people from engaging in the practice of giving and taking dowry. A step towards the effective implementation of the DPA will be to bring it in line with the implementation of the PWDVA. An example being, capacities of Protection Officers under the PWDVA can be developed so that they can take on the additional responsibility of implementing the DPA instead of having two separate implementing authorities. This will be a step towards dovetailing implementation procedures to avoid fragmentation and overburdening.

### **Prohibition of Child Marriages**

One of the earliest legislative initiatives to curb harmful practices was the enactment of a law to prevent child marriages in 1929, pursuant to sustained demands made by social reform groups. The Child Marriage Restraint Act (CMRA), as it was called, has been recently amended in 2007 to become the Prohibition of Child Marriages Act, 2006

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<sup>35</sup> Givers of dowry are provided with limited protection under the law in that Section 7(2) of the DPA provides that “*Notwithstanding anything contained in any law for the time being in force a statement made by the person aggrieved by the offence shall not subject such person to a prosecution under this Act*”. However, the Act contains no definition of the term “person aggrieved”.

<sup>36</sup> Discussion on the PWDVA is included in the concluding portion of this paper.

<sup>37</sup> Dowry related harassment has been covered under Section 3(b) of the PWDVA as well as in the explanation of “economic abuse”.

<sup>38</sup> Lawyers Collective; 1<sup>st</sup> Monitoring and Evaluation Report 2007 of the PWDVA; Printgraphics; New Delhi; 2007 and Lawyers Collective; 2<sup>nd</sup> Monitoring and Evaluation Report 2008 of the PWDVA; Printgraphics; New Delhi; 2008

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(PCMA).<sup>39</sup> The PCMA, in continuance of provisions contained in the CMRA, prohibits the marriage of woman under the age of 18 and a man under the age of 21. However, according to the National Family and Health Survey III, 2007 (NFHS III), child marriages in India are fairly widespread.<sup>40</sup> Child marriages are contracted primarily for reasons of poverty coupled with prevalent traditional and cultural practices and mores.<sup>41</sup> All child marriages are forced, as a person is not capable of giving full and informed consent before attaining the age of majority.<sup>42</sup> Child marriages also result in denial of childhood and adolescence as well as adverse health consequences, particularly for women. However, despite the existence of the CMRA, a UNICEF report showed that prosecutions under this Act did not exceed 89 in any given year.<sup>43</sup>

The issue of child marriages poses a continuing conundrum vis-à-vis the age of the contracting parties. The CMRA and now the PCMA, penalizes those entering into or in any way associated with child marriages. Under this law, as mentioned earlier, the age prescribed for entering into a valid marriage is 18 for women and 21 for men. On the other hand, the IPC under Section 375 exempts marital rape from the purview of penalties and sets 15 as the age of consent for sex within marriages.<sup>44</sup> This creates obvious anomalies in the standards set in the two laws and impacts on prosecutions under child marriage laws.

The other issue raised in child marriages is the validity of such marriages. Previously, under the CMRA, child marriages were deemed to be illegal but valid. Hence all persons entering into a marriage with a child or associated in arranging child marriages were liable to face criminal prosecutions even though the marriage was deemed to be valid. The PCMA, however, clarifies this position by making child marriages voidable at the option of the contracting party who was a child at the time of the marriage. A petition for declaring a marriage void is to be presented within two years of such person attaining the

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<sup>39</sup> The PCMA is yet to be enforced in many of the states, therefore, it is not possible to comment on its efficacy at the moment. The paper limits itself to a comparison of provisions contained in the PCMA and the CMRA and issues that have arisen.

<sup>40</sup> The NFHS III reports that 45% of women in the age group of 20-24 were married before the age of 18 compared to 16% of men in the 20-49 age group married before the age of 18.

<sup>41</sup> Child marriages are contracted to avoid poverty and indebtedness and to secure girl children economically and socially for the future. In some cases girl children are married off to avoid higher dowry payments required for older girls. Law Commission of India; Report No. 205; Proposal to amend the Prohibition of Child Marriages Act, 2006; New Delhi; 2008

<sup>42</sup> Codified religious family laws govern marriages in India. None of these laws permit child marriages and subject the same to penal consequences outlined in the CMRA.

<sup>43</sup> Black, Maggie; *Early Marriage, Child Spouses*; UNICEF, Innocenti Research Center, Digest No. 7, 2001 quoted in the Law Commission Report see *supra* N 42

<sup>44</sup> The age of consent in non-matrimonial situations is 16 under Section 375. Section 376 of the IPC goes on to provide severe penalties for those having sex with their wives who are below the age of 12, while penalties for having sex with wives between the age of 12-15 is lesser in comparison.

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legal age for marriage.<sup>45</sup> To avoid destitution of women entering into child marriages, the PCMA includes provisions on maintenance and residence to be provided to the woman until her remarriage, by the male contracting party. In cases, where the male contracting party is also under the legal age of marriage, maintenance is to be provided by his parents. Additionally, the PCMA includes provisions for granting appropriate custody orders of children born out of a child marriage. Although a positive development, many civil society groups feel the law should deem all child marriages as void *ab initio* to act as an effective deterrent. The Law Commission of India, however, recommends that marriages below the age of 16 should be deemed as being void *ab initio*, whereas marriages between the ages of 16-18 should be treated as being voidable at the option of the contracting parties. All provisions on maintenance, residence and child custody are to apply to both void and voidable marriages. The Law Commission's recommendation appears to be the most logical solution to this issue. It is hoped that the State shall take on board on these recommendations and effect appropriate amendments to the PCMA.

A reason for the ineffective implementation of the CMRA was the insubstantial penalties prescribed for those entering into child marriages and those involved with arranging or engaged in the conduct of such marriages. Further, injunctions to prevent marriages provided for under the CMRA proved ineffective as such injunctions could be obtained only after notice was served on the offending parties. Another significant reason for its ineffectiveness was that the CMRA set a time limit and did not allow complaints to be filed after the completion of 1 year of the marriage. These issues have been addressed and dealt with in the PCMA. The PCMA provides rigorous penalties for those entering into child marriages and broadens its scope by specifically penalizing those either performing, abetting, or directing child marriages or involved in solemnizing, promoting, permitting or failing to prevent child marriages. It also guards against further victimization of child brides by exempting women entering into child marriages, from penal liability. Moreover, the PCMA bestows additional powers on district level judicial officers to grant timely injunctions to prevent child marriages. It also does away with the time limit for filing complaints under the law. The content of the PCMA is a vast improvement over the CMRA. Additionally, it provides for the appointment of Child Marriage Prohibition Officers and statutory duties to create awareness on the issue of child marriages and its adverse consequences. However, much of its effectiveness will depend on financial and budgetary allocations made for its enforcement.

Another important factor to essential to ensure the effectiveness of the PCMA is the registration of marriages. Religious family laws govern marriages in India. Most of these laws do not provide for the compulsory registration of marriages. Although some state

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<sup>45</sup> This would mean that women are to present a petition for declaring a marriage void before completing 20 years and men have to present a petition before reaching the age of 23. This allows men an additional 2 years in bringing such petitions when compared to women. This aspect has been critiqued by the Law Commission of India, which advocates for setting the age of marriage at 18 for both men and women. Law Commission Report, see *supra* n-42.

governments have enacted laws mandating the compulsory registration of marriages, such registrations seldom take place, as the validity of the marriage is not affected due to non-registration and there are no penalties prescribed for the failure to register marriages. This is an issue that needs an urgent response from the State. It has a direct bearing on the prevention of child marriages in view of the fact that public officials record the age of the parties at the time of registering marriages. The compulsory registration of marriages and its strict enforcement will, therefore, act as a deterrent in cases child marriages thus providing fillip to the enforcement of the PCMA.

Compulsory registration of marriages also serves the important purpose of protecting rights of parties to a marriage, as also to streamline implementation processes of laws on violence against women. For instance, in a related strain, a condition for the registration of marriage could be that the male contracting party and his family file a declaration stating that no dowry has been taken at the time of marriage or that no dowry shall be demanded in future. Or that the list of presents given voluntarily at the time of marriage be made part of the marriage record and submitted to public official who can then verify whether or not the gifts are excessive in nature.<sup>46</sup>

### **PWDVA: lessons for the future**

The PWDVA was brought into force in October 2006. Although, it is too premature to comment on the effectiveness of this law due to the recentness of its enforcement, it is possible to discern some trends that portend the way forward for the implementation of this law and its connection with other laws on violence against women.

As mentioned earlier, the PWDVA is a civil law aimed at protecting women from domestic violence. It recognizes a woman's right to a violence free home and provides for injunctive relief in the form of *inter alia* protection orders, in cases where this right is violated. The breach of a protection order is a deemed to be a punishable offence. Even though this is a civil law, applications for injunctive orders under the PWDVA are to be filed before magistrates under criminal law. This law is unique in that it clearly outlines the mechanism for enforcement by providing for the appointment of Protection Officers and the role and duties of service providers and other law enforcement mechanisms. Protection Officers, appointed under the PWDVA, perform a dual role of facilitating an aggrieved woman's access to courts and support services in addition to assisting the court in discharging its functions. In addition, Section 11 of the PWDVA obligates the Central and State Governments to create awareness, provide trainings to implementing agencies and develop protocols to ensure the delivery of coordinated services.

The comprehensive definition of "domestic violence" contained in this law includes some forms of harmful practices relevant to the Indian context such as dowry related harassment, harassment for not producing a male child, forcing a woman to marry against

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<sup>46</sup> See *Supra* P 7 N-33

her will, denial of basic economic entitlements including shelter and maintenance, etc.<sup>47</sup> The law includes within its ambit aggrieved women in all forms of domestic relationships and is not limited to those in matrimonial relationships. This means that the law is not limited for the use of those facing domestic violence or subjected to harmful practices in matrimonial relationships.<sup>48</sup> Although the married women are the primary users of the law, other women in domestic relationships have been successful in obtaining orders from the court. For instance, widows have been able to get residence orders to prevent dispossession from the deceased husband's house. In Rajasthan, activists have used this law to prevent forced marriages. There are also reported cases of sisters and mothers obtaining protection orders to address violence within the home. This indicates that the PWDVA may prove to be a useful tool in addressing harmful practices perpetrated by those in a domestic relationship with the aggrieved woman.

In the first 9 months of its enactment, approximately 8000 applications were filed under this law in 2007.<sup>49</sup> Although comprehensive filing statistics were not available in the second year of its implementation, data collected by some courts indicates that filing rates have almost tripled in some states.<sup>50</sup> One of the reasons for the high reportage could be the fact that the PWDVA allows an aggrieved person to approach the court directly. In 2007, the highest number of cases was reportedly filed in the state of Rajasthan<sup>51</sup> even though the state had not put in place any statutory mechanism to ensure the enforcement of this law. This demonstrates that direct access to court enables higher rates of reportage.

By the second year of its enforcement, Protection Officers had been appointed in all states in the country. The Lawyers Collective: 2<sup>nd</sup> Monitoring and Evaluation Report 2008<sup>52</sup> showed that women, particularly belonging to lower economic classes, were able to benefit from the services of the Protection Officers in bringing applications before the court, which they were previously unable to do due to the lack of a supportive state agency. This Report also documented the increased role of Protection Officers at the pre-litigation stage wherein they provided or facilitated access to support services for women seeking legal remedies.<sup>53</sup> It is to be noted here that appointment of Protection Officers have been done by vesting additional responsibilities on existing government officials. However, they seem to function better than what has been the experience of appointing implementing officers under other laws. A reason for this could be that they work under the direct supervision of criminal courts and hence are compelled to take action on receiving

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<sup>47</sup> The Rules under this Act contain formats for recording complaints of domestic violence. These forms mention various different forms of conduct that amount to domestic violence such as forced marriages.

<sup>48</sup> Other relationships include those related by marriage, consanguinity, adoption, or in a relationship in the nature of marriage, and family members living together in a shared household.

<sup>49</sup> See *supra* N-39

<sup>50</sup> 2<sup>nd</sup> Monitoring and Evaluation Report 2008 on the PWDVA. *Supra* N-39 at P69

<sup>51</sup> 3440 of 7913 cases filed were in Rajasthan. 1<sup>st</sup> Monitoring and Evaluation Report 2007. See *Supra* N-39

<sup>52</sup> *Supra* N-52

<sup>53</sup> Data for the 2<sup>nd</sup> Monitoring and Evaluation Report 2008 was collected from urban centers hence this report has an urban bias. However, given that a new law is most likely to be implemented in the urban areas before reaching the rural, this Report is useful in understanding the potential

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complaints of domestic violence. Perhaps it is the awareness that if they do not take action, a woman could approach the courts directly and the courts would then issue orders to them, which they would have to comply with or face penal consequences. The PWDVA also provides for penalties to be imposed on Protection Officers for dereliction of duties. Another reason could be that the office of the Protection Officer is rooted in the practices followed by the women's movement in assisting women in distress. The lessons learnt have been translated into the law, by the manner in which the Rules have been drafted. This aspect not only ensures the effective functioning of the Protection Officer but also to hold Protection Officers accountable to their statutory role.

Protocols for coordinated service delivery are yet to be put in place. It is expected that these will evolve with the added experience of implementing this law. However, some states have taken the initiative of putting in place mechanisms for coordination, Andhra Pradesh being a case in point. The fact that the PWDVA obligates various state agencies to, at a minimum, provide information to aggrieved women has galvanized some of these agencies to take action. For instance, in the case of Andhra Pradesh- it was the police who took the initiative to enforce this law.

### **In conclusion**

Although one cannot predict the future of the PWDVA, its current workings provide some ideas on rationalizing drafting and implementation processes. Aspects of comprehensive definitions, coordinated responses and in-built accountability mechanisms indicate successful strategies that may be used in the formulation of other laws on harmful practices. The limitations of this law with regard to its use in preventing harmful practices is that it recognizes civil wrongs whereas the gravity of harmful practices require a response in criminal law. Secondly, it applies only to practices that are perpetrated by those in a domestic relationship, whereas other entities might be involved in perpetrating harmful practices.

The way forward is to advocate for comprehensive laws on key issues such as a statutory equality code, a criminal law on violence against women, a comprehensive legislation to regulate medical practice, etc. Each of these laws should be co-related both in terms of defining its ambit and in the mode in which implementation is envisaged. Statutory mechanisms for enforcement should be provided for in the law and also provisions to ensure accountability. Efforts should be made to translate lessons learnt by the women's movement into the methods adopted for the implementation of laws.

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**Annexure I**

| <b>Women's Status in India</b>                       |  |
|--|--|
| Juvenile Sex Ratio                                   | 927 female /1000 males                                     |
| Maternal Mortality                                   | 540 per 100,000 live births                                |
| Female Literacy                                      | 47.8% literacy rate (compared to 73.4% male literacy rate) |
| Political Participation                              | 9.2% of Members of Parliament are female                   |
| Ratio of female to male earned income, female income | 26%  |

(Compiled from Census 2001 and Human Development Report 2006)<sup>54</sup>

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<sup>54</sup> Lawyers Collective (Women's Rights Initiative); Staying Alive: 1<sup>st</sup> Monitoring and Evaluation Report 2007 on the Protection of Women from Domestic Violence Act, 2006; New Delhi; 2007

## Annexure II

### List of Central Laws and Legal Provisions Applicable to Women in India<sup>55</sup>

#### Employment and labor

1. Bonded Labour System (Abolition) Act, 1976
2. Contract Labour (Regulation & Abolition) Act, 1979
3. Employees State Insurance Act, 1948
4. Equal Remuneration Act, 1976
5. Factories Act, 1948
6. Inter-state Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979
7. Legal Practitioners (Women) Act, 1923
8. Maternity Benefit Act, 1961
9. Minimum Wages Act, 1948
10. Child Labour (Prohibition and Regulation) Act, 1986
11. Payment of Wages Act, 1936
12. Plantations Labour Act, 1951
13. Workmen's Compensation Act, 1923
14. Beedi & Cigar Workers (Conditions of Employment) Act, 1966
15. Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
16. Mines Act, 1952
17. Supreme Court guidelines on addressing sexual harassment at the workplace

#### Laws on violence against women

1. Relevant provisions of Indian Penal Code, 1860 including provisions on dowry deaths, cruelty within marriage, rape, molestation, etc.
2. Relevant provisions of Code of Criminal Procedure, including procedure to obtain maintenance.
3. Relevant provisions of the Indian Evidence Act
4. Immoral Traffic (Prevention) Act, 1956
5. Dowry Prohibition Act 1961
6. Commission of Sati (Prevention) Act, 1987
7. Protection of Women from Domestic Violence Act, 2005
8. Prohibition of Child Marriages Act, 2006

#### Family laws

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<sup>55</sup> Compiled from <http://wcd.nic.in/>

1. Foreign Marriage Act, 1969
2. Guardians and Wards Act, 1890
3. Indian Succession Act, 1925
4. Married Women's Property Act, 1874
5. Hindu Marriage Act, 1955
6. Hindu Succession Act, 1956
7. Indian Divorce Act, 1869
8. Hindu Minority & Guardianship Act, 1956
9. Hindu Adoption & Maintenance Act, 1956
10. Special Marriage Act, 1954
11. Muslim Personal Law (Shariat) Application Act, 1937
12. Converts Marriage Dissolution Act, 1966
13. Christian Marriage Act, 1872
14. Family Courts Act, 1984

#### Health Laws

1. Medical Termination of Pregnancy Act, 1971
2. Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994
3. Mental Health Act, 1987

#### General Laws

1. National Commission for Women Act, 1990
2. Indecent Representation of Women Act, 1986