

**Domestic Violence: An Analytical Study on Legal
Protection and Practice in the United Kingdom,
Japan and Myanmar**

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Table of Contents	Page
Abbreviation	vii
Abstract	ix
List of Tables	xi
Chapter 1: Introduction	1
1.1. Background	2
1.2. Religious Perspectives on Domestic Violence	6
1.3. Objectives of the Research	10
1.4. Statement of the Problem	13
1.5. Scope and Limitations of Research	15
1.6. Research Methodology	16
1.7. The Structure of the Research	17
Chapter II: Literature Review	19
2.1. Definition of Domestic Violence	19
2.2. Types of Domestic Violence	21
2.2.1. Physical Violence	22
2.2.2. Psychological Violence	23
2.2.3. Sexual Abuse	24
2.2.4. Economic Abuse	25
2.3. Theories of Domestic Violence	26
2.3.1. Psychological Theory	27
2.3.2. Sociological Theory	28

2.3.3. Feminist Theory	30
2.3.4. Cycle of Violence Theory	31
2.4. Summary	33
Chapter III: Causes and Consequences of the Domestic Violence	34
3.1. The Causes of Domestic Violence	34
3.1.1. Individual Causes	35
3.1.1.1. Emotional Causes	35
3.1.1.1.1. Outlet to Stress	36
3.1.1.1.2. Anger	37
3.1.1.1.3. Low Self- Esteem	38
3.1.1.1.4. Sexual Jealousy	39
3.1.1.2. Conflicts and Disputes over the Children	40
3.1.1.3. Drug Abuse and Alcohol Dependency	40
3.1.1.4. Economic Causes of Domestic violence	42
3.1.1.4.1. Direct Economic Causes	43
3.1.1.4.2. Indirect Economic Causes	44
3.1.2. Social and Culture causes of Domestic Violence	46
3.1.2.1 Patriarchal Ideology	46
3.1.2.2. Habit of Chastisement or Use of Force and Control	48
3.1.2.3. Values Surrounding the Family	50
3.1.2.4. Cultural Impact	51
3.2. The Consequences of Domestic Violence	53
3.2.1. Effects of Domestic Violence on Women	54
3.2.2. Effects of Domestic Violence on Children	56
3.2.2.1. Direct Effects	57
3.2.2.2. Indirect Effects	58
3.2.3. Effects of Domestic Violence on Men	59
3.2.4. Effects of Domestic Violence on Other Family's Members	63
3.2.5. Effects of Domestic Violence on Society	64
3.3. Summary	66

Chapter IV: Legal Protection and Responses of Domestic Violence in the United Kingdom	68
4.1. Perceptions of Domestic Violence	68
4.2. Extent of Domestic Violence	69
4.3. Contributing Factors	72
4.4. Response to the Problem	73
4.4.1. Domestic Violence Laws	75
4.4.2. The Criminal Justice Responses	78
4.4.2.1. The Police Response	79
4.4.2.2. The Prosecutorial Response	84
4.4.2.3. Judicial Response	88
4.4.2.3.1. Specialist Domestic Violence Courts	89
4.4.3. Civil Remedies	92
4.4.3.1. Divorce	93
4.4.3.2. Custody Proceedings	97
4.4.3.3. Issuing Restraining Orders	99
4.4.3.3.1. Non-molestation Order	101
4.4.3.3.2. Occupation Order	104
4.5. Summary	109
 Chapter V: Legal Protection and Responses of Domestic Violence in Japan	 111
5.1. Perceptions of Domestic Violence	111
5.2. Extent of Domestic Violence	113
5.3. Contributing Factors	115
5.4. Response to the Problem	117
5.4.1. Domestic Violence and Laws	119
5.4.2. The Criminal Justice Responses	122
5.4.2.1. The Police Response	122
5.4.2.2. The Prosecutorial Response	125
5.4.2.3. Judicial Response	127
5.4.3. Civil Remedies	130

5.4.3.1. Divorce	130
5.4.3.2. Custody Proceeding	132
5.4.3.1. Issuing Protection Orders	135
5.5. Summary	137
Chapter VI: Legal Protection and Responses of Domestic Violence in Myanmar	138
6.1. Perceptions of Domestic Violence	138
6.2. Extent of Domestic Violence	141
6.3. Contributing Factors	143
6.4. Response to the Problem	146
6.4.1. Laws relating to Domestic Violence	149
6.4.1.1. The Rights of Women in the Constitution	150
6.4.1.2. Provision under Criminal Law	151
6.4.1.3. Myanmar Customary Law	154
6.4.2. The Criminal Justice Responses	156
6.4.2.1. The Police Response	156
6.4.2.2. The Prosecutorial Response	159
6.4.2.3. Judicial Response	161
6.4.3. Civil Remedies	162
6.4.3.1. Divorce	163
6.4.3.2. Custody Proceedings	165
6.5. Case Study in Domestic Violence	166
6.6. Summary	171
Chapter VII: A Comparative Analysis of Legal Responses on Domestic Violence	174
7.1. Similarities and Differences	175
7.2. Advantages and Disadvantages	179
7.3. Summary	182
Chapter VIII: Conclusion	189

BIBLIOGRAPHY

194

APPEDIXES

211

Abbreviation

ASBO	Anti Social Behavior Order
ASEAN	Association of South East Asia Nations
BCS	British Crime Survey
CAFCASS	Children and Family Court Advisory and Support Service
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSW	Commission on the Status Women
CPS	Crown Prosecution Services
DEVAW	Declaration on the Elimination of Violence Against Women
DPMCA	Domestic Violence Proceeding & Magistrates' Court
DVCVA	Domestic Violence Crime and Victims Act
DVMPPA	Domestic Violence & Matrimonial Proceedings Act
FLA	Family Law Act
GDI	Gender related Development Index
HDI	Human related Development Index
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MARAC	Multi –Agency Risk Assessment Conference

MCA	Matrimonial Causes Act
MHA	Matrimonial Home Act
MMCWA	Myanmar Maternal and Child Welfare Association
MNCWA	Myanmar National Committee for Women's Affairs
MWAF	Myanmar Women Entrepreneurs Association
MWSF	Myanmar Women Sports Federation
PFHA	Protection from Harassment Act
SDVC	Specialist Domestic Violence Court
The U.K	The United Kingdom
The U.N	The United Nations
UNDP	United Nations Development Programme
UNHR	Universal Declaration of Human Rights
WHO	World Health Organization

Abstract

Domestic violence has become the most ubiquitous problem in the lives of women around the world. Many countries, whether rich or poor, face severe problem with domestic violence, but the problem takes different forms. Governments around the world laid down the policies to respond to the problem and to fight against it. The analysis of policy against domestic violence stresses the distinction between responsiveness on this issue, found in many nations, and effectiveness in actually creating the conditions for change. In assessing effectiveness, domestic violence legislation must be examined with particular emphasis on the extent of the problem and on the coverage of law. Another factor for consideration is that of how governments take action upon the issue. Finally, legal implementation and enforcement process must be assessed: does the law have meaningful enforcement process and to what extent are the provisions being effectively enforced?

The United Nations issued some declarations on the elimination of violence against women. Under CEDAW and other international instruments ruled that domestic violence should be regarded as human rights violation, even though, the states implementations may be considered inadequate and slow down.

Recently, in many countries the domestic violence issue has been moved from the private realm to the public. Consequently, policies regarding the problem are changing and violence in the home is becoming a criminal matter. Yet the degree of protection women received varies significantly across countries. Among those countries that have responded to domestic violence, the United Kingdom and Japan play significant role although degree of responsiveness is difference in each country.

In the analysis of responsiveness to domestic violence in the United Kingdom and Japan, although these two countries have diverse social and cultural norms, they have traditionally recognized women's subordination to their husbands. They have permitted some degree of family violence as a means to maintain that subordination. Such kind of male dominance in society is also to be found in Myanmar in which the customary law explicitly allowed husbands' chastisement to their wives. All these countries regarded the violence as a family matter which should not be intervened by the state or governments.

Public interest in domestic violence has increased with some groundbreaking research into the effects of domestic violence. The problem is now a substantial part of crime survey in the United Kingdom and Japan. Recognizing domestic violence as a “real crime” has become an important part of the governments’ policy. Recently, the response to domestic violence in the United Kingdom is seen to be tougher than Japan. Direct incrimination and stiff punishments for the perpetrators in the United Kingdom are stronger than that of Japan. However, provision for monitoring and reviewing the implementation of law is the better performance in Japan.

In Myanmar there are no official data is kept of domestic violence cases. The government expresses slight concern for domestic violence and continuously denies on the fact that it is a major issue. However, increasing on divorce rates and other available research substantiates that this problem should no longer be hidden or concealed. Actually, the term “domestic violence” is a new one in Myanmar society; it was introduced in the late 1990s only after attending Beijing Conference. The problem of domestic violence is still neglected and considered a normal family affair. Still to date no protection order or restraint order is available for safeguarding the victims. Criminal action is taken only when the assault committed or harm caused by perpetrators is serious or grievous. Yet, Myanmar fails to enact a law or to create a suitable legal environment for victims vulnerable to domestic violence.

This paper expresses the research undertaken in the field of domestic violence and its consequences for criminal justice agencies and relief afforded under civil justice response in both the United Kingdom and Japan. There are still many unreported domestic violence cases though there is a shift in cultural beliefs regarding male dominance. Public awareness need to be raised continuously.

The lessons learnt from these two countries will provide an effective path with which to deal with domestic violence in Myanmar, an issue which has never been touched before. Myanmar firstly has to acknowledge the existence of the problem of domestic violence. Secondly, the people should be informed about the negative consequences of domestic violence. Finally, a suitable legal environment needs to be established, not only to give effective protection for the victims but also to take necessary action against the perpetrators.

List of Tables

1. Successful Prosecution for Domestic Violence 2005- 2009
2. Criteria for granting non-molestation orders
3. Domestic Violence Non – Molestation Applications Made in the County Courts,
2004-08
4. Domestic Violence: Non – Molestation Orders made in the County Courts, 2004 - 08
5. Domestic Violence Occupation Applications Made in the County Courts, 2004 - 08
6. Domestic Violence: Occupation Orders made in the County Courts, 2004 - 08
7. Damage Caused by Violence from Spouse
8. Support System for Victim of Spousal Violence in Japan
9. Number of Arrest made in cases involving Murder, Injury or Violence inflicted by
Spouse
10. Domestic violence Cases among Criminal Regular Trials
11. Divorce Suits among Civil Regular Trials

Chapter I

Introduction

Domestic violence, a well-known term, impacts millions of people, children and adults alike, regardless of any race, ethnicity or sex, throughout the world. Although it may describe different kinds of violent relationships, it is most commonly applied to violence within an intimate relationship in which one partner uses a pattern of assault and intimidating acts to assert power and control over the other partner. Although domestic violence usually focuses on violent, physical attacks, it also includes psychological, economic, and sexual abuse, as well as attempts to isolate the partner.

Research in many countries has also acknowledged that, in addition to the immense personal costs of domestic violence, there are significant social and financial costs to society as a whole. In fact, domestic violence is a problem even considered a disease within any society. The problem of under-reporting incidents has been noted, but even regarding published figures, women constitute the majority of victims of violent crime committed by intimates.

Nowadays, domestic violence is considered a crime in most legal systems. Over the past years there have been many initiatives and campaigns against domestic violence. Several instruments and documents, both nationally and internationally, have addressed the seriousness of domestic violence. On the other hand, careful observations should be made whether the objectives of enacting the law meet the real needs of the victims. The adequacy of laws protecting the victims of domestic violence action against perpetrators is the main theme of this paper.

In this paper, the legal responses to domestic violence in the United Kingdom*, Japan and Myanmar will be compared and analyzed. These countries chosen for this thesis represent vastly different geographic regions and cultures. Thus, the contributing factors to domestic violence vary from one country to another. Whatsoever the reason is,

* . The United Kingdom is made up of England and Wales, Northern Ireland, Scotland. Although the paper expresses the term "the United Kingdom", it mainly focuses on the data and facts about England and Wales.

these factors fall with in one of the categories of emotional, economic, social and cultural causes. Once domestic violence is perpetrated, there are severe effects not only on the person concerned but also directly or indirectly on third parties. Regarding these countries, the former two have established their respective laws with which to combat domestic violence though their methods have some differences and similarities in addressing to the problem. Myanmar still chooses to ignore the problem. Even though the official data about domestic violence is not provided, it can be estimated to some extent.

To make meaningful comparisons of crime information among countries is a difficult, if not impossible task. There are no uniform definitions of domestic violence and no measures that are used as a worldwide benchmark to accurately record exist in incidence. Although data of domestic violence in some countries is available here, there are some problems of trying to obtain valid or current information for Myanmar. Despite these difficulties, a cursory view the United Kingdom, Japan and Myanmar together with other countries suggests that domestic violence is prevalent in them all. It is truly a global issue.

The intent of writing this thesis is to provide greater insight into the problem of domestic violence as well as for the benefit of victims. In most countries around the world, domestic violence is increasingly being recognized as a very serious social problem. Perhaps through studying the problem in other countries, progress can be made at their own accord. Having a world perspective is important. When, even one woman, child, or man is victimized or when one person commits an act of domestic violence, it is one too many.

1.1. Background

In the past, domestic violence or women's rights issue were excluded from discussions of international human rights. However, today, the concept of violence against women has become a part of the international agenda within the framework of the concept of human rights.¹ Therefore, domestic violence or violence against women is regarded as a human rights violation. Women are beginning to use this policy consensus

¹ . Subrata Paul, *Combating Domestic Violence through Positive International Acton in the International Community and in the United Kingdom, India and Africa*, 7 *Cardozo J. Int'l & Comp. L.* 227 www.lexis.com, accessed on 2 August, 2010

in conjunction with international instruments to alter laws and practices at local and national levels because these instruments can be particularly effective in changing the law. Furthermore, international human rights standards are also being used in the national forum. Women's groups are using a country's international obligations as the minimum standard against which national laws should be measured. Gains in this area are slow but significant. While international instruments provide few concrete remedies against states that fail or refuse to protect women from violence in the home, they are important for establishing the fundamental human rights principle that women have the right to live free from domestic violence.

Since the 1970s, the efforts of the United Nations have paved the way for the determination of international norms and standards on domestic violence against women. Violence against women has increasingly been recognized as a human rights concern. There have been several meetings, seminars and conferences within the last two decades. In 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations. Among the international human rights treaties, the CEDAW Convention takes an importance place in bringing the female half of humanity into the focus of human rights concerns. The spirit of the Convention is rooted in the goals of the United Nations. During the 1993 World Conference on Human Rights in Vienna, the term "women human rights" was officially pronounced and it was the product of the intensive efforts by the women's movements.² In the Declaration on the Elimination of Violence against Women (DEVAW) adopted in 1994, the term "violence against women" was defined as follows:

*"Any act of gendered-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."*³

This Declaration urges the States to end violence against women and to prevent the use of any custom, tradition or religion as an excuse to maintain the problem. This has

² . Bonita Meyersfeld, *Domestic Violence and International Law*, Hart Publishing Ltd., 2010, pp. 19-21

³ . The Declaration on the Elimination of Violence against Women, Art: 1

enabled the establishment of a mechanism that can thoroughly examine the concept of violence against women throughout world. In the Declaration, it mentions:

“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”⁴

The Fourth World Women’s Conference in Beijing (1995), known as the Beijing Platform for Action, determined 12 critical areas and the eradication of violence against women has been considered as one of the critical areas. In this Congress, it also states that:

“In many cases, violence against women and girls occurs in the family or within the home, where violence is often tolerated. The neglect, physical and sexual abuse, and rape of girl children and women by family members and other members of the household, , as well as incidence of spousal or non-spousal violence, often go unreported and are thus difficult to detect. Even where such violence is reported, there is often a failure to protect victims or punish perpetrators.”

When observed, the international instruments mentioned above, all the States parties must make their efforts for more positive role and responsibilities. They must promote the effective strategies to address the problem of domestic violence against women. The first UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, commented a narrow interpretation on international human rights protections and overlooked the responsibility of the States. However, since 1970s, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) require States to respect and ensure, among other things, the right to life, the right to be free from torture and cruel, inhuman or degrading treatment and the security of a person.⁵ Increasingly however, international legal interpretations and norms are evolving to define more clearly the positive role and responsibility of the state in preventing abuse perpetrated by Para-State or private actors.

⁴ . *Ibid*, Art: 4

⁵ .Abdulrahim P. Vijapur, *The Concept of Human Rights: National and International Perspectives*, International Politics, Vol.2, No.4, 2009, pp.22-35

Due to the world wide women's campaign demanding procedures that would allow women to seek redress for violations of CEDAW when no remedy is available at the national level, the UN adopted the Optional Protocol to CEDAW.⁶ It offers women international remedies and possibilities for obtaining justice in individual cases and achieving a broader impact by encouraging governments to take the necessary action at the national level.

When more and more countries recognized the domestic violence as a particular form of discrimination against women, they began to find out a legal solution and tried to adopt specific legislation. The worldwide movement and effort of women's groups achieved progress both at international and national levels. However, there is still a challenge to progress and put human rights standards for women at the international level into practice. Certainly, specific law addressing domestic violence has provided positive solution to deal with sensitive human right issue of domestic violence. Nevertheless, the question arises whether specific law dealing with the problem of domestic violence is really effective in practice or not. It is still has a long way to go in order to totally wipe out the problem of domestic violence.

In an international participation on domestic violence, a delegation from Myanmar attended the Fourth World Conference on Women, held in Beijing in 1995. The outcome of Beijing Conference was the Beijing Declaration, highlighting the Beijing Platform for Action which was on the twelve critical areas of concern for women's advancement. In order to fulfill the commitment made in Beijing, the government formed the Myanmar National Committee for Women's Affairs (MNCWA) and its working committees in 1996.⁷ The operational Committees work alongside with the government departments, the NGOs and the communities. Strategies were laid down in order to reduce violence against women. Then Myanmar became a party of the CEDAW Convention in July 1997. The 3rd of July, the founding day of the MNCWA has been designated "the Myanmar Women's Day", with honor in 1998, for the Committees' formation was a historic undertaking. Nevertheless, before the mid 1990s, the term

⁶ . Entered into force on 22 December, 2000. As of 3 March 2009 it had 79 States Parties.

⁷ . The 42nd CEDAW Session, 27 October,2008, "*Oral Statement by the Women of Burma to the CEDAW Committee*", <http://www.womenofburma.org/Statement&Release/BURMA-CEDAW-Oral-Statement.pdf>, accessed on September 2,2010

“domestic violence” was hardly seen in legislative, legal transactions and daily life in Myanmar society. Up to now, there is no empirical change with respect to legal responses on domestic violence.

1.2. Religious Perspectives on Domestic Violence

Historically, many societies were patriarchal whereby it had a male as the head of the family, who exercised control and ownership over the other societal members. Their women were treated as inferior and severely discriminated against. For example, in the Laws of Cnut (circa 1020 AD), it was stated that the penalty for adultery committed by husband was compensation. When committed by a woman, her husband made forfeiture of all her own property and it was also punishable to amputate her nose and ears.⁸ Such imbalances between men and women arose from male dominance upon over women. In addition, these unequal practices were recognized by some major religions.

Human history is full of domestic violence by men against women. During pre-biblical times, when men did not understand their role in procreation, men “feared, adored and obeyed the matriarch; the hearth which she tended in a cave or hut being the earliest social centre, and motherhood their prize mystery.” When men realized their role in procreation, their status increased while women’s decreased and patriarchy became the norm. Society moved from a permissive to restrictive attitude towards sex; as men sought to have exclusive possession of women. This shift from a matriarchal to patriarchal model has also been argued to have resulted in a shift from a democratic to authoritarian way of life; power and control became the norm.⁹

The biblical story of Adam and Eve has been misinterpreted to perpetuate the inferior status of women and sanction violence against them. Two points can be drawn from his work: the deliberate subordination of women by men in positions of power and the cultural acceptance of violence against women. The story, as known today, perpetuates the idea that God created Adam (man) in his image and that Eve (woman) was created from Adam’s rib. The status of the woman as secondary is clear. The blame

⁸ . Dorothy Whitelock, *English Historical Documents c.500-1042*, 2nd ed., Vol.1, Taylor & Francis, 2007, p.463

⁹ . Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, In: Maria Roy, *Battered Women: A Psychosociological Study of Domestic Violence*, Van Nostrand Reinhold, 1977, p.5

for the events in the Garden of Eden is also laid on the woman, not the man; thus making “women culturally legitimate objects of antagonism.”¹⁰ This biblical interpretation left its mark on the laws through the ages, from the Apostle St Paul to St Augustine (354-430 AD), Gratian of Bologna (c1140 AD), Blackstone of England (18th century) and Napoleon of France (19th century). Vintage support for the above observation of Steinmetz and Straus is found in Gratian’s compilation of canon laws in the twelfth century:

*Women should be subject to their men...The image of God is in man and it is one. Women were drawn from man, who has God’s jurisdiction as if he were God’s vicar... Therefore woman is not made in God’s image... Adam was beguiled by Eve, not she by him. It is right that he whom woman led into wrongdoing should have her under his direction, so that he may not fail a second time through female levity.*¹¹

From the Islamic religion’s point of view, the nature of domestic violence is still unclear whether a man beating a woman is appropriate or not. These are analyzed with reference to the Qur’an, the divine endorsement from Allah, which discusses the forms of beating in certain circumstances. It seems that domestic violence is no place within the framework of Qur’an. However, the matter is not that easy. There is a Qur’anic verse which appears to explicitly permit husbands to chastise their wives. The Qur’an states that:

*“Men are the maintainers of women because God has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as God has guarded; and as to those on whose part fear desertion, admonish them, and leave them alone in the sleeping-places and beat them; then if they obey you, do not seek a way against them; surely God is High, Great.”*¹²

¹⁰. Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response*, 3rd .ed., Sage Publications, Inc., 2003, p.58

¹¹ .Terry Davidson, *supra* note 9, pp. 11-12

¹² .The Qur’an, chapter 4 (An-Nisa), verse 34

This view has been used by particularly male scholars¹³ to argue in favor of the man having the right to beat his wife. Some scholars argue that it is a wrong interpretation. A passage in the Qur'an states that one way of restoring marital peace if all else fails is by a single strike. It is argued that Verse 4:34 was written at a time when violence against women was rampant. Seen in Qur'an this light, the single strike rule should be interpreted as a "restriction on existing practice and not a recommendation". It is an interpretation that makes sense. Nevertheless, the verse in the Qur'an indeed permits husbands to hit their wives, although it does not mention using rod.¹⁴

In Hinduism, a wife has to share everything in this world with her husband he also does the same thing with her. She must take care of anything inside her household, including the family health, the children's education, and a parent's needs. The ideal of Hindu marriage is for husband and wife to be "spiritual partners," A women's role is usually linked to that of her husband, who takes the position of her god and guru. For many centuries, there was even the hope that a widow would choose to be cremated alive with her dead husband in order to remain united with him after death.¹⁵ This is a rather astonishing shift of gears which leaves the impression that sati, the burning of widows on their husband's pyres. There is no explanation or qualification of this claim.

By the nineteenth century, however, wives had become the virtual slaves of the husband's family. With expectations that the girl will take a large dowry to the boy's family in a marriage arrangement, having girls is such an economic burden that many female babies are intentionally aborted or killed at birth. Daughters are a drain on the family's resources, as money and goods (dowry) have to be given by her parents to the groom and his family when they marry. Demands are frequently made by husbands and in-laws for more money and goods after the marriage and these are often violently enforced. Deaths occur increasingly. Young wives are murdered usually by burning so that a husband is free to remarry to obtain another dowry, not infrequently, women commit suicide because of incessant abuse. Housewife ends life after dowry harassment.

¹³ . Muslim, Abu'l-Husain, "Sahih Muslim", International Islamic Publishing House, Riyadh, Saudi Arabia, 1971, translated by A. Siddiqi; Abu Dawud, Suliman, "Sunan", al-Madina, New Delhi, 1985, translated by A. Hasan; Ibn Majah, Sunan, Kazi, Lahore, Pakistan, 1995; Guillaume, A., "The Life of Muhammad", Oxford, 1955, page 651; Dashti, Ali, "23 Years: A Study in the Prophetic Career of Mohammad", Mazda, Costa Mesa, CA, 1994; Kathir, Ibn, "Tafsir of Ibn Kathir", Al-Firdous Ltd., London, 2000

¹⁴ . Judithe Tucker, *Women, Family, and Gender in Islamic Law*, Cambridge University Press, 2008, p.25

¹⁵ . Mary Pat Fisher, *Living Religions*, 5th ed., Prentice Hall, 2002, p.105

There are also cases today women being severely beaten or killed by the husband's family after their dowry was handed over.¹⁶

Buddhism, the dominant religion in many parts of Asia, emphasizes the importance of perseverance and endurance and that life is a cycle, with each state linked to another. Its doctrine is tied to the Four Noble Truths: (1) Life is painful; (2) Pain originates from desire; (3) For pain to end desire must end as well; and (4) The path to the end of pain is righteous living. The ultimate state is Nirvana, which is a peaceful state, absent of desire.¹⁷

There is an emphasis on fatalism; that is, all human beings must bear whatever trials and challenges that have been placed in the journey of life. This is the essence of karma, a Buddhist doctrine which advocates that all life is subject to suffering. This fatalistic orientation has colored attitudes toward help-seeking in domestic violence cases, where many Asian domestic violence victims remain silent about the abuse and do not seek help because they believe that they have to persevere and that violence is part of their fate.¹⁸

This concept of women as a subjugated class perpetuated discriminatory laws in various respects. Women were historically treated as chattel to be owned by men; injury to a wife or daughter allowed the father or husband to sue for loss of service; inheritance was through men and marital rape was not an offence. Historically, it was the husband's duty and right to physically chastise his wife. Wife beating, rather than being condemned and criminalized, was instead regulated; wife beating was accepted – and acceptable.¹⁹

Feminist writers have used the story of Bluebeard to illustrate the extent to which wife beating and violence against women was an acceptable part of life. The “original” Bluebeard was a French soldier in the fifteenth century, a notorious paedophile who had raped and killed a large number of young boys. The true story of Bluebeard, a vicious sex-murderer of young boys gradually became a story about a man who killed his wives. As one author noted, “It is almost as if the truth of Bluebeard's atrocities was too

¹⁶ . Kim Knott, *Hinduism: A Very Short Introduction*, Oxford University Press, 1998. pp.86-87

¹⁷ . Nicky Ali Jackson, *Encyclopedia of Domestic Violence*, Taylor & Francis Group, LLC, 2007, p.33

¹⁸ . *Ibid*

¹⁹ . Vincent B. Van Hasselt, Randall L. Morrison, Alan S. Bellack & Michel Hersen, *Handbook of Family Violence*, Plenum Press, 1988, p.407

frightening to men to survive in the popular imagination...” Conversely, the abuse or killing of wives was a phenomenon so much the norm that it was less difficult to accept.²⁰

This historical phenomenon tells us that there is entrenched discrimination against women and that violence against women has been legitimized by legal systems and social practices. The modern occurrence of domestic violence is part of this history any strategy – legal or otherwise – must recognize that in many cases “men who assault their wives are actually living up to cultural prescriptions that are cherished in Western and any other society – aggressiveness, male dominance and female subordination...”²¹

Therefore, in order to tackle the problem of domestic violence, it should be noted that all of the people must first acknowledge its existence and make it a public matter; otherwise, it will remain a latent feature through our cultural acceptance of it. Secondly, the gendered nature of domestic violence must be made the focus of strategies to solve the problems of domestic violence.

1.3. Objectives of the Research

The paper focuses on the legal protection and current responses for domestic violence in the United Kingdom, Japan and Myanmar. Among these countries, apart from Myanmar, the United Kingdom and Japan have enacted the domestic violence laws respectively. About two decades ago, the Myanmar government has been striving to protect for the rights of women and child. But the problem of domestic violence is still neglected and considered a minor one though the existence of the problem is admitted.

In reality, the issue of domestic violence seems to be as a hidden or secret problem in Myanmar society. Domestic violence issue is wrongly perceived by the Myanmar society as a family problem. Although the official and reliable data are not available for domestic violence, it has to be believed that this problem exists to some extent in Myanmar. It is undeniable that the existing laws are well established in their respective roles. However, the nature of domestic violence is a rather complex issue between the concept of human rights and individual rights. It should also involve a multi-faceted approach, taking into account social, legal, and health issues. Thus, to deal with

²⁰. Terry Davidson, *supra* note 9, p.13

²¹. R. Emerson Dobash & Russell P. Dobash, *Violence Against Wives: A Case Against Patriarchy*, Free Press, 1979 p.24

the rights of women effectively, including children and all kinds of victims, Myanmar should constitute a proper domestic law to combat domestic violence in line with international norms and standards as defined in the prominent international legal instruments and conventions.

In Myanmar, women have tolerated violence because they learned to accommodate being abused in a male-dominated society. Very few women took direct action to stop violent incidents, even though many victims reported intense emotional reactions and grave suffered consequences. Moreover, victims were unwilling to cooperate with prosecutors and often refused to press charges or testify against the batterer because of fear of retaliation, a desire to continue the relationship, concerns about losing the economic support provided by the batterer, the community usually applied pressure to the victims to withdraw the case, or the hope that the battering would stop. Even after going to trial, the court imposes lenient sentences on convicted domestic violence offenders, rarely requiring imprisonment. In the trial of civil suits, on the other hand, the only relief she can claim from the court is to obtain a divorce decree. There is no practice of issuing protection order to offenders of the violence.

This lack of assertive actions makes it obvious that education regarding recourse available in all settings in which violence occurs was solely needed years ago in Myanmar. It is hoped that today, improved protection of policies against violence and educational efforts will successfully increase women's awareness of their human right to protect themselves against violence. Thus, this study is made with the following objectives:

- To create a suitable legal environment for victims of domestic violence in Myanmar in accordance with international standards sanctioning domestic violence;
- To recognize that domestic violence constitutes a serious crime against the individual and society, which will not be excused or tolerated;
- To give a wide range of flexible and speedy remedies to victims of domestic violence and to enforce the legal action against the perpetrators;
- To monitor and evaluate whether the provisions of domestic violence legislations are really enforceable or not.

Accordingly, this research will explore the legal responses practiced in the developed countries such as the United Kingdom and Japan in order to constitute a model legal practice for Myanmar. I have chosen this subject as a topic of Ph.D. dissertation for the following reasons;

Firstly, the main objective of this research is an endeavor to create a suitable legal environment for victims of domestic violence in Myanmar, especially to those vulnerable women and children, by providing effective legal remedies. Many countries, like the United Kingdom and Japan, formally linked to tradition and structured on patriarchy, have made significant progress in combating domestic violence. They are continuously also trying to uncover better ways to fight against it all the time.

Secondly, the misconception of domestic violence must be changed in order to fully achieve the rights of women. It has to be recognized that domestic violence constitutes a serious crime against the individual and society, which will not be excused or tolerated for any reason. It is important to look beyond the cultural context and identify casual factors of violence. It should be beyond dispute that violence against individuals which is not acceptable regardless of class, creed or culture. The notion that violence against women is tolerable in order to maintain the family unit is misguided. The governments must create high-level political commitment to implementing CEDAW, and to develop technical expertise to fulfill their CEDAW obligations. The primary goal of criminal justice agencies in ending the violence recognizes the impact that domestic violence has on the victims of the crime and treats it as a crime of violence. This attitude of "zero tolerance" towards domestic violence is the most effective of the community as involved a whole.

Thirdly, the relevant legal responses practiced in the United Kingdom and Japan are to be explored in order to constitute a model for state practice by Myanmar. Whether the laws in the UK and Japan create a wide range of flexible and speedy remedies are also to be investigated. The following are some reasons to choose these countries as the model legal practices for Myanmar. Looking at the last 20 to 30 years, there have been enormous gains in these countries in the direction of making violence against women, and domestic violence, more visible and less publicly acceptable. The respective Domestic Violence laws in both countries tend more and more to provide remedies to the

victims and to take proper legal action upon the perpetrators. It is evident that the people keep their trust on the applicability of law. These practices on how the public awareness is raised should be adapted for the interest of Myanmar.

Finally, to point out that it is critical to hold states accountable for monitoring and evaluation of the implementation of domestic violence laws, in adhering to legal obligations, to allow for the compilation of best practices, and the identification of loopholes in the law. The primary goal of any monitoring exercise is to examine whether the incidence of domestic violence has decreased with the effective enforcement of laws.

There are numerous approaches in handling domestic violence issues, such as social, health and economic perspectives. Whatever different approaches exist, there is no doubt that legal response or handling the domestic cases by legal ways and means plays a vital role. The perpetrators must be punished for their commitment of violence under the law. At the same time, the victims must be protected by all means. Although the attitude of individuals and the community constitute a crucial role in combating human rights violation, the legal response to control upon each and individual's behavior is one of the effective ways to reduce the future perpetrations of domestic violence. It is hoped that this research will in the future contribute to the enactment for prevention of domestic violent crime in Myanmar. By analyzing the practices in the UK and Japan, as well the norms and standards of international legal instruments though not discussed in detail in this study, steps that should be taken for Myanmar to address the problem will be more accentuated and efforts will be made toward making change and hopefully also in very diverse cultural settings in different parts of the world.

1.4. Statement of the Problem

In order to systematically carry out activities for the advancement of women, the Myanmar National Committee for Women's Affairs (MNCWA) was established on 3 July 1996. In August 1997, the Committee adopted the National Action Plan and identified six critical areas that are considered to be the most relevant for the advancement of women. Violence against women, girl-child included one of its areas. The Sub committee on violence against women carried out a base-line study of marital violence in the country. The findings of a study in two townships revealed that marital

violence exists; as per the government the magnitude is not very great.²² However recent study reveals the fact that domestic violence seems to be hidden and that it occurs to some extent.

In Myanmar, both the police and the prosecutors feel reluctant to intervene into family disputes even in cases where it has already developed to domestic violence. Intervention by arrest and prosecution seldom takes place unless a serious consequence such as death or serious bodily injury has resulted. In most cases, the police forces are the first official agency to whom victims of domestic violence turn for help. They frequently refrain, however, from interfering in family disputes, based on the excuse that domestic violence is a private matter which is best settled within a family, or a women's matter that should be dealt with by the women's affairs associations which are non-governmental organizations without any law enforcement powers. The public prosecutors or legal officers share the same attitude and are further restrained by the legislative restrictions in making prosecution decisions. Likewise, judges tend to view domestic violence as a family problem. Very often, battered wives' cases do not end in prosecutions as the police usually advise people to solve their problems peacefully and without official involvement. Even when they end up in court, offenders are likely to receive a light sentence.

Due to insufficient legal protection, the victims of domestic violence in Myanmar seldom prosecute offenders criminally. They usually rely on civil protection, file for divorce decree at their end of tolerance. A study made in one court reveals that the rate of criminal prosecution for domestic violence offence is rather low while the filing for divorce on the grounds of domestic violence was increasing.*

The Myanmar government states that there are few reported cases of rape or sexual assault and the existing laws protect women and children; the penalty for sexual abuse and rape is very heavy punishment, even up to imprisonment for life.²³ However, these provisions mostly deal with the crimes committed by a third party. Moreover, the

²² .Consideration of reports submitted by state parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Initial Report submitted by Myanmar to the Committee on the Elimination of Discrimination against Women (CEDAW) on 25 June 1999, CEDAW/C/MMR/1

*The data and facts about this study are mentioned in detail in Chapter 6 of this paper: "Legal Protection and Response of Domestic Violence in Myanmar"

²³ . CEDAW Reports, *supra* note. 22

absence of reporting the crime of domestic violence does not mean to “no incidence” actually. There is no provision for domestic violence in the penal code or any other existing laws. Similarly, when domestic violence occurs in a family, protection order of any kind is available for victims as a temporary protection under civil law.

There is an urgent need for Myanmar to establish a system of legal protection for victims of domestic violence. This can be done by reviewing laws to deal with the issue and in addition to proposing specialized legislation targeted at the control and prevention of domestic violence. The combination of these measures can provide a comprehensive legislative framework to fight the epidemic of domestic violence in Myanmar. In the regard, foreign experience provides valuable guidance for Myanmar as it seeks to review existing laws to deal with domestic violence in a more effective and comprehensive manner.

1.5. Scope and Limitations of the Research

In this research, exclusively facts and data about violence against women by perpetrated men have been chosen. Adversely, the violence against men by women is also explained as a part of my study though it is not a major role in the study. It is not an intentional attempt to ignore or diminish the existence of this problem among men or women or in same sex relationships. Moreover, the studies have shown that the majority of the perpetrators of domestic violence are males with females being their primary victims. As a result, more focus is placed on women as the victims of domestic violence rather than on men.

Policies and legislations aimed at the eradication of domestic violence have been put into practice in various forms in several societies. In this study, however, it is to be emphasized on the legal systems practiced in the United Kingdom and Japan and the lessons learned from their practices are to be used for the interest of Myanmar. Although there are many measures to combat domestic violence, this study is especially made from legal point of view. For commitments and discussions, as far as possible specific and concrete explanations are used. In order to restrict the scope of this study instead of trying to cover all aspects, only the legal protection and responses for domestic violence were carried out.

1.6. Research Methodology

This paper examines legal response to domestic violence, encompassing the full range of decisions makers within the legal system to analyze developments in substantive law and practice, in particular the movement towards an integrated justice approach. It then identifies the nature and extent of the domestic violence in the United Kingdom and Japan and how the legal systems respond to the problem. These comparisons are made between the two countries in order to try to find out the most suitable ways for handling domestic violence cases in Myanmar, which lack legislative experience for domestic violence.

The study firstly looked into reliable data sources from the respective countries. For the United Kingdom and Japan, the data are available from reliable sources through internet and books. In order to make more accurate data and facts in Japan, interviews were made with concerned authorities dealing with domestic violence cases in Niigata Prefecture. The researcher found that it was not possible to get the available data for domestic violence cases in Myanmar apart from some studies made by one researcher prior to this study. Therefore, one of the courts in Myanmar which is currently dealing with domestic violence related cases was selected for the survey of domestic violence cases. The facts and figures relating to domestic violence cases filed to the court were collected for a four-year period from 2006 to 2009. As it was not possible to interviewing with respective persons involved in the cases, the researcher used only data analyzing method as to how the domestic violence problem is solved in the courts in Myanmar.

This paper mainly based on the enacted laws and international instruments officially recognized by the respective governments and organizations. Fortunately, most of the laws and instruments were available in English. The data and facts collected from governments' reliable web-sites were very helpful for this study. Then, many legal texts written by prominent authors in the field of domestic violence were read and their points of view were taken into account in approaching the issue of domestic violence.

1.7. The Structure of the Research

The thesis consists of 8 chapters. Chapter 1 begins with introduction and background of domestic violence which mainly focuses on important international legal

instruments relating to human rights and violence against women. The linkage between the international movements and Myanmar is also briefly stated. Then it explains the perspective of the domestic violence being based on attitudes regarding domestic violence under some major religions. And, the objectives of the research, the scope and limitation, methodology and an overview of research chapters will be mentioned as briefly.

In chapter 2, literature review over domestic violence is explained including the main types of domestic violence. As there have been a few theories put forward to help explain the causes of domestic violence, theories on domestic violence, such as psychological theory, sociological theory, feminist theory and cycle of violence theory will be touched in some points.

In Chapter 3, the causes of domestic violence are firstly examined including individual causes and social and cultural causes. Despite the fact that most of the victims of violence are women and children, men and other family members may become the victims in some situations. Thus, it will also discuss about the consequences of domestic violence which includes directly or indirectly effects, on women, children, men, other family members and society.

Chapter 4 will describe the research positions which exist for legal protection and response of domestic violence in the United Kingdom. Perceptions and current situations of domestic violence should be studied first to understand the real nature of it. Which kinds of factors contribute to domestic violence are also to be learnt. As the government of the United Kingdom recognized the violence as an enormous social problem, how its legislative measures, the police, and prosecution respond to the problem are significant factors of this research. Especially, setting up the Specialist Domestic Violence Courts which are significant steps towards solving special features of domestic will be studied in the chapter.

Chapter 5 will be concerned with the legal protection and response to domestic violence in Japan. The problem of domestic violence has gradually been acknowledged as a serious problem, national and local government responses have just begun. Thus, the perceptions and current situations of domestic violence will be discussed the same thing as per the previous chapter. The role of legislative, the police, the prosecution and court

procedures are also to be examined in this chapter. It will also focus on available remedies, such as divorce, custody proceeding and issuing protection orders for the victims.

In Chapter 6, legal protection and response of domestic violence in Myanmar will be discussed. Currently, the present legal framework provides no specific measures to prevent domestic violence, the perceptions and current situations will be studied in order to assessing the real state of the domestic violence problem in Myanmar. The available laws for the rights of the women will be examined. How the police respond to this problem and how prosecution regard the problem will be studied. To clarify the current situation of domestic violence, a case study is made on the data and fact collected from one of the courts in Myanmar.

Chapter 7 will be the most significant chapter. It will be the main theme of the study and will analyze the legal responses on domestic violence practicing in the United Kingdom and Japan. This chapter mainly focuses on their respective laws promulgated for combating domestic violence. Some points are highlighted in this chapter, what similarities and differences exist between them; and what advantages and disadvantages can conclude from these findings.

Chapter 8 will be the final chapter where it will try to evidence out the major findings from this research. How the legal obligations to combat domestic violence are binding on the states are discussed. The lack of law in Myanmar for domestic violence issue in the ASEAN region is also highlighted. The future necessities of a law in Myanmar for combating domestic violence are stated for which particulars need to be fulfilled or when it is enacted on.

Chapter II

Literature Review

This review grows out of a larger study to examine the general definitions, types and theories of domestic violence and it is social-legal in approach and draws upon the sociological and legal literature pertaining to domestic violence globally. Domestic violence implies destruction, anger and pain; while family suggests the qualities of caring, love and joy. It occur at all family levels. Many female victims of domestic violence become victims of their own choice. There are various types of domestic violence situations and theories abound regarding the negative and social and economic consequences of domestic violence.

The area of domestic violence research is a rather young endeavor and a literature review on domestic violence can contain a vast amount of new research. However, the amount of data available is relatively small given the severity and intensity of this social problem. Although domestic violence may include various types of combination of victims, the majority of the literature review that limits to focus on violence against women committed by men within the context of marriage, or in other words, spousal violence. However, in much of the recent literature, there are references to this type of violence as “partner violence”, which also includes violence between intimate couples who are not necessarily married or who are the opposite gender.

2.1. Definition of Domestic Violence

The literature refers to term domestic violence from a variety of descriptions. Some researchers use the term “battering” while others use “violence” or “abuse”. Similarly, the term “domestic violence”, “domestic abuse”, “domestic assault”, “intimate partner violence”, “partner abuse”, “family violence”, “martial dispute”, “wife beating”, “spouse abuse”, and “battering” are often used interchangeably.²⁴ The variety of terms often leads to confusion and controversy regarding meaning and implication.

²⁴ . Margi Larid McCue, *Domestic Violence: A Reference Handbook*, 2nd ed., Contemporary World Series, ABC-CLIO Ltd, 2008, p.2-3

“Domestic” identifies the setting of the act, that is, in a marital or intimate cohabiting relationship, in the home. “Violence” is used because this is not a question of minor arguments or “disputes” but, rather, intentional, hostile, and aggressive physical or psychological acts. Although incidents of domestic violence certainly vary in magnitude and frequency, they are nonetheless violent acts perpetrated on a partner in relationship, in the presumed safety and privacy of the home.²⁵

The term violence is misunderstood by many people. They tend to identify violence as only murder or homicide and serious physical assault. However, violence also consists of pushing, shoving, grabbing, slapping, intimidating, name-calling, physical or emotional threats, and sex without consent of the spouse or partner. According to *Webster’s Seventh New Collegiate Dictionary*, the meaning of violence is “exertion of physical force so as to injure or abuse, an instance of violence treatment or procedure, injury by or as if by distortion, infringement, or profanation; intense turbulent or furious often destructive action or force”.²⁶

Many researchers regard such violence as a problem of both sexes, and they agree that domestic violence is gender neutral in definition and reality. Some researchers limit their examination to incidents of physical aggression, whereas others include sexual assault and still other attempt to incorporate components of psychological and emotional abuse.²⁷ Common to all definitions of domestic violence used by some legal professionals is “a pattern of coercive behavior used by one person to control and subordinate another in an intimate relationship”. These behaviors include physical, sexual, emotional and economic abuse.²⁸ Since such acts occur in the privacy of the home, any definition largely depends on the description of this behavior by the victim, the perpetrator, and to a lesser degree, the police, the social service worker, or the medical professional. Moreover, concepts such as the legitimate use of power are culturally determined, and so those people who determine which acts are, in fact violence must reflect their societal biases.²⁹

²⁵ . Albert R. Roberts, *Helping Battered Women: New Perspective and Remedies* , Oxford University Press, Inc., 1996, p.68.

²⁶ . Mangal Dan Dipty, *The Three Dimensions of Domestic Violence*, Tate Publishing, LLC, 2009, p.23

²⁷ . Albert R. Roberts, *supra* note 25, p.68

²⁸ . Margi Larid McCue, *supra* note 24, p.3

²⁹ . Albert R. Roberts, *supra* note 25, p.68

Mostly, domestic violence or violence at home is a hidden problem. Protected by the privacy of the family, the institution of marriage has been viewed as a license to document and quantify, there is general consensus on several facts. The manifestations of this violence run the gamut of physical behaviors from slaps and pushes to stabbing and shooting, and they frequently include verbal, emotional, psychological, and sexual abuse.³⁰ Many people do not have a good understand well about domestic violence. Some think that it is a private family matter that occurs among uneducated minorities. Some believe that it only happens in the people who are in unsound mind. On the contrary, it occurs with people of all races, ethnicities, religious, and social and economic backgrounds in our society.³¹ The batterers come from all professional backgrounds, including laborers, doctors, law-enforcement officers, educators, plumbers, managers, business owners, ministers, professional athletes, movie stars, and more.³²

Domestic violence many times begins as an isolated abusive incident, but when the abuse is repeated and forms a pattern of reoccurring abuse. As the frequency of violent episodes increases, they become more severe. Likewise, the longer that violence continues over months and years the more serious and dangerous it becomes.³³ Perpetrators generally use multiple forms of abusive behavior to dominate their partners, particularly through the use, or threat of, sexual and physical violence. The uses of these abusive behaviors result from traditional beliefs of male superiority and privilege. Therefore, men believe that they have right to impose their will and expect servitude from their female partner.³⁴

2.2. Types of Domestic Violence

Domestic violence is not a one-time accident. Actually, it is a complex system of abuse. Among the various types domestic violence, they may be categorized mainly as physical, psychological, sexual and economic abuse. Many times all four occur in the same relationship; but, sometimes only one kind of abuse may be occurring. However, emotional abuse comes along with every kind of abuse. The more frequent the violence

³⁰ . *Ibid*, p.69

³¹ . Mangal Dan Dipty, *supra* note 26, p.24

³² . *Ibid*.

³³ . Margi Larid McCue, *supra* note 24, p.3

³⁴ . Mike Wilson, *Domestic Violence: Opposing View Points* , Greenhaven Press, 2009, p.77

happens, the more severe the violence's nature. Likewise, the longer that violence continues over months and years, the more serious and dangerous it becomes. In other words, over time situations many progress from verbal abuse to frequent punching to using weapons.³⁵

2.2.1. Physical Violence

Physical violence includes acts that are perceived as having the intention of producing bodily harm or injury.³⁶ It is any use of size, strength, or presence to hurt or control someone else.³⁷ When abuse crosses the line into overt violence, it may begin with relatively "minor" assaults, such as painful pinching or squeezing. As the abuse is repeated, however, it grows more violent and many times becomes directed to a part of the body, such as the torso, where the injuries are less likely to show.³⁸ Forms of physical violence include:³⁹

- Throwing an object at some one,
- Pushing, grabbing, or shoving,
- Slapping,
- Kicking, biting, or hitting,
- Trying to hit with something,
- Beating,
- Choking,
- Threatening with a knife or gun, or some other dangerous objects,
- Causes permanently disabling or disfiguring injuries and finally murders

All physical violence may or may not go under this pattern of gradual escalation. Some violence may happen quickly to the last step, without going through the steps in between. For example, if a man believes strongly in his role as the head of the family and maintains control over his household through emotional means, he might feel great fear if he perceives a threat to his control, because it threatens his manhood. This perceived

³⁵ . Margi Larid McCue, *supra* note 24, p.6

³⁶ . Nancy A. Crowell and Ann W. Burgess, *Understanding Violence against Women*, National academy press, 1996, p.14

³⁷ . K.J. Wilson, *When Violence at Home: A Comprehensive Guide to Understanding and Ending Domestic Abuse*, Hunter House Inc., 2nd ed., 2006, p.9.

³⁸ . Margi Larid McCue, *supra* note 24, p.8

³⁹ . Nancy A. Crowell and Ann W. Burgess, *supra* note 36, p.14

threat can trigger an act of violence that seems to occur unexpectedly. In such cases, the batterer feels he must bring the situation back to “normal”—regaining his rightful place at the head of the family. The violence can be directed at his partner or at the children if any of them challenge his control. In looking back, battered women who suffer what seems to be unexpected violence usually recognize that there were warning signs, which they might have seen if they had only understood the dynamics of domestic violence.

2.2.2. Psychological Violence

Psychological violence is any use of words, voice, action, or lack of action meant to control, hurt, or demean another person. This type of abuse is usually harder to define than physical abuse. While some emotionally abusive relationships do not involve physical abuse, all physically abusive relationships contain some emotional abuse. One of the dangers of this type of abuse is that it is frequently subtle and insidious.⁴⁰ The following categories of behavior can be described as psychological violence:⁴¹

- Verbal attacks such as ridicule, verbal harassment, and name calling, designed to make the women believe she is not worthwhile in order to keep her under the control of the abuser,
- Isolation that separates a woman from her social support networks or denies her access to finances and other resources,
- Extreme jealousy or passiveness, such as excessive monitoring of her behavior, repeated accusations of infidelity, and having control over whom she had contact,
- Verbal threats of abuse, harm, or torture directed at the woman herself or at her family, children, or friends,
- Repeated threats of abandonment, divorce, or of initiating an affair if the woman does not comply with the abuser’s wishes, and
- Damage or destruction of the woman’s personal property.

All of the acts described show how the perpetrators wish to control the women they abuse. This kind of violence consists of insults and humiliation, purposeful

⁴⁰ . K.J. Wilson, *supra* note 37, p.11

⁴¹ . Nancy A. Crowell and Ann W. Burgess, *supra* note 36, pp.15-16

distancing of the woman from friends, family and all potential sources of external help. The men exert extraordinary control over the women's behavior, thoughts, feelings, what she wore, where she went, whom she saw, as well as over the family's resources. They constantly humiliate and diminish and tell that they are dirty and ugly, that they smell. These kinds of violence seem to be obvious as psychological violence. On the other hand, isolating victims by not allowing them to work and controlling their contact with the outside world seems common to all the research in this area⁴². Such isolation creates economic dependency, making it difficult for the victim to leave, and, in the men's eye, 'justifies' the treatment of the women as his property. Perhaps, pathological sexual jealousy is seen as the most dangerous example of psychological violence because male sexual jealousy often leads to serious spousal violence. This kind of violence, sexual jealousy, will be discussed in the later chapter in detail under the causes of domestic violence.

2.2.3. Sexual Abuse

Sexual abuse consists of having sex with the partner by use of physical force, threats, intimidation, manipulation, or putting pressure on the person to perform any sexual act against one's will. Sex is defined as any contact with any part of another's body that is considered by the victim to be sexual organ or sexually erotic part of the body.⁴³ It includes sexual control of reproductive rights and any form of sexual manipulation carried out by a perpetrator who intends to or perceived to intend to cause emotional, sexual, and physical degradation to another person. It includes repeatedly using demeaning sexual language, minimizing or ignoring a partner's feelings about sex, or making humiliating comments about a partner's body.⁴⁴ Forms of sexual abuse include but are not limited to:⁴⁵

- Unwanted touching
- Sexual name calling
- Unfaithfulness

⁴². Deborah Lockton & Richard Ward, *Domestic Violence*, Cavendish Publishing Ltd., 1997, p.17

⁴³. Mangal Dan Dipty, *supra* note 26, p.24

⁴⁴. Barrie Levy, *Women and Violence*, seal Press, 2008, p. 5

⁴⁵. K.J. Wilson, *supra* note 37, pp.13-14

- False accusations about infidelity
- Withholding sex
- Assaulting breasts or genitals
- Forced sex with partner
- Forced sex with someone other than partner
- Forcing partner to strip
- Forcing partner to watch others have sex
- Rape with an object
- Unwanted sadistic sexual acts
- Engaging in a violent sex act

Domestic violence is often manifested not only in physical assault but sexual violence as well. It means that physical violence is often associated with sexual violence. Even where an allegation of a criminal offence for non-consensual intercourse or force sexual acts other than intercourse has been made under the law, a conviction would be difficult to obtain because the victims are generally reluctant to class this in the same category as other forms of sexual abuse. Where the forced acts are accompanied by threats and violence, it is more difficult to show consent. Non-consensual sex is another form of violent abuse which has nothing to do with passion. Likewise, forced sexual activity is an assertion of power and control. Actually, sexual abuse is associated with much higher levels of psychological disturbance than other forms of violence.

2.2.4. Economic Abuse

Economic abuse is the use or misuse of the financial or monetary resources of the partner or of the partnership without the partner's free consent.⁴⁶ It can consist of controlling or restricting a partner to access of money by hiding assets and bank accounts, depriving access to financial resources, or by letting the partner suffer without food or daily necessities. Economic abuse includes but is not limited to:⁴⁷

- Forcing the victim to give his or her paycheck and not allowing him or her to spend any of it

⁴⁶ .Joye Brennfleck Shannon, *Domestic Violence Sourcebook*, Health Reference Series, 3rd.ed., ed., Omnigraphics Inc., 2009, p.234

⁴⁷ .Mangal Dan Dipty, *supra* note 26, p.29

- Withholding funds and giving allowance to the victim if asked
- Making the victim beg for money
- Forcing the victim to stay home
- Discouraging the victim from seeking gainful employment
- Keeping the victim totally dependent on the batterer

Among the types of domestic violence, the economic abuse is also gentle and hardly to grasp like psychological violence. Thus its usage is used as 'abuse' instead of using 'violence'. In this type, even the abuser may not notice that he is making abuse his partner. He may probably think that it is such a discipline on household matters. Such kind of violence is mostly seen in the eastern society in which the husbands are taking responsibility for daily expenses for his family. Sometimes, this kind of abuse is relating to psychological violence. For example, social isolation creates economic dependency, making it difficult for the victim to leave.

In the types of domestic violence, it is found out that only singular pattern is hardly running for it. They interlink each other. When physical violence happens, psychological violence may occur more or less for victims. Sexual violence mostly includes with physical and psychological violence. And economic abuse may be the root of other kinds of violence. Among them, the physical violence is easy to see. What is not easy to see, however, is the psychological violence and economic abuse. As for sexual violence, the victims are not much easy to prove that the acts have taken place in the situations where the wife had consented in the past. Even where an allegation of a criminal offence for sexual violence had been made, a conviction would be difficult to obtain for perpetrators.

2.3. Theories on Domestic Violence

There are many different theories as to the causes of domestic violence. Some of these theories address why men batter, others attempt to explain why women stay in abusive relationships, and some try to explain both phenomena. Studies have been undertaken within a variety of disciplines, each guided by a distinct theoretical perspective. As an in-depth analysis is beyond the scope of this thesis, an overview of these theories will be provided.

2.3.1. Psychological Theory

A number of theorists and researchers have considered various psychological factors and their relation to battering. Psychological theories and perspectives of domestic violence have inferred that domestic violence is the result of childhood experiences (e.g., being abused as child); personality traits (e.g., high need for power); personality disturbances (e.g., borderline personality disorder); head injury; psychopathology (e.g., antisocial personality disorder); or other psychological disorders or problems such as posttraumatic stress disorder, poor impulse control, poor self-esteem, or substance abuse. Other researchers and writers have focused on domestic violence perpetrators' feelings of low personal control or desire to maintain or regain control as causes of battering.⁴⁸

O'Leary (1993) argued that the value of such psychological explanations "has been both empirically and conceptually validated".⁴⁹ Gondolf and Fisher (1988) describe the process of "learned helplessness" affecting the victim in abusive relationships. They suggest that the negative intermittent reinforcement of the punishment or abuse leads the battered victim into a state of submissive passivity. The abuse lessens the woman's sense of control, and she may internalize blame or simply stop struggling to extricate herself from the abuse.

Dutton and Painter (1993) examined the construction of strong emotional attachments developed in violent intimate relationships. They posited "the development of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses, or intimidates the other". Such relationships are characterized by a power imbalance perceived by the victim and intermittent flare-ups of abuse, conditions deemed necessary for traumatic bonding.⁵⁰

Dotton (1994) suggests that traumatic bonding theory clarifies why some women repeatedly return to abusive partners. When the victim leaves the abusive situation, her fears for her safety begin to decrease and her underlying attachment to her abuser

⁴⁸ .Mary P. Brewster, *Domestic Violence Theories, Research, and Practice Implications* , In: Albert R. Roberts, *Handbook of Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies*, Oxford University Press, 2002, pp.25-26

⁴⁹ .K Daniel O'Leary, *Through a Psychological Lens: Personality Traits, Personality Disorders, and Levels of Violence*, In: Richard J. Gelles & Donileen R. Loseke (Eds), *Current Controversies on Family Violence*, Sage Publications, Inc., 2005, p.27

⁵⁰ .Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspective* , Allyn & Bacon, 1988, P.27

manifests itself. Her vulnerability predisposes her to want the affection present, by virtue of the intermittent nature of the abuse, in her relationship with her abuser. Therefore, she may suddenly choose to return to her abusive partner.⁵¹

2.3.2. Sociological Theories

Sociological theories that have attempted to explain domestic violence include family systems theory, social learning theory, resource theory, and exchange theory. Proponents of the family systems model of intimate partner violence propose that all family members play a role in the “construction and maintenance of a system of violence and that violent behavior is transmitted from generation to generation”. According to this model, a battered partner remains in the abusive situation because of the system’s resistance to change and need to maintain balance. The couple involved in domestic violence is caught in a cycle of violence.⁵²

Another sociological theory that has been applied to battering is social learning theory, which is based on the premise that people learn behavior through watching others and modeling their behavior. Several scholars have written about the intergenerational transmission of domestic violence based on social learning theory. Research has suggested that those who witnessed marital violence in their families of origin are more likely to experience intimate partner violence themselves. For example, male exposed to violence in their families of origin were more likely to become perpetrators of domestic violence, whereas females who observed violence in their families of origin were likely to be subjected to their partners’ aggression.⁵³ Violence in one’s family of origin has consistently been correlated with battering perpetration and victimization.

Moreover, social learning theory posits that domestic violence arises due to a constellation of contextual and situational factors (O’Leary, 1988). Key contextual factors include individual characteristics, couple characteristics, and societal characteristics, such as stress, violence in the family, and an aggressive personality.

⁵¹ . Albert R. Roberts, *supra* note 25, p.72

⁵² . Mary P. Brewster, *supra* note 48, pp.26.27

⁵³ . Margi Larid McCue, *supra* note 24, p.13

Situational factors such as substance abuse or financial difficulties, will lead to violence.⁵⁴

Resource theory and exchange theory are two other fairly popular sociological explanations of domestic violence. Resource theory is based on the assumption that force or the threat of force is inherent in all social systems. Those with greater resources (e.g., income, property, social contacts, prestige) have greater force or decision-making power. Men typically have the advantage of greater financial resources, resulting in their female partners being more vulnerable. On the other hand, those with few personal, economic, or social resources may resort to violence as a way to dominate or control others.⁵⁵

Exchange theory, on the other hand, draws on behavioral psychology and is based on costs and benefits. As in any exchange relationship, partners in an intimate relationship provide each other with services and/or benefits. Each partner continues to provide the other with desired affection, money, love, sex, and so forth, as long as the partner reciprocates with something that is as desirable (e.g., appreciation, praise, love). Over time, one partner may use force to get what he wants from the other. If he suffers no legal or other negative consequences, the violent partner perceives violence as a beneficial and effective tactic to get whatever he desires from his partner. The partner not only has avoided punishment for his actions but also may be rewarded for his behavior through his partner's compliance. Similarly, abused women may comply with their partners' desires to avoid being beaten. According to exchange theory, behavior can be molded through rewards and punishments by others. Battered women may seek to avoid punishment (i.e., violence) by complying or staying in an abusive relationship to avoid possible death as threatened by her partner. If kindness is shown by her typically abusive partner, this, too, reinforces her behavior. The rare display of kindness becomes a valuable reinforce to the abused woman, and she may be compliant in the hope of gaining that reward.⁵⁶

⁵⁴ . Sana Loue, *Intimate Partner Violence, Societal, Medical, Legal, and Individual Responses* , Kluwer Academic Publishers, 2002, p.32

⁵⁵ . Mary P. Brewster ,*supra* note 48, p.28

⁵⁶ . *Ibid*, pp.28-29

2.3.3. Feminist Theory

According to feminist theory, the main factors that contribute to violence against women include historically male-dominated social structures and socialization practices teaching men and women gender-specific roles. Feminists have analyzed dynamics of oppression and the intersection of gender, race and class to explain that the institutionalization of violence against women in political, legal, and economic systems makes it invisible and acceptable. Feminist research has focused on women's stories of their own survival, victimization, and fears as the major source of information about gendered violence, and it has confronted gender bias reflects patriarchal social attitudes.⁵⁷

Subsequently, violent behaviors in men towards their partners occur due to the way in which males are socialized to behave in certain ways (aggressive, competitive, powerful and masculine). These acceptable positions of power by society are argued to also filter into the family sphere. Feminists argue that society expects men to be 'head of the household' in terms of earning and controlling the family income, directing decisions and authority. By societal reinforcement of these beliefs the use of violent behavior to control women in relationships is legitimized.⁵⁸ According to the feminist model, this imbalance of power within gender relationships is supported through socialization influences. Melville (1994) is explaining here the social formation of ascribed tendencies between males and females (competitiveness, aggressiveness, nurturing and caring respectively). This is evidenced amongst typical gender distinguished roles, such as sport and managerial roles for men and domestic (nurturing, rearing) duties for women.⁵⁹

Moreover, domestic violence from a feminist perspective also focuses on the relationship between cultural ideology of male dominance and structural forces that limit women's access to resources.⁶⁰ Thus, violence against women becomes a method used by men to maintain social control and power over women and therefore is a result of the subordinate position women occupy in the social structure. This subordination is the cultural legacy of the traditional family. In other words, violence against women is one

⁵⁷. Barrie Levy, *supra* note 44, p. 21

⁵⁸. Kaye Healy, *Violence in the Family: Issues in Society*, Spinney Press, 1998, p.13

⁵⁹. Patricia Esteal, *Violence Against Women in the Home: How Far Have We Come? How Far to Go?* *Family Matters*, No.37, 1994, pp. 86-93.

⁶⁰. Margi Larid McCue, *supra* note 24, p.15

manifestation of a system of male dominance that has existed historically and across cultures.

2.3.4. Cycle of Violence Theory

Domestic violence increases in frequency and severity. It is never an isolated incident or a one-time occurrence and follows a cycle that repeats itself continually which is difficult to break. The “cycle of violence” theory explains how and why the behavior of a person commits the violence may change so dramatically over time. It also provides an understanding to why the person affected by domestic and family violence continues to face a violent situation.

The cycle of violence is a term used to describe the pattern of violence that occurs in an abusive relationship. It may never stop. Most victims are caught in a cycle of violence. It does happen again, and sometimes it is worse. This cycle can take varied periods of time, but tends to speed up the longer the relationship lasts. Dr. Walker⁶¹ found that there are three phases the couple goes through over and over, in a circular pattern. Those are the tension-building phase, the acute battering incident phase, and the honeymoon phase. Theory helps to understand the women’s experience.⁶²

According to Dr. Walker, a spouse becomes edgy, critical, and irritable in the tension-building phase. This stage may last from a few days to a period of years. Usually, both spouses can sense the impending loss of control and become desperate, which only fuels the tension. During the tension building phase, the aggressor expresses dissatisfaction and hostility. The woman tries to appease him; she attempts to please him and to avoid aggravating him. She tries not to respond to this hostile action and uses general anger techniques. Often she succeeds for a little while which reinforces her unrealistic belief that she can control this man.⁶³ Though she may be hurt, the victim does not recognize what she is experiencing as abusive. She sees the incident as isolated. The idea of leaving the relationship is unlikely at the stage.

⁶¹ .Dr. Walker has been one of the pioneers in the study of domestic violence. She has authored many books on domestic violence, including several editions of “*The Battered Women*”. One of e her most famous discoveries is the cycle of violence.

⁶² . Mary P. Brewster, *supra* note 48, p.31

⁶³ . Lenore E.A. Walker, *The Battered Woman Syndrome* , Springer Publishing Company, Inc., 1984, p.95

Then the second stage comes and the violent outburst occurs with acute battering. During this period, anything can be the catalysts for the explosion. Often the man will fly into a rage and become violent. They often turn on anyone who intervenes. The batterer “unleashes a barrage of verbal and physical aggression that can leave the woman severely shaken and injured.”⁶⁴ There may or may not be an incident that sets the batterer off, compounding the situation. Typically the first sign of physical injuries occur at this time.

Then the phase three of loving contrition comes after the brutality. It is a period of profound relief for both partners. The man is remorse and apologetic, or, at the very least, nonviolent. He may beg forgiveness, swear it will never happen again, and go out of his way to be kind, tranquil, and loving. He will often promise to change, bring his wife gifts, and shower her with attention and romantic gestures. Here there is a great deal about why women stay with abusers. The woman may also believe that this really will be the last time and her partner will change. But unless something changes—such as intervention by someone outside the home—the cycle will start again.⁶⁵ In this way the violence continues among the spouses. However, the cycle differs for each perpetrator in relation to the time length of the overall abuse and the time length of each stage. Moreover, the process can be inconsistent, claiming that it is not uncommon for the perpetrator to stay continually in the ‘tension’ and ‘incident’ stages. In addition, the stage of ‘making-up’ with the victim and being ‘clam’ about the situation usually diminish over time.

The above theories try to find a cause and thus an explanation for domestic violence. It has already been noted that many of the theories isolate the same factors, while grafting those factors into different models. What all of these theories demonstrate, however, is that there is no one sole cause, one single factor nor one ideal model which adequately explains the reason for the extent of domestic violence across the whole spectrum of society today. Thus, to develop a cogent theory of the causes of domestic violence, we need to integrate and define the interplay between the social, psychological, physiological factors.

⁶⁴ . *Ibid*, p.96

⁶⁵ .Dawn Bradley Berry, *The Domestic Violence Sourcebook: Everything You Need To Know About*, McGraw-Hill Companies, Inc., 2000, pp. 36-37

2.4. Summary

There are several names for domestic violence. In these names, 'spousal violence' and 'intimate partner violence' are relatively recent terms introduced in an attempt to include all violence against an intimate partner, regardless of marital status, and to exclude other forms of violence, such as child abuse, elder abuse. Various definitions for domestic violence have been made by the United Nations, conventions, scholars and researchers. There is no universally accepted definition up to now. Generally, it may be defined as a pattern of coercive and controlling behavior and tactics used by one person over another to gain power and control in an intimate relationship.

Domestic violence includes physical, psychological, sexual and economic abuse. Many times all four occur in the same relationship; however, sometimes only one kind of abuse may be occurring. In most cases, whenever any kind of abuse occurs, emotional or psychological abuse is present. The longer the violence happens, the more severe the violence's nature. The violence may occur in people of all races and class.

Many theories have existed and evolved over time to attempt to grasp the reasons for domestic violence in human society. On the individual level, different theories that integrate more psychological and sociological perspectives exist. Under feminist theory, domestic violence is attributed to a flaw in societal structure rather than to any specific individual male pathology. The cycle of violence theory states the repeated nature of the violence when it starts. All these theoretical approaches examine interpersonal and societal factors within the context of domestic violence.

Chapter III

Causes and Consequences of the Domestic Violence

The present chapter deals with the causes and consequences of domestic violence. Firstly, the causes of occurrence of the domestic violence in households have been analyzed categorically. These causes are divided into two parts, namely individual causes, and social and cultural causes. Where there are causes, there must be consequences. Then it goes to consequences of domestic violence how the domestic violence impact on different kinds of family members including society.

Before going to the causes of domestic violence in detail, some explanations are to be addressed to clarify between causes and contributing factors. There are some factors that contribute to incidents of violence though these are not direct causes. However, these factors exacerbate violence in combination with direct causes. It is important to realize that domestic violence is the combined effect of causes with contributing factors and underlying issues that leads to a bout of violence of some kind. Numerous cases studies on domestic violence, for example, cite incidents in which an intoxicated male tells his female spouse to do something and when she refuses he beats her. Alcohol in this sense can be a cause to the violence because without drinking he may not commit such act. However, it has to be noticed that not every intoxicated males are perpetrators of domestic violence. In this incidence, male's violent behavior is a contributing factor that makes a worse to the cause of alcohol consumption.

In this chapter, the common causes that may lead to domestic violence are explained. The degree of contributing factors may be different from one country to another. Such contributing factors of domestic violence that generally occur in the United Kingdom, Japan and Myanmar are discussed in the later chapters respectively.

3.1.The Causes of Domestic Violence

What are the causes of domestic violence? And when does it begin? Spousal violence can start at any stage of the relationship, even after several years into the relationship. It can also occur at any time during or after the spousal relationship. There is

no single definitive “cause” of domestic violence. There may be many different contributing factors, at the individual characteristics of the violence perpetrator, societal and cultural levels.

There are misunderstandings about the causes of domestic violence. Some people blame the victim for causing the domestic violence. Some people believe that it is the batterer’s ⁶⁶inability to control his or her anger. However, it is observed that most batterers’ records show no prior incident of losing control of their anger at public places or on their jobs. Many batterers do not have a history of violence within other except their spouses or partners. Other people think that problems such as martial, financial, or drugs and alcohol are the causes of domestic violence.

Some of the commonly cited causes of domestic violence include patriarchy and machismo; traditional, cultural and religious beliefs and practice that conferred the title of the head of household on men. However, while domestic violence may be exacerbated by particular social structures, value systems and traditions, it is rooted fundamentally in unequal power relations. Women’s lack of social status and power, accepted gender roles and reinforce their subordinate position. These assumptions cover the cause of the domestic violence. In order to understand the spousal violence, the causes of spousal violence must be identified in its nature.

3.1.1. Individual Causes of Domestic Violence

Individual causes for domestic violence can be divided into two portions here: emotional causes and economic causes. The former relates to the causes concern with the individual’s emotion, such as outlet to stress, anger, low self-esteem, sexual jealousy. It also includes conflicts and disputes over children and drug abuse and alcohol dependency. The latter is relating to the direct and indirect economic causes of domestic violence.

3.1.1.1. Emotional Causes of Domestic Violence

An emotional state of a partner is an important factor that can explain many instance of spousal violence. Sometimes, a spouse abuses his or her partner violently because he or she as individual can’t control his or her impulses or emotions. There are

⁶⁶ . Mangal Dan Dipty, *supra* note 26, pp.33-34

some situations which cause the spousal violence such as stress, anger, depression and low self-esteem, sexual jealousy, disputes over children, drug abuse and alcohol dependency and so on. Emotional cause is also relating to both economic and social or cultural causes. Without a pleasant emotion between spouses or intimate partners, they cannot build a pleasant life and they will blame each other for these. And this can result in severe violence.

3.1.1.1.1. Outlet to Stress

The family structure is one of the violent settings that a person is likely to encounter because family is a group of person who cohabit. Within this living arrangement, forces converge to causal stress. The level of stress in turn increasingly leads to high rate of violence within family. Stress may be defined as a psychological state which is the internal representation of a particular and problematic transaction between the person and their environment.⁶⁷ Stress is common to everyone. It can be caused by trouble at work pressure, loss of beloved person or pet, money problems, retirement from job, serious health problems, legal troubles, marital problems, etc. If someone experiences stress, he or she tends to responded improperly to other people. His or her relationship with others makes change and this can lead to violence if the person who is under stress fails to control it. The stress can affect anyone at any time. Many individual when stressed will become depressed and socially isolated; others are angry and physically aggressive.⁶⁸

Stress may be increased when a person is living in a family situation, with increased pressures. Stresses, due to inadequate finance or other such problem in a family may further increase tensions. Violence is not always caused by stress, but may be one way that some people respond to stress. Families and couples in poverty may be more likely to experience domestic violence, due to increased stress and conflicts about finances and other aspects.⁶⁹ Today, most the people are under stress for one reason or another because they are struggling to meet the every days needs. But, when someone is

⁶⁷ . Cary L. Cooper and Roy Payne, *Personality and Stress: Individual Differences in the Stress Process*, John Wiley & Sons Ltd, 1991, p.8

⁶⁸ . Vincent B. Van Hasselt, Randall. L. Morrison, Alan S. Bellack & Michel Hersen , *supra* note 19, p.39

⁶⁹ . Judith A. Seltzer & Debra Kalmuss, *Socialization and Stress Explanations for Spouse Abuse* , Journal of Social Force, vol.67, 1988, pp. 473-491

under stress which cannot be controlled by him, he or she is likely to cause violence as he or she is trying to find an outlet or loophole to reduce their stress.

Generally, economic circumstances play a vital role in family affairs. For instance, when a person does not have enough earning for his or her standing or family, when he or she cannot avoid some situations, such as he or she has to pay for room fee, social service costs, increasing costs of raising children as they grow older, illness, old age, he or she will certainly feel some stress.⁷⁰ In the same way, social situation such as poverty, racial and sexual discrimination or harassment, unemployment, isolation, and a lack of social all take a toll on daily quality of life.⁷¹ When they come across these social conditions, they will experience stress. Not all the stress is great or serious. But, the small amount of daily social stress may lead to violence when it produces an intolerable situation. Therefore, the social stress as well as economic stress is the problem among the individuals or family members. Without an outlet for these feelings, the stress increases, and the abuse is perpetuated.

3.1.1.1.2. Anger

Many people are unsure about the difference between 'managing' anger and violence and carry beliefs, values and labels about anger as the 'problem', rather than identifying a concern about the use of violence or abuse. Anger is a strong feeling of displeasure. The concept of anger usually refers to an emotional state that consists of feelings that vary in intensity from mild irritation or annoyance to intense anger. The synonyms of anger are ire, rage, fury, indignation, and wrath.⁷² Anger would involve a thorough battery of measurements regarding subjective feeling states, cognitive processes, physiological reactions, and expressive behavior. For example, while assessing anger via questionnaire can provide a direct assessment of subjective feeling states, it can only provide an indirect assessment of other response domains.⁷³

⁷⁰ .Richard J. Gelles & Murray A. Straus, *Intimate Violence : The Causes and Consequences of Abuse in the American Family* , Silmon & Schuster Inc. 1989, p.83

⁷¹ .Karel Kurst-Swanger & Jacqueline L. Petcosky, *Violence in the Home: Multidisciplinary Perspective* , Oxford University Press, Inc., 2003, p.38

⁷² .Michael Potegal, Gerhard Stemmler & Charles Spielberger, *International Handbook of Anger: Constituent and Concomitant Biological, Psychological, and Social Processes* , Springer + Business Media, LLC, 2010, P.401

⁷³ . Christopher M. Murphy & Christopher I. Eckhardt, *Treating the Abusive Partner: An Individualized Cognitive-Behavioral Approach* , The Guilford Press, 2005, p.103

Anger might be well understood if we could measure it with a thermometer, but unfortunately, we don't yet have one to measure it. We tend to use the word anger for all categories of harsh negative feelings. Annoyance and indignation are lesser degrees of anger, which can be less harmful to self and other. Rage and fury are higher degree of anger that can be more harmful to self and others. Ire and wrath are words for anger we seldom use in day-to-day life.⁷⁴

No one is free from anger. Being a figure of humankind, anger is not extinguishable. It is a strong emotion of displeasure. Individually, anger is a component of a personality disorder⁷⁵ or an expression being out of control. It is also said as the negative emotion. It includes negative reactions to stress, how a person experiences emotions, and a person's expectations of other people's attitudes toward the use of aggression to achieve certain ends.⁷⁶

All human beings response to other peoples verbally or in action to express their feelings of anger when they dislike a person or behavior and when they cannot control their feelings. When a spouse feels anger, he or she expresses that anger verbally and then he or she may release his or her anger physically by beating to the other. Moreover, sometimes due to such reaction may cause the victims death. Hence, anger places a major call as a factor for the domestic violence.

3.1.1.1.3. Low Self- Esteem

Self-esteem is a core identity issue, essential to personal validation and our ability to experience joy. People who have good self-esteem often express self-confidence and feel that they can accomplish the things they wish to do. However, low self-esteem has been associated with powerless and depression. Physical health suffers as well.⁷⁷ Nobody could feel well and behave in the proper manner towards other if he or she experiences low self-esteem. Especially, a spouse with low levels of self-esteem may resort to physical retaliation to maintain the appearance of control especially if the abuser is

⁷⁴ . Mangal Dan Dipty, *Supra* note 26, p.72

⁷⁵ . John Hamel & Tonia L. Nicholls, *Family Interventions in Domestic Violence: A Handbook of Gender-Inclusive Theory and Treatment*, Springer Publishing Co.,2007, p.34

⁷⁶ .Eve S.Buzawa & Carl G. Buzawa, *supra* note10, p.34

⁷⁷ .Lenore E.A. Walker, *The Battered Woman Syndrome*, 3rd ed., Springer Publishing Company, ILC, 2009, p. 155

unable to express his feelings verbally. The easiest targets of opportunity are typically family members.⁷⁸ Thus, low self-esteem is one of the principle causes of spousal violence.

3.1.1.1.4. Sexual Jealousy

Jealousy is another warning sign imbedded within romantic tradition. People expect jealousy to be a by-product of infatuation and love and often mistake it as a yardstick by which to measure affection. However, in abusive relationships, jealousy typically far exceeds the bounds of reason and, except for attempts to end the relationship, tends to underlie the most violent and life-threatening assaults. Jealousy fuels many of the intrusive behaviors described previously and contributes to the severity of retaliation for imagined misdeeds during times of physical separation or estrangement.⁷⁹

Abusive people are frequently irrationally jealous about their spouses. Abusive men monitor their wives' use of space and time, questioning all contact with other men. They are suspicious about any other man's interest in their wife, assuming exclusively sexual motives.⁸⁰ Sometimes, the women express feelings of alienation from their husbands such as feeling of worthlessness. Many women expressed that husbands constantly accused them of infidelity and adultery. On the other hand, husbands sometime doubt their own virility and question their wife's fidelity. They may discourage the wife from participating in activities outside the house.⁸¹

At the same time, men's annoyance regarding sex may be said to be an important problem possibly leading to confrontation and arguments. Three percent of the men in Violent Men Study said they had physically forced their partner to have sex, while about one quarter of the women said they had been physically forced to have sex.⁸² In reality, sexual jealousy is an indication of mistrust although an abuser says jealousy is a sign of

⁷⁸ . Eve S. Buzawa & Carl G. Buzawa, *supra* note 10, p.33

⁷⁹ . Albert P. Cardarelli, *Violence between Intimate Partners: Patterns, Causes, and Effects* , Allyn & Bacon, 1996, p.58

⁸⁰ . Donald G. Dutton, *The Abusive Personality : Violence and Control In Intimate Relationships* , 2nd ed., Guilford Press, 2007, p.58

⁸¹ . Maria Roy, *Battered women : A Psycho Sociological Study of Domestic Violence* , Van Nostrand Reinhold, 1977, p. 41

⁸² . R. Emerson Dobash Russell P. Dobash, *Rethinking Violence Against Women* , SAGE Publications, Inc, 1998, p.152

love. It is obvious that sexual jealousy can lead to quarrel between the spouses and can result in serious violence.

3.1.1.2. Conflicts and Disputes over the Children

Conflicts and disputes over children are among the main factors causing spousal violence. Some may argue that the violence between partners is not relevant to children at all that the violence even affects children. However, there are evidences that conflicts and disputes over children can be a source of domestic violence.

Conflicts over children take several forms. Some involve the amount of time and energy women spend in child care rather than husband care. Some involve conflicts about what to do about children trouble or about the usual troubles of adolescents. Some involve the “invasions” of the woman’s children from another relationship who “spoil” the man’s desire for an exclusive relationship with his partner and “their” new family.⁸³

Regarding disputes over children, there are indications that many husbands resented parental responsibilities, both emotional and financial. They usually have arguments over disciplining the children often when the husband would beat one of the children. The wives felt that their husbands regarded children as a threat to the relationship because the children would “rob” them of their wives affections.⁸⁴ Frequently, the spouses have different views and treatments on their children disputes. Thus, men as of father and women as of mother have some confrontations about the conflicts and dispute over their children. These confrontations sometimes lead to the violence among the spouses.

3.1.1.3. Drug Abuse and Alcohol Dependency

Alcohol or drug use can increase the risk of violence. For example, a man with a quick temper or low frustration level may be more likely to act out his anger physically or verbally after he has had alcohol. Alcohol or drugs tends to lower a person’s inhibitions.⁸⁵ Abusive men with alcohol or drug problems attack their wives more frequently, are more apt to inflict serious injuries on their partners, are more likely to be sexually assaultive

⁸³. *Ibid*, p.148

⁸⁴. Maria Roy, *supra* note 81, p.42

⁸⁵. Dawn Bradley Berry, *supra* note 65, p.75

toward their partners, and are more likely to be violent outside the home than abusers without a history of substance abuse.⁸⁶ Some abusive men use the excuse that substance abuse causes them to be violent. Although many men who abuse alcohol never become violent, nearly half of men who commit acts of violence against their partner also have alcohol abuse problems.⁸⁷

Most researchers have reported that high numbers of domestic violence offenders use illegal drugs or consume excessive quantities of alcohol. Individuals who have a pattern of excessive alcohol use at one time, but not on a consistent basis (binge drinking) are far more likely to engage in domestic violence than individuals who engage in other patterns of sustained alcohol consumption. Especially, it is reported that domestic violence rates for 'high moderate' drinkers were twice as high, and the rates for binge drinkers were three times as high as non-drinkers. The estimate is that binge drinkers are three to five times more likely to be violent against a female partner than those who do not drink.

Moreover, those use that alcohol and drugs commit more serious acts of violence. For example, one study found that more than half of prison inmates convicted of violent crimes against intimates were drinking or using drugs at the time of the offense. About 40% of intimate partner homicide offenders reportedly were drinking at the time of the incident.⁸⁸ Furthermore, the role of alcohol and drug use is also a risk marker for domestic violence victims. Research suggests that rates of substance abuse among women with victimization histories are higher than among women in the general population.⁸⁹ Many victims use these substances before being attacked. 42% of victims used alcohol or drugs on the day of the assault; 15% had used cocaine. About half of those using cocaine said that their assailants had forced them to use it. Also significant is the increased risk for women's use of alcohol and drugs after abuse.⁹⁰

⁸⁶ . Albert P. Cardarelli, *supra* note 79, p.63

⁸⁷ . Joyce Brennfleck Shannon, *supra* note 46, p. 88

⁸⁸ . Robert C. Davis, Arthur J. Lurigio & Susan Herman, *Victim of Crime*, 3rd ed., Sage Publications, Inc., 2007, p.65

⁸⁹ . Walker R, Logan TK, Jordan CE & Campbell JC, *An Integrative Review of Separation in the Context of Victimization: Consequences and Implication for Women*, Trauma Violence Abuse, No.5, Vol.2, 2004, pp.143-93

⁹⁰ .Robert C. Davis, Arthur J. Lurigio & Susan Herman, *supra* note 88, p.66

A woman who becomes a victim of abuse is at risk of abusing alcohol and other drugs to escape the pain and shame of abuse. Some abusive partners force the woman to drink or do drugs under the threat of further violence. Some battered women may use substances to eliminate the fear of being physically attacked again by their partners.⁹¹ Numerous studies have found that women using alcohol or drugs are more likely to be victim of domestic violence. Such dependence can impact long term on women's physical health and ultimately result in death.⁹²

Substance and partner abuse might spring from a personality or physiological disorder, such as a chemical imbalance in the pleasure centers of the brain or elevated testosterone levels in males, which lead to the misuse of alcohol or illegal substance and the inability to control violent tendencies.⁹³ Obviously, individuals who consume alcohol or drugs are at greater risks of violence perpetration of violence acts and victimization than individuals who do not consume such substance. Alcohol and drugs undermine a person inhibitions and self-control making people do things they would not normally do. Hence, intoxication is a serious martial problem and abuse is an unfortunate consequence of alcohol and drugs.

3.1.1.4. Economic Causes of Domestic Violence

Economic abuse may take place when individuals control access to other person's resources, such as food, clothing, shelter, insurance, and money. Most of the people think that spousal violence or abuse refers to physical violence and they are not aware of the impacts of economic abuse. Women's economic status is a crucial component to the problem of domestic violence. In general, if women have less financial safety and less access to financial opportunities, battered women will generally have fewer options for escaping the control of a batterer. Normally, woman in society has been economically dependent on man throughout time. The man is the head in a family and they are regarding themselves as having to manage all the properties and wealth in the family.

⁹¹ .Joyce Brennfleck Shannon, *supra* note 46, p.90

⁹² .Lynne Harne & Jill Radford, *Tackling Domestic Violence: Theories, Policies and Practice* , Open University Press, 2008, p.43

⁹³ .Nick Ali Jackson , *supra* note 17, p. 696

In daily lives, man influences with the express decisions concerning money. This is based on the belief that the money is the man's possession or at least he has more right to it than the woman. Such situation involves the withholding information on common money, control of expenses, questioning on the details of spending, withholding money, keeping secret bank accounts and credit cards. Husband often give no chance to women to manage their financial or economic affairs. Women experience the financial abuse since they are dependent on their husbands. As she is dependent on her spouse financially, even if she wants to escape from this abuse, she is not being able to do it. She can do two things either she responds to it or tolerates this abuse whether she likes it or not. So some cases of spousal violence are contacted with economic causes like inequality or imbalance and lack of the financial resources among the spouses.

3.1.1.4.1. Direct Economic Causes

The control of financial resources is an important indicator of the distribution of power within families. Generally, economic resources of a family such as land and houses are owned and managed by male spouse. Male control of family based on the *Patriarchal system* inevitably places decision – making authority in male hands, leading to male dominance and proprietary rights over women.⁹⁴ The concept of male property rights over women is recognized by law in some countries. For instance, English feudal law reinforced that concept.⁹⁵

In some countries, women still cannot own property, and their husbands or male relatives have full control over all resources. Women are seriously disadvantaged economically in relation to men.⁹⁶ It is clear that the allocation of resources is a frequent and main source of conflict in spousal relationships. Men are usually defined as the primary income providers while their partners' main responsibility lies in domestic servicing.⁹⁷ Sometimes, men want to control their wives through financial power. Precisely, the values based on the patriarchal system and societies are directly related to the spousal violence through the imbalance of economic resources between the spouses.

⁹⁴ . *Ibid*, p. 611

⁹⁵ . Eve S. Buzawa and Carl G. Buzawa, *supra* note 10, p.60

⁹⁶ . Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence against Women*, *Journal of Willamette Law Review*, Vol.33, No.4, 1997, pp.773-846

⁹⁷ . Graham Allan, *FamilyLife: Domestic Roles and Social Organization*, Basil Blackwell Ltd., 1985, p.145

Moreover, the unemployment or low income or the situation where a spouse, usually a woman, is not allowed to work generates the economic difficulties of the spouses. Some husbands may prevent their wives from working. The economic dependency of women continues to be a fundamental feature of most societies. Economic deprivation has been identified as both an important contributing factor and as a consequence of violence. The lack of money may lead to a change of life-style. These financial commitments foster the prospect of family stress⁹⁸ and then domestic violence. More pervasive forms of economic change accentuate the prospect of violence at the home. Unemployment, with its consequent insecurity and loss of self-esteem, ranks high in this regard.⁹⁹ Thus, poverty in the family is a primary factor which contributes to domestic violence.

In addition, women have no power to escape from an abusive relationship if they have no economic independence. The reverse is that women's increasing economic activity and independence is viewed as a threat which leads to increased male violence. This is particularly true when the male partner is unemployed, and feels his power undermined in the household. Therefore, economic deprivation is one of the main causes of the domestic violence.

3.1.1.4.2. Indirect Economic Causes

Besides the above factors, there are some causes which indirectly contribute to spousal violence. Most men frequently exercise their financial power to control and dominate their partners. This practice comes out of a community based on the patriarchal system which has promoted economic and legal conditions that maintain wife abuse. Thus, women have difficulty gathering the financial resources to leave their abusive husbands or, if they left, often they are driven back by their economic vulnerability.¹⁰⁰ This patriarchal system makes it easier for men to dominate their wives and to control their financial resources. On the other hand, economic imbalance is based not only on patriarchal domination, but it is also caused by the labour market which is favoring to man employee rather than the women employee. For instance, in Japan, according to the

⁹⁸ . Gordon W. Russell, *Violence in Intimate Relationships*, PMA Publishing Corp., 1988, p.140

⁹⁹ . *Ibid*, p.139

¹⁰⁰ . Vincent B. Van Hasselt, Randall. L. Morrison ,Alan S. Bellack & Michel Hersen, *supra* note. 19, p. 99

figures in 2009, while male regular worker's salary level stands at 100, female regular worker's salary level is at 69.0. Likewise, the salary level for male part-time workers is 53.3 while that of female part-time workers remains 48.5.¹⁰¹ As a result, many husbands in Japan are indifferent to housework as a woman's chore. This indifference illustrates unchanged systematic discrimination against women as a part of the workforce and in society.

Moreover, domestic violence occurs when the spouses are jobless or have not enough income or imbalance of income and outcome. It relates to situations where the women are not allowed to work outside the house. Some societies think that the women should stay inside, maintain the household and family. If they go out and work, the harmony of the family would be destroyed. The husband may also prevent his wife from working. The creation and continuation of this economic dependency often constitutes a major obstacle faced by abused woman.¹⁰² In addition, some employers prefer to recruit men rather than women. Some women do not have education or the job skill require for employment. Some have necessary qualifications for job but they cannot work because of their children duties and household responsibilities. So, they have less money and they have to rely on their husbands.

Women generally view money as belonging to the family as a whole to be spent on children, the household, men's personal needs and recreation, and lastly, on their own personal needs and desires.¹⁰³ The husband controls all of the earned income by keeping tight reins on the budget. The wife is given just enough money to buy groceries for the family.¹⁰⁴ So she lacks money to spend for her personal items or desires. Some husbands only prefer to pay for actual needs of the family and they think this is enough. On the other hand, women have to spend for some items rather than actual needs. Some husbands may think that their wives are spending money carelessly. Some women may also feel that husband are very stingy and pay no attention to family matters. These are indirect causes of domestic violence.

¹⁰¹.Gender Equality Bureau, White Paper on Gender Equality 2009, <http://www.gender.go.jp/whitepaper.pdf>, Cabinet Office, assessed on September 5, 2010

¹⁰².Nathalie Des Rosier and Louise Langevin, *Representing Victims of Sexual and Spousal Abuse*, Irwin Law Inc., 2002, p.29

¹⁰³.R. Emerson Dobash Russell P. Dobash, *supra* note 21, p.147

¹⁰⁴.Maria Roy, *supra* note 81, p. 41

3.1.2. Social and Culture Causes of Domestic Violence

Domestic violence is also related to social and cultural factors. Social factors contributing to spousal abuse often relates to the role of women in society because most victims of intimate violence are women. Violence rooted in unequal power between men and women may also include frequent infliction of harm that is justified by custom, tradition, religion, or by the relationships surrounding the crime even if the inflicted harm is considered criminal by law. Therefore, this is one of the main causes which relate to the issue of domestic violence.

3.1.2.1. Patriarchal Ideology

‘Patriarchy’ is a social structure and a gendered ideology that has explanatory power for the oppression of women and children. The concept of patriarchy provides a useful construct for identifying and analyzing the maleness of the law against which women and children are positioned. ‘Some customs support men’s absolute control and ownership of their wives. Some societies think that men are always the leaders and women are followers. Most societies gave the patriarch of a family the right to use force against women and children under his control.

Roman civil law gave legal guardianship of a wife to her husband. This concept, “*patria potestas*”, included the largely unfettered ability of the husband to physically beat his wife, who becomes, in legal effect, his “daughter”. He also had the right to sell a wife into slavery or, under certain circumstances, to put her to death. Traditions of subordination of women have a long history rooted in patriarchy – the institutional rule of men. Women were seen in virtually all societies to be naturally inferior both physically and intellectually. In ancient western societies, women, whether slaves, concubines or wives, were under the authority of men and they were treated as property. As men ruled in society so husbands ruled in the home.¹⁰⁵

In the patriarchal family, the hierarchy of power meant that children were afforded an inferior status. Children were expected to be subordinate and obedient, especially to their father. Fathers had the right to ultimately decide whether their infants lived or died. Therefore it was common for fathers, as the highest power within the

¹⁰⁵ .Eve S. Buzawa and Carl G. Buzawa, *supra* note 10 ,pp. 57-58

family unit, to use violence as part of their child-rearing practices. Corporal punishment was frequent and exercised without due causes or concern. Children were also often victims of infanticide, an ancient custom of killing infants and children for economic or social purposes. Like children, women in the patriarchal society had less power in all aspects of social and private life. The subordination of women was legitimized through the hierarchal structure of the family unit, as well as institutions and social structure of society as a whole. Individual needs and self-fulfillment were goals appropriate for men, not women. Women were considered the “appropriate victims”.¹⁰⁶

Moreover, under the patriarchal ideology men assumed that they can control all in the family. The man is the head of the household; assertive and always right, unconditionally. The woman is expected to fulfill the man’s needs and to support him in whatever he believes and does, unconditionally. The child’s duty was that of “unquestioning obedience”, the wife’s to “submit” and “defer” to her husband’s rule. His order is final and exclusive. He may think of as the lord or master in the family and of the wife and children as his followers or servants. Thus, he behaves as he likes and sometime he does not hesitate to act aggressively. Because of the evil effects or misunderstandings rooted in the patriarchy, men sometimes torture their wives and children because the law gives permission to them to chastise their wives.¹⁰⁷

According to a traditional patriarchal model of society and of the family, women have lower status than men and men have more power and are legitimate to control women and children. Traditionally, the society defines the roles of women as a mother who gives birth to children, as a wife responsible for raising children and taking care of the elders. The roles of men include being the head of the family, supporting family financially. There are beliefs that men can use violence as a way to solve family conflicts and good wives need to be patient and keep family conflicts and problems as a secret. Women are told that family conflict is a private matter that should be dealt with within the family and not to involve outsiders. Most people also see that domestic altercations between husband and wife are normal in the society and they should not get involved as they are outsiders. Therefore, when there is a domestic violence, women often get

¹⁰⁶. Karel Kurst-Swanger and Jacqueline L. Petcosky, *supra* note 71, p.28

¹⁰⁷. John Hamel & Tonia L. Nicholls, *supra* note 75, pp. 307-308

isolated from social help; as a result women in violent relationship experience depression, trauma, stress, or even suicide attempts.¹⁰⁸ Hence, this system is viewed as a root of the domestic violence.

3.1.2.2. Habit of Chastisement or Use of Force and Control

The legal system is complicit in domestic violence against women, as evidence by a husband's right of physical chastisement and restrictive divorce laws. The traditional patriarchal family is based on the assumption that the man should be the dominant partner in an unequal relationship and should rule over his wife and children as his possessions. In some countries, women have no independent legal identity apart from their husbands. But social customs and institutional structures play a significant role in identifying women as the targets of abuse in the context of intimate relationships.¹⁰⁹ The historical definition of marital contracts according to legal sanctions worldwide gave men enormous power and essentially characterized women and children as chattels to do with as men pleased.¹¹⁰ For instance, the Anglo-American common law originally provided that a husband, as master of his household, could subject his wife and children to corporal punishment or chastisement so long as he did not inflict permanent injury upon on them.¹¹¹

Until the late 19th century, Anglo-American common law gave husbands superiority over their wives in most aspects of the marital relationship. By law, a husband has the right to acquire the value of his wife's paid or unpaid labour, acquired rights to his wife's person, the value of her paid and unpaid labour, and most property she brought at the marriage. A wife was obliged to obey and serve her husband. As master of the household, a husband could command his wife's obedience, and subject her to corporal punishment or chastisement if she defied his authority.¹¹² In his treatise on English

¹⁰⁸ . *Ibid*, p. 137

¹⁰⁹ . Judith Armatta, *supra* note 96.

¹¹⁰ .Harold V. Hall & Leighton C. Whitaker, *Collective Violence: Effective Strategies for Assessing and Interviewing in Fatal Group and Institutional Aggression*, CRC Press, 1998, p. 221

¹¹¹ .Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy* , The Yale Law Journal, Vol.105, No.8,1996, pp.2117-2207

¹¹² .Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking*, Yale University Press, 2000, p.13

common law, Blackstone explained that a husband could give his wife moderate correction.¹¹³

In other legal systems, such as under certain interpretations of Islamic law, husbands are expected to control and physically discipline their wives as necessary. Moreover, chastisement is an accepted practice in other countries as well. In Kenya, “the husband also has the right to “discipline his wife under customary law, which often means serious domestic violence”. And in Nigeria, the criminal code “justifies a reasonable amount” of physical chastisement of a wife. The right of chastisement remained the law in most jurisdictions of the United States until the end of the last century. Even where law has abrogated the right of chastisement, its influence is still felt in attitudes of the people at large. This attitude also persists in legal systems that minimize the significance of wife abuse, consider wife abuse a private matter, or blame the victim for her own abuse.¹¹⁴

Additionally, in most countries of the world, a wife still has no legal protection from her husband’s sexual assaults. Marriage is considered to provide a right of sexual access for the male. Laws not only sanction wife abuse for disciplinary and other reasons, but also give husbands the legal right to kill their wives in certain circumstances. Some traditions allow the killing of ‘errant’ wives suspected of defiling the honour of the family by indulging in forbidden sex or divorcing without the consent of family.¹¹⁵ Accordingly, men are given power to use of force and control the family. This is also a source of domestic violence.

3.1.2.3. Values surrounding the Family

Family is the basic social unit and plays an important role in building a good and stable society. When one thinks of the term *family*, what comes to mind? For many of us it is a safe haven, a place in which one seeks unconditional love and acceptance, a group of intimates whom bond with and depend on. For numerous others, *family* means something much different. The words *family* and *home* represent feelings of fear, anger, disappointment, and danger. Unfortunately, for some, home may be a place in which

¹¹³ . Harold V. Hall & Leighton C. Whitaker, *supra* note 110, p. 221

¹¹⁴ . Judith Armatta, *supra* note 96.

¹¹⁵ . *Ibid.*

they are regularly physically assaulted, neglected, or sexually molested. So, although some families are able to love and support each other, others are in continuous conflict.¹¹⁶

Family usually needs to have rules to govern and give direction to its family members, including defining the roles and the relationship among family members how to interact with one another to live together peacefully. Each member needs to know their own roles, comply with the family rules, and have proper interactions within the family. By doing so, the family will be in a balanced position without domestic violence.

When the spouses live in the extended family, the intervention of other family members such as parents, or brothers, or sisters of a spouse can sometimes cause problems and violence between the spouses. Even when the spouses live outside the family, the influences of these members sometimes have improper effects on it. When a spouse hears about the direct interference upon the relationship between them, or when he or she notices unwanted interferences indirectly, these will diminish the values which surrounded the family. But on the other hand, in situations where they offer no help while a spouse is suffering violence makes him or her feel seriously injured. Thus, the values surrounding the family sometimes have negative effects as well as positive outcomes. Family support or intervention can have diverse results.

In addition, each individual personality is represented as a configuration of key concepts in the situational life space. The tendency of the men to see the women as possessions which is frequently an outcome of cultural values has its personality correlates of jealousy and insecurity. The personality factors which include low frustration – tolerance, jealousy, masochism, aggression have been cited in spousal violence situations.¹¹⁷ Therefore, the value of family and the concerned spouses are much related with the spousal violence.

3.1.2.4. Cultural Impact

“Culture” is a collective design for living; it is nevertheless true that not all such designs are equally serviceable.¹¹⁸ It includes knowledge, belief, art, law, custom and

¹¹⁶ . Karel Kurst-Swanger & Jacqueline L. Petcosky, *supra* note 71, p.26

¹¹⁷ . Gordon W. Russell, *supra* note 98, p.142

¹¹⁸ . Michael Lewis, *The Culture of Inequality* , University of Massachusetts Press, 1978, p.49

other capabilities and habits acquired by man as a member of society.¹¹⁹ They are passed down from generation to generation through verbal communication, instruction, and general observation. Culture also encompasses a worldview, which in turn encompasses assumptions and perceptions about the world and how it guides individuals' behaviors and responses to their environment.¹²⁰

Culture values and beliefs play a significant role in shaping a woman's experience of violence and abuse. While domestic violence, rape, sexual harassment, trafficking of women, and other forms of violence take place in every part of the world, several forms of abuse take place primarily in certain regions or cultures, such as honor killings and female genital cutting. Individual, family, and community responses to all of them vary significantly among cultural, religious, and ethnic groups. A woman's real and perceived options for addressing violence differ based on her sense of self as a member of a family and community.¹²¹

An important aspect of culture is its view of the value of individualism or collectivism. For example Western cultures are generally individualist. Conversely, Asian cultures are characterized as collectivist. In general, collectivist cultures emphasize obedience to and harmony within the group while individualist cultures emphasize personal satisfaction, achievement, and autonomy. Another and related cultural value is the relative looseness or tightness of a culture and the level of tolerance for diverse, nonconforming behavior. In contrast, tight collectivist cultures are characterized by specific rules that regulate social interaction and have strong negative social consequences (i.e., shame, loss of face) for those who deviate from the prescribed role behavior. The goal of the tight collectivist family structure is to control the individual to protect and preserve the group. A result is that it leads to invisibility of the individual, and especially of women, in collectivist cultures where women's roles are restricted as bearers of children and teachers of cultural norms.¹²²

¹¹⁹ . John Tomlinson, *Cultural Imperialism: A Critical Introduction*, The Johns Hopkins University Press, 1991, pp. 4-5

¹²⁰ . Nicky Ali Jackson, *supra* note 17, p. 32

¹²¹ . Barrie Levy, *supra* note 44, p. 37

¹²² . Nicky Ali Jackson, *supra* note 17, p. 33

Cultural beliefs also interact with other beliefs on the part of individuals and families with male violence.¹²³ The Hispanic cultural value of “machismo” supports some Latino men’s belief that they are superior to women and the “head of their household” in determining family’s affairs. “Machismo” may cause some Hispanic men to believe that they have the right to use violent or abusive behavior to control their partners or children.¹²⁴ In Roman society custom allowed women to be purchased as brides and treated as additions to the husband’s property. The husband had the right of life and death over his wife, children, and family slaves. During this period the wife’s status was closely akin to that of a slave. She was responsible for bearing and raising the husband’s children, and subjected to violent beatings or death if she acted contrary to his wishes or to the social code of the time. In Western history, the hierarchical structure of society in some cases gave permission to husbands to beat or even kill their wives and English common Law permitted that physical “chastisement” of wives, according to the seriousness of her offence.¹²⁵ The cultural norms prevailing in some countries are not only unable to prohibit domestic violence but also encourage it. Thus, spousal violence may have been adaptive to these cultural environments.

Regarding patriarchal system, Dobashes¹²⁶ identified two central features for the foundation of patriarchy. The first is the manner in which social relationships routinely reinforce the dominating and controlling position of men. The second feature is the sanctification of a system of social relationship from which violence between men and women may result. The very underpinnings of such relations are sustained by an ideology embedded in our system of institutions, including our religious, political and economic systems.¹²⁷

Moreover, the existence of a common value system in society to which most members subscribe and that is eventually internalized into a belief system by the majority of societal members. This can be assumed to be true for most forms of crime and deviance, but the existence of a common belief system regarding violence against women

¹²³ . Barrie Levy, *supra* note 44, p. 31

¹²⁴ . John Hamel & Tonia L. Nicholls, *supra* note 75, pp. 327-327

¹²⁵ . Nancy Hutchings, M.S.W, *The Violent Family: Victimization of women, Children, and Elders*, Human Sciences Press, Inc., 1988, p. 65

¹²⁶ . Dobash, R.E and Dobash, R.P are the authors of *Violence against Wives*, 1979

¹²⁷ . John Hamel & Tonia L. Nicholls, *supra* note 75, p.34

is questionable. In society, there is a diversity of objectives available for forming attachments, involvement, and commitments are strengthened in a network that endorses male dominance values. Societal values have not consistently denounced assaults on wives but, in fact, throughout history, have upheld men's right to subjugate their wives by force.¹²⁸

By the cultural patterning of aggression, violence is a learned behavior shared by members of groups whose value systems encourage the use of violence. It is also a reflection of basic values that shape the norms governing family life, conflict resolution, child-rearing practices, and so forth. In addition, violence is transferred from one generation to the next by individuals who witness or are victims of family violence in their childhood homes.¹²⁹ Since the cultural is the root of the values and beliefs of society, the members of society are visibly influenced by it. If one's culture allows men to have more power or to be dominant over women and there is a sharp imbalance in the family, it is obvious that there will frequently be violence.

3.2. The Consequences of Domestic Violence

Domestic violence adversely affects victims, family members, perpetrators, communities and states on profound emotional, physical, psychological and economic levels. Abused victims and related persons experience fear, lack of the self-confidence and are helpless, confused and may even exhibit suicidal tendencies. Of course, it is not only dangerous to the parties concerned but also to persons who are not directly involved, such as, the children, elders, and other family members. Once the violence has been committed, for whatever reason, we should know that it may occur again.

3.2.1. Effects of Domestic Violence on Women

The effects of domestic violence on women victims are devastating. Aside from the obvious physical effects, some of which can be severe and can last lifetime, women suffer emotionally, socially, and financially as result of domestic violence. They may endure economic hardship, the loss of their homes and possessions, the loss of

¹²⁸ . R. Emerson Dobash Russell P. Dobash, *supra* note 21, p. 48

¹²⁹ .Vincent B. Van Hasselt, Randall. L. Morrison, Alan S. Bellack & Michel Hersen , *supra* note 19 ,pp. 447- 448

employment, isolation from family and friends, lowered self-esteem, and even the loss of their children.¹³⁰ However, the same act can have very different meanings depending on many features that shape perceptions and behavior, including the age of the victim, her relationship with the perpetrator, culture, social class, sexual orientation, previous history of violence, perceived intent of the violence, and perceived causes and effects of the violence.¹³¹

One of the most obvious impacts in relation to women's experiences of domestic violence is the physical harm caused through injuries. This can range from bruises, scratches, and cuts to burns, broken bones, concussions, miscarriages, stab wounds to permanent damage to vision or hearing, joints, or internal organs to death. Many battered women have suffered stress-related physical illnesses, such as hypertension, ulcers, allergies, skin disorders, chronic fatigue, chronic back ailments, or migraine headaches. Some battered women have a high incidence of one or more dangerous ineffective coping strategies, such as eating disorders, substance abuse, frequent job changes, unsafe sexual activity, prostitution, troubled relations with others.¹³² Moreover, death resulting from suicide among women is a hidden aspect of the most serious impacts of perpetrators' violence on women.¹³³

Women who have sustained sexual or physical assault have been found to disproportionately suffer from depression, thoughts of suicide, and suicide attempts.¹³⁴ If women were regularly abused, it would have post traumatic stress, disorder, depression and finally develop to discouragement. Besides, women may pass on the aggression to their children.¹³⁵ Moreover, wives being abused for a long time would have motives to murder husbands instantly because of wrath.¹³⁶

Furthermore, victim of rape or sexual assault experience more symptoms of physical and psychological ill health. Sexual abuse and rape can lead to unwanted pregnancies and the dangerous complications that follow from resorting to illegal

¹³⁰ . Margi Larid McCue, *supra* note 24, p.18

¹³¹ . Nancy A. Crowell and Ann W. Burgess, *supra* note 36, p. 75

¹³² . Margi Larid McCue, *supra* note 24, p.22

¹³³ . Lynne Harne & Jill Radford, *supra* note 92, p.40

¹³⁴ . Nancy A. Crowell and Ann W. Burgess, *supra* note 36 , pp.74 -79

¹³⁵ . Michele Cascardi & K. Deniel O' Leary, *Depressive Symptomatology, Self-esteem, and Self-blame in Battered Women*, *Journal of Family Violence*, Vol.7, 1992, p. 249-259

¹³⁶ . Lynne Harne & Jill Radford, *supra* note 92, p.38

abortions. Women in violent situations are less able to use contraception or negotiate safer sex, and therefore run a high risk of contracting sexually transmitted diseases such as urinary tract infections and HIV/AIDS.¹³⁷ In addition, high levels of both sexual and physical violence during pregnancy resulted in greatest risks to the health of both the mother and the unborn child. This abuse is related to a variety of negative health outcomes, including miscarriages, premature birth, stillbirth, infertility, haemorrhage, and having low birth babies.¹³⁸

When women suffer violence by their partners, they want to escape the violence situations. But, some could not do that because most women are raised to believe that the woman is the primary caretaker of the family, the member responsible for “holding things together”. Others fear for the safety of their children, family, or friends. Although some women stay in relationships because they believe their partners will change, other stay for fear that the violence will escalate against themselves or their loved ones should they leave.¹³⁹ Common barriers that exist for victimized women include: social isolation, financial dependence, guilt and shame, fear, pressure to keep the family together, and lack of appropriate community response. Therefore, women experiencing domestic violence may also turn to alcohol or drugs as a form of escape from the violence.¹⁴⁰

In some minority communities, domestic violence can be perpetrated and/or condoned by the extended family and the community at large. The victim may be accused of bringing dishonor to family and the community, if they question or leave abusive and oppressive relationships. This often results in severe consequences such as social ostracism, sexual harassment and acts of violence, including so called 'honour killings'.¹⁴¹ There is no doubt that, victims are often not capable of escaping from the violence and they may be falling down as the abused parties.

¹³⁷ . Poco Kernsmith, *Sexual Coercion and domestic Violence*, In: June Keeling & Tom Mason, *Domestic Violence: A Multi-Professional Approach for Healthcare Practitioners* , Open University Press, 2008, p.61

¹³⁸ . Lynne Harne & Jill Radford, *supra* note 92, p.40

¹³⁹ . Dawn Bradley Berry, J.D., *supra* note 65, p.51

¹⁴⁰ . Kimberly P. Brackett, *Battleground: The Family* , Greenwood Publishing Group, Inc., 2009, p. 225

¹⁴¹ .Margi Larid McCue ,*supra* note 24, p.58

3.2.2. Effects of Domestic Violence on Children

While the domestic violence is affecting spouses or couples who are involved in a quarrel, it also affects to the children directly or indirectly. In this respect, children may suffer negative consequences both as a result of witnessing incidents of domestic violence but also, having to cope with its aftermath. The effects of domestic violence on children include behavior problems, emotional distress, and impaired function in areas such as self-esteem, social competence, and social problem-solving.¹⁴² Children may misunderstand the violence as a reasonable way to resolve conflicts, and these negative effects are carried forth to the next generation.¹⁴³

Children can witness domestic violence in number of different ways. For example, they may be in the same room and may get caught in the middle of an incident, perhaps in an effort to make the violence stop; they may be in another room but be able to hear the abuse or see their mother's physical injuries following an incident of violence; or they may be forced to take part in verbally abusing the victim.¹⁴⁴ In Japan, Cabinet Office Survey (2008) showed that 31.9% children have witnessed violence by their parents. And 32.4% children did not witness violence but they understood from noises, voice or appearance.¹⁴⁵ Children do not feel safe in their home and this can have many negative physical and emotional effects. All children witnessing domestic violence are being emotionally abused, and this is now recognized as 'significant harm' in recent legislation in Japan of the Child Abuse Prevention Act¹⁴⁶ Stipulates that the spousal violence causing a child's emotional damage shall be liable under this law.

Children, either as victims or as witnesses to domestic violence, even if they are not the direct targets of the violence, can be affected in their emotional development and behavior as well as in their educational adjustment. In the home where violence occurs, fear, instability, and confusion replace the love, comfort, and nurturing of the children's needs. Children learn that relationships involve pushing, kicking, hitting, and punching

¹⁴² .Amy Holtzworth-munroe, Leonard Bates, Natalie Smutzler & Elizabeth Sandin, *A Brief Review of the Research on Husband Violence-Part I: Martially Violent Verses Nonviolent Men*, Journal of Aggression and Violent Behavior, 1997, Vol.2, No.1, pp. 65-99

¹⁴³ .CS Widom, *The Cycle of Violence* , Journal of Science, 1989, Vol.244, No.4901, pp. 160-166

¹⁴⁴ .Lynne Harne & Jill Radford, *supra* note 92, p.57

¹⁴⁵ .Gender Equity Bureau, Stop the Violence, Cabinet Office Japan, 2008, <http://www.gender.go.jp/e-vaw/book/images/pdf/stoptheviolence.pdf>, accessed on September 22, 2010

¹⁴⁶ . The Child Abuse Protection Act 2000, Article 14 (2)

are acceptable behaviors, and that violence is a means of getting what one wants. There is a real danger that children will learn aggression and it will become part of their pattern of behavior.¹⁴⁷

3.2.2.1. Direct Effects

When domestic violence is occurs in a family, it will affect not only the spouse but also the children. There are some children who suffer directly as a result of the parental violence at home. As a result, the domestic violence cause harm to children directly and they are at risk of injury during violent incidents. Children 'witnessing' domestic violence in a number of different ways such as observing fathers being directly violent or threatening to mothers; overhearing it; seeing physical injuries; observing 'the emotional consequences of fear, hurt and intimidation.'¹⁴⁸ Children witnessing domestic violence and living in an environment where violence occurs may experience some of the same trauma as abused children.¹⁴⁹

In the most of the families, women are the primary caretakers of children; therefore, the battering of mothers affects children in several ways. Children who witness violence against their mothers are at considerable risk physically, psychologically, and emotionally. These children face the threat of witnessing traumatic events and the threat of physical abuse. Sometimes, when children intervene to rescue their mother, by deflecting the abuser's attention to them or, by distracting the abuser, or seek outside help (e.g., calling the police, running to a neighbor's house) during the domestic violence, they may get injury by the abuser. That injury to children can sometimes lead to death.¹⁵⁰

Moreover, domestic violence can severely impair a parent's ability to nurture the development of their children. Mothers who are abused may be depressed due to the violence. They may be emotionally withdrawn, numb or irritable or have feelings of hopelessness. The result may be a parent who is less emotionally available to their children or unable to care for their children's basic needs.¹⁵¹ Even when children are protected from direct harm and from witnessing violence or conflict, they will be affected

¹⁴⁷ . Margi Larid McCue, *supra* note 24, p. 25

¹⁴⁸ . Lynne Harne & Jill Radford, *supra* note 92, p.57

¹⁴⁹ . Joyce Brennfleck Shannon, *supra* note 46, p.11

¹⁵⁰ . Lynne Harne & Jill Radford, *supra* note 92, p.61

¹⁵¹ . *Ibid*, p.38

by the impact on their parents' ability to care for them. Also they may be very distressed by witnessing traumatic incidents, particularly when a parent is injured. Post traumatic stress disorder occurs in a substantial number of children exposed to domestic violence.¹⁵² It can be said that the domestic violence affects children as severely as it does the abused partner.

3.2.2.2. Indirect Effects

The children may receive injuries indirectly when the domestic violence occurs between their parents in home. Infants may be injured if being held by their mother when the batterer attacks. Older children may be hurt while trying to protect the mother. Many fathers unintentionally injure children while throwing furniture and other household objects when abusing the mother. Children tend to sustain the most serious injuries, such as concussions and broken shoulders and ribs. As a result of the myriad problems within a violence household, child neglect can occur and can result in both physical and emotional injuries.¹⁵³

The long-term effects of domestic violence on children can be devastating. Like sponges, children may soak up the adults' problem-solving techniques. If no actions are taken against the perpetrator, children may imitate violent behavior because that is what is common in their household and there appears to be no negative results. It is estimated that male children who witness abuse are more likely to assault their mates when they grow up. Witnesses of domestic violence learn that violence is an acceptable way to deal with conflict. Children in a family in which their mother is being abused learn both the victim role and the aggressor role. This perpetuates the cycle of violence as children and then as adults.¹⁵⁴

The children who witness domestic violence are at risk of suffering from numerous emotional and behavioral disturbances. The children may experience emotional symptoms such as anxiety, temperamental problems, depression, and low self-esteem. Moreover, children may exhibit physical conditions, including sleep disorders, headaches, stomachaches, diarrhea, ulcers, asthma, and enuresis. Other physical responses to

¹⁵² . Dawn Bradley Berry, *supra* note 65, p.132

¹⁵³ . Margi Larid McCue, *supra* note 24, p. 24

¹⁵⁴ .Lynne Hame & Jill Radford, *supra* note 92, p.63

witnessing domestic violence get worse around bedtime and include sleepwalking, bed-wetting, nightmares, separation, anxiety, clinginess, and insomnia. Behavioral responses may include aggressive behavior with other children, adults, or animals; regression in developmental behaviors already mastered, excessive crying, withdrawal or fantasy life, emotional neediness, over compliance, extreme passivity, self-mutilation, school problems and delinquency.¹⁵⁵ The children who have experienced parental violence have more deficits in social competence and higher levels of depression, and temperament problems than children in non-violent homes.¹⁵⁶

Studies have shown that children who personally witness violence are four times more likely to develop patterns of violent behavior later on in life. As the child matures into adolescence, these consequences may become more entrenched and more severe, including the idea of suicide, substance abuse, early marriage and early pregnancy.¹⁵⁷ These children may be further victimized or blamed for having a psychological or behavioral problem rather than receiving validation and support in coping with family problems.

3.2.3. Effects of Domestic Violence on Men

Domestic violence may occur by one partner to another regardless of sex. Not only women but also men may be abused by the other partner. Though most spousal violence is perpetrated by men, there are some cases in which men are abused by women. Domestic violence often involves female aggression or mutual combat. In those cases, the men could be injured or killed and may need of medical attention.

They are often mentally and physically exhausted. They feel guilty, shame, humiliation, anger, depression and withdraw from relationship.¹⁵⁸ In addition, they feel helpless. Sometimes abused men tried to tell someone about it. They try to stay out of home to avoid facing their female partners. But most do not feel comfortable to tell other about their plight. Victims often feel trapped in the situation and see no way out.¹⁵⁹

¹⁵⁵ .K.J. Wilson, *supra* note 37, p.43

¹⁵⁶ .Nancy A. Crowell and Ann W. Burgess, *supra* note 36, pp.84-85

¹⁵⁷ .Margi Larid McCue, *supra* note 24, p. 25

¹⁵⁸ .Joyce Brennfleck Shannon, *supra* note 46, p.232

¹⁵⁹ .Vincent B. Van Hasselt, Randall. L. Morrison, Alan S. Bellack & Michel Herse, *supra* note. 19, pp.447

Abused men are ashamed and embarrassed to admit that they are victims and to seek help, especially from friends or family members to whom they do not wish to appear weak or incapable of handling their own problems.¹⁶⁰

Society seems to neglect women's violence against men to some extent, probably because of the assumption that men suffer less physical injuries and that men can "take it better" or more easily defend themselves and the old stereotypes – traditional forms of masculinity where men are supposed to be strong and tough.¹⁶¹ Again the violence of women is regarded as the products of uncontrollable psychological forces that render a woman helpless, thus stigmatizing her as sick rather than as merely emotionally. Even with respect to serious crimes committed by women, such as cutting a male organ while he is asleep, the jurors or judges are often sympathetic to the women accused.¹⁶² Such violence is unreported and often ignored or inaccurately justified as action in self-defense.

One of the best known relating to the problem of domestic violence and wife abuse is the case of "*R. v. Thornton*," also known as the Sara Thornton's Case in Britain. In this case the wife's conviction for the matter of her abusive husband was quashed and a retrial was ordered by the appellate Court and she was sentenced to five years imprisonment for manslaughter. The juries were sympathetic to the accused because of her diminished responsibility, personality disorder and the effect of her deceased husband's abuse over a period of time on her mental state.¹⁶³ Although some commentators have argued that male and female in the legal system ought to be treated equally, the position adoptive in the Sara Thornton Case still prevails and is in use in the field of homicide law.¹⁶⁴

An increasing number of men are experiencing verbal or physical abuse from their partners. For this reason, abuse against men is more hidden than violence against women.¹⁶⁵ The attacks against women by men involved the use of bodily force (hitting, punching, slapping, kicking, etc), but when women assault men, that bodily force can

¹⁶⁰ . Dawn Bradley Berry, *supra* note 65, p.68

¹⁶¹ . John Hamel and John Hamel & Tonia L. Nicholls, *supra* note 75, p.306

¹⁶² . Dawn Bradley Berry, *supra* note 65, p.71

¹⁶³ . R. V. Thornton, Criminal Appeal No. 2 of 1996, Court of Appeal, <https://www.lexis.com/research>, accessed on May 8, 2010

¹⁶⁴ . Wendy Chan, *Legal Equality and Domestic Homicides*, International Journal of the Sociology of Law Vol. 25, 1997, p.203-229

¹⁶⁵ . Dawn Bradley Berry, *supra* note 65, p.67

include kicking, slapping, hitting, throwing the objects and using weapons. Naturally, men are stronger than women so they are not very likely to suffer a serious injury from hitting or kicking or similar forms of assault. But when women use weapons for an assault, this may result in greater injury to men. Therefore, the men who were injured by domestic violence required medical attention and had to be hospitalized overnight or longer.¹⁶⁶

The violence is damaging in a number of ways, not just in terms of physical injury. Even when a woman slaps a man, and she doesn't cause any physical damage, the man may suffer psychological harm. There is ample evidence that victims of domestic violence suffer grave damage to their self-esteem. Moreover, such violence contributes to drug and alcohol abuse, mental illness, attempted suicide, and depression.¹⁶⁷ There are no absolute rules for understanding the emotional differences between men and women. Domestic abuse can also be mental or emotional. However, what will hurt a man mentally and emotionally, can in some cases be very different from what hurts a woman. For some men, being called a coward, impotent or a failure can have a very different psychological impact than it would on women. Unkind and cruel words hurt, but they can hurt in different ways and linger in different ways. Mostly, men are more deeply affected by emotional abuse than physical abuse. A significant number of men are overly sensitive to emotional and psychological abuse.¹⁶⁸ Similarly, humiliating a man emotionally in front of other men can be more devastating than physical abuse.

A woman's aggression may take many forms besides hitting or throwing things. A common issue is money or finance. Cash may start disappearing, or she will make extensive use of a credit card and will run up debt. When the man asks about expenditure, she will abuse him. She will make him feel guilty when he suggests that certain articles cannot be afforded. Commonly, one day the man simply finds all their accounts have been drained and she is nowhere in sight. Sometimes, women file a restraining order and then take all available money or sell any belongings that the man is forced to leave

¹⁶⁶ Philip W. Cook, *Abuse Men: The Hidden Side of Domestic Violence*, Greenwood Publishing Group, Inc., 1997, pp. 15-17

¹⁶⁷ *Ibid*, p.23

¹⁶⁸ Jane Meskill LCSW & Michael Conner Psy.D, *Understanding and Dealing with Domestic Violence Against Women*, <http://www.oregoncounseling.org/Handouts/DomesticViolenceWomen.htm>, accessed on August 21, 2010

behind.¹⁶⁹ Though the man is provided of income for the family, when he is faced with these financial abuses, he may feel guilty himself; he cannot leave the family or stay in it at the same time. He will feel trapped in it and he may blame himself for the situations.

Nowadays, some women have the chance to earn more money than men. A man may become the second person in the family as far as finance concern. He has no power to decide anything in the family. When he also meets with this situation, he will not think highly of himself and he may lose his self-esteem. In these two situations, a man's health and status of mind may be obviously affected. He will not be so relaxed, he may not have the taste of family life, the worse thing is that he will try to escape from this dilemma by using improper ways, such as taking drugs or alcohol, finding fault and physically torture to others or himself and so on.

When a man is subjected to domestic violence by his partner, he becomes isolated as he does not wish to express his feeling and to avoid embarrassment. And at least, he will not try to bring his friends to his home because of his worries to see his failure. That makes him feel very uncomfortable and he may terminate the relationship with his friends. In order to escape from his dilemma or to stay away from his home, he may stay away from social functions more and more. The surest thing is that most of the men who have been abused by their female partners try to avoid spending time with their families.

Unfortunately, there are few services for battered men, and some end up in homeless people's shelters, and may not receive additional assistance. In case of spousal violence, the majority of resources and programs are geared toward women. Hence, men feel upset and don't behave towards others properly.¹⁷⁰ Their productivity at work becomes worse. Moreover, they may become alcoholics, or gamblers, or victims of drug abuse. At the end, they will behave in the same manners towards the abuser so the domestic violence will continue or the spousal relationship will end with many problems. Actually, termination of relations is a last resort for people who have exhausted other forms of social control, and who no longer can find value in remaining in relationship that is marred by physical or emotional violence, or who fears for their lives or the lives

¹⁶⁹ Charles E. Corry, Martin S. Fiebert, & Erin Pizzey, *Controlling Domestic Violence Against Men*, Nuance No.3, 2001, pp. 71-86

¹⁷⁰ Nicky Ali Jackson, *supra* note 17, pp. 313-314

of their children. The problems can still exist even after their termination of the relationship and such problems continue the hatred between the parties, such as the guardianship for children (if any), fear of loss of emotional intimacy and financial security and so on.

3.2.4. Effects of Domestic Violence on Other Family Members

When domestic violence occurs, other family members who are living together with those spouses may also experience physical, emotional and economic difficulties. As soon as the violence occurs in the family, the other family members usually try to stop it or try to keep away from it. Whether they can stop or hide from such violence or not, it causes physical or mental pain in their mind more or less.

When the domestic violence continues, some abused victim may leave the abuser to gain immediate safety or to escape from serious situation. The relatives or close friends have to hide the victim in order to rescue her from the situation. Some perpetrators may respond by pursuing the partner, promising to change, apologizing, or trying to reform. But some do not use this way. They want to tackle this by using improper or violent ways instead of recognizing and apologizing for their fault. They often act aggressively or mistreat the relatives or friends of the victims.

By employing violent ways or using rude manners, one may bring about life-threatening risks even in minor cases. Some cases are filed before the court as criminal action but some cases remain silent as the victims or attacked persons are not willing to report their damage. Whatever the result; the effects of violence against other family members are regarded as unwanted or discourteous manner by of the abuser. The third parties or victims who suffered from domestic violence are sought to be protected in many countries. For example, In Japan, the Prevention of Spousal Violence and the Protection Act¹⁷¹ gives favour to the victims by allowing them to rely on non-molestation order or protection order against abusers.

In addition, the consequences of the spousal violence are serious if the spouses are the key persons to take care of the family. Not only the mistreatment but also the

¹⁷¹ . Article 10(4) of the Prevention of Spousal Violence and Protection Victims 2001 (Revised in 2007)

neglect causes the other family members difficulties.¹⁷² In adequate hydration, nutrition, or compliance with medical treatments may result in physical deterioration. More subtle evidences of mental or physical deterioration, such as weakness, malaise, lack of energy, apathy, depression, or cognitive impairment are susceptible to the more insidious attribution. Either the stress of mistreatment or the neglect of needed treatment can precipitate psychiatric disorders.¹⁷³ The family members may also face the economic difficulties because one or both spouses sometimes control the financial resources of the family. Therefore, the spousal violence contributes the chaos in the relationship of all family members rather than the respective spouses.

3.2.5. Effects of Domestic Violence on Society

The violence between the spouses may also affect society as a whole. The outlook of the spousal violence in the society and the prevention programmes are the main impacts. Rape, attempted rape, and aggravated assault of women all have negative psychological consequences in the society. Women are more affected than men, particularly in regard to increased fear of violent crime. Women's fear of crime seems to be driven primarily by their fear of rape. Thus, a further social consequence is fear of crime. The consequences of fear of crime are potentially severe for the society.

The fear of crime which starts domestic violence is very dangerous to society. Its impact on a person's productivity or ability to earn a living is difficult to measure. These sorts of consequences may be seen as unwanted results for society, such as social instability, detriment to individual's productivity, restriction of life style, poor quality of life, decreased confidence, disempowering victim mentality, reduced natural surveillance and so on. Criminologists recognize that one social consequence of crime that affects many people beyond those who have been directly victimized is fear of crime.¹⁷⁴ During or after the domestic violence, there would be small or serious crime. Criminality is one

¹⁷² . For instance, the elders, the members of the victim's family, especially need assistance when they no longer are able to carry out the activities of daily life, such as bathing or dressing, preparing meals, taking medication appropriately or handling finances. But the mistreatment to the elders during or after their violence may cause from interpersonal stress to death risk.(Robert T. Ammerman, Michel Hersen, supra n.3, p.148)

¹⁷³ .Robert T. Ammerman, Michel Hersen, *Treatment of Family Violence*, John Wiley & Sons, Inc. Press, 1990, p. 147

¹⁷⁴ .*Ibid*, p. 86

of the outcomes of the spousal violence that affect society. Rape is a crime involving forced sexual activity, usually including sexual penetration, against the will of the victim. The victims of rape or sexual assault experience more symptoms of physical and psychological ill health than non-victimized women. The rape committed by a stranger to a woman is regarded as a crime in any civilized society. But, rape can occur in the context of ongoing spousal violence (where a partner sexually assaults another partner against that partner's will). Men who raped their wives could not be criminally prosecuted. They have got the cover of law because most of the states consider marital rape is a less serious crime than stranger rape.¹⁷⁵ Research on assaults by men against their wives indicates that the most violent incidents often include sexual as well as physical attacks.¹⁷⁶ It is certain that the victims of rape in spousal violence can develop emotional and psychological concern and disorder that last well after the physical injuries have healed.

On the other hand, the State and the society have been trying to tackle the impacts of domestic violence. The prevention programmes run by the State and other social organizations for the problem of domestic violence. They have to spend for violence requires a lot of resource which include medical costs, social welfare costs, judicial aid, and so on. Moreover, the productivity and labour of the victims would be lost after they are abused. Consequently, the spousal violence will affect to the society by raising the fear of crime and by absorbing a lot of finances from the State budget. Emergency services, general medical care, prenatal care and mental health care are among the tasks of the State relating to the treatment of the victims of violence. There is an enormous cost to the state in the form of time spent by law enforcement officers, courts, lawyers, public health workers and more. There is cost to social welfare organizations in the form of money and donated time to staff and run shelters, counseling services, hotlines, and more. There is cost to the productivity of our workforce in the form of absenteeism, worker re-training (when a victim is killed), and decreased productivity. The educational system is

¹⁷⁵ .Dawn Bradley, *supra* note 65, p. 160

¹⁷⁶ .Albert P. Cardarelli, *supra* note 79, p.50

required to provide specialized services to children who are victims of domestic violence.¹⁷⁷

The effects of domestic violence have a great significant on society. It is not easy to measure and it affects to every sphere of life. These evil results of domestic violence cause great misery to families in society. The economic impact of domestic violence is considerable even though the real nature of broken life cannot be measured. The huge sum of medical expenses and the loss of capacity for commercial productivity are the most fundamental problems. Psychological damage and need for permanent mental care for the victims are of certainly a great burden to society. Absence of work, decrease in productivity and retraining works may reduce the nation's GDP and may force the world to function below its potential. As already noticed domestic violence has also a detrimental effect on children and undermines the growth of future generations.

3.3. Summary

There are numerous factors which may cause to domestic violence not only because of individual's emotion and character but because of social and cultural impact. Due to these causes when the violence occurs, it affects and damages whole families across all the social classes.

It is no coincidence that an overwhelming majority of the victims of domestic violence are women and children. At the root of these crimes lies a society in which patriarchy determines the worth of human beings. Although laws have changed to protect women and children from abuse, domestic violence is still an epidemic in the world. In most arenas traditional gender based roles in human being's society place men in positions of power over women. Often, media and other forms of socialization encourage using violence as a means of gaining power and control. Many people place the most value on those individuals with the power and control. It also affects upon human's belief systems because this foundation is set out. Many factors, such as alcohol, drug use and poverty, contribute to a growing use of domestic violence. Because these crimes are so complex that the efforts to intervene must be collaborative and thorough.

¹⁷⁷ . Barrie Levy, *supra* note 44, p.95

The effects of domestic violence are affecting not only to the families concerned but also to the society. However, men are not the only one in the society who is guilty of using violence. Women and children are becoming more violent as well, oftentimes responding to acts of violence with violence or misunderstanding as opposed to using to acts of reasonable ways as perpetuates the cycle of violence. All the different forms of domestic violence adversely affect the society. If violence against women comes out is brought to light and made open and the wrongs done to them for help and rescue them, it will influence the society both positively and negatively. On one hand it acts as an inspiration and ray of hope for other suffering women and on the other hand, it also spoils the atmosphere of society because some families try to imitate what others indulge in irrespective of it being good or bad for the family.

Moreover, domestic violence negatively affects the productivity level of the victim. Men and women lose interest in household activities. If they are employed they fail to work at full capability. Children are found to concentrate less on studies. When old people are tortured and physically abused, they may need to spend part of their income for medication. The cumulative effect of domestic violence at all levels and across all regions is the hindrance to the country's development and slow economic growth.

Chapter IV

Legal Protection and Responses of Domestic Violence in the United Kingdom

In the United Kingdom government has expressed a public commitment to the elimination of domestic abuse. It currently provides adequate protection for basic rights and the Parliament has taken positive steps to augment the protections afforded by the Common law by adopting legislation that provides women with protections against domestic violence. Thus, the perceptions of the people in the United Kingdom are initially explained and the extent and factors contributing to violence are then discussed. Then, it goes to the responses of the problem, including the current domestic violence law and other relating laws. This is followed by legislative initiatives, which mostly offer criminal justice response, including the police, the prosecutors and the court. About the specialist domestic violence courts is explained in this chapter for its special performance. And civil protections, including issuing occupation and non-molestation orders and divorce suit proceedings are analyzed in detail with reliable data and tables.

4.1. Perceptions of Domestic Violence

Domestic violence is phenomenon that has remained largely invisible over centuries. Traditional roles of women as inferior and subordinate to men, and as property of their husbands, have served as a model for generations. In consequence, any acts that took place in the privacy of the domestic environment were not the concern of the public domain.¹⁷⁸ Husbands have used violence against their wives as an assertion of their prerogative as a husband. Communities would take action against those husbands, but also that action was rarely, if ever, taken against those husbands who were important members of a community.¹⁷⁹

A husband's rights over his wife were clearly articulated in English common law. These rights extended to complete control of her property and over her daily affairs. They also extended to having the right to correct and chastise his wife: a husband was allowed

¹⁷⁸ .Shirely Rawstorne, *England and Wales*, In: R.W. Summers & A.M. Hoffman (Eds), *Domestic Violence: A global view*, Greenwood Press, 2002, p.25

¹⁷⁹ .Deborah Lockton & Richard Ward, *supra* note 42, p.2

to “give wife a serve beating with whips and clubs...” for some offences. It was thus acceptable, both legally and socially, for husband to use physical force against their wives: only when this force was used to excess was such behavior proscribed. They could be beaten with a stick (although no wider than the husband’s thumb), raped, sold, and apprehended by husbands. Chastisement was “necessary” because the husband was legally responsible for his wife’s behavior. Hence, as Sir William Blackstone commented, “it is reasonable to entrust him with this power of chastisement in the same moderation that a man is allowed to correct his apprentices or children. The only limits placed on a husband’s right to beat his wife were that he does so in a moderate manner. Unless a wife’s life was threatened, courts had no right to interfere with the exercise of this right, and women had no *locus standi* contest.¹⁸⁰ It was believed that what happens between or among family members is a “private” matter. If a husband hit his wife or child, it was not a crime, but rather, business as usual within the family structure. It was acceptable for a husband to keep his wife in line by using force.

However, society has now moved on from the concept of a wife as possession: husband and wives are now seen as equals. In addition, the use of violence within the home, or domestic life, is seen to be wrong, or uncivilized.

4.2. Extent of Domestic Violence

Despite uncertainty about how many people are affected by domestic violence, it is certain that this problem is pervasive. Victims of intimate partner abuse can be found in all social, ethnic, and racial groups. Although both women and men are victims of abuse, the rates of victimization of women are significantly higher than men.

Domestic violence causes more death and disability worldwide amongst women aged 15-44 than war, cancer, malaria or traffic accidents¹⁸¹. It is estimated that one in every five women faces some form of violence during her lifetime, in some cases leading to serious injury or death.¹⁸² Violence against women and girls is a problem of pandemic

¹⁸⁰ Subrata Paul, *supra* note 1.

¹⁸¹ *World Bank Study World Development Report: Investing in Health*, New York, Oxford University Press, 1993

¹⁸² World Health Organization, *Addressing violence against women and achieving the Millennium Development Goals*, WHO pres, 2005, http://whqlibdoc.who.int/hq/2005/WHO_FCH_GWH_05.1.pdf, accessed on September 10, 2010

proportions. At least one out of every three women around the world had been beaten, coerced into sex, or otherwise abused in her life by someone known to her.¹⁸³ It is estimated that worldwide, one in five women will become a victim of rape or attempt to rape in her life time.¹⁸⁴

In the United Kingdom, according to the British Crime Survey 2008/09, women were more likely to have experienced intimate violence more than any other type of abuse. More than 1 in 4 women and around 1 in 6 men had experienced any domestic abuse. Further, 77 % of victim of domestic violence are women and domestic violence has more repeat victims than any other crime. Over average, 2 women a week are killed by a current or former male partner and nearly half of all female murder victims are killed by partner or ex-partner.¹⁸⁵ It is also apparent that the problem is not confined to adult women. A recent survey that 16% of the teenage girls that were questioned (who average age was 15) were hit by their boyfriends.¹⁸⁶

Every year, a million women suffer from domestic violence. In fact, intimate partner violence has been credited as the leading cause of serious injury to women. Over half (i.e. 54%) of victims of partner abuse suffered some injuries or emotional effects as a result of the abuse. The most common effects were mental or emotional problems 26%, minor bruising or a black eye 20%, scratches 14%. The majority of the victims who had sought medical help had seen a GP or gone to a doctor's surgery 77%. Over one-quarter of the victims (i.e. 27%) had been to a hospital casualty or accident and emergency department, and 11 % had been to specialist mental health services. In abusive relationships, incidents of battery often recur frequently, monthly or even daily. Research suggests that around one-third of the victims have experienced abuse for relatively short periods of time. Another third of the victims also reported having experienced partner abuse for relatively long periods of time. The majority (64%) of victims of partner abuse

¹⁸³.General Assembly, In-Depth Study on All Forms of Violence against Women: Report of the Secretary A/61/122/Add.1, <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomenstudydoc.pdf> General, 2006, accessed on February 2010

¹⁸⁴.State of World Population, *The Promise of Equality Gender Equity, Reproductive Health and the Millennium Development Goals 2005*, <http://www.unfpa.org/swp/2005/presskit/summary.htm>, accessed on September 10, 2010

¹⁸⁵.Claire Flood-Page and Joanna Taylor (eds.), *Crime in England and Wales 2001/2002*, Supplementary Volume, London: Home Office, 2003, p.12

¹⁸⁶.Sylvia Walby, *The Cost of Domestic Violence*, Women & Equality Unit, London, 2004, http://www.devon.gov.uk/cost_of_dv_report_sept04.pdf, accessed on August 10, 2010

since the age of 16 suffered abuse caused by only one partner. Women were more likely to have experienced longer period of partner abuse, repeat victimization and injury or emotional effects as a result of the abuse. The injuries incurred by victims of intimate partner abuse are usually greater than injuries inflicted by strangers.¹⁸⁷

Additionally, in homes domestic violence occurs, children may experience occurrences of domestic violence not only as direct victims but also as witnesses. At least 750,000 children a year witness domestic violence¹⁸⁸ and in London 30% of domestic violence murders are witness by children.¹⁸⁹ Children who live with domestic violence are at increased risk of behavioral problems and emotional trauma, and mental health difficulties in adult life. Nearly three quarters of children on the 'risk' register live in households. There are currently 450 women's refuges in the UK and in 2007, 17406 women and 25,384 children stayed in refuge accommodation.¹⁹⁰ One of the effects of domestic violence between adults is thus that experiencing domestic violence directly or indirectly as a child can constitute child abuse. Thus, an additional conflict has been set up, between victim mother and the victim child.¹⁹¹ Nationally, 52% of child protection cases involve domestic violence. Domestic violence disturbances also tend to become more violent and dangerous over time. A survey of 130 abused partners found that 76% of the 148 children ordered by the courts to have contact with their estranged parent were said to have been abused during visits: 10% were sexually abused; 15% were physically assaulted; 26% were abducted or involved in an abduction attempt; 36% were neglected during contact, and 62% suffered emotional harm. Most of these children were under the age of 5.¹⁹²

Economically, domestic violence is also devastating. Overall 4% of victims had lost their job or had to give up working as a result of partner abuse. 1 in 10 people (10%)

¹⁸⁷.Home Office Statistical Bulletin: *Homicides, Firearm Offences and Intimates Violence* , 2008/2009, <http://www.homeoffice.gov.uk/rds/pdfs/10/hosb0110.pdf>, accessed on February 3, 2010

¹⁸⁸.Department of Health, *Secure Futures for Women: making a difference* London, 2004, http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4060445.pdf

¹⁸⁹.Metropolitan Police, *Findings from the Multi-Agency Domestic Violence Murder Reviews in London*, 2003, <http://www.met.police.uk/csu/pdfs/MurderreportACPO.pdf>, accessed on August 10, 2010

¹⁹⁰.Home Office Statistical Bulletin, *supra* note 224.

¹⁹¹.Smith Roger, *The wrong end of the telescope: Child protection or child Safety?*, *Journal of Social Welfare and Family Law*, Vol.24, No.3,pp.247-261

¹⁹².Home Office Statistical Bulletin, *supra* note 187.

who had experienced partner abuse had to take time off from work due to the abuse. 6 in 10 (60%) victims who had taken time off from work had taken less than a week off and about 2 in ten (22%) had taken a month or more off due to the partner abuse. Home Office Study, domestic violence accounts for around 16% of all violent crimes in the United Kingdom at a cost in excess of £ 23 billion a year.¹⁹³

The above figures show that domestic violence is a crucial social problem for society in the United Kingdom. A victim may suffer from minor injury to death or from temporary harm to disability. It becomes the front line issue because it harms not only to family concerned but also to society.

4.3. Contributing Factors

In the United Kingdom, the causes of domestic violence cannot definitely stated by the British Crime Survey. However, the particular social or economic strains are important factors. Individual psychological factors in perpetrators or victims, psychosocial factors, and behavioral issues are main reasons. Some said that men who abuse their wives are mentally ill or disturbed. And some also argue that the uncontrollable anger of a violent man emanates from unresolved conflicts with his parents resulting in a displacement of anger and aggression onto the most convenient targets in his life, such as to his wife or girlfriends. Their unmet needs develop in childhood and express themselves as violence in later life. Men may become disturbed in a “cycle of violence” whereby a boy who witnesses his father beating up his mother becomes likely to beat up his own wife when he is an adult. Male frustration, stress, and blocked goals are also the factors of violence in the United Kingdom. Stress here includes economic conditions, bad housing, relative poverty, and lack of job opportunities. However, these explanations ignore the same frustration in women and do not address domestic violence in more affluent areas of society.¹⁹⁴

The women or victim herself are to be blamed by regarding domestic violence as an “understandable phenomenon”. An example is constant “nagging” forcing the man into a violent retaliation. In some situations, the women themselves want to be hit and

¹⁹³. *Ibid*

¹⁹⁴. *Ibid*, p.27

provoke violence. Evidence to support this claim is the fact that many women leave one violent relationship only to enter another. However, this explanation does not consider the psychological impact that continued violence and helplessness can have on a woman. The demoralizing effect of continual beatings creates a feeling of worthlessness; the victim becomes not only a victim of violence but a victim of low self-worthiness, seeing herself as a victim of life with no expectations and undeserving of anything worthy.¹⁹⁵

Because women have been economically dependent on men throughout time, their position in society in the United Kingdom has allowed domestic violence to prevail. Childbirth and child rearing have enabled men to control women, keeping them subordinate and dependent. This dependency may keep women in violent relationships not because they enjoy pain or collude at some level, nor because they are pathologically disturbed, but because they have very little choice. They often do not wish to uproot or upset their children, and they conceal the evidence for the children's sake.¹⁹⁶

Men's rape and assault of women reflects a form of masculinity represented by domination, control, humiliation, and degradation of women. Men's violence against women is facilitated by men's domination and any reduction in this violence will occur only when gender inequality is reduced and when human social bonds are more caring. The more recent stereotype of masculinity refers to the pressures of men to perform certain functions in society, such as being the provider. When this does not or cannot happen, the man becomes frustrated and demoralized, so he responds with another masculine behavior, such as violence.¹⁹⁷

4.4. Responses to the Problem

Although the recognition of domestic violence began during the 1800s, no laws were enacted to criminalize violence against wives even though such assaults could be included within the 1861 Offences against the Person Act. In practice, judges did little to challenge the patriarchal privilege of legitimate chastisement of wives. In 1857 the first Matrimonial Causes Act (which is entered into force in 1858 January 1) offered a civil remedy to women. They could obtain a separation order if their husband was convicted of

¹⁹⁵. *Ibid*, p.28

¹⁹⁶. *Ibid*.

¹⁹⁷. *Ibid*

aggravated assault and if they were considered in grave danger. Domestic violence itself was treated with ambivalence. When women tried to do something about it, they could be seen as provoking the attack or taking advantage of the new laws to bring malicious complaints or disgrace to their husbands. Violence within the home was regulated, if at all, via the use of civil legal proceedings rather than the use of criminal law. Even if the police do not use the criminal law against a violent person, the civil law can still be used to get protection and to allow people to live in safety.¹⁹⁸

Since the 1970s, when routine police practice was to avoid arresting violent men, an extensive body of research has developed from this focus on legal interventions and has detailed the shortcomings of legal responses. For example, women are ill-informed about the legal system and process and so left at risk of further assault; civil remedies are not consistently applied or supported by police or courts; domestic violence offences have not been systematically prosecuted; courts orders allowing contact between children and abusive men further endanger women; demands of civil and criminal courts are sometimes contradictory; the law applies a single incident framework to domestic violence instead of recognizing and treating it as an ongoing process of intimidation, abuse and control; mandatory arrest policies designed to address the historical failure of police to arrest violent men have led to a growth in 'dual arrest' and possible over-policing of poor people, and people of color. Clearly, the justice system routinely fails to provide 'justice' in cases of domestic violence.¹⁹⁹

On the other hand, some recent work has demonstrated that certain aspects of legal intervention can be effective and can play a vital part in protecting women and challenging men. Such work suggests that there may be opportunities to improve legal responses to men's violence. Most of the study investigates special projects which pilot innovative techniques in the justice system, for example: special domestic violence courts can better incorporate victims' pragmatic interest; advocacy projects can prevent repeat victimization and enable earlier intervention; consideration of victim preferences can improve victim satisfaction and decrease subsequent violence; personalized inter-agency crisis intervention can be effective at enabling a woman to leave and/or support a

¹⁹⁸ Shirely Rawstorne, *supra* note 178, p.30

¹⁹⁹ Ruth Lewis, Making Justice Work: Effective Interventions for Domestic Violence, *The British Journal of Criminology*, Vol.44, No.2, 2004, pp.204-224

prosecution; enhanced evidence gathering, including use of photographic evidence, induces more guilty pleas, thus speeding up the court process, minimizing attrition and increasing the conviction rate. Together, these findings demonstrate that there are aspects of traditional or innovative legal responses which can have positive impacts on men's subsequent violence and women's safety and quality of life.²⁰⁰

4.4.1. Domestic Violence Laws

The latter part of the 1970s brought three significant pieces of legislation: the Domestic Violence & Matrimonial Proceedings (DVMPA) Act 1976, the Domestic Proceedings & Magistrates' Courts Act (DPMCA) 1978, and the Housing (Homeless Persons) Act 1977. Although the acts were intended to provide legal remedies, the ways in which they were interpreted and implemented have meant that battered women continue to be inadequately protected. The legislative responses were concerned with civil law remedies, leaving criminal law largely untouched in terms of the protection of victims and the punishment of the perpetrators of domestic violence. The Domestic Violence & Matrimonial Proceedings Act 1976 paved the way for further legislation, the Domestic Proceedings & Magistrate's Courts Act 1978. The latter new provisions included giving magistrates power to issue orders for the protection of married women who had been subjected to physical violence. The two acts, specifically concerned with domestic violence, required the support of other legislation concerned with clarifying and increasing the statutory responsibilities of the local authorities housing departments. The Housing (Homeless Persons) Act 1977 included specific terms for persons who had become homeless as a result of domestic violence. The Matrimonial Home (MHA) Act 1983 provided another option of relief for persons sharing a home²⁰¹.

The introduction of the Matrimonial Homes Act 1983 into the arena of domestic violence only applies to these with a matrimonial home defined in its strictest sense, i.e. married couples. Furthermore, the Act only applies if both spouses are entitled to occupy the home by virtue of a legal estate vested in them jointly or by virtue of a contract or enactment, or if one spouse has a statutory right to occupy the matrimonial contract or

²⁰⁰ . Dee Cook & Mandy Burton, *Enhancing Safety and Justice: The Role of Specialist Domestic Violence Courts in England and Wales*, British Society of Criminology, Vol.7, 2008

²⁰¹ . Shirely Rawstone, *supra* note 178, p.31

enactment, or if one spouse has a statutory right to occupy the matrimonial home.²⁰² The MHA 1983 was designed to deal with the occupation rights of the parties rather than with their physical protection, and as such does not allow the court with their physical protection, and as such does not allow the court to do other than declare, enforce, prohibit or suspend the operation of those rights *vis-à-vis* the spouses.²⁰³

The Family Law (FLA) Act 1996 enables many people experiencing domestic violence to apply for court orders against their abusers, who they may or may not live with. These orders can stop the abusive behavior itself or, in some cases, prevent the abusive person from entering the home. Courts can attach a power of arrest so that if the order is not obeyed, the police can take the abuser to court, in contrast to the previous legislation where the power of arrest was discretionary. Nevertheless, problems with the power of arrest remained, since the police were reluctant to enforce them, as breaches were not regarded as criminal offences and the courts were reluctant to make non-molestation orders against harassment unless this also included physical violence.²⁰⁴

The Protection from Harassment Act 1997 (PFHA 1997) makes it an offence to behave in a way which a person knows, or ought to know, causes someone else harassment²⁰⁵ or fear of violence²⁰⁶. This makes abuse of a psychological nature a criminal offence and can include conduct which takes place in a domestic context. Under this Act, a restraining order is available which is designed to regulate the offender's future behavior. In 1999, just over half of all convictions under the PFHA 1997 were accompanied by a restraining order²⁰⁷. A breach of the restraining order can result in imprisonment for up to five years.

The Domestic Violence Crime and Victims Act 2004 (DVCVA 2004) also amends the Family Law Act 1996 (FLA 1996) and introduced new powers for the police and courts to deal with offenders, while bolstering support and protection that victims receive. The law makes common assault an arrestable offence²⁰⁸. It signifies new police

²⁰². The Matrimonial Homes Act 1983, Sec. 1(1)

²⁰³. *Ibid.*, ss.1(2), 1(9) & 9

²⁰⁴. Lynne Harnie and Jill Radford, *supra* note 92, pp. 96-97

²⁰⁵. The Protection from Harassment Act 1997, Sec.2

²⁰⁶. *Ibid.*, Sec.4

²⁰⁷. J.Harris, The Protection from Harassment Act 1997 – An evaluation of its use and effectiveness, Home Office Research Finding No.130, 2000

²⁰⁸. Domestic Violence Crime and Victims Act 2004, Sec.10-13

powers to deal with domestic violence including making it an arrestable, criminal offence to breach of non-molestation order, punishable by up to five years in prison²⁰⁹. It strengthens the civil law on domestic violence to ensure cohabiting same-sex couples to have the same access to non-molestation and occupation orders as opposite sex couples, and extends the availability of these orders to couples who have never lived together or been married²¹⁰. The courts enable to impose restraining orders on acquittal for any offence (or if a conviction has been overturned on appeal) if they consider it necessary to protect the victims from harassments. This will deal with cases whether the conviction has failed but it is still clear from the evidence that the victims need protection²¹¹. The law put in place a system to review domestic violence homicide incidents, drawing in the key agencies, to find out what can be done to put the system right and to prevent future deaths²¹². It provides a code of practice, binding on all criminal justice agencies, so that all victims receive the support, protection, information and advice they need. The victims of mentally disordered offenders are given the same rights to information as other victims of serious violent and sexual offences. The victims have the right to recover money in compensation from the offenders through the Criminal Injuries Compensation Authority²¹³. The law closes a legal loophole by creating a new legal offence of causing or allowing the death of a child or vulnerable adult²¹⁴. The offence establishes a new criminal responsibility for members of a household where they know that a child or vulnerable adult is at significant risk of serious harm.

Violence against women has to be seen in the context of the patriarchal family system and the subordinate status of women: the law alone cannot change attitudes. However, with legislation in place and recognition of the fundamental attitudes toward the position of women in society, it has become more clear how best to combat the problem. The interpretation and application of the law is influenced by two public policy principles at every stage of the process. One is that the family is private and that is sanctity takes precedence: the other is that violence within the family by men toward

²⁰⁹. *Ibid*, Sec.1

²¹⁰. *Ibid*, Sec.2,3 & 3

²¹¹. *Ibid*, Sec.12

²¹². *Ibid*, Sec.6,7,8 & 9

²¹³. *Ibid*, Sec. 57

²¹⁴. *Ibid*, Sec. 5

women is not to be equated with public violence. It is possible to interpret these stances as indicating that the state – through its laws, legal process, and personnel – symbolically condones male violence against partners unless it is of the most appalling gravity. Indeed, the law and the courts have been seen to reluctantly protect women in this family dilemma. One significant factor has been evident: the police are reluctant to prosecute. However, growing awareness of the need for this to change is how readily accepted. Since the initial legislation in the 1970s, there have been various approaches to dealing with domestic violence. Today the government in the United Kingdom is committed to tackling domestic violence on every front. There are two areas of strategy to combat the problem: prevention, and support for those who are already victimized. Violence and abuse in a close relationship or domestic situation are now treated seriously by the criminal justice system; unfortunately, the effectiveness of the strategies differs around the country.²¹⁵

4.4.2. Criminal Justice Responses

The criminal justice system refers to the different people and systems that work together to enforce the criminal laws. It usually includes police, prosecutors, and judges. It may also include the corrections system, which is made up of jails, prisons, probation departments.²¹⁶ Historically, police and prosecutors have viewed battering as a family problem. The criminal justice system created a figurative “curtain of privacy” to shield husbands who beat their wives from public view, in the belief that the parties should be left to work out their “differences” privately. If outside intervention was appropriate, counseling was preferred over prosecution. It was only in the 1970’s that the criminal justice system – at the prodding of battered women and their advocates – began to treat domestic violence like other assaults.²¹⁷ By the 1980’s, prosecutors in some jurisdictions had initiated special programs for domestic violence cases.²¹⁸

Many victims may not recognize that a criminal offence has occurred. There may be fear that police involvement could result in the situation getting worse, with further

²¹⁵ Shirely Rawstone *supra* note 178, pp.31-32

²¹⁶ Dawn Bradley Berry, *supra* note 65, p.157

²¹⁷ Eve S. Buzawa & Carl G. Buzawa, *supra* note 10, p.90

²¹⁸ *Ibid*, p.117

abuse or violence taking place, or the victim suffering embarrassment if the police presence brings the abuse to the attention of neighbors or others. The controlling behavior of the perpetrator of violence may also create barriers to reporting. Getting a true picture of the extent and nature of domestic violence is somewhat problematic. It is an area that suffers from under reporting for a number of complex reasons not least because some victims perceive it as a private family matter to be kept within home. Thus, handling the domestic violence cases under criminal justice system is easy to understand but hard to get real outcome in practice. In general, the criminal justice system in the United Kingdom has more recently attempted to respond to domestic violence through increased frequency of response by the police, the imposition of increasingly punitive legal sanctions as a deterrent, including arrest, and the notification of victims of their legal rights and the availability of supportive services.

4.4.2.1. The Police Response

The police are the primary agency charged with maintaining civilian law and order, and protecting the public by preventing and fighting crime. They are one of the most visible, widely recognized, geographically comprehensive and accessible services and also a very powerful agency, with powers of arrest and detention and a gate-keeping role in respect of law enforcement and access to justice. This include the power to define an incident as a crime or not, and to decide on whether and what action to take against suspected perpetrators. They can also facilitate access to other voluntary sector and statutory services, thereby playing an enabling role in respect of community domestic violence, housing and health services.²¹⁹

Police responses to domestic violence have traditionally been variable, depending on the attitudes and approach of the individual officer. Until the late 1980s the criminal justice system paid little attention to the needs of women and children experiencing domestic violence. Domestic violence was frequently seen as a private matter, not 'real' violence, and the sympathies of a predominantly male police force were often with the violent man/husband. Much domestic violence still goes unreported to the police. While

²¹⁹. Lyne Hame and Jill Radford, *supra* note 92, p.117

many women have sought help from the police in an emergency, for others calling the police is not the first option, and is often only a last resort after repeated attacks.²²⁰

Many abused women have been ambivalent about calling the police. Some victims do not call the police because of fear of future acts of abuse, hope that the abuse will stop without legal intervention, financial dependence, welfare of their children, lack of support from families and friends, and the desire to save their marriage.²²¹ Victims may call the police not necessarily to have their abuser arrested, but because they believe the presence of law enforcement allows them to muster some degree of control of their situation.²²² Other victims may not call the police because of their perception that the abuse may increase in severity and frequency if the abuser is arrested or if the legal intervention leads to separation.²²³ This hesitation manifests itself in the fear of staying and the fear of leaving. Some victims who call the police want their abusers arrested but not prosecuted. They want to maintain an intimate relationship with their partner without the abuse.²²⁴ These experiences of individual police attitudes, coupled with the limitations of the legislative response, led to many women experiencing an inconsistent police response.

The recognition of the need for changes in police practice to both domestic violence and rape led to the first Home Office Circular in 1986, followed in 1990 by a much more substantial Circular to Chief Constables. This circular signaled clearly that domestic violence is now viewed as a crime both by practitioners in the criminal justice system and by government. The circular urged the police to develop explicit force policies on domestic violence and to establish dedicated units with specially trained officers to deal with domestic violence 'where practicable and cost effective'. The circular also specified the central features that should be included in any force policy statements:

²²⁰. Marianne Hester, Chris Pearson & Nicola Harwin, *Making an Impact: Children and Domestic Violence: A Reader*, 2nd ed., Jessica Kingsley Publishers Ltd, 2007, p.110

²²¹. Robert C. Davis & Barbara Smith, *Domestic Violence Reforms: Empty Promises or Fulfilled Expectations?*, *Crime & Delinquency*, Vol.41, No.4, 2005, pp. 541-552

²²². Ford. D. A, *Prosecution as a victim power resource: A Note on Empowering Women in Violent Conjugal Relationships*, *Law and Society Review*, Vol. 25, No.2, 2005, pp.314-334

²²³. Richard B. Felson, Steven F. Messner, Anthony W. Hoskin & Glenn Deane, *Reason for Reporting and Not Reporting Domestic Violence to the Police*, *The Journal of Criminology*, Vol.40, No.3, 2006, pp. 617-648

²²⁴. Eve S. Buzawa & Carl G. Buzawa, *supra* note 10, p.418

- the overriding duty to protect victims and any children from further abuse
- the need to treat domestic violence at least as seriously as other forms of violence
- the use and value of power of arrest
- the danger of conciliation between victim and offender
- the need to establish effective recording and monitoring systems

The primary duty was to protect the victim and any children involved and then to consider what action should be taken against the offender. Immediate protection could include referring or taking the woman to a refuge and liaising with statutory and voluntary agencies for long-term support. Chief constables were urged to liaise on the development and implementation of these policies with a wide range of agencies, and particular consideration was given to the need for good liaison with the Crown Prosecution Service (CPS), for the discussion of evidential and other matters to ensure consistency of aims and approach in the prosecution of domestic violence.²²⁵

Many constabularies developed domestic violence policies, modeled on the circular, and established specialist domestic violence units or included dedicated domestic violence officers in community safety, child protection or vulnerable persons units and issued practice guidelines to their officers. The initial role of specialist domestic violence units was to provide support during the period between the incident and the completion of any criminal proceedings against the perpetrator, with a view to encouraging victims not to withdraw their complaints. As the roles of the new police domestic violence officers were developed within local forces, implementation was characterized by local diversity.²²⁶

As in many constabularies, domestic violence calls were now given a zero rating, i.e. top priority, and attended and initially dealt with by uniformed officers. Uniformed officers were briefed to treat domestic violence incidents like any crime scene, and to engage in 'enhanced' evidence gathering, drawing on forensic crime scene investigators, for finger prints, detecting forced entries and photographing injuries and criminal damage to the property. With the consent of the victim, they were encouraged to take statements

²²⁵ . Marianne Hester, Chris Pearson & Nicola Harwin, *supra* note 220, p.110

²²⁶ . Mandy Burton, *Legal Response to Domestic Violence*, Taylor & Francis, p.94, 2008

from witnesses, like neighbors, and other family members. The officers attending completed a checklist domestic violence form, devised by the domestic violence officers to ensure key evidence was collected. The checklist also required officers to check on the welfare of any children in the residence. While they were not expected to be child protection specialists, they were required to note and respond to any visible injuries to the children and make a note if they were displaying distress.²²⁷

The role of the specialist domestic violence officers was primarily to provide advice and support and to ensure that best evidence was collected. The different civil and criminal law options were explained by domestic violence officers, who through their involvement with the domestic violence multi-agency form, were able to make informed referrals to other agencies, like the local refuges, housing, health and benefits services. Safety planning with victims was another key role and, then appropriate, officers facilitated access to target hardening measures, which included the installation of panic alarms, small CCTV cameras as well as door and window locks. An innovation developed by domestic violence officers was the production of pocket-sized domestic violence 'diaries'. Following a page of safety incidents, with prompts to ensure relevant information was recorded subsequent incidents, with prompts to ensure relevant information was collected, i.e. to record not only what had happened, but also dates, details of location and officers attending, things that women often overlooked. These 'diaries' proved particularly valuable in relation to civil law injunctions and proceedings under the harassment legislation. Following an instance when a domestic violence officer was called to court to explain these 'diaries', local courts allowed them to be used in evidence as 'contemporaneous notes'.²²⁸

The domestic violence officer also played a key role in preparing cases for and making recommendations to the Crown Prosecution Service in relation to the decision to forward cases to prosecution. Their status as 'dedicated officers' allowed them time which, together with their developing expertise, enabled them to take detailed witness statements from the survivor and any other witnesses, for example neighbors, friends and other family members. In addition, domestic violence officers were charged with

²²⁷ . Lynne Harne and Jill Radford, *supra* note 92, p.122

²²⁸ . Mandy Burton, *supra* note 226, pp.95-96

taking withdrawal statements as it was considered that they would be better able to assess whether or not the victim had been pressurized by the perpetrator or his family into making a withdrawal. They found that some women wishing to withdraw were willing to be 'summoned' to court to give evidence because then the responsibility for proceeding with a case did not lie with them but with the police and Crown Prosecution Service (CPS), making it easier to explain to their children and family members. This strategy, supported by the local CPS, provided negotiated solution to the dilemma presented by the pro-arrest positive policing strategy of taking forward prosecutions, where there is sufficient evidence, irrespective of the survivors' wishes. As will be explored there is a continuing dilemma over how much influence survivors should have in the new approach to domestic violence which is both 'victim centered' and committed to increasing arrest and prosecution rates.²²⁹

The police are a key 24-hour agency for women experiencing domestic violence and perhaps the first port of calling in an emergency. Each police officer has the discretion to use his or her powers to intervene in the situation and to arrest, caution or charge an abusive man. Arrest can be made to prevent further injury or to protect a vulnerable person or child. The police can also arrest someone who has broken bail condition or an injunction with power of arrest.²³⁰ This includes breach of any non-molestation order under the Domestic Violence Crime and Victims Act 2004. The Act provided a new focus for the criminal justice system response to domestic violence to improve support and protection offered to women and introducing new powers to enable both police and courts to deal more effectively with offenders.

The police are also a very powerful agency, with powers of arrest and detention and a gate-keeping role in respect of law enforcement and access to justice. Every minute in the UK, the Police receive a call from the public for assistance for domestic violence. This leads to police receiving an estimated 1,300 calls each day or over 570,000 each year. 89% of the 1,300 calls to the police were from women being assaulted by men. According to the British Crime Survey, there were 293,000 incidents of domestic violence in 2008/2009. These studying showed that an offender was arrested in 35% of

²²⁹ Lynne Harne and Jill Radford, *supra* note 92, p.123-124

²³⁰ . Marianne Hester, Chris Pearson & Nicola Harwin, with Hilary Abrahams, *supra* note 220, p.111

cases, and charged in 11%. No action was taken in 21%. Compared to previously findings based on the 2004/05, the proportion of cases in which the police arrested the offender has increased.²³¹

The level of victim satisfied in the police response to partner abuse has increased from the previously figure (59%) based on the 2007/08. Prior longer term trends have shown that victims' satisfaction with the police fell in the 1990s but since 2000 has remained broadly stable between 58% and 60% until the increase seen in 2008/2009. Moreover, British Crime Survey Shows that 80 % of adults were satisfied with contact that was initiated by the police and 67% were satisfied with the police when they initiated contact themselves.²³² Victims' perceptions of police response to domestic abuse cases have been somewhat underrepresented. Victims are the ones who have the most to gain from effective law enforcement response to domestic violence calls. It is important to examine their perceptions and experiences concerning their interactions with law enforcement.²³³

Many aspects of domestic violence are difficult to define as crimes, and they do not fit readily into common categories of assault under criminal law. Nevertheless, the criminal justice system has an important role to play in preventing and challenging domestic violence, both symbolically and practically. Local and national attention within the past decade has focused on encouraging more women to seek help from the police and the criminal justice system and on encouraging this system to provide a better response for such women and their children.²³⁴

4.4.2.2. The Prosecutorial Response

Once an abuser has been arrested and charged, the file passes to the Crown Prosecution Service (CPS). The police and the CPS have agreed charging standards for certain types of offence, including assaults. Police custody officers should liaise with the CPS at an early stage to seek advice on the sufficiency of the evidence, type of evidence

²³¹ .Home Office Statistical Bulletin: *Homicides, Firearm Offences and Intimates Violence*, 2008/2009, <http://www.homeoffice.gov.uk/rds/pdfs/10/hosb0110.pdf>, accessed on June 5, 2010

²³² .Home Office Statistical Bulletin: *Police Powers and Procedures England and Wales*, 2007/08, <http://rds.homeoffice.gov.uk/rds/pdfs/09/hosb0709.pdf>, accessed on June 5, 2010

²³³ .Ida M.Johnson, *Victim's Perceptions of Police Response to Domestic Violence Incidents*, *Journal of Criminal Justice*, Vol.35, 2007, p.498-510

²³⁴ .Marianne Hester, Chris Pearson & Nicola Harwin, *supra* note 220, p.111

required and the most appropriate charge. Custody officers should ensure that all advice given by the CPS is recorded on the prosecution file. The CPS will take into the safety of the victim, and any others who are involved. They also take the views of the victim into consideration when deciding whether to proceed with a prosecution although this is not the sole determining factor.

The “traditional” response of prosecution to instance of domestic violence was similar to that of the police. Prosecutors often perceived domestic violence cases as family matters that did not belong in the court. Consequently, there both low prosecution rates of domestic violence cases and high dismissal rates. Prosecutors often explain low rates of prosecution by emphasizing that victims of domestic violence tend to change their minds about pressing charges, often recanting their testimonies and/or becoming “non-cooperative witnesses”. Given that these cases rely heavily on the testimony of the victim, some prosecutors argue that they have no choice but to withdraw the charges when the victim does not cooperate.²³⁵

In an effort to reform such practice, some jurisdictions have adopted “no drop” prosecutorial policies. It can essentially be divided into what has been termed “hard” or “soft” no-drop policies”. ‘Hard policies’ require prosecutors to pursue cases regardless of the victims’ withdrawal of complaints or protests with some requiring victims to testify by issuing summons and threatening prosecution in response to a victims’ refusal to cooperate. ‘Soft no-drop policies’ encourage victims to participate but allow prosecutors some discretion in determining the extent to which the victims’ participation is required. Some of these policies may require that the prosecutor consult with the victim prior to making charging decision, in at least the very serious cases. In both cases, however, the victim’s decision-making ability is removed at the point at which charges are brought. She will then take on the position of witness in the case, and the state replaces her as the complaining party. Such policies provide that once a complaint has been filed, the victim of intimate partner violence may not withdraw it, despite threats or intimidation from the batterer.²³⁶

²³⁵ .Sana Loue, *supra* note 54, p.105

²³⁶ . *Ibid*, p.123

In particular, prosecuting cases is carried out by the CPS despite retraction by the victim, where there is sufficient evidence to do so. Thus, current CPS policy states that, generally, the more serious the offence because of, for example, the presence of children, or the level of violence used or the real and continuing threat to the victim or others, the more likely the CPS are to prosecute in the public interest, even if the victims do not wish the same.²³⁷ If this is the case, the CPS will then consider three options: to apply to the court to use the victim's statement as evidence without the victim having to give evidence in court, to proceed with the prosecution by helping the victim to attend court by the use of special measures or to compel the victim to give evidence in person in court.²³⁸

The Crown Prosecution Services (CPS) response to domestic violence, once heavily criticized, has improved in recent years. Each of the 42 CPS regions has a domestic violence coordinator with extensive experience in prosecuting domestic violence and other cases. The CPS policy includes continuing with a prosecution against the victim's wishes or requiring a witness to go to court against the witness's wishes. Section 23 of the Criminal Justice Act 1988 allows the CPS, in very limited circumstances, to use the victim's statement as evidence without calling the victim to court. Moreover, the rules on the admission of hearsay evidence have been relaxed by Sections 114–121 of the Criminal Justice Act 2003. Hearsay evidence can be admitted where the victim is unable to attend for physical or psychological reasons, where there is a previous inconsistent statement and where the incident has been reported to a third party. In these conditions, the CPS has to prove beyond reasonable doubt that the person who made the statement is afraid to give evidence or is being kept out of the way. The victim does not have to give evidence to prove that he or she is afraid. This proof can come from someone else, for example a police officer or doctor, or sometimes can be seen from the victim's behavior in court. If the court decides that the statement can be used under Section 23, the court must then decide whether, in the interests of justice, the statement should be used in this way.²³⁹

²³⁷ *The Crown Prosecution Service Guidance: Policy for Prosecuting Cases of Domestic Violence*, 2005, Para 5.13

²³⁸ *Ibid*, Para 5.16

²³⁹ . Marianne Hester, Chris Pearson & Nicola Harwin, *supra* note 220, p.115

As revealed in the second annual CPS Violence against Women Crime Report, more than 67,000 people were prosecuted in 2008/09 for domestic violence offences and almost 48,500 were convicted. This compares with fewer than 30,000 convictions in 2005/06. Across all Violence against Women offences, between 2006/07 and 2008/09 charging increased from 53 per cent to 63 per cent, successful prosecutions rose from 65 per cent to 72 per cent and guilty pleas increased from 56 per cent to 63 per cent. Unsuccessful outcomes due to victim issues fell from 17 per cent to 14 per cent between 2005/06 and 2008/09 in line with the increased focus the CPS now places on supporting victims. The Prosecutors have been working across the criminal justice system in 127 specialist domestic violence courts, with support for victims through more than 700 trained Independent Domestic Violence Advisers. Similar support services for sexual offences are also being developed.²⁴⁰

Table (1): Successful Prosecution for Domestic Violence 2005- 2009

Year	DV Number	Successful	unsuccessful
2008-09	67,094	72.2%	27.2%
2008-07	63,819	68.9%	31.1%
2007-06	57,361	65.2%	34.8%
2006-05	49,782	59.7%	40.3%

Source: The Crown Prosecution Service

The advantages of victimless prosecution are clear: it involves less invasion of the victim's autonomy if the victim is opposed to litigation; it means that victims can avoid the pressures placed on them giving evidence in these kinds of cases; and it can prevent threats or other pressures being put on victims not to be involved in litigation. Of course none of this should be seen as not seeking to prosecute with the victim's consent and doing much more to enable and encourage the victim to support the litigation. The use of specialist domestic violence police, prosecutors and courts might assist in these procedures.²⁴¹

²⁴⁰ .The Crown Prosecution Service, *Violence against Women Crime Report 2008-2009*, http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2009.pdf, accessed on August 5, 2010

²⁴¹ . Shazia Choudhry, *Righting domestic violence*, *International Journal of Law, Policy and the Family*, Vol.

4.4.2.3. Judicial Response

Victims of domestic violence may instigate civil proceedings at the same time as criminal proceedings are being pursued in practice. Where this happens, civil and criminal courts should share information, as decisions in one court may impact on decisions in the other. Recent investigation into court procedures has shown, however, that information sharing between courts is weak and requires development.²⁴²

As judicial reaction to domestic violence, sometimes, judges or magistrates are faced with difficult decisions when there is a discrepancy between what is known generally about the nature of these cases and the facts of the specific incident as presented in court. They cannot pass sentence on the basis that the violence has occurred frequently where the other incidents were not reported or charged, or have not been proved or admitted. While it is recognized that victims of domestic violence may have suffered abuse over a considerable period of time, the courts can sentence on the basis of continuing abuse only if the offender is convicted of separate offences arising from different incidents, or clearly admits them, or is convicted of harassment on the basis of persistent abuse, or if the offender has a criminal record of violence against the victim or other family members. The law²⁴³ provides greater opportunity for the prosecution, in a contested case, to draw attention to previous unreported violent incidents as evidence of the defendant's bad character. This raises a question over the extent to which this evidence could then form basis for sentencing.

Court of Appeal guidance, in the context of victim personal statements, is that judges or magistrates should be very cautious in paying attention to pleas for mercy.²⁴⁴ The majority of researchers believed that very little weight should be given to the views of the victim in domestic cases, and that sentencing should be a matter for the court mainly because pleas for mercy may be influenced by the defendant or other family members, and the victim should not be made to feel responsible for the sentence period. Thus, it is found that, in accordance with general sentencing principle, little weight is given to pleas by the victim to reduce the sentence considered appropriate by the Court in

20, No.1, 2006, pp.95-119

²⁴². Crown Prosecution Service, Evaluation of Domestic Violence Pilot Sites at Gwent and Croydon 2004/05- Interim report, 2004

²⁴³. The Criminal Justice Act 2003, Sec.101

²⁴⁴. Consolidated Practice Direction, 1 WLR 2870, 2002, Para 28, R vs. Perks, 1 Cr App R (S) 66, 2001

the United Kingdom. But where the court is satisfied that the offender genuinely intends to reform his or her behavior, it may be appropriate to impose a sentence that will allow the offender to be rehabilitated – this may mean imposing a suspended sentence order or a community order with a requirement to attend a domestic violence programme, rather than imposing a short custodial sentence.

Empirical evidence on how the criminal courts in the United Kingdom respond to domestic violence is limited. The majority of all criminal offences that make it to court in the United Kingdom are dealt with by magistrates' courts. The empirical evidence on magistrates' approaches to the sentencing of domestic should be viewed through the lens of serial decision-making, as the practices of agencies earlier on in the process may affect the information and options available to the magistrates when it comes to sentencing. It has traditionally been asserted that the sentences for domestic violence are trivialized and inadequate. Thus an innovative approach to tackling domestic violence in the criminal justice system was made in order to meet the needs of it. Here, setting up specialist domestic violence courts is at the core of the government's strategy for improving the handling of domestic violence cases by the criminal justice agencies. The crucial question is whether the specialist court initiative has the ability to deliver the promised improvements.

4.4.2.3.1. The Specialist Domestic Violence Courts

Establishing specialized courts or court process for domestic violence cases is another way to increase the judiciary's responsiveness to domestic violence. In the UK, the Government National Action Plan includes the provision of more specialist domestic violence courts to be rolled out over several years in an attempt to improve case outcomes and bring more offenders to justice. Significantly, other goals have been to reduce the costs of prosecuting domestic violence cases through speeding up the process and increasing efficiency by hearing all domestic violence cases on the same day.²⁴⁵

The Specialist Domestic Violence Courts (SDVCs) are based on a partnership approach to domestic violence by the police, prosecutors, magistrates, the probation service and specialist support services for victims. These court systems provide a

²⁴⁵ . Lynne Hame and Jill Radford, *supra* note 92, p.137

specialized way of dealing with domestic violence cases in magistrates' courts. All agencies work together to identify, track and risk assess to domestic violence cases, support victims of domestic violence and share information better so that more offenders are brought to justice.

Two types of specialist court system are being set up across England and Wales: *cluster courts*, where all cases are grouped into one court session in order to deal with pre-trial hearings – bail variation, pleas, pre-trial reviews, pre-sentence reports and sentencing and *integrated courts*, which bring together criminal and civil proceedings.²⁴⁶ By the beginning of 2004 there were seven specialist domestic violence courts or fast track systems for domestic violence operation in England and Wales. In these courts domestic violence cases are clustered so that all the pre-trial hearings, and sometimes the trials, can be dealt with on the same day or days of the week in a dedicated court often by specialist personnel including a victim's advocate.²⁴⁷

There are four main benefits of domestic violence courts. Compared to the prosecution of domestic violence cases in other courts, a domestic violence courts offers greater consistency in sentencing. Secondly, victim assistance/witness support has greater efficiency and benefits to its services users to the confinement of cases into a specialist court. Thirdly, there is a potential for a domestic violence court to deal with the complexity of cases and be responsive to civil and criminal cases. Finally, domestic violence courts can offer fast track access to programmes for perpetrators intended to control their violent behavior and with proven efficacy.²⁴⁸

One of the main issues with the prosecution of domestic violence within the traditional court setting is the high rate of attrition. Leaving aside attrition in the early stages of the prosecution process, which is in itself substantial, only about half of the cases brought into the judicial process resulted in conviction. One of the main obstacles to successful prosecution is the heavy reliance that the criminal justice agencies have placed on victim participation in domestic violence cases. Where victims withdraw their

²⁴⁶ . Marianne Hester, Chris Pearson and Nicola Harwin, *supra* note 220, p.117

²⁴⁷ .Mandy Burton, *Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence Courts in England and Wales*, International Journal of Law Policy and the Family, Vol. 20, No. 3, 2006, p.37

²⁴⁸ . Susan Eley, *Changing Practices: The Specialized Domestic Violence Court Process*, The Howard Journal Vol. 44, No. 2, 2005, pp.114 -115

support for the prosecution, cases are normally terminated. Thus the challenge for specialist domestic violence courts in bringing more perpetrators to justice involves either ensuring that fewer victims retract their complaints, or finding other ways to successfully pursue cases where victims withdraw. In terms of enhancing perpetrator accountability finding ways to continue with a prosecution when the victim withdraws requires the criminal justice agencies to gather and use evidence besides the victim's testimony in appropriate cases. Evaluation of seven courts in England and Wales show that victim retraction is not significantly reduced within the specialist court setting. Thus, perhaps a better measure of success is to look at whether specialist domestic violence courts handle retraction appropriately, for example ensuring victims are properly supported through that process. Court specialization is beneficial in this respect because it facilitates the provision of independent advocacy support for victims.²⁴⁹

In terms of enhancing perpetrator accountability finding ways to continue with a prosecution when the victim withdraws requires the criminal justice agencies to gather and use evidence besides the victim's testimony in appropriate cases. Enhanced evidence gathering is crucial to the success of victimless prosecutions. Evaluation of seven domestic violence courts found that they can be a focus for enhanced evidence gathering i.e. obtaining evidence such as photographs of the victim's injuries, medical statements, 999 tapes and statements from other witnesses. The impact of better evidence gathering has seen an increase in the conviction rate, which has in turn led to fewer victim withdrawals and more guilty pleas.²⁵⁰ The rate of 'successful' prosecutions in some SDVCs is reported to be as high as 80%, with the same provisos in 2008.²⁵¹

The fact that there is little evidence that the domestic violence courts increased the proportion of defendants convicted overall could clearly be viewed as a failure when one the goals of the courts, at least from the government's perspective, is to bring more perpetrators to justice. Recent initiatives like the domestic violence court specialization programme do bring incremental improvements to the criminal justice response to domestic violence, but many challenges in effectively meeting the needs of victims and

²⁴⁹ Mandy Burton, *supra* note 247, pp. 374-375

²⁵⁰ *Ibid.*

²⁵¹ The Crown Prosecution Service, *Violence against Women crime report 2008 – 2009*, <http://www.cps.gov.uk/publications/equality/vaw/index.html>, accessed on March 2010

holding perpetrators to account remain. Implementing good policy into practice poses challenges even in specialist court settings where the multi-agency framework is well developed and the commitment and training of individual is strong. The police and the CPS still receive negative feedback on their performance in gathering and presenting evidence, although this is mixed in with increasingly positive assessments of the attitudes displayed by the criminal justice personnel. The criminal justice system still has some way to go in achieving its full potential for effectively responding to domestic violence, but specialist domestic violence courts seem like a step in the right direction.

4.4.3. Civil Remedies

Under civil proceedings for remedying domestic violence in the United Kingdom, the sub-titles are divided into the parts of divorce, custody right and issuing protection orders. It is undeniable the fact that divorce is falling under civil remedies for abused person, especially for women victims who has been intolerable for abuser's behavior anymore.

Regarding with custodial right, domestic violence is considered as a form of child abuse while the child may not be the primary target, nor see the violence directly and only senses its consequences because it also leaves adverse effects upon the children and the child experiences it as abuse. Thus, in most of the countries, family law legislation specifies domestic violence as a factor to be taken into account in child custody and visitation rights. Child custody is actually a parental right which the right is neutral or equal for both parents. When divorced from each other, they have the equal custodial right for their children. In the case of domestic violence, such equal right may not be given to the abusive parent, mostly to the male abusers, by the court because the violence is considered not to be in the best interest of a child. On the other hand, the abused woman or mother may have a right to claim for child custody rather than her abusive partner. Thus, custodial right is specified in one of the remedies available for abused women in domestic violence cases.

Moreover, the use of civil protection orders in response to domestic abuse appears to be rather at odds with the view that domestic violence should be treated as criminal behavior. Civil protection orders are useful in curtailing activity which may induce fear in

the recipient but is not in itself criminal and therefore may not attract police attention. Civil protection orders may also prohibit criminal behavior such as assault and threatening behavior. Engaging with the civil law enables women to actively respond to current abuse and seek to stop future abuse without reliance on the criminal law and its agents.

In the United Kingdom, the protection orders introduced by the government are civil orders and are therefore granted under civil procedure. These legislative initiatives or the hybrid nature of civil and criminalizing in its breach aspire to focus on prevention rather than waiting until an event happens and responding with prosecution and punishment. The use of these orders has easier option for those seeking the order and for those against whom the order is granted. In respect of those seeking the order, the civil standard of proof and rules of evidence tend to be less onerous than the equivalent criminal standards. Nevertheless, the aim of remedying under many kinds of protection orders tends to focus on prohibition of future behavior rather than overt censure of past behavior.

4.4.3.1. Divorce

If someone is experiencing domestic violence, the first thing he or she needs to do is get out from the situation. It is quite simple for strangers or couples who have no marriage tie between them. But this can be a lot more difficult if he or she is married to the abuser, because of the legal and financial issues involved. He or she may want to leave but feel reluctant and frightened to leave the family home or be cut off financially, especially if she is a housewife with little or no income of her own. If she has children, it may be doubly hard.

In the United Kingdom, the Matrimonial Causes Act 1973 sets out the law for seeking a divorce or order of judicial separation. It was anticipated that the law governing divorce would change radically with the passing of the Family Law Act 1996, which provides for a “no fault” divorce. However the relevant parts of that Act have not been brought into force and it is no longer expected that they will be brought into force in the foreseeable future or, indeed, at all. Therefore the law remains governed by the 1973 Act. For the purpose of this it is assumed that the spouse seeking a divorce or order of

judicial separation is a woman; but the law is applied in exactly the same way if it is the man seeking a divorce or order of judicial separation.

Domestic violence is the most common cause of divorce in the United Kingdom. To apply for divorce the couple has to be married for at least one year²⁵², which can be a terrifying situation for women that experience violence immediately after marriage. If a woman wants a divorce, the court has to be shown that the marriage has irretrievably broken down for one of the following reasons²⁵³:

- Adultery;²⁵⁴
- Unreasonable behaviour²⁵⁵ e.g. mental or physical cruelty, violence or rape;
- Desertion for a continuous period of two years or more;²⁵⁶
- The partners have lived apart for two years and both consent to divorce;²⁵⁷
- The partners have lived apart for five years, in which case consent is not required.²⁵⁸

Among the reasons mentioned above, relating to unreasonable behaviour, the plaintiff or the victim must show that his or her spouse has behaved in such a way that cannot reasonably be expected to live with him or her. Unreasonable behaviour is now the most common fact on which to prove the grounds for divorce in the United Kingdom. In an unreasonable behaviour petition, the petitioner sets out a number of allegations against the respondent. It is worth bearing in mind that the court doesn't insist on really severe allegations of unreasonable behaviour in order to grant a divorce. Relatively mild allegations such as devoting too much time to a career, having no common interests or pursuing a separate social life may suffice. Using mild allegations may make it easier to agree the contents of the petition. In any proceedings for divorce for unreasonable

²⁵². The Matrimonial Causes Act 1973, Sec: 3(1)

²⁵³ *Ibid*, Sec: 1(2)

²⁵⁴ *Ibid*, Sec: 1(2)(a)

²⁵⁵ *Ibid*, Sec: 1(2)(b)

²⁵⁶ *Ibid*, Sec: 1(2)(c)

²⁵⁷ *Ibid*, Sec: 1(2)(d)

²⁵⁸ *Ibid*, Sec: 1(2)(e)

behaviour, the petitioner must prove that the parties to the marriage have lived with each other for a period at least six months.²⁵⁹

The legal definition for “unreasonable behaviour” was defined by Mr Justice Dunn in the case ‘*Livingstone-Stallard vs. Livingstone-Stallard*’²⁶⁰ as follow:

“Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to with him, taking into account the whole of the circumstances and the character and personalities”.

Mr Justice Dunn made a further important observation which indicated that unreasonable behaviour clearly encompassed what could be described in today’s terms as “emotional abuse”.

In cases of domestic violence, the introduction of new provisions for divorce in the Family Law Act 1996 may be helpful in some ways. Part I of the Act contains a new principle, that any risk to the safety of the parties should be minimized or reduced by the court or other professionals within family proceedings relating to divorce.²⁶¹ A number of other provisions may also be helpful: information about support and protection from domestic violence must now be provided in the divorce information sessions; parties have a right at the court directions stage to have separate meetings to receive information about mediation or other matters; and it is recognized that mediation, which is voluntary, is inappropriate where there is a fear of violence by either party.

When one party presents a petition for divorce, the court shall inquire into the facts alleged by him and into any facts alleged by the respondent.²⁶² Where there is no opposition to a divorce, a petition will have to be processed, with a statement about the arrangements for the children, signed by both parties. Documents are filed in the court with a request for directions. If the judge considers the petition and agrees that the parties should divorce there will be a hearing where a decree nisi is pronounced. Six weeks and one day after the decree nisi, the woman can apply to the court for a decree absolute. Once the decree absolute is issued the divorce is final. If the husband contests the divorce,

²⁵⁹. *Ibid*, Sec: 2(3)

²⁶⁰. *Livingstone-Stallard vs. Livingstone-Stallard*, 2 All ER, 1974

²⁶¹. The Family Law Act 1996, Sec: 1(d)

²⁶². *Ibid*, Sec: 1(3)

women can apply for an injunction at the same time as they are applying for divorce or formal separation.

An order for judicial separation is a formal recognition that a husband and wife have separated and means that there is no longer any legal duty for them to continue living together. However, they do remain married and therefore neither can remarry. The law and process for obtaining a decree of judicial separation is very similar to that for obtaining a divorce. A petition for judicial separation may be presented to the court by husband or wife to a marriage on the ground mentioned in section 1(2) of the Matrimonial Causes Act and section 2 of this Act shall apply accordingly for the purposes of a petition for judicial separation alleging any fact, as they apply in relation to a petition for divorce alleging that fact.²⁶³ On a petition for judicial separation it shall be the duty of the court to inquire into the fact alleged by the petitioner and the respondent. Where the court is satisfied on the evidence on any fact mentioned in section 1(2) of this Act, it shall grant a decree of judicial separation.²⁶⁴ But in judicial separation, before granting a decree, the difference between divorce decrees is that it must be subject to section 41 which provides for restrictions on decrees for dissolution, annulment or separation affecting children.

There is no legal obligation to apply for an order for judicial separation upon the break-up of a marriage and deciding to separate. Application for a decree of judicial separation are now rarely made; but it may be advisable to consider applying for such a decree if there are reasons why an application for a divorce cannot be made or there is no wish to end the marriage and a wife wishes her separation to be formally recognised or there is a need to apply for financial orders.

4.4.3.2. Custody Proceeding

In the UK child custody law determines who should be responsible for the care and charge of a child, after divorce or separation. In the majority of cases parents opt for joint custody, which enables the child to spend an equal amount of time with each parent. This option also allows both parents to participate in any decision making which may

²⁶³ .The Matrimonial Causes Act 1973, Sec: 17(1)

²⁶⁴ . *Ibid*, Sec: 17(2)

affect the child. However, if parents are unable to amicably decide what living arrangement is best for their child, the courts will decide on their behalf. Child custody issues arise from divorce it is also a common concern in guardianship or any action that involves paternity rights. The best interest of the child is the standard that is emphasized in any issue directly involving children and their welfare and emotional needs.

The Children's Act 1989 governs most of the disputes between parents in relation to their children. It defines parental responsibilities²⁶⁵ as all rights, duties, powers, responsibilities and authority which by law a parent of a child have in relation to the child and his property. Parental responsibility is acquired automatically by both mother and father if they are married. If they are not, then the father can obtain parental responsibility either by agreement with the mother or by a court order. Step-parents and guardians may also acquire parental responsibility subject to existing laws. When the child reaches the age of 18, parental responsibility automatically ceases. The court may also, within its power under Section 10 of the Children Act 1989, make an order in any family proceeding where questions arise with respect to the welfare of the child.

Under Section 8 of the Children Act 1989, the court may make orders is of special interest to separated parents as it deals with residence order, contact order, specific issue order and prohibited steps order. A residence order determines with whom the child should live. This can be made in favor of any person and more than one can have it. A contact order is an order that sets out when a person with whom the child lives should make the child available to spend time with another person. It can be in the form of visiting or staying. However, contact orders can be revoked. The specific issue order deals with matters of parental responsibility where the courts have to intervene due to disagreements between persons holding such parental responsibility. A prohibitive steps order specifically directs the person named in the order not to do a specified act without the court's permission.²⁶⁶

The court has to consider a number of things set out in the Child Act. The Court must consider the welfare of the child as being the paramount consideration. In considering what is best for the child, the Court has to have regard to the "welfare check

²⁶⁵ .Children Act 1989, Section 3(1)

²⁶⁶ . Marianne Hester, Chris Pearson and Nicola Harwin, *supra* note 221, p.94

list” which is guidance set out in the Children Act. The Factors which the Court will consider are:-²⁶⁷

- the wishes and feelings of the child considering his age and level of understanding
- the child’s physical and emotional needs
- the likely effect on the child of any change in circumstances
- the age, sex, background and other characteristics considered relevant by the court
- any harm the child has suffered or is at risk of suffering
- capability of each parent and any other person considered relevant by the court in meeting the child’s needs
- the rang of power available to the court under the Act

The Court must take account of each of these factors but does not have to give them all equal weight. An important consideration when considering whether the fact of domestic violence is relevant to the issue of contact is the effect upon the primary custody of the violence after the separation. For children who are fearful of violent fathers and are forced to have contact, their fearfulness and anxiety is unlikely to lessen. They are frequently witness life-threatening attacks on their mother during contact visits. A minority of children will also experience abduction by violent fathers and experience increased emotional trauma and feelings of insecurity as a consequence. As a result, many victims of violence remain afraid of their former partners and that fear is obviously communicated to the child.²⁶⁸ In a situation where the court is faced with an application for contact which could not effectively be arranged without the risk of serious harm being caused to the primary career, the court would have to approach the issue of contact with extreme caution.

The Courts regard domestic violence seriously and will want to look at all the circumstances of the case before Contact Orders. If a child may be at risk from a parent for whatever reason, it may be appropriate for supervised contact to take place, or for contact to take place within the confines of a Contact Centre so that the child’s safety can

²⁶⁷ .Children Act 1989, Section 1(3)

²⁶⁸ .Lynne Harne & Jill Radford, *supra* note 92, p.67

be ensured and the quality of the contact can be monitored. The Court can make Orders requiring that this takes place although there may be a charge raised by the Centre for the provision of supervision and facilities.

It may be that the courts have not always sufficiently taken into account the ongoing consequences for the child of contact with a non-resident parent who has been seriously physically or psychologically violent towards the primary carer. The wishes and feelings of a child who has lived in a violent household have to be given appropriate weight. There will be a small number of difficult cases in which the child would be entitled to have a guardian to represent him in order for the viewpoint of the child to be presented adequately to the court.²⁶⁹

Once the court has found proved violence which is significant and relevant to the disposal of the case, the court must not only consider the effects of that violence on the child and the primary carer, but should also consider the response of the perpetrator of the violence. Violence to a partner involves a significant failure in parenting – failure to protect the child’s carer and failure to protect the child emotionally. Recognition by the perpetrator of the past violence and the effect of future violence, consideration of his capacity to change and behave appropriately and his motive for seeking contact in the future are highly relevant factors in the balancing exercise.²⁷⁰

4.4.3.3. Issuing Restraining Orders

Protection from domestic violence under civil law is provided by means of an injunction or court order requiring the abuser to do, or not to do, something. Since the mid 1970s, many judiciaries worldwide have passed civil laws designed to protect women suffering from domestic violence through the provision of civil protection orders. In the UK between 1976 and 1997, injunctions and protection orders could be obtained under three different statutes:²⁷¹

- Domestic Violence and Matrimonial Proceedings Act (DVMPA) 1976
- Domestic Proceedings and Magistrates’ Courts Act (DPMCA) 1978
- Matrimonial Homes Act (MHA) 1983.

²⁶⁹. Re A (Contact: Separate Representation); [2001] 1 FLR 715

²⁷⁰. Re M(Contact: Violent Parent) [1999] 2 FLR 321

²⁷¹. ME Rodgers, *Understanding Family Law*, Cavendish Publishing Ltd., 2004, p. 133-136

The Domestic Violence and Matrimonial Proceedings Act (DVMPA) 1976 would appear that the availability of remedies in civil law to protect victims of domestic violence were more than adequate prior to the enactment of the FLA 1996. The DVMPA 1976 protects married partners irrespective of whether they are living together or not. It does not protect victims in other forms of domestic relationships such as those merely sharing living accommodations as friends or family, or those living in homosexual or lesbian relationships. Many victims are excluded from the provisions of the DVMPA and forced to rely on the criminal law or on remedies in tort.

The position in relation to applicants under the Domestic Proceedings and Magistrates' Courts Act (DPMCA) 1978 is even more restrictive. It only applies to spouses and gives no protection to couples living outside of marriage, thus excluding cohabitation, family members or divorced couples.

The Matrimonial Homes Act (MHA) 1983 only applies to those with a matrimonial home defined in its strictest sense, i.e. married couples. Furthermore, the Act only applies if both spouses are entitled to occupy the home by virtue of a legal estate vested in them jointly or by virtue of a contract or enactment, or if one spouse has a statutory right to occupy the matrimonial home.²⁷² It was designed to deal with the occupational rights of the parties rather than with their physical protection, and as such does not allow the court to do other than declare, enforce, prohibit or suspend the operation of those rights.

It can be seen that these laws mentioned above has moved some way in giving protection to victims of domestic violence but that there is an incoherence between the different pieces of legislation. The DVMPA 1976 was probably the most far-reaching given that it protects both married unmarried partners and its operation has become restricted. The DPMCA 1978 has always been restricted in its application and has almost fallen into disuse in some regions. The MHA 1983, while allowing a court to suspend but occupational rights does not allow adequate enforcement of the order. In short, these legislations seem that very few victims understand and it is susceptible to failing in its very aim of providing a remedy to battered women.

²⁷². The Matrimonial Homes Act 1983, Sec.1(1)

Thereafter, the Family Law Act 1996²⁷³ was introduced in order to revolutionize the divorce process. Amongst other things, it tried to abolish the notion of ‘fault’ based on divorces, which are brought on grounds such as unreasonable behavior and adultery. The better protection for domestic violence was Part IV of the Family Law Act 1996, which consolidated these remedies and superseded the previous legislation. Likewise, the Domestic Violence Crime and Victims Act (DVCVA) 2004 should also provide further improved protection for sufferers of domestic violence.²⁷⁴ There are two forms of injunctive relief available to victims of domestic violence under Part IV of the Family Law Act 1996, (FLA). A victim of domestic abuse can apply for a non – molestation injunction under s.42 of the FLA and/or an occupation order under s.33-38. The DVCVA has made a number of changes to this area of the law.²⁷⁵

4.4.3.3.1. Non-molestation Order

A non- molestation order is an injunction aimed at preventing a partner or an ex-partner from causing or threatening violence to a victim or from molesting a victim or a victim’s child.²⁷⁶ Under the law molestation includes intimidation, pestering, threats and harassment. An order is granted to ensure the health, safety and well being of the applicant or any relevant child. The applicant must prove that there is a genuine need for protection. A non-molestation order can be made for a specified period or until a further order is introduced or the order may be varied or revoked. There is no limit on the length of time that non-molestation orders can be extended. However, if the court decides of its own volition that an order should be made in the course of other family proceedings, then the order will cease to have effect if those proceedings are withdrawn or terminated.²⁷⁷ A breach of a non-molestation order is a criminal offence punishable by up to 5 years imprisonment under the DVCVA 2004.

²⁷³ .The Family Law Act ,1996, Chapter 27; entered into force in October 1997

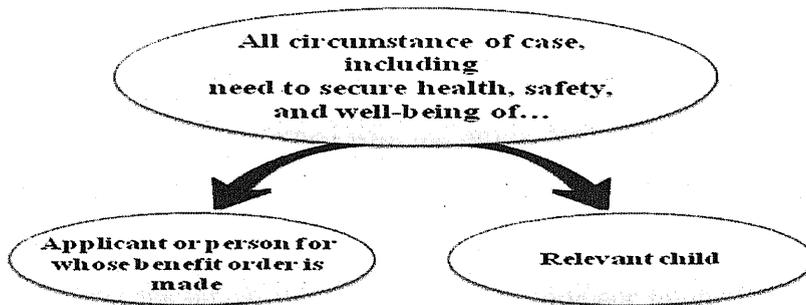
²⁷⁴ .Marianne Hester, Chris Pearson and Nicola Harwin, *supra* note 220, p.121

²⁷⁵ .ME Rodgers, *supra* note 271, pp. 133-136

²⁷⁶ . The Family Law Act 1996, Sec. 42

²⁷⁷ . Marianne Hester, Chris Pearson and Nicola Harwin, *supra* note. 220, p.117

Table (2): Criteria for granting non-molestation orders



The Act means that a breach of any terms under the non molestation order will constitute a criminal offence and so the police can arrest him immediately if the order is broken, even if a specific criminal offence has not been committed. Prior to this, where an order had been issued without a power of arrest was subsequently breached; the applicant would have to return to court to seek a warrant for the respondent's arrest. This change in the law has made two options open to the applicant when a non-molestation order is breached.

1. The applicant can call the police who will deal with the breach as a criminal offence.
2. Alternatively the applicant can still choose to return to the civil court that made the non-molestation order for the breach to be dealt with as a contempt of court. However, a respondent should not face both a criminal sanction for breach of a non-molestation order and proceedings for contempt of court in respect of the same conduct.

There is some uncertainty as to the standard of proof that should be applied in cases involving a breach of a non – molestation order. In '*Manchester CC v McCann*'²⁷⁸ the House of Lords considered the evidential burden of proof that should be applied in a case involving a breach of an Anti Social Behavior Orders (ASBO) under s.1 of the Crime and Disorder Act 1998. It was acknowledged that breach of an ASBO constituted civil proceedings and ordinarily the standard of proof applicable in civil proceedings was the balance of probabilities. However, breach of an ASBO entailed serious criminal consequences and as such the criminal standard of proof should apply. In '*Hipgrave v*

²⁷⁸. *Manchester CC v McCann*, 4 All ER 593 HL, 2002

*Jones*²⁷⁹ the Court of Appeal considered the standard of proof to be applied in making restraining orders under the Protection from Harassment Act 1997 (PHA), which have potential criminal sanctions for breach. The court draws a distinction between ASBOs sought by public authorities and aimed at preventing crime and disorder, and injunctions under the PHA which are concerned with the protection of the rights of an individual. In relation to injunctions under the PHA it was asserted that the civil standard of proof applied, despite the fact that breach could be treated as a criminal offence.²⁸⁰

The most recent annual figures for domestic violence injunctions state that 17,141 applications for non-molestation orders were made through the county court. The number of applications to the county courts for domestic violence remedies increased by three per cent in 2008 compared with 2007. Within this, applications for non-molestation orders increased by 8 per cent, while applications for occupation orders decreased by 7 per cent. 69 per cent of applications were for non-molestation orders and 77 per cent were *ex parte* (in the absence of the respondent).

Table (3):

Domestic Violence Non – Molestation Applications Made in the County Courts, 2004-08

Non – Molestation Applications			
Years	Ex – parte	On notice	Total
2004	12,809	4,765	17,574
2005	13,035	4,297	17,332
2006	13,041	3,844	16,885
2007	12,402	3,469	15,871
2008	13,888	3,253	17,141

Source: Ministry of Justice <Judicial and Court Statistics 2008 >

²⁷⁹. *Hipgrave v Jones*, 2 FLR 174, 2005

²⁸⁰. *Mandy Burton*, *supra* note 226, p. 56

Table (4):

Domestic Violence: Non – Molestation Orders made in the County Courts, 2004 -08

Non – Molestation Orders			
Years	With power of arrest attached	Without power of arrest attached	Total
2004	22,290	1,433	23,723
2005	21,649	1,202	22,851
2006	20,860	1,160	22,020
2007	19,264	555	19,819
2008			19,367

Source: Ministry of Justice <Judicial and Court Statistics 2008>

The victims have a right to choice under the DVCVA. They can deal with the matter themselves, usually through the solicitor, or they can call police. No one will want to involve the police – a criminal prosecution may not be their desired outcome or they may simply feel more comfortable in civil suit where they feel more empowered in taking action themselves. On the other hand, if the police are called, they can intervene straight away and enforce the order.

4.4.3.3.2. Occupation Order

An occupation order regulates who is allowed to occupy the home and can direct a person to leave the home. If a victim does not want to live with her partner anymore, or if she wishes to exclude the abuser from occupying the residence, she may apply for an occupation order.

The court can order the following;

- The abuser to move out of the home or part of it.
- The abuser to stay away from the home or keep a certain distance away from the home.
- Regulation of the occupation of the home.

These occupation orders may be granted under five different sections of the Family Law Act 1996 depending on the nature of the relationship between the parties and whether the applicant has an existing right to occupy the home. Eligibility and the type of order depend on whether a victim has a legal right to occupy the property. The Act introduces a new concept of 'entitlement'. An entitled person is someone who has some legal right to occupy the property, e.g. the person is the freehold owner, tenant, contractual licensee or someone with a beneficial interest, or has matrimonial home rights. The term 'matrimonial home rights' in the new legislation replaces the term 'rights of occupation' contained in the Matrimonial Homes Act 1983. Spouses of entitled persons automatically have matrimonial home rights under the Act. These rights are also sometimes obtained through the divorce process. A non-entitled person has neither the legal right to occupy the property nor matrimonial home rights. The main differences among these five different categories of order are:

- the range of people who can apply
- the criteria the court must use in assessing whether to grant an order
- the length of time the orders may last

An application may be made as follows:

Under section 33 by a person who is entitled to occupy the home because that person is a legal owner or tenant or has matrimonial home rights in relation to the home against another person with whom he or she is associated, whether or not that person is also entitled to occupy the home. This provision will apply to most married couples and cohabitants and others who are sole or joint owners or tenants of their home. An order can be made for a specified period or until further order.

Under section 35 by a former spouse who is not entitled to occupy the home or who has matrimonial home rights in relation to it against his or her former spouse who is so entitled. An order under this section can be made only for an initial period of six months but can be extended for periods of up to six months on one more occasions.

Under section 36 by a cohabitant or former cohabitant who is not entitled to occupy the home against the other cohabitant or former cohabitant who is so entitled. An order under this section can be made for six months and can be extended for one further period of up to six months. In the case of non-entitled former cohabitants, this is an

extension of the previous law, as previously exclusion of a former partner was not possible. However, restriction to a maximum of one year discriminates against those who have cohabited for several years with a partner and may well have made substantial personal and economic contribution to the family home.

Under section 37 by one spouse or former spouse against the other spouse of a former spouse where neither is entitled to occupy the home. This situation could include a couple lodging in a relative's or friend's house or squatting. An order can be made up to six months and extended on one or more occasions for further periods of up to six months.

Under section 38 by one cohabitant or former cohabitant against the other cohabitant or former cohabitant, where neither is entitled to occupy the home. An order can be made up to six months but can be extended for a further period of six months.

In order to apply for a non – molestation or occupation order, applicant must be an ‘associated person’.²⁸¹ This means that applicant must be associated with each other in one of the following way. ‘Associated persons’ as people who:

- are or have been married to each other
- are or have been in civil partnership with each other
- are cohabitants or former cohabitants (includes same sex couples)
- non-cohabiting couples who ‘have or have had an intimate personal relationship with each other that was of significant duration’
- live or have lived in the same household other than by reason of being the other’s employee, tenant, lodger or boarder
- are relatives (e.g. parents, grandparents, in –law, brothers, sisters)
- have formally agreed to marry each other (even if the agreement has now ended)
- have a child together
- are parties to the same family proceedings (e.g. child contact or divorce)

The Family Law Act states that a power of arrest shall be attached to one or more provisions of a non-molestation or occupation order where the respondent has used or threatened to physical violence against an applicant or any relevant child unless the applicant or child is protected adequately without a power of arrest²⁸². This means that a

²⁸¹ . The Family Law Act 1996, Sec. 62

²⁸² . The Family Law Act 1996, Sec. 47

applicant or child is protected adequately without a power of arrest²⁸². This means that a copy of the order must be held on record at the police station and the police can arrest the abuser, without a warrant, immediately if the order is broken. The police must reasonably suspect that the perpetrator breached some of the provisions in the order.

Under the Domestic Violence Crime and Victims Act 2004 a breach of a non-molestation order is a criminal offence so a power of arrest does not need to be attached to this part of the order. However, the consequences of breaching an Occupation order will remain the same, so a separate ‘power of arrest’ will still need to be requested from the court. Where there is no power of arrest attached to the occupation order, and the abuser is in breach of the order, the victim can apply for a warrant for the abuser’s arrest and they could then be convicted for contempt of court. The possible sentence for the breach of an order under the civil court is a maximum of 2 years or a fine in civil contempt proceedings.

Table (5): Domestic Violence Occupation Applications Made in the County Courts, 2004-08

Occupation Applications			
Years	Ex – parte	On notice	Total
2004	6,920	3,319	10,239
2005	6,880	3,162	10,042
2006	6,555	2,829	9,384
2007	5,842	2,509	8,351
2008	5,392	2,346	7,738

Source: Ministry of Justice <Judicial and Court Statistics 2008 >

²⁸². The Family Law Act 1996, Sec. 47

Table (6): Domestic Violence: Occupation Orders made in the County Courts, 2004 -08

Occupation Orders			
Years	With power of arrest attached	Without power of arrest attached	Total
2004	8,248	920	9,168
2005	8,078	807	8,885
2006	7,283	696	7,979
2007	5,647	1,298	6,945
2008	3,375	1,724	5,099

Source: Ministry of Justice <Judicial and Court Statistics 2008 >

A major advantage of civil protection orders is that they bring the domestic violence victim into contact with the legal system. Seeking a civil protection order is often a battered woman's first step toward obtaining legal assistance to stop the violence. Civil protection orders thus serve as a gateway through which the victim gains access to various types of resources and support. Moreover, civil protection orders make it easier for victims to avail themselves of the criminal justice system later if they choose to do so, since police are often more willing to arrest a batterer for abuse if a protection order is in place. Additionally, civil protection orders can help accomplish many goals, including stopping the violence, protecting the abused woman as well as children and other family members, holding the offender accountable, providing financial support for the victim and her children.

With new legislation in the United Kingdom, law enforcement agencies have now developed strategic risks models links to police forces for domestic violence projects in order to prevent future harm to potential victims. Domestic violence can no longer be ignored, least of all by legislators and those who have to deal with the daily consequences, such as the police and other criminal justice agencies. Under new legislation, the police have power to arrest a perpetrator of domestic violence for his common assault or for his breach of non-molestation order. While provisions such mandatory arrest are meant to increase accountability and protection, tradeoffs inherent in such stringent policies

include safety and autonomy of the victim. Although the domestic violence is not acceptable and cannot be tolerated, on the other hand, it is necessary to take attentive measures on the needs and rights of a victim and preempt or punish abusers.

4.5. Summary

The Domestic Violence Crime and Victims Act 2004 increases the protection, support and rights to victims and witnesses. The 2004 Act came into force on November 15, 2005 and gives the police and other agencies, the legislative framework and power to get to the heart of domestic violence crimes and to assist victims and witnesses with practical advice including witness protection schemes safety planning advice and translation facilities.

The specialist police personnel who are responsible for dealing specifically with domestic violence issues has developed. Where such a victim is identified, agencies will convene a “Multi-Agency Risk Assessment Conference” (MARAC) in order to develop and deliver an effective safety plan. Legislative measures in civil law now include non-molestation orders, non-contact orders, curfew orders etc. but only the breach of such an order will become a criminal offence, punishable by up to five years imprisonment on indictment. Since January 1, 2006, cohabiting same-sex couples have the same access to non-molestation and occupation orders as heterosexual couples. Furthermore, common assault as part of domestic violence is now an arrestable offence, and a police officer may arrest the perpetrator without a warrant. All courts including magistrates’ courts can now impose a restraining order when sentencing for any offence linked to domestic violence.

Looking at the last 20 to 30 years, there have been enormous gains in the direction of making violence against women, and domestic violence, more visible and less publicly acceptable. A high priority is given to the more individualized path of action through legal system, underestimating the need for material services and support for women and children trying to rebuild their lives following violent relationships. There is still a need for greater recognition of the vital importance of support based on collective and mutual social provision, and for embarking resources for this. Such support needs to embrace community-based services, such as those pioneered by Women’s Aid and by women’s services and campaigns on violence against women generally. Additionally, it would be

valuable to use the national inter-departmental domestic violence committees to scrutinize existing legislation as the case may be for its likely impact on women experiencing all forms of violence. They are essential both to provide effective services and to begin the process of developing an awareness that challenges the widespread acceptance of the unequal power relationships between men and women which underpins violence towards women.

Chapter V

Legal Protection and Responses of Domestic Violence in Japan

At the end of 20 century, the idea of male-dominated society has declined. The equality of sex has finally taken rooted in Japanese societies, and domestic violence has gradually been recognized as a social problem. In addition, as a result of international movements such as United Nations activities concerning violence against women, public organizations are starting to intervene in civil disputes even though there used to be a rule of non-intervention for public agencies. Accordingly, in a society in which men dominate women in social, economic, and physical terms, the issue of domestic violence is now taken as serious problems because Japanese people have become more conscious of human rights. In this chapter, it begins with how the Japanese people perceived the concept of domestic violence in the past and how this perception changed gradually. Then the extent of problem is explained for how much it impacts on the society. The contributing factors are also analyzed in order to guess the causes of violence in Japan. As a main theme of this chapter, the criminal and civil justice response are explained in details and how the Prevention of Spousal Violence and Protection of Victims law and law enforcement agencies, such as the police, the prosecutors and the judicial sector are reacting to the problem.

5.1. Perceptions of Domestic Violence

Domestic violence in Japan rooted in a male-dominated society and the right of the husband to hit his wife was recognized. Japan's democratization essentially started after World War II. Although the Emperor System collapsed after the war, the idea of a male-dominated society, a vestige of feudalism, was not immediately swept away. In fact, the idea of the male-dominated society accounted in Japanese society as an ethic of feudal society, although it has been weathered over time. In other word, a husband is still implicitly allowed to hit his wife as a means of discipline. Before World War II, women were regarded as inferior to men and women submitted themselves quietly to ill-treatment, while carrying the hard burden of domestic jobs and caring for family

members. It was widely accepted that wives should always obey their husbands, and even if a husband hit his wife, most people were not concerned about it. They rarely accused her husband of violence because his wife belonged to him. No other person was allowed to say anything about the husband's behavior, no matter how violent or unreasonable it may be. Marital or domestic violence was considered as a mere quarrel between husband and wife, rather than a crime. Unless marital violence causes fatal consequences, women had to endure the violence and it was not considered as a social problem.²⁸³ This belief that men may abuse women perpetuated offensive situations.

However, more than 50 years have passed since World War II, and the idea of male dominated society has declined. The equality of the sexes has family taken root in Japanese societies, and domestic violence, which has been treated as "family problems", has gradually been recognized as a social problem. Moreover, due to rapid economic and industrial change after the numerous international treaties and conferences on human rights since the late 1980s, and recent feminist movements, have increased public awareness concerning violence between partners.²⁸⁴ In addition, as a result of international movements such as United Nations activities concerning violence against women, public organizations are starting to intervene in civil disputes even though there used to be a rule of non-intervention for public agencies.

At present, domestic violence is increasingly emerging from obscurity to be a serious issue and growing recognition that a number of Japanese women are victims of domestic violence. Stronger government policies have established to promote gender equality in both the family and the workplace. Many highly educated women have participated in the workforce and they seem to have become more financially independent than women in prewar. They have stopped being hesitant to speak out, expressing their own opinion and put a higher value on self-fulfillment. Most of the women become less patient and less tolerant about tyrannical or unreasonable treatment of men. On the other hand, men are convinced that they are superior to women and can control their wives without realizing their wives' changing attitudes. As a result of these

²⁸³ . Noriyoshi Watanabe *Japan*, In: R.W. Summers & A.M. Hoffman ed., *Domestic Violence: A global view*, Greenwood Press, 2002, pp. 83-84

²⁸⁴ . Mizuho Aral, *Japan*. In: Kathleen Malley-Morrison, *International Perspectives on Family Violence and Abuse: A Cognitive Ecological Approach*, Lawrence Erlbaum Associates, Inc., 2004, p.280

processes, in a society which men dominate women in social, economic, and physical terms, acts of violence against women who are in vulnerable positions are now being regarded as crimes rather than as personal problems.²⁸⁵

5. 2. Extent of Domestic Violence

In Japan, domestic violence has gradually been accepted as a significant issue by the general public because of the raised consciousness about human rights and international movements. However, victims of domestic violence or acts of violence by acquaintances tend to sustain them, because the abuse is usually kept secret among the parties concerned.²⁸⁶ Now that full-scale investigations have begun²⁸⁷, it is possible to explain the results of a limited number of recent investigations.

According to a survey conducted by the Metropolis of Tokyo in 1997, 3 out of 100 women have experienced violence on the charge of bodily injury or assault caused by a husband or partner. Also, 1 out of 100 women have experienced such violence repeatedly. In September and October 1999, the Prime Minister's Office conducted a national wide survey on violence between men and women. The respondents were, men and women 20 years old or older. 4.6% of the female respondents and 0.6% of the male respondents reported that they "have been assaulted so badly that they felt endangered". In addition, 2.6% reported that they "have been assaulted to the extent that they needed doctor's treatment". Moreover, 17.7% of the female respondents reported that they had been threatened and forced to perform sexual acts, and 5.3% reported that they had been forced to watch pornographic videos. The largest percentage of the respondents (37.7%) who experienced violence reported that they "have been shouted at" by their partner.²⁸⁸

In February 2000, the prime Minister's Office revealed that 4.6% of women have experienced life threatening physical assault, 4.0% severe physical abuse, and 14.1% minor physical abuse. Approximately 17.7% of the women have been forced into sexual contact and 45.3% have been shouted at by their partner. Among 225 women who have been physically abused by their partner, although 50.4% have talked to someone about

²⁸⁵ . Noriyoshi Watanabe, *Supra* note 283, p.84

²⁸⁶ . *Ibid.*

²⁸⁷ . Domestic Violence Action & Research Group, *A Study of Husbands' (Boyfriends') Violence in Japan*, Report to the Submitted 4th World Conference on Women, Beijing , 1995

²⁸⁸ . Noriyoshi Watanabe, *supra* note 283, p.90

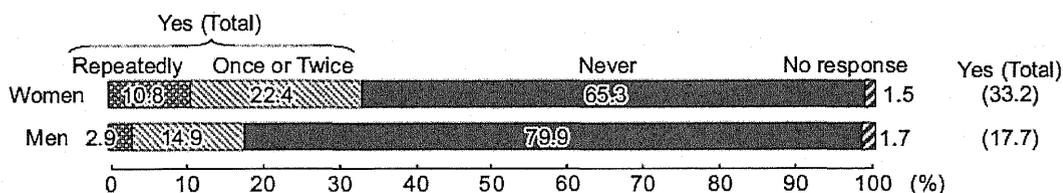
the abuse, few of the women reported the abuse to a public organization such as the police, a hotline, or the local government. Nearly 31.8% of the women talked about the abusive incidents to family and friends, while 40.9% did not tell anyone about the abuse.²⁸⁹

According to a Cabinet Office's Survey on Domestic Violence (2002) 15.5 percent of women have suffered physical assault from their spouse or boyfriend and 9 % have suffered sexual coercion from their spouse or boyfriend in their lifetime. In total, almost one out of five (19.1 %) of women have experienced one or more of these "lives were in danger" due to violence from their spouses or boyfriend. This means one out of every twenty women suffers severe domestic violence.

In the 2005 WHO's *Multi-Country Study on Women's Health and Domestic Violence against Women* showed that, 15% of Japanese women had experienced physical or sexual violence, 9% had experienced moderate physical violence, and 4% had suffered extreme violence (defined as being hit with a fist, kicked, dragged, threatened with a weapon, or having a weapon used on them). The study also found that among abused women, 68% told someone and 7% sought help.²⁹⁰

In 2008 Survey on Violence between Men and Women" by the Cabinet Office, showed that 10.8% women and 2.9% men has "on many occasions" experienced either "physical assault", "mental harassment of frightening threats," or "sexual coercion" by their spouse. And 33.2% women and 17.7% men have experienced "at least once" while 22.4% of women and 14.9% of men victims experienced one more than.²⁹¹

Table (7): Damage Caused by Violence from Spouse



Source: Survey on Violence on Violence between Men and Women (2008), Cabinet office

²⁸⁹ . Aya Yokoi, *State Intervention and Women that Suffered from Domestic Violence: Practices of Koera and Japan in Legislation for the Prevention of Domestic Violence*, Mita Journal of Sociology, Vol. 9, 2004, pp. 52-71

²⁹⁰ . Margi Larid McCue, *Supra* note 24, p. 93

²⁹¹ .The Cabinet Office, "White Paper on Gender Equality 2009",

<http://www.gender.go.jp/whitepaper/ewp2009.pdf>, accessed on January 1, 2010

Moreover, Shelter interviews indicate that self-defense is often a motive when battered women are themselves violent toward their partners. Women who murder their spouses often claim self-defense, but genuine self defense is infrequent, less than 10% of the time. However, women who kill their male partners are more likely to have previously experienced physical assaults against them. Approximately 25% to 30% of all intimate partner assaults lead to injury. Women incur injuries two to three times as frequently as men.²⁹² There are 100 to 120 murder cases annually in which a husband kills his wife by the use of violence. About 40 of these murdered women had been abused by their husbands. Approximately 30% of female victims of murder are killed by a husband or common-law husband.²⁹³

The court data also shows the extent of domestic violence which women suffer. When wives file divorce requests, the husband's domestic violence is usually cited as a major reason for the action, second only to "personality incompatibility." Approximately one third of women who apply for divorce points out their husband's physical violence as the reason for such applications.²⁹⁴ The exact number of domestic violence remains unidentifiable, but it may be more widespread than people commonly think. The nature of the problem cannot be more easily visible than other social issues because it mostly outbreaks within a family or the victims are not much willing to disclose their situations.²⁹⁵

5.3. Contributing Factors

Throughout the history of investigating the nature, prevalence, and extent of domestic violence, many researchers have claimed the possible causes of domestic violence and its perpetuation to be patriarchal social structures, unequal or unbalanced power structures, rigid gender roles, socialization at home, and so forth. The major

²⁹² John Hamel, *Gender Inclusive Treatment of Intimate Partner Abuse: A Comprehensive Approach*, Springer Publishing Company, Inc., 2005, pp.3-5

²⁹³ Noriyoshi Watanabe, *supra* note 283, p. 86

²⁹⁴ *Ibid*

²⁹⁵ Yoshio Sugimoto, *An Introduction to Japanese Society*, 2nd ed., Cambridge University Press, pp. 167-168

contributing factors to violence are considered to be gender inequality and the patriarchal system.²⁹⁶

Generally, families of Japanese descent may be characterized as having a hierarchical structure in which roles and powers are recognized primarily according to age and gender. The man is regarded as the head of the household ties, family harmony, and efforts to avoid bringing shame upon the family name maintain this family structure. This values place a considerable pressure on family members to keep their conflicts “private”. These cultural norms are likely to influence how a woman deals with a male partner’s abuse toward her and/ or her children. The internationalization of male domination shapes the ways in which women are expected to behave. The respondents enumerated a range of expectations imposed upon women such as being: “obedient”, “dutiful”, “polite”, and “accommodating”. An acceptance of male domination and female subordination may be internationalized and is, in turn, manifested in a woman’s suppression of her needs and wants. Violence is used by men to satisfy their own desire, force others to be subordinate to them, or serve as an outlet for their feelings, ignoring the hardship and humiliation that the assaulted women experience. There is also a belief that men cannot control their sexual desires because they are impulsive. These attitudes enable Japanese society to overlook men’s violence against women.²⁹⁷

The majority of Japanese women, regardless of their generational positions, indicated that their Japanese background has influenced the manner in which they had dealt with their partners’ violence. These women’s subjective accounts have elucidated multiple and interlocking ways in which socio-culture factors bind their responses to their partners’ violence. For example, the value placed on endurance, conflict avoidance, and deference to male domination was reported to have hindered women’s ability to recognize their partners’ behavior as abusive. Even if abuse was recognized strong pressure kept them from confronting the abusive partner. Moreover, a combination of

²⁹⁶ . Kersti A. Yllo & Murray A. Straus, *Patriarchy and Violence against Wives: The Impact of Structural and Normative Factors*. In: Murray A. Straus & Richard J. Gelles (Eds), *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families*, Transaction Publishers, 1995, p.383

²⁹⁷ .Mieko Yoshihama, Reinterpreting strength and safety in a socio-cultural context: Dynamics of domestic violence and experiences of women of Japanese descent, *Journal of Children and Youth Service*, Vol. 22, No. 3-4, 2000, p.207-209

cultural values and behavioral expectations impeded these women from seeking outside help.²⁹⁸

In addition, they endure the violence so as not to break up their families for the sake of the children.²⁹⁹ A strong attachment to divorce and the resultant discriminatory treatment of children by partner's family and members of her community may have influenced her decision to remain married. It is crucial that a woman of Japanese descent's responses to domestic violence be understood in her unique and complex socio-cultural context, one in which endurance is valued, and confrontation is discouraged. These cultural attributes can be misinterpreted as a manifestation of deficiencies and not in the best interest of the children. Ironically, for the woman, the silence of women may cause the different interpretation for passivity or disregard for children's well-being.³⁰⁰

Clearly, men who use violence are people regardless of their educational and social backgrounds, income levels, or ages. It is men's "social, economic, and physical strengths" that dominate women. The continuing social structure in which women depend on men, serves as a basis of violence. Indeed, because violence against women has traditionally not been acknowledged as a social problem, Japanese men continue to abuse and assault women, taking advantage of their vulnerable positions.³⁰¹ This practice has been accepted by the society as a whole. It is necessary not only for women to change their attitudes but for men to change as well.

5.4. Responses to the Problem

In Japan, domestic violence was for the most part neither recognized nor addressed prior to 1992, and it has gradually been acknowledged as a serious social problem. National and local governments' responses have only just begun. This increase in public awareness is largely attributable to the efforts of grassroots women's organizations that paralleled the rise of international movements against gender-based violence during the early 1990s. Action-oriented research projects on domestic violence

²⁹⁸ . *Ibid.*

²⁹⁹ . Noriyoshi Watanabe. *Supra* note 283, p.90

³⁰⁰ . Mieko Yoshihama, *supra* note 297, p.207-209

³⁰¹ . Noriyoshi Watanabe, *supra* note 283, p.91

conducted by these organizations have played an important role in shaping public discourse on the issue in Japan.³⁰²

Following the 'Declaration on the Elimination of Violence against Women' at the UN General Assembly in 1993, tackling 'violence against women' was also discussed as one of the most prominent issues that needed an urgent response at the fourth World Conference on Women held in Beijing, China in 1995. At the same time, in Japan, eliminating violence against women was mentioned as one of the eleven priorities of the 'Joint Participation Plan of Men and Women for 2000'. In the process, lawyers' groups and women's organizations have consistently criticized the substantive and procedural deficiencies of the proposed law.

In 2001, the Act on the Prevention of Spousal Violence and the Protection of Victims was enacted with the intention to protect victim.³⁰³ Based on this law, prefectural authorities have established Spousal Violence Counseling and Support Centers. Beginning in 2002, the government also began to provide funding for shelters for abuse survivors in every prefecture in Japan. Currently, 186 facilities are providing consultation and counseling services, temporarily protection, information, and assistance for obtaining protection orders and shelter.³⁰⁴ The Law also has provisions for protection orders to be issued by the court against the perpetrator on the petition of the victim. The number of women and men who used these services has been increasing since the Act was enacted. For example, the number of counseling cases handled by Spousal Violence Counseling and Support Centers was 35,943 in 2002 but increased to 68,196 in 2008. Likewise, the number of domestic violence case handled by police increased from 14,140 in 2002 to 25,210 in 2008.³⁰⁵ Police credit the increase to widespread public awareness of the issue, which has prompted more women to come forward to report the incidents and some positive influence for the victims of domestic violence.

The Cabinet Office has been implementing various types of public information and enlightenment activities, including the promotion of the Campaign for Eliminating

³⁰² .Mieko Yoshihama, *The Definitional Process of Domestic Violence in Japan*, Journal of Violence against Women, Vol. 8, No.3, March 2002, p. 339.

³⁰³ .Yoko Shoji, *Domestic Violence in Japan: Perceptions and Legislation*, In: Misa Izuhara, *Comparing Social Policies: Exploring New Perspectives in Britain and Japan*, The Policy Press, 2003, pp. 122-131

³⁰⁴ .Gender Equity Bureau, *Stop the Violence*, Tokyo, Japan: Japan Cabinet Office, 2009

³⁰⁵ .*Ibid*

Violence against Women advocated by the Headquarters for the Promotion of Gender Equality.³⁰⁶ To support victims of spousal violence who are not sure whom to consult, the Cabinet Office established the “DV Counseling Navigation” dial hotline to introduce the nearest counseling counters, such as Spousal Violence Counseling and Support Centers, through an automated voice guidance system in January 2009. The Ministry of Health, Labour and Welfare itself provides temporary protection to victims and their accompanying family members by taking them into protective custody through women’s consulting offices, and also entrusts privately-run shelters that meet the standards stipulated by the Minister of Health, Labours and Welfare to provide temporary protection to such people.³⁰⁷

Moreover, the Ministry of Health, Labor and Welfare has given special training to prefectural Women’s Consulting Offices staff and developed a network with related organizations, as well as strengthened night protection system through Women’s Consulting Office and Women’s Protection Facilities and Daily Life Support Facilities for Mothers and Children, and expanded the placement of officials in charge of psychological treatment.³⁰⁸ These measures the Government make efforts to protect victims of spousal violence, to encourage them to become independent and to prevent such violence.

5.4.1. Domestic Violence Law

Domestic violence is increasingly emerging from obscurity to be a serious issue in Japan. There is growing recognition that a number of Japanese women are victims of domestic violence. As a result of this awareness the Prevention of Spousal Violence and Protection of Victims Act (hereinafter SV Act) was enacted in April 2001 and came into force in October 2001 to develop systems for notification, consultation, protection and support for self-reliance concerning spousal violence. Under this law, violence by a spouse was regarded as a crime for the first time and it was determined that each local

³⁰⁶ Japan, *Response to the Questionnaire to Governments on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the Government Assembly (2000)*, http://www.gender.go.jp/english_contents/situ-kaitou-e.pdf, accessed on January 29,2010.

³⁰⁷ Gender Equality Bureau, Cabinet Office, *White Plan on Gender Equality 2009*,<http://www.gender.go.jp/whitepaper/ewp2009.pdf>, accessed on 22, February, 2010

³⁰⁸ National Report by Japan for the Universal Periodic Review, 2008, http://www.mofa.go.jp/POLICY/human/report_0803.pdf, accessed on July 20,2010

government should run more than one public shelter as a minimum requirement. Shelters were set up nationwide as temporary evacuation centers for victims of domestic violence. The significance of this law is the introduction of protection of victims and at the first time legal grounds were provided to case of domestic violence. In the past, due to the ambiguity of domestic violence between the civil and criminal boundaries, it was difficult to gain police cooperation as criminal offence and was not common to receive an interim order under the civil law.³⁰⁹

The law was revised for the first time on June 2004, which was implemented on 2 December 2004. The new revisions made widening of the definition of violence by a spouse³¹⁰ and made expansion of the protection order system, such as against a former spouse. This law made an order for prohibiting a spouse from approaching the victim's child or children and also prohibiting on wandering about in the vicinity of the dwelling that is the principal base for daily life of the victim. The term of validity of the eviction order was lengthened.³¹¹ Improvements in the procedures for re-application for a restraining order and protection order. Municipal authorities can establish spousal violence counseling and support centers within their jurisdiction. The new revisions have made clarification of support for victims of spousal violence striving to achieve self-reliance, etc.³¹²

To be in line with the efforts taken by the international community to eradicate violence against women, the law was revised second time in 2007 which is effective on 11 January 2008. The last revision on the DV law clarified on the fact that municipal authorities obliged to make efforts to formulate their own basic plans and to offer the services of spousal violence counseling and support centers in their own appropriate facilities. The scope of the protection order was also expanded for victims who have received life-threatening intimidation and also to the establishments of orders prohibiting

³⁰⁹ .Yoko Shoji, *supra* note, 303, p.131

³¹⁰ .Spousal Violence Act, Preamble. Article 1, According to the former law, 'spousal violence' was defined as 'physical violence (illegal attacks from one spouse that threaten the spouse's life or physical condition)'. However, under the amended law, psychological or sexual violence, as well as words that affects the dignity of individuals, ignoring whatever they may say, or forcefully showing pornographic videos against their wish, are also specifically included.

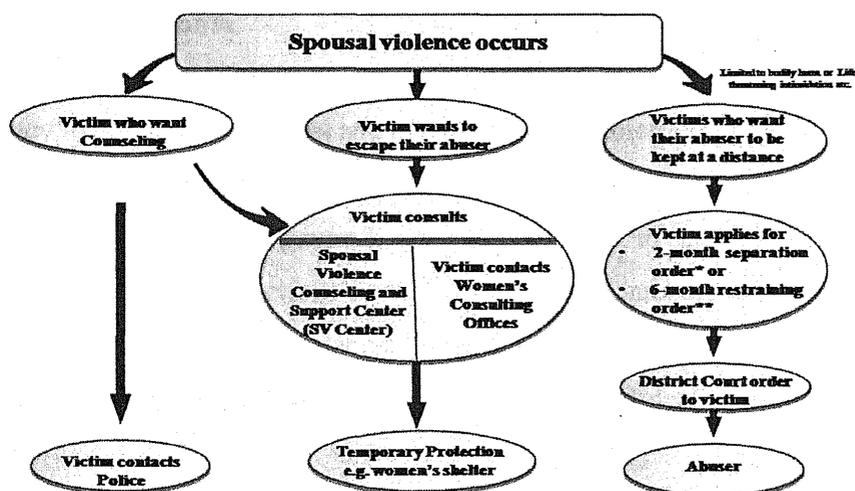
³¹¹ .Spousal Violence Act, Article 18

³¹² .Spousal Violence Act, Article 2

phone calls or other behaviors.³¹³ The abuser is prohibited from the victim's relatives or others.³¹⁴ With a view to promotion of the victims, the expert committee also proposes the expansion of supportive measures, such as securing immediate living costs and housing, as well as improved collaboration of relevant bodies. It also points out that medical personal, who may report to support centers or the police when they find suspected victims and who seek to provide them with information on support centers, are not performing their duties in an appropriate manner.

Formerly in Japan, the executive branch, especially the police, did not provoke to cope with family matters, in light of the old maxim "the law does not interfere with family affairs. However, this law expects the administration, the police, and the courts to perform a certain role to prevent spousal violence."³¹⁵

Table (8): Support System for Victims of Spousal Violence in Japan (from October 2001)



* 2 month separation order (from 2 December 2004; previously this was for 2 weeks):

victim's spouse must leave marital home

** 6-months restraining order: victim's spouse or previous spouse must have no contact

with victim at home, work or usual locations

³¹³ . Spousal Violence Act, Article 10, Paragraph 2

³¹⁴ . Spousal Violence Act, Article 10, Paragraph 4

³¹⁵ .Criminal Law and Procedure, *Law for the Spousal Violence and Protection of Victims*, Waseda Bulletin of Comparative Law, Vol.21,2001.

5.4.2. Criminal Justice Responses

The criminal justice response comprises of numerous elements, including the police, the prosecutor and prosecutorial infrastructure, the judicial system.³¹⁶ The crime victims must cooperate with the police by signing a report and with the prosecutor by pressing charges, appearing in court as a witness, and providing evidence of the crime. If the person accused of the crime pleads guilty or is convicted, he or she will be sentenced to various penalties, which may include paying a fine, spending time in a prison, serving a period of probation and paying the victim money to cover the damage caused by the criminal action. In domestic violence cases, convicted abusers are also often required to obey orders to stay away from their victims, complete a program of counseling or treatment, or perform community service.³¹⁷ The DV law in Japan stipulates a new system in that the Court's orders issued in response to requests from private individuals are secured by penal provisions, which had not been adopted in Japan before.

5.4.2.1. The Police Response

The police play a central role in society's response to domestic violence. They are the first agency to contact for victims and offenders. Their interventions address domestic conflict at several levels. They help to prevent physical conflict in the first place, can respond when it has already occurred, and can attempt to prevent or suppress its recurrence in the future. Their actions form the basis for all subsequent prosecutorial and judicial intervention in domestic violence cases. Given the importance of their role, it is not surprising that police action or non-actions attract a good deal of public scrutiny and critique.

One criticism concerns the approach to what the police call "domestics". Officers have traditionally used counseling and calming techniques designed to reestablish the "domestic peace" within a family instead of treating the violence as a crime and collecting evidence necessary to charge the batterer. Police have also been criticized for the way they treat domestic violence victims. They are often not sufficiently sensitive to victim's needs. The police have responded to these criticisms by developing strategies

³¹⁶ . Sana Loue, *supra* note 54, p. 97

³¹⁷ . Dawn Bradley Beery, *supra* note 65, p.157

designed to improve their handling of domestic violence.³¹⁸ For example, in 1999, “The Outline of the Implementation of Measures to Protect Women and Children” was made by the National Police Agency. With regard to cases that violate penal laws, the police will arrest suspects of domestic violence and take other appropriate steps on behalf of the female victims. In addition, with regard to the cases that do not violate penal laws, the police will provide victims with anti-crime guidance and refer them to appropriate municipal departments and bar associations.³¹⁹

In October 2001, the Spousal Violence and Protection of Victims Act became effective. These new guidelines led to the changes in how the police investigate domestic violence cases. According to statistics from the National Police Agency, the rate of arrest clearances for cases in which husbands have injured or assaulted their wives has greatly increased since 2000. Over a hundred wives are killed by their husband’s violence every year in Japan. In 2008, there were 200 cases of murder, 1339 cases of injury, and 1045 cases of assault in which the perpetrator was the husband and victim was his wife.³²⁰ Compared with the data on domestic violence from 2000, the reported numbers of injuries and assault have increased. Looking at the changes in the number of arrests for crimes against partners in the case of female victims by crime, an upward trend is seen for both assault and injury since 2000. In 2008, assault increased by 105 cases (12.1%) to 975 cases, while injury increased by 13 cases (1.0%) to 1,268 cases on a year-on-year basis. Therefore, an increased awareness of domestic violence and people are more willing to report it and the police are more likely to make an arrest. Thus, even before the SV Act, there was growing general acceptance that domestic violence is criminal.

³¹⁸ .Annette Jolin and Wiebke Steffen, *Germany*, In: R.W. Summers & A.M. Hoffman ed., *Domestic Violence: A global view*, Greenwood Press, 2002, pp.45-46.

³¹⁹ .Noriyoshi Watanabe, *supra* note 283, p. 92

³²⁰ . Gender Equality Bureau, Cabinet Office , *Women and Men in Japan 2010*, http://www.gender.go.jp/english_contents/pamphlet/women-and-men10/1-7.pdf, accessed on 30 April 2010

Table (9):

Number of arrest made in cases involving murder, injury or violence inflicted by a spouse (2000-2008)

Year	Murder	Injury	Violence
2000	134/197 (68.0%)	838/888 (94.4%)	124/127 (97.6%)
2001	116/191 (60.7%)	1,065/1,097 (97.1%)	152/156 (97.4%)
2002	120/197 (60.9%)	1,197/1,250 (95.8%)	211/219 (96.3%)
2003	133/215 (61.9%)	1,211/1,269 (95.4%)	230/234 (98.3%)
2004	127/206 (61.7%)	1,143/1,198 (95.4%)	284/290 (97.9%)
2005	126/218 (57.8%)	1,264/1,342 (94.2%)	359/379 (94.7%)
2006	117/179 (65.4%)	1,294/1,353 (95.6%)	671/707 (94.9%)
2007	107/192 (55.7%)	1,255/1,346 (93.2%)	870/933 (93.2%)
2008	126/200 (63.0%)	1,268/1,339 (94.7%)	975/1,045 (93.3%)

Sources: Pamphlet on Stop the Violence, Gender Equality Bureau, Cabinet Office

Moreover, according to the DV law, the court, when issuing a protection order, must notify the Superintendent General of the Metropolitan Police Department or the Chief of the Prefectural Police Headquarters. Once they have been notified, police become responsible for protecting the victims. They need to promptly contact victims and, if the victim wishes, meet with them and advise them on how to immediately report to police in case of an emergency. The police also need to ensure that perpetrators fully understand what a protection order means and that it is a criminal offense to violate protection orders. Police must clearly warn and instruct perpetrators so that they will follow the protection orders. Immediately after the issuance of a protection order, the police officer in authority checks on the perpetrator's whereabouts and contact victims to check where they live and to learn about their life circumstances. When deemed necessary, they also conduct safety patrols in victim's neighborhood. Where a protection order also stipulates that a perpetrator must leave a residence shared with the victim, police officers confirm whether the perpetrator has actually left. Officers also accompany

victims when they enter their residences to remove their belongings.³²¹ In 2009, the National Police Agency handled 2,429 serious cases where courts issued restraining orders against spouses or other family members under the domestic violence law.³²²

According to Niigata Prefecture metropolitan police department, it is found that there were 380 domestic violence cases in 2007; and 445 cases in 2008. It has been reached to 470 domestic violence cases reported to police. When we look into the whole data in Japan, there were 20992 cases in 2007. It reached to 25210 cases in 2008 and 28185 cases in 2009. Physical violence is the most common form of the violence and the majority of the victims are women, which is 459 women out of 470 victims of the violence.³²³ There is no professional or special-trained police for domestic violence cases. Community safety division in the police department has to handle the violence cases; and the Criminal division is responsible if the violence involves in assaults and injuries.

The police response to domestic violence has improved noticeably in the last few years. Cases are now taken seriously, and victims are treated with the same respect accorded to victims of other crime.

5.4.2.2. The Prosecutorial Response

Prosecution is any action taken by the state in response to an alleged criminal violation in order to move the case toward adjudication. It can include diverting a case from trial into a treatment program. The duties of prosecutors include carrying out investigations, instituting prosecutions, ensuring that the courts apply the law correctly, and ensuring that judgments have been carried out.³²⁴ Therefore, the prosecutor plays a primary role in determining the criminal justice response to a case of domestic violence.

A person who has committed a criminal offence, such as assault, will often be arrested and then released on bail, either by the police or by a Judge. Then the criminal case will be heard and the accused, if found guilty, will be punished. A protection order, which is of particular importance in a domestic violence case, does not, in the initial

³²¹ Juri Yukita, *Police Responses to Domestic Violence*, Women's Asia 21, Violence from Japan, No.21, October, 2008

³²² Japan Today, *Japan News and Discussion*, <http://www.japantoday.com/category/crime/view/domestic-violence-cases-hit-record-28158-in-2009>, accessed on 17 March, 2010

³²³ According to the data survey made on August 1st 2010, at the office of Niigata Prefecture Police Department

³²⁴ Margi Larid McCue, *supra* note 24, p. 132

stages, involve a criminal prosecution. A person seeking protection goes to a court and asks the court to make a protection order, the effect of which is to tell the defendant not to engage in certain conduct again. That is, criminal proceedings generally punish past behavior whereas civil proceedings provide protection for the future. The standard of proof in the civil proceedings is different from the criminal standard – on the balance of probabilities rather than beyond reasonable doubt. It is therefore much easier to obtain a protection order than it is to secure a conviction in criminal proceedings. Once a protection order has been made, it is a criminal offence to breach it. Therefore, it is only at this stage – when a protection order is breached – that a criminal prosecution can arise out of the protection order legislation.³²⁵

Many instances of domestic violence constitute criminal offences. Some types of behavior, such as emotional or verbal abuse, do not constitute and they are beyond the reach of the criminal law. If so, such behavior can only be controlled by protection orders. Despite the fact that criminal assaults, and worse, occur frequently in domestic situations, one of the main problems associated with family violence has been the already noted lack of criminal prosecutions. Historically, police and magistrate have shown a marked reluctance to bring the full force of the criminal law to bear within the family. Others point to community attitudes which silence or condone family violence. On the other hand, the victim may not want a criminal prosecution. This may be for reasons which are understandable: the parties may have made up or the victim does not want to risk her partner being imprisoned or fined which will impact financially on the family. Or it may be simply because the victim fears her partner's reaction. If she does not co-operate with the prosecuting authorities then the prosecution will almost certainly fail. In some jurisdictions a spouse is not a compellable witness, that is, cannot be forced to give evidence in criminal proceedings. Therefore, a lot of domestic violence incidents occur without witnesses. In addition, even if the case comes to court and is successfully prosecuted, magistrates and judges have tended to treat offenders leniently.³²⁶

To success the prosecution of domestic violence police, judges, victim advocacy services, and probation must play a role. A prosecutor will not succeed without the

³²⁵ .Renata Alexander, *Domestic Violence in Australia: The Legal Response*, the Federation Press, 3rd .ed., 2002, p.30

³²⁶ . *Ibid*, pp.31-33

support of the other justice system components. Each participant must understand their role and its importance. When police make good arrests and conduct good investigations, prosecutors are more likely to win a case, when a victim's advocate provides a battered woman with information about prosecution and her role; the victim is more likely to participate as a witness. When judges give strong messages that domestic violence is unacceptable, both by their sentences and by their words from the bench, they reinforce the efforts of police and prosecutors.

5.4.2.3. Judicial Response

Judges play a crucial role in addressing domestic violence. Judges make decisions that affect the lives of the victim, the batterer, the children and potentially other family members. The judicial system can help protect victims and their families, ensures that perpetrators are held accountable and prevent further domestic violence.

Domestic violence is a widespread problem everywhere that it has been studied; it is also true that women face many obstacles when they seek relief from the legal system. Prior to 1992, domestic violence in Japan was considered a personal, private, and infrequent problem as opposed to a prevalent, serious social problem. Tolerance of domestic violence in Japan was reflected in and reinforced by the virtual lack of social policy and services to address this problem. Despite the fact that the Japanese Penal Code does not exempt assault, battery, and confinement committed by husbands against wives, in practice these laws were rarely applied to domestic violence cases. Courts in Japan were routinely harder on women than men, and that judges often sympathized with husband's behavior. Most of the Japanese women were much care for social and cultural concerns about shaming one's family or endangering the reputation of one's spouse or children. Likewise, women who brought charges of domestic violence often suffered degrading treatment from the police, lawyers, mediators and judges involved in their cases. Most of the domestic violence cases went unreported due to these factors and a lot of terrible consequences were followed.

In 1995, a groundbreaking case³²⁷ in Japanese court seemed to change in perceptions about domestic violence. On July 11, 1995, the District Court in Nagoya

³²⁷ . Nagoya District Court for seven years Heisei (s) ix III, The third part of a criminal sentence on July 11, 1995, Case No. 39

decided not to impose punishment on a 46-year-old woman convicted of murdering her abusive husband. Prior to this case, there was no precedent in Japan in which an intimate partner's repetitive violence was considered possible grounds for self-defense. In this case, the woman was abused by her husband seriously for four years, such as relentless assault on strength, strangling unconscious in long-sleeve shirt, and golf club strikes to the back of the head, linear skull fracture. And she was also treated in several hospitals because of these wounded by violence. On that day of committing murder, he made tortured and abused her all day long with heavy drinking. Then, she decided to murder and stabbed once in the left side front neck to cut internal carotid artery. Her husband was bleeding and dead due to these wound. Although the court found the defendant to have used excessive force and therefore did not acquit her on the grounds of justifiable homicide, the court exercised its discretion and spared her any punishment. In the verdict, the court acknowledged the cumulative suffering that had driven her to the crime of which she was found guilty. This decision seemed to demonstrate the changing attitude of criminal justice response upon domestic violence crime.

However, in the other case³²⁸, the Court did not grant an excuse of murdering for domestic violence ground due to the extraordinary circumstances or excessive defense in the case. In that case, the abused common-law husband made violence against his wife with threatening behavior. He then made sexual abuse the daughter of the accused repeatedly. The two accused, the mother and his son, being angry with such violence and sexual abuse, they were also afraid of the victim and that even hesitant to talk to police. They could not stand for any more victims raped the daughter. Before murdering, they tried to kill him by putting excessive amount of sleeping pills in the food. By consulting well, they finally murdered him by stabbing with knife, by strangling the neck to death and they pierced and abandoned the body in the park. They planned well to commit the crime and it took almost 30 minutes. The Court remarked that, knowing the victim daughter could be protected by a child guidance center eldest daughter, but rather feared the idea of violence to intense fury. Thus, the Court viewed that the crime was premeditated and the defendant was sentenced for 7 years of imprisonment for criminal punishment through comprehensive consideration on all of the circumstances.

³²⁸. Hakodate District Court (s) of No. 254, sentenced on March 29, 2007

Like the case mentioned above, in a case³²⁹ decided by the Tokyo District Court in 2008, the domestic violence victim, a 33-year-old woman, was sentenced of imprisonment for fatal killing and disposing of body parts of her husband around Tokyo after cutting the corpse into five pieces. In this case, the spousal abuse began shortly after she and her husband were married in March 2003. In June 2005, she was taken in at a domestic violence shelter with a broken nose and bruised face but returned to live with her husband a month later. Her husband kept nude photographs of her and threatened to publicize them if she left him and also did not agree to divorce on her terms. Although prosecutors alleged that she killed her husband in a fit of anger after futile discussion over divorce, the judge rejected the accusation and ruled that the killing was prompted by mental oppression and deep despair. But the presiding judge finally ruled that the mental disorder did not play a role in shaping the crime, thus, the accused bears full criminal responsibility for what she did. Although prosecutors in the case demanded a 20-year prison term for a 'self-centered crime', the Court sentenced 15 years of imprisonment upon her.

When observed the criminal justice responses upon the cases cited above, the courts are trying to give more leniencies for the victims of domestic violence even murdering their spouse because of the victims' emotional distress. On the other hand, the victims must need to cooperate with respective authorities without using unlawful acts on their private ways if the violence occurs. Otherwise, the law shall not grant for their excessive defense.

However, the traditionally belief in the sanctity of a man's home and his right to privacy so that he could control his wife and family by any means necessary has slowly evolved into the view that women have a right to protected from abuse by their intimate partners. Now a victim of domestic violence may obtain a remedy for her or his suffering—either through domestic violence protective orders, criminal prosecution, or civil litigation.³³⁰

³²⁹ . 'Kaori Mihashi Case', decided by the Tokyo District Court in 2008

³³⁰ . Margi Larid McCue, *supra* note 24, p. 197

5.4.3. Civil Remedies

In an effort to conceive domestic violence law, it is fitting to focus on civil protection orders, since they are the most commonly used legal remedy for domestic violence. A protection order is a court order that imposes legally binding restrictions on an offender's future conduct. Civil protection orders may be obtained through self-contained legal proceedings, instead of or in addition to a divorce action or criminal prosecution. When many women do not want to have their partners arrested and sent to jail; they view the types of relief offered in a protection order as more likely to benefit themselves and their children. However, civil protection orders are not entirely separate from the criminal justice system; if the order is violated, criminal enforcement proceedings may result. The policy on DV law in Japan created protection orders for victims of domestic violence and also created government services for victims. This is a great first step toward addressing domestic violence in Japan.

5.4.3.1. Divorce

Divorce is the legal termination of marriage, ending nearly half of all marriages, and affecting the lives of many children growing up in modern society. There is no single cause of divorce. The causes are multiple, complex and interrelated. Some have to do with the idiosyncrasies of the individuals; others involve social and cultural factors. Therefore, absence of any of the requisites for a strong marriage (e.g., commitment, family support, communication, and adaptability) could contribute to marital failure.³³¹

In Japan, the basis for current laws governing marriage and divorce were established by the comprehensive revision of the Civil Code in 1947. According to Japanese civil law, a new family comes into being upon the registration of marriage. In Japan, it is the act of registration that makes a couple legally married. Thus, the legally married of a couple is required for the submission of the correct paperwork to the local authority. Nevertheless, most couples hold plentiful ceremonies to celebrate their wedding.³³²

³³¹ Daniel L. Smith-Christopher, *Battleground religion*, Vol. 1, Greenwood Publishing Group, Inc. 2009, p.133

³³² Curtin J. Sean, *Japan's Divorce Decade: An Analysis of Legal and Social Trends in Divorce During the 1990s*, Journal of Regional Research Institute-Asahikawa Uni. No.22, 1999, p.54

Conversely, dissolving a marriage can be equally simple process. At present, there are four general categories of divorce. There are (1) divorce by agreement, (2) divorce through mediation by the family court, (3) divorce by judgment of the family court and (4) divorce by judicial decision.

When husband and wife agree to divorce, they simply their affix there seal to a Registration of Divorce and submit it to the local government office. Approximately 90% of divorces are accomplished this way. However, when husband and wife cannot agree to a divorce, there are three remaining options open. The first one of these is divorce by arbitration in which the husband or wife request that the family court assist with mediation. The court will try to find a settlement that is acceptable to both sides. If this succeeds, then the couple reaches an agreement and file for divorce. When arbitration fails, the family court takes over and has the authority to render its own terms for the divorce. This is known as a divorce by judgment of the family court. If the family court's decision is acceptable to both parties, a final settlement is made and the couple files for divorce.³³³

In such cases the Civil Code recognizes only five grounds for divorce: (1) infidelity; (2) malicious abandonment; (3) the passage of more than three years, during which it unknown whether the spouse is alive; (4) serious mental disease without hope of recovery, and (5) any other serious reason for which it is difficult to continue the marriage.³³⁴

The serious reasons acceptable in the final catch-all category are left rather vague, but include spousal violence, spouse convicted of or imprisoned for a criminal act, irreconcilable difference of value or character, lack of affection and failure of spousal relationship. The final interpretation of 'serious reasons' is entrusted to the court. Under the former Civil Law, Article 813 (5) ruled that unbearable spousal violence was a reason for divorce; however, spousal violence is now dealt with under Article 770 (5), the 'serious reasons' clause, in the current Civil Law. The violence is accepted as destruction to marital relationship. And the couple cannot be compelled to continue as a couple

³³³ . *Ibid*, p.55

³³⁴ . Civil Code, Article. 770

anymore as commonly accepted.³³⁵ Relating to the causes of divorce, particularly the number of cases in which wives mentioned “violence” as a reason for divorce. Therefore, domestic violence is one of the grounds for divorce. Conversely, divorce itself is a kind of remedies for domestic violence.

5.4.3.2. Custody Proceedings

Although violence against one parent by another is often considered to be relating between the respective parties and custodial right is not mainly concerned with domestic violence issue, it may be said that it is the essential remedies for mother who has been abused and the child victims. At present days, the custody-determination proceedings are taken into much account when they divorce. Most of the countries recently came to recognize that domestic violence needs to be considered in custody decisions.

In many countries, the child's welfare or the child's best interest is the court's fundamental consideration for determining custody of a child after separation or divorce of the parents. Custody of children is a broad concept encompassing all of the rights and obligations related to a child. During the marriage, these rights are vested equally in both parents. In cases of separation or divorce, custodial rights and obligations are usually divided, most often so that one parent has custody and provides the main residence for child, while the other parent is granted access, or visitation and information rights. It is when parents are unable to resolve their conflict with each other, or at least to prevent their children from being drawn into it, that the harmful consequences of divorce are likely to be most severe.

Domestic violence in relationships is often the catalyst for one spouse to file for a divorce or to leave a relationship. If there are children involved, an issue of child custody arises. A court must determine which parent will have custody of the child: an accused, a victim of domestic violence, or both. Ultimately, the court will always consider the “best interest of the child”³³⁶ regarding incidents of domestic violence in child custody cases.

³³⁵ .Keiko Irako, *Spousal Violence as a Cause of Divorce in Japan*, *Daito Law Review* , Vol.3, pp. 51-71, 2005

³³⁶ Preamble of the United Nations Convention on the Rights of the Child(UNCRC), 1989; The Universal Declaration of Human Rights; The International Covenant on Civil and Political Rights, Art:23& 24; the International Covenant on Economic Social and Cultural Rights, Art: 10

In many jurisdiction, properly implementing the Convention³³⁷ requires an overhaul of child custody and guardianship laws, or, at the very least, a creative approach within the existing laws.

In Japan, the Civil Code provides that the parents have the rights and incur the duty of providing for the custody of and the educating of the child³³⁸, and such parental rights and duties to a minor are called 'shin – ken', meaning the parental power or parental authority. Shinken includes all the rights and responsibilities included in Kangoken (physical custody). It also includes the right to engage in legal acts on behalf of a minor child and obligation of supporting the minor child. Shaken continues until it terminates in connection with a divorce, the child reaches the age of majority (generally 20), or is terminated judicially, for reasons such as abuse. While father and mother are in matrimonial relation, they jointly exercise the parental power.³³⁹ When a couple with children divorce, they are require to decide who will have custody of their children under the Japanese Civil Code.

In cases where the father and mother effect a divorce by agreement³⁴⁰, the person who is to take custody of the their children and other matters necessary for the custody shall be determined by their agreement, and if no agreement is reached or possible, such maters shall be determined by the Family Court. Family Court will determine which parent should have the parental power from the view point of the interests of the children. Joint custody is not available, though, in a few cases, one parent obtains custody while the others gets 'care and control' of the children.

Although parents have parental power over their minor a parent may lose such parental powers for various reasons including abuse of the parental power or gross misconduct or mismanagement of a child's individual property.³⁴¹ Moreover, The 2004 Law for the Prevention of Spousal Violence and the Protection of Victims³⁴² provides that in cases where spousal violence is feared or where it is feared that an attempt will be made to take custody away form the custodial parent by physical means, a protective

³³⁷ . *Ibid*, The United Nations Convention on the Rights of the Child

³³⁸ . Civil Code Article 820

³³⁹ . Civil Code Article 818(3)

³⁴⁰ . Civil Code Article 766 (1)

³⁴¹ . Civil Code Article 834 - 837

³⁴² . Law No. 64 of 2004 amending Law No.31 of 2001

order may be obtained prohibiting the spouse who does not have custody from approaching that children at school or at other location.³⁴³

Furthermore, visitation is not specifically provided for in the Civil Code, but the Code does give the Family Court authority to make custody determinations and this could be interpreted to give the court authority to make visitation orders. Visitation may be granted when the parent in physical custody of the child agrees to it, but otherwise the non-Japanese parent will have virtually no recourse, either through the judicial system or otherwise – the question of the best interests of the child notwithstanding.³⁴⁴

The ‘best interests of the child’ standard, there are extremely detailed criteria as to when visitation can be terminated, limited, or not awarded at all. Some are obvious (being drunkard, being violent to the child), but other quite subjective: bad mouthing the other parent, using visitation to try to renew the material relationship, and ‘other conduct that is against the best interest of the child’.³⁴⁵

Visitation is not favored in Japan because of a feeling that the child custody should not be subjected to the tension and disagreement between parents that are at the root of a divorce. Divorce may be seen as a ‘selfish’ act on the part of parents who, putting their own interests ahead of the interests of their child and their obligation to properly raise their child, simply end their marriage relationship. In such case the party who does not have custody of the child has only himself to blame for his situation.³⁴⁶

Perhaps the Family Court System and the mediators used by the system are simply not familiar enough with visitation to undertake the task of working out reasonable visitation arrangements. Whatever the reason, it appears that visitation is rarely ordered and even when ordered is for short duration separated by extended periods of time. When parties agree to visitation (or even when a court orders visitation) and the custodial parent then refuses to allow visitation there is little that the other parent can do, as there is no effective enforcement mechanism.³⁴⁷

³⁴³ . Law No. 64 of 2004 amending Law No.31 of 2001, Chapter 4 Article 10, where the child involved is over the age of fifteen, the Protective Order can only be granted with the child’s consent.

³⁴⁴ .Carl.F.Goodman, *The Rule of Law in Japan: Comparative Analysis*, 2nd.ed., Kluwer Law International, 2008, p. 132

³⁴⁵ .Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*, *Asian-Pacific Law & Policy Journal*, Vol.8, No.2, 2007, pp.229-256

³⁴⁶ . Carl F. Goodman, *supra* note 344, p.132

³⁴⁷ . Colin P.A. Jones, *supra* note 345

5.4.3.3. Issuing Restraining Orders

In most countries women have a choice of three legal strategies to protect themselves against domestic violence (1) divorce or legal separation from the abusive husband, (2) a civil protection order that requires the batterer to stop abusing, threatening, or harassing the woman (3) criminal prosecution of the batterer.

In Japan, under the Prevention of Spousal Violence and Protection of Victims Act, a Judge in District Court may issue a civil protection order when a battered woman applies in a written petition. The order usually commands the abusive partner (a spouse, former spouse) to stop abusing, harassing, or threatening the woman and to stay away from her. It can be also contain other provision, such as rules governing child custody and visitation, eviction of the abuser from the family home, prohibition of the battered from contacting the woman at her residence, school, or place of employment and other forms of relief that the court deems appropriate.³⁴⁸ If the protection order is violated, the court shall be punished by imprisonment with work for not more than one year or a fine of not more than one million yen.³⁴⁹ The remedies provided by protection orders are separated from divorce and separation procedures. Even if the woman plans to file for divorce, she may still need a civil protection order because her only recourse if the batterer violates the divorce decree would be to return to court.

Upon a petition from the victim, the Court shall render a judicial decision promptly.³⁵⁰ This order comes into effect when it was sent to the opposite party or when the decision has been rendered on his appearance. The order may oblige the spouse for a six-month period to refrain from approaching the victim's domicile and two-month period leaving from loitering in the vicinity of the victim from the day the order comes into effect.³⁵¹ Although they offer many potential benefits, protection orders have had several limitations. First of all, it may be difficult for a woman to obtain an order. In some situations, it may take several weeks for a woman to obtain a protection an order. Moreover, domestic violence frequently occurs during evenings or on weekends, when most courts are not in session. Not the court provides for issuing emergency protection

³⁴⁸ . The Prevention of Spousal Violence and Protection of Victims Act 2001, Section 10-12

³⁴⁹ . *Ibid*, Sec. 29

³⁵⁰ . *Ibid*, Sec. 13

³⁵¹ . *Ibid*, Sec. 10

orders after hours. One of the greatest limitations in the effectiveness of civil protection orders is that they have not always been consistently enforced.³⁵²

The police response to domestic violence cases has also been improved since the enforcement of the Spousal Violence Law in 2001, but the violation of protection orders is not rare. Only or may be 3 percent of those with protection orders taken out against them were arrested in 2006.³⁵³ In many cases, the police merely give warnings to violators without arresting them, and arrests are made only in cases of repeat violations or when violators ignore warnings.³⁵⁴ Other limitations in the effectiveness of protective orders include inadequate funds for training the respective personnel who assist battered women seeking an order; difficulty in serving protection orders, thereby placing women in danger during the days or (sometimes) weeks until service has been made; and ineffective or nonexistent monitoring to determine whether batterers are complying with the term of the order.³⁵⁵

Despite these limitations, obtaining protection orders seems to have a positive impact on battered women's sense of personal control and self-confidence, gaining a sense of control, reducing their fear, and beginning the process of divorce, reducing their feelings of helplessness, using the legal system, and sending a strong message to the batterer that abuse would not be tolerated.³⁵⁶

The DV law in Japan defines violence as illegal attacks that threaten the spouse's life or physical condition. It is suggesting that Japan is now conforming to other efforts undertaken by the international community. The actual provisions in the law more tends to give assistance for victims rather than the rights. Although there were some insufficiencies in its original law 2001, it could be furnished more and more to meet the needs of it. Despite the problems, early reports of compliance suggest that the law is being utilized by victims because arrests for spousal abuse and requests for protection

³⁵² K.J. Wilson, *supra* note 37, p. 92

³⁵³ In 2006, the total number of protection order issued was 8785 orders. Among them, 3 percent means 267. Protection order violation cases in which police did make arrests involved the most malicious perpetrators. (According to National Survey on Police Response to Victim of domestic Violence) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AJWRCJapan94.pdf>, accessed on 13 April, 2010

³⁵⁴ The Asia-Japan Women's Resource Center (AJWRC), *Review of Japan: Alternative Report, Human Rights Committee*, 94th Session, Geneva, 2008

³⁵⁵ K.J. Wilson, *supra* note 37, p.93

³⁵⁶ *Ibid*

orders have increased. The law will be much developed in the future by assessing ways to strengthen the policy in the next reviews.

5.5. Summary

Since the enforcement of the Prevention of Spousal Violence and Protection of Victims Law in 2001, which has been revised in 2004 and 2007, the responses of the police, the prosecutors and the court have also been much improved. But a fully implementation of the measures outlined in this law is needed to ensure for the safety of the victims and to take necessary action to perpetrators.

On the other hand, today in Japan, more and more young women have begun to choose their own way of living independently and freely, choosing a single life or career life. Women have begun to realize their own power under these movements and efforts. One in four females prefer not to get married or not to have children because otherwise she is expected to quit her job and stay at home to raise children. Poor child supports for working mothers, prejudices within the working environment, inflexible hours for working, and the prevailing tradition that only women should undertake domestic chores prevent Japanese females from having a family and a job simultaneously.³⁵⁷ Because of this, not only the fertility rate has been falling, making Japan's birth rate one of the lowest in the world. The total fertility rate, which was around 2.1 in the 1960s and 1970s, fell to a record low of 1.29 in 2004. If the present trends continue, on the other hand due to the increase of life-expectancy, Japan's population will shrink from its present number of 127 million to 65 million by the end of this century, according to demographers.³⁵⁸

They should decide and choose their own lifestyle themselves and place value on their individual dignity. Women's decisive attitudes towards such issues as breaking the silence about DV, not enduring irrational treatment and advocating their own rights are necessary in Japan to raise public awareness of the concept of equality of the sexes. Now is a transitional period in a long and painful process toward women's liberation.

³⁵⁷ .Abdullah Al Madrani , *Gender Equality Gains Support in Male-dominated Japan*, 2006, <http://gulfnnews.com/opinions/columnists/gender-equality-gains-support-in-male-dominated-japan-1.226642> , accessed on December 20, 2010

³⁵⁸ .National Institute of Population and Social Security Research, *Selected Demographic Indicators For Japan*, http://www.ipss.go.jp/p-info/e/S_D_I/Indip.html, accessed on December 22, 2010

Chapter VI

Legal Protection and Responses of Domestic Violence in Myanmar

Although the Myanmar government had admitted in existence of domestic violence or violence against women, they insist on saying that this problem is not a major one and that existing laws can deal with the problem well. To catch the nature and perceptions of Myanmar people upon domestic violence, the traditions and cultural norms practiced long time ago was explained. The factors contributing to the violence and how much was occurring in the society were highlighted. Then, legal responses including civil and criminal action for solving domestic violence cases were observed sector by sector and laws pertaining to that problem were also focused. To make precise about the attitude of courts and prosecutorial side in dealing with domestic violence cases, a case study was made and the facts of domestic violence cases taken in criminal action and the decisions made by the court were studied with necessary data and tables.

6.1. Perceptions of Domestic Violence in Myanmar

Domestic violence is prevalent throughout the society in Myanmar. However, it is regarded as a "private" or "family" affair, in which no one except immediate family members and close relatives can intervene. Individually, Myanmar women are taught to be polite and gentle, to keep their decency as their lives, to do housework and to be strictly faithful to their husband. When encountered any quarrel or fight between husband and wife, the women mostly contend themselves that, as a Myanmar proverb "*lin-nhin-maya, sha-hnin-thwa*", or "the tongue and teeth", the couples are as close as to clash often.³⁵⁹ The thought and belief patterns come from grand narratives, teachings, mottos and practices influenced by patriarchy. This leads to an imbalance of power between men and women. For instance, men are always the leaders; women, the followers. It has been accepted that a good wife should secret domestic violence or family affairs as a private sphere and not to be discussed in public according to the

³⁵⁹ . Mi Mi Khaing, *The World of Burmese Women*, Zed Books Ltd., 1984, p. 18

saying “Do not take the fire from inside to outside”.³⁶⁰ Therefore, they also feel ashamed of revealing such matters to people outside their family in case they are perceived as “badly-behaved” women.

Likewise, in the society, the husband and wife relationship as based on the ‘perceived differences between the spiritual, physiological and psychological natures of the two sexes’ and identifies the higher spiritual plane on which the man as *ain-oo-nat* or spirit of the house is placed.³⁶¹ It means that male superiority much place over women's authority in Myanmar custom.

Central to the notion of male superiority rooted on the concept of ‘*hpon*’ which strengthens the spiritual elevation that men enjoy in Myanmar society. All males have a *hpon*, an intrinsic quality that is accorded to few females, and even if it were, less than that accorded to a male. It gives men the advantage of a special status, higher than that of women. Thus, at the spiritual level, the position of Myanmar women fares badly. The spatial division is a constant reminder of women’s inferiority and a clear demarcation of what is not a woman’s place. Traditionally, and continuing to the present, women cook and sew, care for and nurture the family. There are also general rules of superstition which are followed by most people. The woman’s clothes, especially the *htamein* or *longyi* (skirt or underwear) are never placed on the upper shelves of the wardrobe, nor thrown carelessly about the house while it is acceptable for a man’s *longyi* to be anywhere. The special clothesline for women’s *htamein* or *longyi* is meant as a taboo space.³⁶² Sex distinction operating on the principle of regard for the male “*hpon*” is present in all relationships. The belief in ‘suitable’ feminine behavior is very strong. One of the cultural mottos for women in treating men in her family is that ‘treat son as masters and husband as god’. Moreover, the universal ‘male’ quality allows a man much sexual freedom, whether he is married or not. These concepts have through centuries run parallel with a full life for women in Myanmar society.³⁶³

Myanmar customary law also recognized men's superiority over women. The *Dhammathats* known as customary disciplines – written by monks and men – sometimes

³⁶⁰ . Nina S. Yulina, *Women and Patriarchy*, Women’s Studies International Forum, Vol.16, No.1, 1993, pp. 57- 63

³⁶¹ .Than Than Nwe, *Gendered Spaces: Women in Burmese Society* , Transformations Journal No.6, 2003

³⁶² .*Ibid*

³⁶³ .Mi Mi Khaing, *supra* note 359, pp. 16-17

describes the husband as the lord and master of the home.³⁶⁴ As a significant example of men's power over women, the *Dhammathats* recognized the husband's power of moderate chastisement with a light cane or split bamboo to his wife. In the *Dhammathats*, there are five improprieties³⁶⁵ that a woman may be guilty of their acts. A guilty wife may not be given brutal punishment, but shall be gently chastised, "By beating her on the back and the buttocks with a cane, split bamboo, or the palm of the hand."³⁶⁶ Although such practice is no longer recognized by the courts, it was recognized for a certain period.

Gender inequities are found in diverse spheres ranging from economic activity to political participation in the domestic sphere. Even in industrialized countries, there are few women representatives in political decision-making. At present, equal participation in decision-making of women at all level in Myanmar seems to be lagged behind. However, some figures of elected women in the last election³⁶⁷ show the better equal participation in decision-making of Myanmar women in future.

In the economic sector, Myanmar women have become more and more participated in business and management roles ever than before. However, according to Gender related Development Index (GDI)³⁶⁸, Myanmar's position on the GDI table equates it to a score just below that of Cambodia, or around 0.58. This slight reduction is

³⁶⁴ . Dr. Maung Maung , *Law and Custom in Burma and the Burmese Family*, The Hague, Martinus Nijhoff, 1963, p.47

³⁶⁵ . These five improprieties are: with regard to food, when she takes her meals before her husband does so; or when she indulges often in her husband's absence in eating rich food; or when she gets up late in the morning and the first thing she does is eat; or when she eats stealthily the greater portion of any food obtained and leaves only a little of it for her husband; with regard to behavior towards men when her conduct towards all men she comes across is as free as towards her husband; with regard to dress if she puts on inappropriate dresses when she attends feasts or stays at home, or goes on a journey, or attends to her duties as a wife and as a mother; with regard to property when she gives away, sells, or mortgages it without the knowledge of her husband; and with regard to looking when she looks at a man with eyes as restless as those of a crow or when she is in the habit of looking at men when they are dressing or undressing, or when they are bathing.

King Wunmingyi U Gaung, Digest II, *Digest of Burmese Buddhist Law concerning Inheritance and Marriage; A collection of Texts From Thirty-Six Dhammathats*, Yangon Hantharwaddy press, 1909, p.18

³⁶⁶ . *Ibid*, p.151

³⁶⁷ . The general election was successfully held in the whole country on 7th November 2010

³⁶⁸ . GDI Index was carried out by UNFPA in Myanmar between the period of July 2009 to 2010, calculated by using the same indicators as the HDI but capturing inequalities in achievement between women and men

from the HDI value results from women's lower adult literacy rate as a percentage of men (92%) and lower estimated earned income (61%).³⁶⁹

There is no doubt that Myanmar society seems to give favor on male dominance while the role of women is disregarded. Men always think themselves that they are much superior to women and women are inferior to them. This assumption leads to bullying of men to their partners in some situations and women are at the same time used to keep their pain and sorrow secretly. Moreover, most women who are abused tend to ignore the situation once they reconcile with their husbands especially if they are fully dependent on their husbands. If they bring their husband to the justice, they may not have enough money to spend for their daily expenses particularly when they have children. One more factor is that women in Myanmar keep it in their mind the nature of violence, or even in some torture, they usually presume it is a normal incident which usually occurs in a family and they regard it should not be displayed in public.

6.2. Extent of Domestic Violence

Until recently, domestic violence was considered largely as a private matter and hidden as a shameful secret. Since there are no official statistics on the problem, it is difficult to estimate any figures. However, in 1996, the Myanmar government created a national committee called the 'Myanmar National Committee for Women's Affairs' (Hereinafter MNCWA). Violence against women has been included in the six areas taken by the Myanmar National Working Committee for Women's Affairs, the general goal of which is the reduction of all forms of violence suffered by women.

Finding from the MNCWA survey indicated that the main causes of violence in Myanmar are financial problems, alcohol, disharmony with in-laws and adultery. Other causes are unemployment, lack of education of husband and wife, early marriage, and large family size. In addition in Myanmar violence is related to males possessing more than wife. According to the battered women of case studies in Myanmar, violence often erupts when a wife realized that her husband has another wife as his first wife. When women learn of this martial problem, it often leads to arguments, resulting in violence.

³⁶⁹. UNFPA Myanmar, *Report on Situation Analysis of Population and Development, Reproductive Health and Gender in Myanmar*, http://countryoffice.unfpa.org/myanmar/2010/08/03/2561/executive_summary/, accessed on 11 December, 2010

Moreover, the research findings revealed that mental violence ranges from 4% to 21% and physical violence ranges from 3% to 15%. Violence against women is now increasingly recognized as a problem with serious medical and social consequences and has become a prominent issue in Myanmar.

According to the research made by Dr. Nilar Kyu* in 2004, among 286 women who lived in Mandalay (the former capital of Myanmar), 27% of women experienced physical assault and 69% of women experienced psychological aggression by their intimate partner. When we look into the nature of violence in detail, 62% of the women had minor psychological aggression and 33% were in severe psychological aggression; while women were having severe physical assault about 17%, there were 25% of women who had minor physical assault; while 52% of women were being felt for shouting, yelling, 40% of women were insulted and 38% of women were done or said something spiteful and stomped out of room. However, 6% of the total sample had been up by their partners or, in some cases, their partners had actually used weapons against them. The fact that the incidence rate for total strife is equal to the rate for psychological aggression indicates that women who experience physical assault also experienced one or more acts of psychological aggression. Finally, only 6% of the abused women took formal action, and 35% simply stated, "I put up with the violence". Moreover, 9% of the abused women reported, "I got buried or lesion" and 19% said "I felt dying".³⁷⁰ Whatever the nature of violence experienced by the victims or women, there are several causes likely to be happened. Result indicated that personal experience of parental violence, husband's unemployment, frequent alcohol use and deceived into marriage without truly knowing the partner were associated with increased risk of violence.

According to the data mentioned above, the victim or the abused woman do not usually keep the violence in their mind that it really affects to the development of human beings. A small amount of victims usually take a formal action only when their husbands torture or bully her with weapons and when they end up their tolerance. That is the nature of women in Myanmar society and they had been taught to act in their life like that.

*Dr. Nilar Kyu is a scholar from Myanmar, and she submitted a dissertation paper for Violence against Women in Myanmar to Graduate School of Education and Human Development in Nagoya University in 2004 for the Degree of Doctor of Philosophy

³⁷⁰ Nilar Kyu and Astuko Kanai, *Prevalence, Antecedent Causes and Consequences of Domestic Violence in Myanmar*, Asian Journal of Social Psychology, Vol.8, 2005, pp.244-246

When a victim encounters with the domestic violence because of her husband's ruthlessness, she always tries to content herself that it is all because of her karma in her past life.

Moreover, recently, the data surveyed at one of the subordinate courts shows that most of the divorce suits based on the ground of domestic violence reasons more or less. These data will be discussed in detail in the coming chapters. It has highlighted that the problem of domestic violence cases exist in some extent in Myanmar. Under the above mentioned data, the victim or the abused woman do not usually keep the violence in their mind and they sometimes spill out their feelings. But a few victims usually take a formal action of prosecution only when their husbands make torture her very seriously and when they cannot tolerate him anymore. That is the nature of women in Myanmar society and they had been taught to act in their life like that. When a victim encounters domestic violence, she always tries to content herself that it is all because of her karma in her past life.

6.3. Contributing Factors

A number of important factors contribute to continue domestic violence against women. In Myanmar, as in other countries, domestic violence is viewed as a private issue or is not viewed seriously. Police and members of public organizations often consider domestic violence as private matter, not recognizing violence against women as a crime despite legislation to the contrary. Women who are victims of domestic violence also find that police and members of the public consider such as a domestic matter and no further action is taken or protection instituted. In addition, law enforcement officers and authorities, in particular the police have known to be judgmental when dealing with victims of domestic violence. As a consequence, many women who experience domestic violence feel humiliated and do not report incidences to avoid the shame and guilt inflicted upon them by others.

Another possible contributing factor that leads to violence against women in Myanmar is that people in Myanmar society still place a good deal of blame on women for not acting “appropriately” or not being “careful”. These attitudes lead to a situation where women are reluctant to disclose or to take action to protect their rights. Frequently,

abused women do not disclose abuse due to feelings of guilt, shame, fear of retaliation, humiliation, denial about the seriousness of the abuse, concern over confidentiality, feelings of self-blame, and loyalty to the abuser. The reluctance to disclose abuse is not related to women's immediate personal safety but also the expected roles and responsibilities to their family, the possible economic impact of relationship breakdown and fear about police interference. In addition, the daily reality of living with abuse may alter many women's sense of identity and cause feelings of entrapment and disempowerment. This can lower women's ability to assert themselves and disclose the abuse to health care providers.

Domestic violence is also linked to gender roles and inequality of gender status in Myanmar. Although some writers³⁷¹ argue that Myanmar women have high social and economic status, both within households and in the wider society. Other argues that women are also expected to display submissive or passive characteristics while men are believed to be the "stronger sex". This expectation makes it difficult for women to assert their rights. It also leads women to accept being submissive as a normal and expected part of their lives. Men, on the other hand, are perceived to be superior to women and may resort to violence as a rightful means to exert their authority.

The notion that the husband is the household head is a common belief in Myanmar. The position of "head" of the family entitles the incumbent to determine what this will mean or for other family members and establishes a general notion of patriarchal authority. Women, on the other hand, whilst occupying all kinds of positions in public life, are supposed to find fulfillment in the roles of mother and wife. They are seldom recognized as household heads. As wives, women are expected to do their husbands' bidding and accept whatever treatment is meted out. In addition, women's mothering role neatly overlaps with her more general role of being responsible for the physical nourishment and emotional nurture husbands. The extensive nature of the patriarchal role,

³⁷¹ Mi Mi Khaing, *Burmese Family*, India University Press, 1962,

Dr.Htin Aung, , *Burmese Law Tales*, Oxford University Press, London, 1961, *Customary Law in Burma*, the John Hopkins Press 1953.

Dr.Maung Maung, *Law and Custom in Burma and the Burmese Family*, The Hague, Martinus Nijhoff, 1963. Dr. Maung Maung is a well know legal scholar and was a Chief Justice and the President of the Union of Myanmar

expectations of women in the family, has ramifications with regard to the potential for violence by husbands towards their wives.

The factors mentioned above are mainly based on social customs and traditional beliefs that men are undisputed heads of the households and men's use of force or abuse on women is accepted for some extent. Moreover, there may be other individual and societal related causes of domestic violence, such as poverty, alcoholism and low level of education. The Myanmar National Committee for Women's Affairs (MNCWA), an organization founded by the government in 1996, has also confessed that the commonest causes of domestic violence in Myanmar are inadequate financial provision for the family, excessive and habitual drinking, disharmony with in-laws in the extended families and adultery.³⁷²

According to a 2005 United Nations Development Programme (UNDP) household survey, one –third of Myanmar's population lives below poverty line. Such kind of poverty or inadequate financial provision may cause inconveniences and stress to daily life among families in Myanmar. There is a strong link between financial problem and domestic violence. When financial stress occurs in a family, it may have an impact both on men and women. It also interlinks with the rise of alcohol consumption in Myanmar. When a man is incapable of getting enough earning for his family, he used to drink as an outlet to stress and he tries to make some problems at home so as to divert his unresolved situation. His diversion comes to violence at home. All members in a family have to suffer from it. On the other hand, a variety of factors may contribute to the poverty of women and children who have experienced domestic violence, including lack of affordable housing and lack of accessibility to legal assistance. Some of the most significant factors are barriers to employment. Because of these barriers, many victims of domestic violence may not be able to leave welfare for work within the imposed time constraints of the recent welfare reform.

As for alcohol consumption, experts emphasize that there is no research evidence that alcohol consumption or even alcohol abuse causes domestic violence. Furthermore, the majority of alcoholics and other men who abuse alcohol do not abuse their partners

³⁷². MNCWA, *Status of Myanmar Women*, 2001, <http://mncwa.tripod.com/mncwa/id8.html>, accessed on 3 August 2010

and most instances of abuse occur in the absence of any alcohol consumption at all. Alcohol does not and cannot make one person abuse another. But many authorities explain that “men who batter frequently use alcohol abuse as an excuse for their violence. They attempt to rid themselves of responsibility for the problem by blaming it on the effects of alcohol. Doctors believe behavioral pattern and poor living standards may also breed the frustration and contempt that often lead to abusive behavior. A neurological specialist in Myanmar³⁷³ said there are a number of factors that could push someone to behave violently towards their loved ones. He said that a major contributing factor to domestic violence in Myanmar is excessive use of drugs and alcohol, which can cause a person to be severely deluded and reckless, which can in turn lead men to act violently towards their wives. There may be confused with interrelationships between alcohol consumption and domestic violence. Some may agree and some may not. Whatsoever, one of the study showed that men who drink alcohol and have a predisposition for physical violence toward their female partners are more likely to be violent on the days they drink alcohol.³⁷⁴

6.4. Response to the Problem

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the General Assembly. This convention was the first document to address women’s rights in all areas of their lives, including political, economic, social, cultural, and family. The primary goal of CEDAW is to eliminate discrimination against women and to promote a respect for human rights throughout the world.³⁷⁵ Currently 186 countries (over 90% of the members of the UN) are registered to the CEDAW and an additional State has signed, but not ratified the treaty, therefore it is

³⁷³. Jessicah Curits & Myo Theingi Cho, *Women of All Age, Status Experience Depression*, Myanmar Times Weekly Business News, Vol. 11, No.216, 2004

³⁷⁴. Timothy J. O’Farrell, Willam Fals-Stewart, Marie Murphy & Christopher M. Murphy, *Partner Violence Before and After Individually Based Alcoholism Treatment for Male Alcoholic Patients*, Journal of Consulting and Clinical Psychology, Vol.71, No.1, pp. 92-102, 2003

³⁷⁵. Margi Laird McCue, *Domestic Violence*, *supra* note 24, p.83

not bound to put the provision of the Convention into practice.³⁷⁶ Myanmar became a party to the CEDAW in July 1997.³⁷⁷

In order to promote and protect the rights of women and girls, the Government has established Myanmar National Committee for Women's Affairs (MNCWA) in 1996 as a national machinery to carry out the Beijing Declaration and platform of Action. In addition, the Myanmar Women's Affairs Federation (MWAFF) as established in 20 December 2003 to take effective measures of women's affairs in implementing the principles and guidelines laid down by the MNCWA. The Women's Affairs organizations were formed in all States and Divisions down to the grass-roots level to carry out the activities in order to promote its functions comprehensively and widely for the advancement of women.³⁷⁸

The National Committee enhances the cooperation between the Government and Non Governmental Organizations in implementing the National Plan of Action. An NGO namely, Myanmar Maternal and Child Welfare Association (MMCWA) which has branches and associations all over the country up to the grass-root level is dedicated to promoting health and the well-being of mothers and children. Similarly, the Myanmar Women Entrepreneurs Association (MWEA) has been active in enhancing the role of Myanmar women in business. In addition, the Myanmar Women Sports Federation (MWSF) has the aim of promoting the participation of women in sports and in the physical, mental and moral development of women.³⁷⁹

The MNCWA has identified six areas of concern for the advancement of Myanmar women namely: education, health, economy, culture, violence against women and girls. Most of the critical areas of concern of the Beijing Platform for Action are interrelated and interdependent. Integrated programmes on the enhancement of the role of women in the health, education and economic sectors can benefit the areas of women and

³⁷⁶ .The Convention on the Elimination of All Forms of Discrimination against Women, *State Parties*, <http://www.un.org/womenwatch/daw/cedaw/states.htm>, accessed on 9 May 2010

³⁷⁷ .23rd Special Session of the United Nations General Assembly, *Women 2000: Gender Equality, Development and peace for The Twenty-First Century*", <http://www.wwan.cn/womenwatch/daw/followup/beijing+5stat/statements/myanmar6.htm>, accessed on 5 May 2010

³⁷⁸ .The 42nd CEDAW Session, 27 October,2008,*Oral Statement by the Women of Burma to the CEDAW Committee*,<http://www.womenofburma.org/Statement&Release/BURMA-CEDAW-Oral-Statement.pdf>, accessed on May 2, 2010

³⁷⁹ .Reply from the Union of Myanmar to the Questionnaire on Implementation of the Beijing Platform for Action, <http://www.un.org/womenwatch/daw/followup/responses/Myanmar.pdf> , accessed on May 14, 2010

poverty, human rights of women and the media. The media is urged not to give a distorted image of women to the public but to enhance the awareness of their role and contributions to the family, the community and the country.

In Myanmar, violence against women and girls do not pose a major problem. Although, it is one of the priority areas of concern of the MNCWA, as it can effect women's health and hinders the advancement of women. The Sub-committee on the violence against women has taken integrated measures to prevent and reduce violence against women, to provide help and to rehabilitate the victims of violence. Moreover, the Sub-committee has laid down strategies such as Raising awareness on the violence directed against women: Wide-spread dissemination of information on where to seek help for victims of violence, Upgrading the capacity for providing health care for the victims including establishment of drop-in centers, counseling centers and shelter homes.³⁸⁰

Two counseling centers each in Yangon and Mandalay Divisions have been established to help the victims of violence. It is in the process of establishing at least one counseling center each in States and Divisions. The training workshops on Systematic data and Counseling Methodology were held in Yangon. The Department of Social Welfare conducts domestic science training courses in States and Divisions for young women and girls to carry out income-generation activities.³⁸¹

“Non-governmental organizations” like the Myanmar Maternal and Child Welfare Association (MMCWA) provides antenatal care at the (MMCWA) centers as well as family planning services. Deliveries are conducted at 33 maternity shelters all over the country. If there are other reproductive health problems, the patients are referred to the nearest hospital or Maternal and Child Health centers.

To achieve the aims of social welfare services six Residential Nurseries, 61 Pre-schools and Day-care Centers, 952 Voluntary Pre-primary School and Day-care center have been opened. Two Women's Homes have been opened in Yangon and Mandalay to look after Women age above 18 groups which are facing social difficulties. These Homes after the social needs give academic education and vocational training and arrange placement of employment. These women's Homes run by voluntary organizations have

³⁸⁰ . *Ibid.*

³⁸¹ . *Ibid.*

received grants from the Department of Social Welfare. Home-making Training Courses and Day-care Teacher Courses were also conducted in various States and Divisions.

In addition to providing vocational training and necessary equipment, credit and Loan Schemes are also being implemented in two ways. One scheme is, in the formation of co-operatives scheme, MCWA members are provided with loans. “Myit Tar Shin” co-operatives have been formed. Another scheme is to raise funds for credit and loan scheme, for the purpose of providing loans to members of township or branch associations. One hundred and forty six townships are now implementing these credit and loan schemes. MNCWA and MWEA are also disbursing loans to the women for income generating activities.³⁸²

It has implemented activities with the advancement of women as its objective and has achieved tremendous progress for the last decade. Yet it was found that there were certain limitations to such as a committee when it was obliged to cope with broad and multi-faceted issues.

6.4.1. Laws relating to Domestic Violence

Myanmar under the Myanmar Kings has a solid foundation of legal framework and judicial administration. There were royal courts having different jurisdictions at the capital city and the local courts and independent benches in the outlying areas. Myanmar laws then was composed of age-old customs. Then Myanmar was annexed by the British in three stages. After the final annexation in 1852, Indian statutes based on English Common Law principles and system were imported and enforced in the land of Myanmar. These statutes were enacted in the form of law Codes such as Penal Code, Civil Procedure Code, and the Criminal Procedure Code and Acts. Most of these laws continued to be in force even after Myanmar gained independence in 1948.³⁸³ In the regime of socialist system and the current legal system, these main pillar laws are still in use in the courts except there were slight amendments. Among these Codes, the Penal Code and the Criminal Procedure Code including other special laws were used for

³⁸² .Country WID Profile (Myanmar), December 1999, *Japan International Cooperation Agency Planning Department*, http://www.jica.go.jp/English/operations/thematic_issues/gender/background/pdf/e99mya.pdf, accessed on 10 May, 2010

³⁸³ . U Aung Than Tun, *Myanmar Laws Digest*, Innwa Publishing House, 2001, pp.23-24

criminal offences. There is no particular enactment of 'civil law' although the Code of Civil Procedure is running for procedures in civil suits. The laws which were designed on the British Common law models, such as the Contract Act, the Negotiable Instruments Act, the Trust Act, the Transfer of Property Act, and the Sale of Goods Act, are used for their particular civil action as the case may be. These Laws and Acts mentioned above are statutory ones. On the other hand, the Myanmar Customary Law, which has also legal binding force like other laws, is not an enacted law, but a 'judge-made' law or case-law, based on the *Dhammathats* and the treatise, the old and new judicial decisions and precedents. The law applies among the Myanmar who professes the Buddhist faith in subjects.³⁸⁴ For Mohammedans and Hindus, their respective laws are applied in the cases of marriage, inheritance and divorce.

Among these laws whether criminal or civil, there is no specific law for domestic violence or there is no particular expression of 'domestic violence' up to now. Some conventional laws are running to deal with domestic violence related cases. Generally, in case of torture and hurt physically, the criminal law or penal code is used. When the case is related to marriage, divorce, inheritance and succession, Myanmar Customary Law and other civil laws are governed to adjudicate.

6.4.1.1. The Rights of Women in the Constitution

Under the Constitution of Myanmar, which was currently adopted in 2008, the Union shall guarantee any person to enjoy equal rights before the law and shall provide legal protection.³⁸⁵ It is also stated that the Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.³⁸⁶ Women shall be entitled to the same rights and salaries as that received by men in respect of similar work.³⁸⁷ Mothers, children and expectant women shall enjoy equal rights as prescribed by law.³⁸⁸ Moreover, the Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate against any citizen of the Republic of the Union of Myanmar,

³⁸⁴ Myanmar Laws Act 1898, Sec. 13(1)

³⁸⁵ Constitution of the Republic of the Union of Myanmar, 2008, Sec. 347

³⁸⁶ *Ibid*, sec.348

³⁸⁷ *Ibid*, Sec.350

³⁸⁸ *Ibid*, Sec.351

based on race, birth, religion and sex. However, nothing in this Section shall prevent appointment of women to the positions that are suitable for men only.³⁸⁹ It is stated that, nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.³⁹⁰ It may be seen that the Constitutions shows its equal rights between men and women which used to formally illustrate as other constitutions, but there was no specific definition for discrimination against women in the Constitution.

The new Constitution formally indicates women's equality with men and includes sex as a ground of discrimination. A provision for temporary special measures has not yet been in the Constitution or domestic legislation that would assist women in achieving equality. It does not have an effective constitutional guarantee of substantive equality and that the definition of discrimination is not in accordance with the definition of discrimination in article 1 of the CEDAW convention, which prohibits direct and indirect discrimination in the public and private spheres.

6.4.1.2. Provision under Criminal Law

Under the Penal Code of Myanmar enacted in 1860, which has been prolonged for over 100 years, whoever assaults or uses criminal force against any woman, intending to outrage? Or knowing it to be likely that he will thereby outrage? Her modesty shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.³⁹¹ In practice, it is hardly seen in the courts filing for the offence to husband for committing assault or criminal force to his wife with intent to outrage her modesty because these are regarded as ordinary matrimonial quarrelling. The binding force of this section is mostly applied to a man who is not her husband.

Moreover, although the sections for wrongful restraint³⁹², wrongful confinement³⁹³, criminal force³⁹⁴, assault³⁹⁵, criminal intimidation³⁹⁶ are stated in the Penal Code. But in practice, when a husband commits one of these offences to his wife,

³⁸⁹ . *Ibid*, Sec.352

³⁹⁰ . *Ibid*, Sec.353

³⁹¹ . The Penal Code of Myanmar, Sec.354

³⁹² . *Ibid*, Sec.339

³⁹³ . *Ibid*, Sec.340

³⁹⁴ . *Ibid*, Sec.350

³⁹⁵ . *Ibid*, Sec.351

³⁹⁶ . *Ibid*, Sec.503

she usually does not ask for help from the police or the courts. Only when she gets hurt because of her husband, and in the termination of her patience, she goes to the police station or to the court for the offence that has been committed against her. But the practice is very rare. Before reaching the court or the police, the elders or the head of the community tried to settle it by their own ways, forcing her not to sue or by taking bonds from perpetrators not to commit again. But the circle of violence for wives never stops in its manners.

Again, according to the Penal Code, a man is said to commit “rape”³⁹⁷ that has sexual intercourse with a woman against her will. If proved, he shall be sentenced to a stiff imprisonment. But there is an exception, it is stated that sexual intercourse by a man with his wife who is not under thirteen years of age, is not rape. So, it may make a conclusion that a husband is allowed sexual intercourse with his wife who has attained the age of thirteen even without her consent or even she is unwilling to do so. In the Penal Code, it is stated that the rape by a husband of his wife may be convicted to the sentence of imprisonment up to 2 years.

But, under the Code of Criminal Procedure, for the abduction or unlawful detention of a woman, the District Magistrate may make an order for the immediate restoration of woman to the liberty and may compel compliance with such order after such inquiry into the truth of the complaint as he may consider necessary³⁹⁸. Moreover, in this Code, it is found out that only a District Magistrate may take cognizance of the offence of rape where the sexual intercourse was by a man with his wife³⁹⁹. In practice, when the data concerned was collected from our country whether any criminal trial was filed in the court under these sections, it has been observed that there was no case against the accused for these offences. So, it shall be deemed to interpret that these sections are sleeping in application.

Again, Private defence⁴⁰⁰ under the Penal Code is no discrimination between man and woman and contains special protection for nature of woman and dignity of woman. Under this provision, The right of private defence of the body extends to the voluntary

³⁹⁷ . *Ibid*, Sec.375

³⁹⁸ . The Code of Criminal Procedure, section.552

³⁹⁹ . *Ibid*, Sec.561

⁴⁰⁰ . The Penal Code of Myanmar, Sec.100

causing of death or of any other harm to the assailant, of the offence which occasion the exercise of the right be of any of the descriptions hereinafter enumerated, namely: –

Firstly – Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly – Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly – An assault with the intention of committing rape;

Fourthly – An assault with the intention of gratifying unnatural Lust;

Fifthly – An assault with the intention of kidnapping or abducting;

Sixthly – An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. According to the description from "thirdly" to the last item, it may be seen that these mainly intend to give special protection to women.

Concerning the protection of woman in pregnancy is provided by the Penal Code.⁴⁰¹ Accordingly, it states as follow;

Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Nevertheless, the exact provisions for domestic violence are not found in the criminal law or Penal Code. Instead, when a husband commits violence to his wife, she has to complain like other people who have been injured in the incident. If she gets hurt due to his violence or if she is criminally intimidated or so on, she has to make a complaint to the police or court. The person in authority concerned will not pay special attention to these offences and victims. They usually regard these offences such a family's ordinary affairs which do not need to intervene.

⁴⁰¹. *Ibid*, Sec. 312

6.4.1.3. Myanmar Customary Law

When a Myanmar woman could not stand the violence made by his male partner or she cannot tolerate his behavior anymore, she usually tries to get a divorce from him. That is the only escape from her situation. Under Myanmar Customary Law, there are mainly three kinds of divorce. They are divorce by mutual consent; divorce by husband's entry into the priesthood; and divorce on account of matrimonial fault. There is no need to emphasize the first two factors of divorce for this paper. Regarding with matrimonial fault to claim for divorce, there are two kinds of matrimonial fault: namely, ordinary matrimonial faults and grievous or serious matrimonial faults. Under ordinary matrimonial fault there are misrepresentations, adultery on the part of the husband, desertion, and ordinary cruelty. Adultery on the part of the wife and grievous cruelty are factors of serious or grievous matrimonial faults.⁴⁰² Concerning about divorce, there are several grounds for divorce in Myanmar Customary Law, but the main features are cruelty, desertion, the husband marrying a second wife without the consent of the first wife, and adultery. It is the evidence of the protection of women from cruelty even in a marriage tie. Therefore in Myanmar 'violence' against women seems to be protected accordingly to customary law.

However, the above mentioned chapter has said that the *Dhammathats* or Myanmar customary law recognized the right of giving light punishment to wife by husband. This right may be said to lead the precedents or rulings in the customary law that allows some act of violence not amount to right of divorce by women. In Myanmar customary law, it is found out that the word "cruelty" is used instead of describing the word "violence". A divorce is now granted to a wife, on the terms of a divorce by mutual consent, and on proof of a single act of cruelty on the part of the husband. But a single assault by a husband on the wife, which was provoked by the wife, is not sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence.⁴⁰³

⁴⁰² . U Mya Sein, *Myanmar Customary Law*, 10th .ed., Innwa Publishing House, 2004, pp.129-130

⁴⁰³ . Maung Kywe vs. Ma Thein Tin, 7 Ran 790

In order to constitute cruelty ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference or delight in pain caused to the sufferer.⁴⁰⁴ There ought to be evidence of such ill-treatment that shows the husband is a man of violent tendencies. The Court usually accepts that divorce ought not to be granted for mere trifling assaults and it cannot be obtained for physical cruelty only. It can only be obtained for cruelty in the legal sense. It has to show that the cruelty must be the matrimonial cruelty. In order to prove cruelty it is necessary to point to some definite words or actions as constituting it. A charge of a matrimonial cruelty is a serious matter and it is for the party who makes such a charge to prove it, if it is denied.⁴⁰⁵

When the provisions and rulings in the customary law are observed, it may be found out that there were no clear definitions for divorce because of mental or psychological violence or mental pain in the *Dhammathats* or leading cases. In some cases, a false accusation of adultery persisted in by the husband might be sufficient cruelty in the legal sense to justify divorce.⁴⁰⁶ Husband's persistence in charging the wife with adultery when he is unable to prove it coupled with his physical assault on the wife for her declining to give up going to her parents' place entitles the wife to claim a divorce.⁴⁰⁷ All sorts of mental tortures of an unbearable nature may be classed as cruelty in the legal sense.

Summing up, we can say that the definitions for domestic violence were not be seen in the customary rules and cases cited on it. They used the word of 'cruelty' instead of using 'violence'. The meaning of cruelty itself is much narrower than the violence. All the cruelties are violence but not all the violence may be cruelties. The nature of domestic violence which is widely recognized as violation of human right may not be conformity with the practice of Myanmar customary law. But the Myanmar community or society accepted it because the Myanmar society is based on patriarchal system and the Myanmar women regarded their husbands as their spirit head of the house. Even if her husband committed cruelty or violence, the common relief she can claim is to get divorce with her husband in the courts. The customary laws that discriminate against women are seen to

⁴⁰⁴ . *Ibid*, pp.795-796

⁴⁰⁵ . Dr. Tha Mya vs. Ma Kin Pu, A.I.R 41 Ran 81

⁴⁰⁶ . Maung Po Aung vs. Ma Nyein, 10 B.L.R 132

⁴⁰⁷ . Maung Ohn Kyaw vs. Ma Hla Mu, A.I.R 1934 Ran 272

be incompatible with the CEDAW convention. It has been found out that domestic violence and discrimination against women appear to be socially legitimized and accompanied by a culture of silence and impunity. Thus the cases of violence are underreported and the reported cases are also settled out of the court.

6.4.2. Criminal Justice Responses

Legislation should state that police and other law enforcement officials are obliged to pursue all cases of domestic violence, regardless of the level or form of violence. Due to its gendered nature and prevalence, domestic violence constitutes a human rights violation which differentiates it from other crimes. This calls for stricter standards for state agencies to investigate complaints of domestic violence and bring perpetrators of violence to justice. If this responsibility is not met, the State fails to meet the guarantee of equal protection rights. It is no doubt that criminal justice system is the most effective way to reduce domestic violence and protect women.

In Myanmar, there is no specific proceeding in handling domestic violence cases. The police, the prosecutors and judges provide a conventional way in treating these violence cases like other offences. Mostly, the police and prosecution side including judges try to settle out the violence cases peacefully in stead of taking prompt action. Only the severe or serious cases reach before the court.

6.4.2.1. The Police Response

The Myanmar Police Force has as its objectives. They are community peace and tranquility; prevalence of law and order; narcotic drugs suppression and to carry out community welfare activities. Accordingly, they prevent crime and they have to detect the offence when it occurs. They have to, at the same time, maintain public order and security.⁴⁰⁸ Mostly, the police in Myanmar deal with the offence which are cognizable or the offence which a police officer may arrest without warrant.

When a police officer receives information of committing an offence or if he encounters committing an offence and the offence is cognizable, he may make a first information report as a complainant or he may open a case by reducing the information

⁴⁰⁸. According to the Handout of the Ministry of Home Affairs issued in 2009

into the police registration book. If he arrests an offender and investigation cannot be completed within 24 hours and the offence is non-bailable offence, he shall send him to the nearest magistrate to get remand or an order to keep him in his custody or in prison. If the offence is bailable case, the police may release the offender with bond. When he has collected all evidence within investigation period, if he finds the accused committed an offence, he shall send the case to the prosecutor office to get the legal advice. When the public prosecutor tenders legal advice for suitable law and section, he then files the case to the court bringing with the accused before the Magistrate. If a police officer receives information of committing a non-cognizable offence, he shall direct the informant or complainant to the Court for direct complaint. But in some cases which may be detrimental to the public security, he may make a complaint even though the offence is non-cognizable one. These are the normal procedures or proceedings that a police officer has to perform his duties.

Therefore, concerning with domestic violence related cases, when police officers received information of cognizable offence, such as wounding or grievous hurt by weapon⁴⁰⁹ or murder⁴¹⁰ or culpable homicide⁴¹¹, he has to take a prompt action upon the offender. But the offence is non-cognizable, such as simple hurt⁴¹² or criminal intimidation⁴¹³ or assault⁴¹⁴, and it has no account on public security, he may refuse to make a complaint at the police station and may direct the complainant to the court.

In practice, the police are usually unwilling to make a complaint for quarrelling or affray between the spouses because they regard these cases as daily-life social problems. Sometimes, they try to make satisfied the abused or battered women or complainant who has been committed the domestic violence crime. Even if the police receive information about the domestic violence, when an accused presents in the station, they usually try to reconcile the spouse and release the accused person. In case of non-cognizable offence committed by the husband, at the trial, the victim or abused wife usually submits the withdrawal of the case to the court. In such cases, the consent of the police is required to

⁴⁰⁹ . The Penal Code of Myanmar, Sec.326

⁴¹⁰ . *Ibid*, Sec.302

⁴¹¹ . *Ibid*, Sec.304 (A)

⁴¹² . *Ibid*, Sec.323

⁴¹³ . *Ibid*, Sec.506

⁴¹⁴ . *Ibid*, Sec.341

submit by the court.⁴¹⁵ For these withdrawals of the complaints, the police rarely object the application and they easily submit their consent as 'no objection' or 'agree' to withdraw'.

When the attitude of the police upon the domestic violence related offence is observed, they have soft approach on it. They prefer to reconcile the offence rather than taking action.

If the case committed by the domestic violence offender is a 'compoundable offence'⁴¹⁶, such as simple hurt, assault or criminal intimidation, the court may allow the victims' application to compound the case in its discretion without taking the consent of prosecutorial side⁴¹⁷. If so allowed, the offender may be acquitted⁴¹⁸ for the case. Similarly with applications to withdrawal of the cases, when the victim wife applies for compounding the case on her offender husband, the courts give much leniency on the offender and easily allow the compounding application in court practice.

Nowadays, as a fulfillment of the commitment made in the Fourth World Conference on Women in Beijing in 1995, known as Beijing Platform for Action, it identified the nine critical areas of concern for the advancement of women in Myanmar. To protect women and children from violence, trafficking and abuses is one of these main areas. Accordingly, the Anti-Trafficking in Persons Law was promulgated in 2005. To be in line with it, the anti-trafficking police units were set up and the special trained police personnel are effectively endeavoring to combat the anti-trafficking crimes. On the other hand, there is no special unit or specific training for police to handle domestic violence offence. At least, the attitude of the police on the domestic violence cases is to be carefully revised in order to give full protection for women and children who are vulnerable in domestic violence situation.

⁴¹⁵ Directive No. 11/ 1975 , issued by the Supreme Court of the Union of Myanmar

⁴¹⁶ The Code of Criminal Procedure in Myanmar, Sec: 345 (1) (2)

⁴¹⁷ Directive No. 17/1979, issued by the Supreme Court of the Union of Myanmar

⁴¹⁸ *Ibid*, Sec 345(6)

6.4.2.2. Prosecutorial Response

In Myanmar, there are three ways of taking cognizance an offence in the Criminal Court. Any magistrate, specially empowered in this behalf, take cognizance of any offence⁴¹⁹ –

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a report in writing of such facts made by any police-officer;
- (c) upon information received from any person other than a police-officer or upon his own knowledge or suspicion, that such offence has been committed.

Sub-section (a) deals with the direct complaint to the Magistrate by the complainant through the complaint on oath. Upon the complaint, if the Magistrate thinks that there is sufficient ground for proceeding, he may issue summons or warrant, as the case may be, for the attendance of the accused. If he thinks there is no sufficient ground for proceeding, he may dismiss the complaint. Or he may postpone the case, before making judgment to take cognizance, to direct a police-officer to make an inquiry or investigation to ascertain the truth of the complaint. According to the inquiry or investigation, the Magistrate may pass the order of taking the case cognized or dismissed.⁴²⁰

As for sub-section (b), when a case is informed to the police-station as a cognizable offence, the first information report is taken. After investigation, the case was filed to the court through the public prosecutor's suggestions.⁴²¹ When a case is filed by the police-officer through public prosecutor, the Magistrate is not allowed to dismiss the case at once. Instead, after examining the witness and taking testimony from them, he may discharge or acquit the accused when there is no evidence for taking cognizance. If the accused is found guilty, the Court may make sentence of punishment of fine, or imprisonment or both as the case may be.

Sub-section (c) mostly relates to the case which the Court by itself makes a complaint at any other Court when he found out that an offence has been committed

⁴¹⁹. The Code of Criminal Procedure, Sec.190

⁴²⁰. *Ibid*, Sec.200-204

⁴²¹. *Ibid*, Sec.154

before him or when he received information from any person other than a police officer that such offence has been committed.⁴²²

These three ways mentioned above are the roots of filing an offence to the Magistrate. Among them, the last one has been rarely used in practice except from some cases, e.g. offences for giving false evidence before a Judge or contempt of court. The rest two are the most common ways for filing the offence to the Magistrate.

In the sub-sections (a) and (b), the role of public prosecutors or prosecutor office takes part in it. When a case is filed by the police-officer through public prosecutor under sub-section (b), the public prosecutor must act before the court compulsorily on behalf of the State whether the case is cognizable or non-cognizable one. When a Magistrate cognizes or takes action a direct complaint under sub-section (a), if he finds that the case is cognizable one or if he thinks that a public prosecutor is necessary in the trial, he may inform to the prosecutor office to act a prosecutor in the trial.

There are two kinds of public prosecutors in Myanmar. The first category is the appointed public prosecutors who are government officials appointed under the Law of the Attorney General. They are also known as law officers and they have to stand at different levels of the Courts on behalf of the State. If an injured person or a complainant may hire a private lawyer at his or her own accord, if the case is cognizable one and this private lawyer may act on behalf of the State or injured person as a public prosecutor. But in this case, he must act under the supervision of public prosecutor or law officer.⁴²³

Concerning with domestic violence cases, for the first instance, the public prosecutors or law officers have to tender legal advice to the case submitted by the police. They have to decide which law and sections should be suitable for prosecution and against who should be prosecuted. Mostly, in domestic violence cases, the public prosecutors or law officers give legal advice on the grounds of witness's statement to the police and other relevant documents, e.g. search forms, criminal medical certificate, and documented photos. Mostly, they identify the section to prosecute upon the findings of medical certificate. When the certificate shows that the wound or hurt got by the injured

⁴²². *Ibid*, Sec.195

⁴²³. *Ibid*, Sec.439

person is simple or grievous, they put the suitable sections⁴²⁴ of criminal law. Neither they can investigate the domestic violence cases by themselves nor can they give bail to the offender. They have to access only upon the documents filed by the police. But they can assign the police to take better evidence as far as they think necessary.

When the police file the case to the court, the public prosecutor or law officer has to act from the complainant side whether the complainant gives a consent or not. They have to present, act, and plead until the completion of the trial. In every case filed by the police, if the injured person or complainant wants to withdraw the case within the trial, it must be through the public prosecutors properly. Otherwise, the Court needs not take into account on such withdrawal.

From tendering the legal advice to prosecuting and acting in the trial, the public prosecutors deal with the domestic violence cases like other crimes. They give legal advice; they act in the cases filed by the police and they easily allow withdrawing the cases. They bear in their mind that domestic violence is not a serious issue which is detrimental to public security.

6.4.2.3. Judicial Response

All Magistrates' Courts in Myanmar have to adhere strictly to the established procedure and practice of admitting documentary and material evidence, examining witness, examining complainant and accused. Basic legal principle to be observed in conducting criminal cases is that the burden of proof lies on the prosecution. Until and unless the prosecution can prove the guilt of the accused, the accused must be deemed to be innocent. Another principle is that no one shall be convicted without being given the right of defence. In other words anyone accused of an offence must be given the opportunity of being heard. If there is a reasonable doubt for the guilt of an accused person he is entitled to the benefit of doubt and cannot be convicted. Moreover, one of the judicial principles laid down by the judiciary law is that the case must be settled within the framework of law.

⁴²⁴ . In case of grievous hurt with deadly weapon, section 326 is used and simple hurt in same transaction is section 324. In case of grievous hurt with ordinary weapon, section 325 is used and simple hurt in same transaction, including hurt by physical assault, section 323 is applied.

These principles mentioned above may be true in normal situation of criminal cases reached before the court. But these may not be utilized in treating domestic violence cases. Sometimes burden of proof will be much heavy on the prosecution side to express her anxiety and fear of violence. The batterer or abusers always insist on defending that it is a mutual quarrelling and it was a simple incident. The most difficult part is that the injured wives or abused women tried to withdraw their complaints on the several reasons. What shall the Court then do with their submissions? The prosecutors including the police hardly reject the abused women's withdrawals and they easily pass their consent to the court expressing no objection. At the judiciary side, the Courts grant the withdrawals and discharged or acquit the offender within the trial. If the prosecution side is not in time to submit their consent to the court for withdrawal, the Court give light punishment, such as fine or one day imprisonment, paying attention to the withdrawal of the battered wife. The facts the court should take into account on withdrawal in such domestic violence cases seem not to be much heavier than other ordinary cases.

Most of the victims' women of domestic violence in Myanmar try to settle their problems not only criminal prosecution but also in a civil litigation for divorce. Thus the grounds for divorce suit on domestic violence nature and the custodial rights for children are also to be analyzed.

6.4.3. Civil Remedies

In Myanmar, any person can take legal action under the law; civil action and criminal action. Civil suits are filed in courts having proper jurisdiction, that is to say, territorial or local, pecuniary, subject matter and personal jurisdiction. Civil actions include reliefs claimed for immoveable property or rights thereto, money claims, damages, mesne profits, specific performance, dissolution, accounts or administration, mortgages, moveable property and matters relating to personal relationships. From time immemorial, personal matters of the Myanmar Buddhist people are governed by age-old Myanmar Customary Law formerly known as Burmese Buddhist Law. This is composed of Myanmar *Dhammathats* essentially based on Myanmar customs and conventions and judicial precedents or rulings of the highest Courts in Myanmar.

Yet, there is no provision of civil remedy for any kind of protective order within the domestic violence. Under the Specific Relief Act 1877, preventive relief may be granted at the discretion of the Court by injunction, temporary or perpetual.⁴²⁵ Unfortunately, it is not much concerning with individual's physical or mental assault or violation. The objective of issuing such injunctive relief is to maintain the property in dispute as its origin within the trial to protect the rights of the parties in the suit. Under the civil proceeding, the victim women in Myanmar have to claim for divorce if she is committed the domestic violence like 'cruelty' which is one of the reasons for divorce.

6.4.3.1. Divorce

There are certain grounds for divorce between Myanmar Buddhist husband and wife like mutual consent, desertion, cruelty, adultery, misrepresentation and ordination. Of these, bona-fide mutual consent is the most crucial factor. The mutual consent must not be a hole-and-corner affair. These must be some formal and mutual agreement or reciprocal expression of consent, not just a capricious or dubious one. Desertion is no longer held tenable as a ground for divorce. Legal cruelty, both mental and physical is good grounds for divorce. Adultery on the part of the wife is a sufficient ground for divorce but not the same for the adultery on the part of the husband. However, if a Myanmar Buddhist husband takes a second wife without the consent of the first wife, she has the right to divorce him. When the husband is ordained as a monk (priest) he is deemed to have taken the vow of chastity, poverty and renunciation of mundane affairs and possessions and then he becomes divested of all his properties.

Among these factors, though these seem not to have any statement relating to domestic violence, the expression "cruelty" is said to be concerned with domestic violence nature. In Myanmar, the *Dhammathats* recognizes the husband's power of moderate chastisement with a light cane or split bamboo. Even in the early days of the British period it was thought that striking wife only once⁴²⁶ or pulling the wife by her hair and abusing her⁴²⁷ was not sufficient ground for divorce. But the Courts in Myanmar no

⁴²⁵. The Specific Relief Act, 1877, Sec: 52
The Code of Civil Procedure 1908, Order.39

⁴²⁶. Mi Pa Du vs. Maung Shwe Bauk, S.J. 607

⁴²⁷. Ma Naing vs. Maung Nyun, 1 B.L.T. 136

longer recognize the husband's power of chastisement. Physical assault by the husband on his wife is now considered to be a matrimonial fault.⁴²⁸

Divorce is now granted to a wife, on the terms of a divorce by mutual consent, on proof of a single act of cruelty on the part of the husband.⁴²⁹ But a single assault by a husband on the wife, which was provoked by the wife, is not sufficient ground for the granting of a divorce to a wife on any terms, whether the character and habits of the husband are not a nature to suggest any likelihood of a repetition of the offence.⁴³⁰ A single act of violence is not necessarily an act of cruelty always; but if an assault is to be regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, or plead with, the pain he was inflicting.

In order to constitute cruelty ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference or delight in pain caused to the sufferer.⁴³¹ There ought to be evidence of such ill-treatment as shows that the husband is a man of violent tendencies.

A petty quarrel should not be treated as a sufficient ground for divorce.⁴³² Divorce ought not to be granted for mere trifling assaults. Social standing of the parties play an important part in deciding in whether the assault complained of was of a nature sufficient to justify a divorce between the parties. Divorce can be obtained not only for physical cruelty but also for cruelty in the legal sense. A false accusation of adultery persisted in by the husband might be sufficient cruelty in the legal sense to justify a divorce.⁴³³ Husband persistent in charging the wife with adultery when he is unable to prove it coupled with his physical assault on the wife for her declining to give up going to her

⁴²⁸. Maung Pye vs. Ma Me, 11 U.B.R.(02-03) Div. p.6;
Ma Gyan vs. Su Wa, 11 U.B.R. p.28

⁴²⁹. Po Han vs. Ma Talok, 7 L.B.R. 79;
Ma Sein Phaw vs. Ba On, 46 I.C 144;
Maung Ngwe San vs. Ma Gyi, A.I.R 1929 Ran 64
Maung Kywe vs. Ma Thein Tin, 7 Ran. 790

⁴³⁰. Maung Kywe vs. Ma Thein Tin, Ibid

⁴³¹. Daw Pu @ Daw Pu Gyi vs. Maung Tun Kha, 1946 R.L.R. 125

⁴³². Maung Kyaw Yan vs. Ma Nyo U, 7 B.L.T. 16
Maung Yin Kye vs. Ma Sein, 22.I.C. 945
Mi Pa Du vs. Maung Shwe Bauk, S.J. 607

⁴³³. Maung Po Aung vs. Ma Nyein, 10 B.L.R. 132

parents' place entitles the wife to claim a divorce.⁴³⁴ All sorts of mental tortures of an unbearable nature may be classed as cruelty in the legal sense. In order to prove cruelty it is necessary to point to some definite words or actions as constituting it. A charge of a matrimonial cruelty is a serious matter and it is for the party who makes such a charge to prove it, if it is denied.⁴³⁵

6.4.3.2. Custody Proceeding

At the time of the divorce, Myanmar Buddhist couples usually settle everything about the custody of their children. Whether the husband and wife divorce by mutual consent, the husband is entitled to the custody of the sons and the wife to that of the daughters. Very young sons ought to be left in the custody of their mother until they are sufficiently grown up. This is the view of the *Dhammathats*.⁴³⁶

But the parties by mutual consent may arrange the matter in any way they please. Where a divorce is adjudged for the fault of one party, the *Dhammathats* do not say in clear terms who should have the custody of the children but say that the guilty spouse should leave the house and innocent spouse should have all the animate and inanimate properties of the couple. In such a case, it would be to the interest of the children to remain with the innocent spouse who gets all the properties. Hence, it seems that the faultless parent ought to get the custody of the children.⁴³⁷ But if the children are sufficiently grown up to form an intelligent preference, their choice ought not to be easily disregarded.⁴³⁸

In one case⁴³⁹ it was held that the proper person to have the custody of a daughter after divorce between the parents was the mother, while in other cases,⁴⁴⁰ it was held that the father was the *prima facie* guardian of his children. But in a recent case⁴⁴¹ it has been held that the general rule is that on a divorce taking place between the parents the

⁴³⁴. Maung On Kyaw vs. Ma Hla Mu, A.I.R. 1934 Ran. 272

⁴³⁵. Dr Tha Mya vs. Ma Khin Pu, A.I.R. 1941 Ran. 81

⁴³⁶. Digest, Vol II, sec 254, 257.

⁴³⁷. U May Oung's Buddhist Law, p.112

U Tha Gywe's Conflict of Authority, Vol I, p.81

⁴³⁸. Po Cho vs. Ma Nyein Myat, 5 L.B.R. 133

⁴³⁹. Mg Pan Bu vs. Ma Nyun, 9 B.L.R. 183

⁴⁴⁰. Ma Chok vs. Maung Po Sin, 11 U.B.R. (92-96), p.645;

Maung Ba Thein vs. Ma Me, 4 B.L.R. 242

⁴⁴¹. Ma Chit May vs. Ma Saw Shin, 13 Ran 166

daughters go with the mother and the sons with the father. In fact the Myanmar Buddhist children are bound by the arrangement made by their parents at the time of divorce regarding custody of children. The parents have an unfettered discretion in this respect. Even when without a divorce husband and wife live separately for the sake of peace, the custody of the children of tender years should be given to the mother and not to the children.⁴⁴²

One has to refer to Guardian and Wards Act and not to the Myanmar Buddhist Law regarding questions of guardianship as section 13 of the Myanmar Law Act is silent on this point.⁴⁴³

To make highlight on the attitude of the courts and prosecutorial side in dealing with domestic violence cases, the case study was made by collecting the data of the Madaya Township Court from 2006 to 2009. In this cases study, the nature of domestic violence related crimes filed to the court and the amount of divorce suits are to be analyzed.

6.5. Case Study in Domestic Violence

Before analyzing the facts of the case, the formation of the courts in Myanmar has to be explained. Under the Judiciary Law 2000, which is currently being used as the courts mechanism, there are four levels of courts in Myanmar. They are the Supreme Court, the State or Divisional court, the District Court and the Township Court. Though the Township Courts are the lowest courts to try the cases, they are the courts which are dealing with the public directly rather than other courts. There are 350 Township Courts in Myanmar. They can try both criminal and civil cases according to the jurisdiction vested upon them. Unlike other countries, they have no separate family courts. Whatever the case is related to marriage, divorce, adoption and inheritance, it needs to be filed to the court respectively.

The Court that was chosen for collecting data about domestic violence is named Madaya township court. Through these data, it has to be analyzed logically to the facts in other courts. The Madaya Township has its width 455 square miles and it locates in north

⁴⁴². Ma Thein Me vs. Maung Po Gywe, 8 B.L.T. 73

⁴⁴³. *Ibid*

east of the Mandalay Division, which is the second populated Division resided by last kingdom of Myanmar and it is 21 miles far from the Mandalay city. The population is about 214330 (according to 2006 census data), the male population is about 102945 and the female is 111385 and most of the residents work as farmers and agricultural producers. The data was collected from the cases filing to the court from 2006 to 2008. Due to the secrecy of the office and privacy of the parties, their real names in the cases are hereafter omitted.

For criminal regular cases filed in the Madaya Township Court, in 2006 there were 4 cases for domestic violence in the 1927 total criminal cases. There were 5 cases for domestic violence while there were 1367 cases totally in 2007. In 2008, there were 7 cases for the violence among 1835 total criminal cases. Recently, according to 2009 data, there was only a single cases prosecuted by the police in the total 1564 cases. In such criminal cases, it includes both the cases sent by the police to the court and the complaints made directly to the court by the injured person.

Table (10): Domestic violence Cases among Criminal Regular Trials

Year	Cases of Domestic violence (both report by the police and the direct complaints to the court)	Total Criminal Cases of the Court
2009	1	1564
2008	7	1835
2007	5	1367
2006	4	1927

Source: Madaya Township Court, Mandalay Division Myanmar

According to the data mentioned above, the numbers of cases for domestic violence may be analyzed separately year by year as follow. In 2006, there were one case sent to the court by the police and three cases were directly complained to the court by the injured person regarding domestic violence.

In the case upon the report made by the police, the complainant or the injured person is the wife. She was about 40. The accused person was her husband and he was

over 40. Before committing the offence, they had not divorced legally but lived separately. While she was at her home on the day, he came and suddenly hit her with an iron rod, accusing her falsely of adultery. She got a severe injury in her head and one of her eyes was blind because of this injury. Then she made her report to the police station and informed the case. The accused person, her ex-husband was brought before the court under section 326 for accusation of grievous hurt which may be sentenced to imprisonment up to 10 years. While the witness for prosecution was examining in the court, the wife submitted her withdrawal of the case to the court. The court also allowed her withdrawal and discharged the accused. In this case, there are two issues for us why the victim wife withdrew the case easily or why the court allowed the case withdrawn.

There were 3 direct complaint cases filed to the court by the injured wife in 2006. When the accused husband was brought before the court, two cases were withdrawn and one was sentenced into fine. All the complaints based on the facts of accusations of her husband's drunkenness and making torture.

In 2007, three cases were sent to the Township Court by the police and two cases were directly complained to the court by the injured person. In the first case upon the report made by the police, the informant or the plaintiff was a man. While he was at home, his younger sister with injuries arrived and told him that her husband made these wounds with knife. So he made his complaint to the police. In that case, the accused was a retired headmaster and he was of an unsound mind. The accused was charged with severe or grievous hurt. Before reaching the verdict, while the case was being heard, the injured person and the informant made their withdrawal of the case to the court. Like the case said above, the court also allowed their submission and discharged the accused.

The second trial was also filed in 2007. In that case, the informant was a third party. The strange thing is that the offence was committed in the street in front of the township court. The accused husband wounded her wife with a wooden rod while he was drunk. She also got severe injuries and seemed to be helpless in the public place. The informant who was the elder in the ward made his complaint to the police. In the final judgment, the Court passed the sentence of fine only to the accused because of the injured wife wish to forgive her husband.

The third case was between the complainant wife and the accused husband. It was happened in 2007. While she was cooking her dinner at home, her husband came back from his farm work and suddenly he cut her with his knife without saying anything. She got her severe injuries in her body. In the judgment, the Court passed fine only to the accused because of the injured wife's wish upon the accused. For two direct complaint cases in 2007, all were allowed to withdraw by the court in the trial because of the complainant's withdrawal and the accused were discharged or acquitted as the case may be.

In 2008, only one case was sent to the court by the police and there were six direct complaint cases to the court by the injured person. In the case upon the report made by the police, the case was informed by the accused person's father to the police station. While the accused was quarrelling with his wife, he cut her with the knife and she got severe injuries. So the father of the accused filed the case in the police station for the offence committed by his son. Like the cases mentioned above, the wife or the injured person withdrew her case and the accused was discharged from the trial. In 2008 six direct complaints were filed before the court, and four cases were allowed to withdraw because of the complainant's application for withdrawal and two cases were sentenced with a fine when the accused were found for guilty in the termination of trial.

In 2009, there was no complaint cases filed to the court directly. Only a case was prosecuted by the police. It was between a husband, a heavy drunkard and a wife, a street seller. Before this incidence, he made tortured to her whenever he became drunk. All the neighbors witness these incidents very well but they mostly ignored it. On that day, he drank a lot and came back to home and then tried to torture her as usual. When she couldn't tolerate and resist him, he took a knife and stabbed to her for three times. The wife got serious injuries which was likely to cause death. Fortunately, she was alive as she got to the hospital in time. At a trial, the pity wife tried to submit the withdrawal of the case as an injured person. But the prosecutorial side did not agree with her application. Finally, the court passed 6 months imprisonment to the offender husband.

When we look into the findings of the criminal cases mentioned above, it may be seen that the injured person usually applied for withdrawal for her claims after filing the case before the court and the Court easily granted her withdrawal or passed the sentence

of light punishment upon the accused. On the injured person's side, she does not want to continue her case for one reason or another. On the other side, the Court has to follow the judiciary principle of dispensing the justice for the settlement of the cases within the framework of law. Thus, it should be observed whether these practices really work or not.

It is not sure that the decrease of criminal cases for domestic violence amounts likely to increase the civil suits for divorce. It has already been mentioned in the above chapter that women in Myanmar usually try to get the divorce with her husband when she cannot tolerate his behavior anymore. Moreover, one obvious factor indicates that the numbers of claim for divorce become much higher than other civil suits.

Therefore, the number of civil suits for divorce claim should be checked out for this purpose. For civil regular suits filed in the Madaya Township Court, in 2006, there were 41 suits for divorce in the 86 total civil suits. There were 42 suits for divorce while there were 116 suits totally in 2007. In 2008, there were 34 suits for divorce among 139 total civil suits. Recently in 2009, there were 31 suits for divorce in the total 161 civil suits. Almost all these civil suits for divorce were found that the plaintiff claimed on the grounds of cruelty, similar to domestic violence incidents, were ranged from about 20 to 50 percent of the total cases each year.

Table (11): Divorce Suits among Civil Regular Trials

Year	Suit for Divorce	Total Civil Suits
2009	31	161
2008	34	139
2007	42	116
2006	41	86

Source: Madaya Township Court, Mandalay Division, Myanmar

According to the data mentioned above, it is no doubt that there exists domestic violence or spousal violence firmly in the community. The Only way the injured wife can get relief from the court is to get a degree of divorce. In the study, it was found out that

all of the suits for divorce were claimed by the wife for the reasons of the assault or getting hurt, adultery of husband and accusation of misconduct to wife without ground. Most of the suits were filed for all these grounds to get relief claimed and some were filed for two of these reasons. The grounds for getting hurt or criminal assault are mostly used to indicate in these suits as usual. Here, the question is why the injured wife or the claimant did not make complaint against him criminally. It has been observed that there were two reasons for doing so. After filing the case in criminal courts, the injured wife or the complainant usually applies for withdrawal of the case because the community or the relatives force her to do so and she herself gets nervous for being blamed. The other cause is that the courts are not used to give stiff punishment to the offenders or perpetrators for these cases are regarded as ordinary family affairs concerning with each individual person. It cannot be avoided noticing the fact that the suits for divorce are tremendously large among all the civil suits.

Actually, the offences were committed by the accused persons, or the sections they had been charged with the offence were the offence amount to some extent of imprisonment if in case they are third party. But the Court gave their mercy to the accused because the judges regarded that these were ordinary family matters which can occur in everyday. Moreover, these are the only cases which were filed to the court. It is no doubt that there were much more cases which may not be brought before the court and settled before the elders by themselves. The attitude of the courts toward the accused in such kind of cases should also be revised; whether it is really effective or not, or could we guarantee that the accused never commit again after taking the mercy from the court or the injured wife? Otherwise, should the court give imprisonment to the perpetrators to reduce the volume of domestic violence cases? At least, the better and proper way should be found for settlement of the cases of domestic violence. The silent sounds of the victims in the violence should not be neglected.

6.6. Summary

In Myanmar, women have tolerated domestic violence because they learned to accommodate to being abused in a male-dominated society. Thus, this may have considered defending themselves or taking steps to rectify the situation only in

exceptionally upsetting cases. Very few women took direct action to stop violence incidents across settings. When reach at court, judicial and law enforcement officers view the violence cases as a family affair that should not be intervened by them. Most of the cases are ended up by withdrawal of injured plaintiff. At the end of trial, light punishments are mostly given to the perpetrators except a few serious cases. There is not any kind of protection order which can give immediate protection for victims and prompt action for perpetrators. The victim, mostly women, has to choose for only two remedies whether she claims for divorce suit or asks for criminal action in case of grievous hurt.

The word 'violence against women' was introduced over a decade ago. Yet, not only victims and perpetrators but also officials concerned still view domestic violence cases that may not harm to society and country. Available data surveyed shows that this problem should not be neglected anymore. This lack of awareness helps to explain the reasons for heretofore inadequate anti-domestic violence legislation as well as ineffective implementation of existing laws.

As a part of combating abuse against women and child, the Myanmar government has enacted the respective law for anti-trafficking in persons. Similarly, a suitable legal environment should be provided for domestic violence victims who are in vulnerable situation. At least, all necessary measures should be taken as soon as possible before enacting a new law. Victims of the violence can be encouraged to cooperate in the awareness movement by disclosing their experiences. It is an acceptable way for officials concerned who are dealing with the violence to review their attitudes upon settlement of cases, discharging the perpetrator and sentencing guideline. These will include due regard for the principles of retribution and deterrence if a custodial sentence is appropriate. Especially, the best and effective ways of immediate protection for the victims should be explored in the present legal system. For instance, the injunctive orders are available for property in dispute to protect the rights of the parties in the civil suits. Such kind of temporary or perpetual injunction order can be extended to personal relief in domestic violence nature.

There may be different culture impacts and values, social norms and traditions. Nevertheless, no law, custom, tradition, culture or religious consideration should be invoked to excuse domestic violence, especially violence against women. Judges,

prosecutors and the police at different levels should be aware of the need of protection of women and children against violence through a proactive interpretation of law. It may be said that it is a time in Myanmar to launch for implementing the protection of women and children who are in vulnerable in domestic violence more effectively.

Chapter VII

A Comparative Analysis of Legal Responses on Domestic Violence

Many countries, whether developed or developing or underdeveloped, face terrible problems with domestic violence. But the problems take different forms, depending on differences in history, culture, and legislation. This chapter describes the comparative analysis of legal responses on domestic violence between the United Kingdom and Japan, and contrast the status of the problem between the two countries. Factors contributing to the development of domestic violence and how the legal sectors are reacting to the problems are discussed and contrasted. The policies on domestic violence practicing in these two countries are discussed in depth. Although the chapter begins with the title of 'comparative analysis', it will mainly compare the practices between the United Kingdom and Japan because they have their respective laws have their basic foundations for domestic violence. Myanmar may have its own approaches in tackling the problem. However, the practice has been much lagged behind and will not be a proper comparison for the other two countries. That is why the portion of Myanmar was omitted in this chapter.

This chapter will assess the adoption of legislation related to domestic violence. What factors affected the passage of the path-breaking the Domestic Violence Crime and Victims Act 2004 in the United Kingdom, and the passage of the Law for the Prevention of Spousal Violence and the Protection of Victims 2001, also known as the DV law, (amended in 2004 and 2007) in Japan with a significant but more modest agenda for change.

Although the DV Act in the United Kingdom seems to be a little later than that of Japan, the concept of domestic violence has already been stated vastly in the Family Law of the UK since 1996 and it still works up to now. Moreover, there were some related laws for domestic violence from 1996 to emerging new DV Act in the United Kingdom. Therefore, it may be said that the United Kingdom has reached far more developed in noticing the problem than Japan. One might hope that Japan could learn from the United Kingdom experience. However, one cannot transplant policies and programs from one

country to another without considering the foreign soil in which the plants must take root. The comparative approach may also hold lessons for the both countries. It suggests lessons that the two countries can learn from each other. These lessons will also help for Myanmar, which has been lack of experience in combating domestic violence problem up to now.

7.1. Similarities and Differences

In the United Kingdom, historic English Common law sanctioned women's subordination and inferiority. Wives were regarded as the property of their husbands. Chastisement was allowed for some extent because the husband was legally responsible for his wife's behavior.⁴⁴⁴ Courts had no right to interfere with the exercise of this right unless a wife's life was threatened. It was believed that the incidence between or among family members is a "private" matter.

Like the United Kingdom, the inferiority of Japanese women was widely accepted by the community. The women should always obey their husbands. Even if a husband hits his wife, no one intervened in the quarrel and no body blamed for his action. The victim women had to endure the violence except in some fatal cases.⁴⁴⁵ However, the root cause or influence of male-domination upon their female partners and people assumption on the problem is seen to be the same for some extent.

Another similar point between the two countries is the extent of domestic violence cases. The figures in both countries show that domestic violence reaches in critical point which should not be neglected. Overall 30 percent of women and 20 percent of men had experienced any domestic violence abuse since the age of 16 in the United Kingdom.⁴⁴⁶ Likewise, in Japan, 33.2 percent women and 17.7 percent men have experienced at least once domestic violence problem in their life time while 22.4 percent of women and 14.9 percent of men victims experienced more than once.⁴⁴⁷ It has reasonable grounds to believe that there are much more cases which have been underreported to the authority in both countries.

⁴⁴⁴. Sir William Blackstone commented, "It is reasonable to entrust him with this power of chastisement in the same moderation that a man is allowed to correct his apprentices or children.

⁴⁴⁵. Noriyoshi Watanabe, *supra* note. 283, pp. 83-84

⁴⁴⁶. British Crime Survey 2008-2009

⁴⁴⁷. 2008 Survey on Violence between men and women by the Cabinet Office in Japan

In the case of emerging new DV law in the United Kingdom, feminist activism has done much to cover violence against women. Recent feminist activity on violence against women emerged in the UK in the 1970s when refuges first open their doors to women experiencing domestic violence. By the mid-1970s, a network of refuges had been established in the UK and the Women's Aid movement was born. Efforts have lately shifted on to the recognition of domestic violence as a crime like any other. In Japan, national legislation, the Law for Prevention of Spousal Violence and the Protection of Victims, was passed on April 6, 2001, and put into effect in October of that year, led by a cross-party group comprised primarily of eleven female Diet members, in part a result of increased women's representation. The DV law was significant because of its all-party female sponsorship in Sangiin, the House of Councilors. In both countries, the use of insider/outsider tactics and development of advocacy coalitions proved useful as women inside and outside government supported legislative change.

One of the similar points between the United Kingdom and Japan is that both of the governments have decided to get tough on domestic violence cases. Severe punishments are defined in their domestic violence laws. A breach of non-molestation order is punishable up to 5 years imprisonment in the United Kingdom⁴⁴⁸ and violation of protection order by the abuser is punishable by imprisonment with work for not more than 1 year or a fine of not more than one million yen.⁴⁴⁹ Such kind of severe punishments given to the offenders of domestic violence is not seen in the past. It is the most impressive aspects of the laws passed related to the enforcement of criminal law against male offenders; albeit through a cumbersome bureaucratic process, it is being implemented. It means that this shift in criminal justice policy has run in parallel with a "knowledge explosion" in relation to the problem of domestic violence. Both countries have expressed a public commitment to the elimination of domestic violence.

The points mentioned above are some of the similarities among the United Kingdom and Japan. Although they have different culture and customs, whether some countries have enacted the law relating to the prevention of domestic violence or not, the root of the problem and extent of its situation is the same. Noticing the danger of it, the

⁴⁴⁸. The Domestic Violence Crime and Victims Act 2004, Sec.1

⁴⁴⁹. The Act on the Prevention of Spousal Violence and the Protection of Victims 2001, Art:29

United Kingdom and Japan have promulgated the respective laws and have been trying to combat the violence by their own ways and means. In carrying out these endeavors, on the other hand, there are differences in practice among these countries. These may be true from their points of view. Different forms of law enforcement in domestic violence should be looked into how these agencies handle the present situation and how they assess future dangerousness.

In addressing domestic violence in Japan by passing its first law on domestic violence in 2001 entitled the Law for the Prevention of Spousal Violence and the Protection of Victims, probably the most important aspect of the law was a built-in review of the law in three years time, allowing it to truly be viewed as a first step in a necessary progression in developing systems that will respond appropriately to domestic violence to insure safety for victims and accountability for batterers. The DV law in the United Kingdom entitled the Domestic Violence Crime and Victims Act 2004 had no such provision like Japan.

Another great strength of the law in Japan is its philosophical grounding of domestic violence as a violation of human rights. By faithful adherence to this philosophical grounding, Japan may be able to develop a system that is truly responsive to victims, respecting their right as individuals to be free from this violence and to be free from the power and control that batterers exercise over their victims. Although the DV law in the United Kingdom gives the police and other agencies the legislative framework and power to get to the heart of domestic violence crimes and to assist victims and witnesses with practical advice, no expression such a violation of human rights was found in the DV law in the United Kingdom.

Moreover, in Japan, it has the potential to allow the development of a system that truly respects the victim's right to determine her own fate, putting faith in her choices – not imposing choices on her. On the other hand, in the United Kingdom, the “pro-arrest policy”⁴⁵⁰ and “mandatory prosecution or victimless prosecution”⁴⁵¹ relating to domestic

⁴⁵⁰ . Home officer Circular 19/2000: Domestic Violence, Revised Circular to Police States that there should normally be an arrest. Pro- arrest policy would encourage the police to arrest a suspect domestic abuser unless there were very good reasons for not doing so.

⁴⁵¹ .The policy for “mandatory prosecution” advocates prosecuting the alleged abuser, regardless of the wishes of the victim. Generally, the more serious the offence, the more likely to prosecute in the public interest, even if the victims says that they do not wish to do so.

violence can be seen in the course that the law does not give much choice to victim.

Another different point or crucial issue between the two countries is the police role in domestic violence cases. In the United Kingdom, significant new police powers to deal with domestic violence including common assault and making breach of non-molestation order to be arrested or arrestable, as criminal offence. Such kind of police power dealing with domestic violence cases is not found in Japan. It means that the law much limits on police power. They may act only after receiving the information of breach of protection order.

Concerning with the attitude of the police towards domestic violence cases, while the DV law in Japan urges that police “shall endeavor” to prevent victims from suffering from spousal violence: it may be found that this is a recommendation, not an obligation. As the DV law in the UK had defined the power of the police vastly in dealing with domestic violence, the police specially trained have made it a high priority to tackle such crime.

The DV law in the United Kingdom strengthens the civil law on domestic violence to ensure cohabiting same-sex couples have the same access to non-molestation and occupation orders as opposite sex couples and extend the availability of these orders to couples who have never lived together or been married. The scope of the protection order in Japan was also expanded to the victim’s relatives or others. But the law makes no clear distinction for persons to whom the protection order is available.

Unlike the Domestic Violence Crime and Victims Act 2004 in the UK, the DV law in Japan does not focus specifically on violence against women as a group. The law permits protection orders to be issued for six months, ordering perpetrators to vacate their homes for two months for one time only. In the United Kingdom, injunctions available under the Family Law Act 1996 are commonly for a specified period of time, for example 12 months. They can also be renewed or they can be made “until further notice”. In non-molestation orders, there is no time limit on the length of time that the order can be extended. Occupation orders can only be extended beyond the initial 12 month period if that person has a legal right to stay in the home, for example they are the owner or co-owner, tenant or joint tenant or due to the fact that they are of have been married to the owner or tenant.

In order to obtain occupation or non-molestation order in the UK, the applicant must be “associated person”. The DV law introduces a new category of associated persons,⁴⁵² namely those who have or have had an intimate personal relationship with each other which is or was of significant duration. An intimate relationship is not necessarily limited to a sexual one and ensures that both heterosexual and same-sex couples who do not live together and do not have children together but have been involved in a relationship for some time to apply for an injunction order. But in Japan, the protection orders may be issued by district courts after a petition is submitted only by the victim with an affidavit and the abuse has been reported to doctors, the police or a local women’s center to demonstrate threat of risk of life or serious physical damage.

The facts mentioned above indicate the core factors of laws pertaining both in the United Kingdom and in Japan. It is not possible to compare their practices line by line and will not be necessary to do. Especially the substances on domestic violence do not appear so well paired; it may be that this imbalance illustrates the different stages of policy development, understanding and recognition of the problem in the two societies.

7.2. Advantages and Disadvantages

The Domestic Violence Crime and Victims Act 2004 has been implemented and entered into force since 2007 July in the United Kingdom. This law extends the definition of those “associated persons” who may apply for non-molestation or occupation orders under Part IV of the Family Law Act 1996 to non-cohabiting couples who have had ‘an intimate relationship of significant duration’. Under the new DV law, a breach of non-molestation order and common assault became a criminal offence, which can be dealt with by the criminal courts – rather than by the family courts where the original injunctive orders was made. This procedure replaced the power of arrest, which will no longer be attached to non-molestation orders.

The DV law in the UK provides stronger legal protection for victims of domestic violence by enabling courts to impose restraining orders when sentencing for any offence. It also enables courts to impose restraining orders on acquittal for any offence if they consider it necessary to protect victim from harassment. This will deal with cases where

⁴⁵². The Domestic Violence Crime and Victims Act 2004, Sec.4

the conviction has failed but it is still clear from the evidence that the victims need protection. The law provides a code of practice, binding on all criminal justice agencies, so that all victims receive the support, protection, information and advice they need. The victims are allowed to take their cases to the Parliamentary Ombudsman if they feel the code has not been adhered to by the criminal justice agencies. The government set up an independent Commission for victims to give their powerful voice at the heart of government and to safeguard and promote the interest of victims and witnesses, encouraging the spread of good practice and reviewing the statutory code. The law put in place a system to review domestic violence homicide incidents, drawing in the key agencies, to find out what can be done to put the system right and prevent future deaths. One of the extra advantages of the law is that the law could close a legal loophole by creating a new offence of causing or allowing the death of a child or vulnerable adult. The offence establishes a new criminal responsibility for members of a household where a child or vulnerable adult is at significant risk. Among the advantages created by the new DV law in the United Kingdom, the most predictable factors are that the law relieves the woman herself of the burden of taking action and she is not liable for any costs of a prosecution. And it could provide a stronger sanction, particularly for those cases in which a power of arrest has not been attached in the past.

Although the DV law in the UK has several advantages for victims and respective persons, there are some disadvantages as well. First of all, the law takes the process out of the woman's hands. The Crown Prosecution Services pursues all the proceedings against her wishes. So it may be disempowering, and have consequences which she is powerless to stop. Moreover, the victim woman may not be happy about criminalizing her partner because she is anyhow the father of her children if any. This may be a particular concern for women who are often particularly reluctant to seek help from the police. One of the disadvantages of the criminalizing the domestic violence cases are that, the criminal cases is normally open to the public and the press. On the other hand, the applications made in the family court are held in chambers. Only people involved in the cases are allowed in the room. Although there is a provision for reporting restrictions to protect the identity of victim and witnesses in criminal courts, this has up to now been used only rarely in domestic violence cases. Therefore, for those who are nervous to

disclose their family affairs in public, the provisions in the law may hamper more or less. The woman should in principle be able to pursue this route even if the police are called out to an incident where a non-molestation order has been breached. Alternatively, if she does not want to involve the police, she may apply separately for a warrant of arrest, or have the matter dealt with in the civil court. Moreover, in some situations, women might not want the man prosecuted for a number of reasons which are understandable: the parties may have made up or the victim does not want to risk her partner being imprisoned or fined which will impact financially on the family. Or it may be simply because the victim fears her partner's reaction. Due to these reasons, the women may try to avoid the way of criminal prosecution even if she faced with real nature of domestic violence.

As in the United Kingdom, there are some factors which are advantageous and disadvantageous in the new DV law of Japan. The law entitled the Law on Prevention of Spousal Violence and Protection of Victims, passed in October 2001 refers to violence as a violation of human rights and barrier to equality, suggesting that Japan is now conforming to other efforts undertaken by the international community. Early reports of compliance have suggested that the law is being utilized by victims. There have been a large number of consultations by victims with police, reflecting increased interest in the DV issue. The Ministry of Justice in Japan also reported on efforts to sensitize new public prosecutors to the needs of female victims. More female police officers have been assigned and efforts have begun to train prosecutors, judges and other judicial personnel in Tokyo and other areas. As mentioned above, a significant step of the DV law in Japan is the statement to review it three years after the initial law's passage by statute. It may assess ways to strengthen DV policy in the next rounds. Therefore, the law could be furnished to a better standard in 2004 and 2007. For instance, although children and victims after divorce were not protected under the original law 2001 provisions, they are now protected. And the term for vacation of domicile order could be extended adequately. The amendments made it possible for victims whose life or person is threatened by intimidation to apply for the protection order; previously the right was reserved only for victims of physical violence. The scope of the protection order was also expanded, covering serial phone calls without speaking as well as the transmission of faxes, e-mails

or obscene materials, in addition to stalking after victims or loitering in the vicinity of their domicile or workplace. Not only victims and their children but also their relatives are also to be protected. Historically, in Japan, marital violence was not considered a criminal act or infringement of rights. As a result, it was deemed unwise to interfere in a couple's marital affairs. The new DV law reverses this situation, making spousal violence a criminal offence if the batterer violates the protection orders. The victims can request help from the police and local courts. The law also obliges local governments to establish Spousal Violence Counseling and Support Centers, as part of a new national support system. These are some of advantageous easily visible by enacting the DV law in Japan.

Although there are much profound effects in enacting the DV law in Japan, the legislation has numerous limitations. The law stipulates that the court shall render a judicial decision promptly with regard to case pertaining to a petition for a protection order and the court may issue an order to violent spouses without hearing.⁴⁵³ In practice, it takes time to obtain a protection order due to the cumbersome bureaucratic process. Moreover, the law requires the victim to come forward after the violence has occurred and places the burden of proof on her. In addition to the need for proof, it is necessary to petition the District Court providing notarized evidence to prove a considerable threat of significant harm to life, evidence from the Spousal Violence Counseling and Support Center, police or physicians, and certification of marital status. No central coordinating agency has been established to monitor the new policy and there is no provision for training of police or judicial personnel in the law. Concerning with marital rape, there is also no recourse for women seeking relief in the law. On numerous occasions, the courts have upheld a man's right to force or coerce his wife into having sex.

7.3. Summary

The incidence of domestic violence in one country may not even be regarded as a significant issue in some other countries. However, a cursory view of among countries suggests that domestic violence is prevalent in them all.

Getting a true picture of the extent and nature of domestic violence is somewhat problematic. It is an area that suffers from under reporting for a number of complex

⁴⁵³. The Prevention of Spousal Violence and Protection of Victims Act, Art.13

reasons not least because some victims perceive it as a private family matter to be kept within home. In many cases, given the broad definition of domestic violence to include non-physical behavior, many victims may not recognize that a criminal offence has occurred. There may be a fear that police involvement could result in the situation getting worse, with further abuse or violence taking place, or the victim suffering embarrassment if the police presence brings the abuse to the attention of neighbors or others. The controlling behavior of the perpetrator of violence may also create barriers to reporting. Thus, the accurate estimates of the prevalence of domestic violence are not available, and the number of incidents would have been even greater if the many sexual assaults that take place within the domestic context are included.

Individual governments including the United Kingdom and Japan are taking significant steps to combat domestic violence through governmental actions and legal reform. While it is true that laws do not necessarily translate into real-life changes, legal precedent can be a powerful tool for reform and the legal system can be a catalyst for change.

It is also interesting to see the impact of women's rights organizations in fighting domestic violence, especially in the United Kingdom and Japan. Legal reform throughout the world has come about through the organizations and activities of women. The international community is also involved in fighting domestic violence by providing aid and information to those countries. The UN's World Conferences on human rights and women rights have provided the necessary impetus to individual governments to take responsibility and control over domestic violence against women.

Both the United Kingdom and Japan have expressed the public commitment and government's tough policies on domestic violence problem. All the DV laws in both countries describe the severe punishments, varied the term of imprisonment, for breaking a protection or restraint order. When these laws are overviewed, the policy in the UK seems to be safer than Japan. On the other hand, it is riskier due to the reasons of fewer applications for non-molestation orders⁴⁵⁴ after the FLA came into force. Whilst it seems counterintuitive that such 'improvements' would contribute to a downturn, it is possible

⁴⁵⁴ . Mandy Burton, *Civil Remedies for Domestic Violence: Why are Applications for Non-molestation Orders Declining?*, Journal of Social Welfare & Family Law, Vol.31, No.2, 2009, pp.109-120

that they made orders more difficult to obtain or pressurize victims into using a route that either they do not want or find ineffective because of the criminal justice agencies response. It is possible that specialization could help to reverse the downward trend in applications for non-molestation orders under the FLA and may even mitigate some of the impact of the DVCVA, if this has precipitated a further more pronounced downturn in applications. The impact of the DVCVA will need to be kept under review as there is, as yet, limited empirical evidence on how the criminal justice agencies are responding to breaches and what the long term impact of this will be upon victims' help seeking behavior.

In Japan, after enacting the Law on Prevention of Spousal Violence and Protection of Victims, there have been an increasing number of reports to the police as well as arrests under bodily injury and assault within couples. It shows that the law successfully and effectively started uncovering existing violence in society. However, its limitations are still many, including the restriction to couples living together only and laying burden of proof much on the victims. The failure to create a central agency to monitor policy, to provide adequate support for shelters and to provide for the training of police and judicial personnel, means that the DV law lacks the multifaceted approach utilized in the landmark United Kingdom's legislation. In its current construction, the DV Law in Japan seems distant from those welfare policies which involve service provision but it does represent a first incremental approach to dealing with the widespread incidence of violence against women. It is also found that the law in Japan is being processed to develop better and better in the future by reviewing and monitoring.

A domestic violence victim now has a number of options within both criminal and civil law to pursue legal action against his or her abuser. Despite such advancement, the current shapes of domestic violence laws leave much to be improved. States must find the middle ground of measures targeting domestic violence that will both respect the needs and rights of a victim and preempt or punish abusers, while always conveying the message that domestic violence is not acceptable and cannot be tolerated.

Both the United Kingdom and Japan have enacted their respective domestic violence related laws within a decade ago. Although the titles of their laws are different each other, the main objective is almost the same. The decree of protection for victims, punishments for perpetrators and public awareness may vary from one another. However

it is undeniable that placing this formerly private issue on the public agenda represents a major accomplishment in both countries.

It is not more than two decades that the Myanmar government has noticed to implement the rights of women and protect them from abusive situation. Coordinating with international, regional and intergovernmental organizations, the task for the protection of rights of women and the task for abused women in violence are being implemented effectively. It is no doubt that the government could stand for women and child victims in emergency than previous time. Nevertheless, in order to meet the needs of victims trapped in the violence, a better legal environment is needed.

Every country has its own approach in dealing with the violence. Experiences from selected countries, the United Kingdom and Japan, for this study have shown that there are many problems in the enforcement of these approaches. Learning these approaches can convey to a better solution for the rights of the domestic violence victims in Myanmar.

Between different approaches in the United Kingdom and Japan, instead of relying on the practices of single country, it is more preferable to select out some strength points that may be fruitful for new legal environment in Myanmar. These approaches may be generally classified into the areas of mandatory arrest, issuing protection orders, social services and monitoring the implementation.

For the first approach, Myanmar should learn 'mandatory arrest policy' from the practice of the United Kingdom. From human rights points of view, this policy promotes effective legal protection to battered women without discrimination. The concerns of women survivors also reflect the urgent need in pushing the police to take active role and should not discriminate against any women who face violence from their husbands. Women victims are mostly disappointed as the police usually refuse to provide any protection to them especially when the women are at home. Therefore the women have to be tolerant and live with violence. The original intent of domestic violence laws are to protect victims who are being battered. Thus, even if not mandated arrest, police officers should be empowered to make arrest.

For the next approach, 'issuing protection order' is a new approach proposed to deal with domestic violence in Myanmar. It is quite difficult for the women survivors to imagine how it will work in practice. Women in Myanmar may or may not think that protection order

which control the abusive husband not to live in the house is relevant to their situation. As they may not have confidence in the enforcement of order and may not believe that their husbands would follow the orders. Majority of population in Myanmar live in the rural areas. Thus, women victims from these areas may feel that it might be difficult for them to apply for the order. Sometimes, she might want the husband to be at home and take responsibility of the family instead of being away from the house. As for Myanmar, nature of non-molestation order practicing in the United Kingdom is more preferable. In Japan, when the protection order is violated, the women need to apply to the court again for making arrest the perpetrators. In the UK, power of arrest does not need to be attached to this part of order. Therefore, the people who are not much experienced in applying such kinds of order like Myanmar may have more interest in this practice.

The third approach 'monitoring the implementation of law' is the area that Myanmar needs to learn. Domestic violence raises broader issues equality. Therefore, implementing domestic violence legislation alone will not eliminate violence. There must be simultaneous efforts to promote women's equality in all spheres. In order to ensure the effective implementation of laws relating to domestic violence there should be a coordinated response from all agencies that targets the root causes of domestic violence. Monitoring should be done through data collection and empirical studies to assess whether systems and laws put in place effectively comply with objectives of prevention and control. In this regard, the practice of Japan is the best that explicitly mention in the provisions of law defining a certain period to check and monitor.

Fourth kind of approach is 'social services' for victims. Social services are common concern and the women survivors think that it is relevant to their situation. It is important to be aware that lacking of social support for poor rural families can be a factor contributing to the situation when the women would have no way and no one to turn to. When battered women have to take care of the children as well as encounter with economic hardship, the women may choose to continue staying in abusive relationship. There is a possibility that the women might eventually fight back and end up killing the husbands in such rural places. For this part, the services of Japan are more acceptable because of its efficacy of social institutions of both governmental and volunteers. In addition to a physically and emotionally safe environment, residents also receive job counseling, financial management, counseling and more.

While it has to be argued that the legal system can provide some protection of women and challenge to men, it should be mindful of the limits of the law; only a small portion of men reach the courts, only a tiny proportion of violent incidents reach the courts. Complementary remedies are also essential and should be based in the community, where the offences occur, rather than relying solely on the formal, institutional power of the legal system. More consideration is needed of preventative strategies and the potential for informal, proactive, community responses to domestic violence that take the burden of responsibility away from women victims. There is scope for further research about the ways in which these communities interface with institutions to challenge and sanction men who use violence, and support and protect women who experience it. The legal system is just one aspect of this essential wider social response.

Chapter VIII

Conclusion

From an international perspective, domestic violence is a nearly universal phenomenon. It exists in countries with varying political, economic, and cultural structures and its pervasiveness signifies that the problem does not originate with the pathology of an individual person. Rather, domestic violence is embedded in the values, relationships, and institutional structures of society. Therefore, the path to eradicate domestic violence from the world is a long and slow one.

Individual governments are taking initial steps to combat domestic violence through governmental action and legal reform. While it is true that laws do not necessarily translate into real-life changes, legal precedent can be a powerful tool for reform and the legal system can be a catalyst for change.

The international community is also involved in fighting domestic violence by providing aid and information to those countries that are unsure of which path to take. The UN's World Conferences on Human Rights, and especially the Conference in Beijing, have provided the necessary impetus to individual governments to take responsibility and control over domestic violence against women. Under CEDAW obligations, all countries should take legal actions and other measures to prevent further acts of violence and provide services to survivors. They may also implement broader preventive measures, such as public information and education programmes, to eliminate domestic violence.

The civil remedies adopted by different countries include 'injunctive orders', such as stop violence or 'non-molestation' orders aimed to prevent future acts of violence; 'remedial orders', which take into account medical expenses, damages to property, impact on mental health; and, among others, custody orders and orders for maintenance or financial support. The criminal remedies that recognize domestic violence as an offence include mandatory arrest and 'no drop' prosecution policies, and measures to encourage survivor participation in criminal proceedings, such as the

implementation of witness protection programmes. In addition to civil and criminal remedies, some countries have introduced other legal devices, such as tort action.⁴⁵⁵

The recognition of domestic violence as a human right violation gives rise to obligations of all countries to address it. First, the countries are obligated to put in zero-tolerance policies on domestic violence, thereby ensuring no impunity for perpetrators of violence. Second, they should revoke laws and policies that either perpetuate or condone domestic violence. Furthermore, they should enforce equality standards in all spheres, particularly with regard to equal entitlements within the family to reduce vulnerability to violence. Third, they are obligated to take special measures to prevent and respond to incidents of domestic violence. This should also include measures to increase access speedy and effective justice as well as access to support services. Access to support services is crucial in creating an enabling environment that sustains survivors of violence when navigating the justice system. Moreover, under general international law and specific human rights covenants, they may also be responsible for any private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

As the complex nature of family violence is slowly being understood, it is increasingly clear that simply identifying problems and responding to crises will not solve the problem. Many aspects of family violence need more attention and initial interventions into family violence are tremendously important in helping countries understand the scope and multiple dimensions of family violence. There are so many areas that impact on domestic violence, besides social services, law enforcement and the medical profession.

In the world today, many positive steps have already been taken to combat domestic violence by the countries, including government aid, legal reform, and shelters for battered women, women's rights organizations, empowerment programs for women, and awareness training of police officers, medical professionals and judges. These have

⁴⁵⁵ . People who commit domestic violence generally are, in theory, liable under intentional tort theories, in addition to whatever liability they may face under criminal law. But despite the frequency with which people are injured by 'domestic violence torts', very few tort suits are brought to seek recovery for the harms of domestic violence causes. See, e.g. Douglas D Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C.L. Rev 543, 565 (1992)

all arisen over the past thirty years to fight domestic violence. Compared to the status of the fight to eliminate domestic violence just ten years ago, great strides have been made. However, women are still disadvantaged by the slow evolution of law and society and it is important that this positive trend towards the eradication of domestic violence continues.

While most of the countries in the world today are paying much attention to the domestic violence, Myanmar is being silent on the issue. Let alone for new legal enactment, the government has admitted that women are not aware of the existing laws which are protecting from the violence. This paper has frequently stated that, in Myanmar, there is no specific law for domestic violence up to now. If so, it should be checked it out whether existing laws cover enough for the victims. Social customs and beliefs pressurize the victim women to stand the violence firmly as far as they can. It may identify some of the latent fundamental causes of domestic violence is a result of patriarchal interpretations of cultural norms. The victims reach before the court to claim divorce decree which is only the remedy available for victims only when they cannot tolerate the abuser's behavior anymore. The law enforcers and judges take action only in serious cases. Mostly, cases are terminated in victim's withdrawal. Light punishments upon perpetrators, no sound protection for victims show the inadequacy legal responses on the issue.

Currently, Myanmar has enacted the Anti-Trafficking in Persons Law in 2005⁴⁵⁶ as a single part of protection for abuse of women, especially for protection of women, children and youth. Compared with the past, the government more and more recognizes the importance role of women force in the national level. Counseling centers have been established in each township to help the victims of domestic violence. Complaint letters from the victims of violence have been scrutinized, channeled to the respective sectors to take prompt action and replied to the victims. However, to be more effective in combating domestic violence, Myanmar certainly does need the new enactment for domestic violence. It does not mean that the current legal provisions are not effective. But these laws do not reach the scope of domestic violence at present.

⁴⁵⁶. The State Peace and Development Council Law No. 5/25

Concerning with domestic violence, all countries in the ASEAN region have either acceded to or ratified CEDAW, and adopted the Declaration on the Elimination of Violence in the ASEAN⁴⁵⁷ region in 2004. This instrument recognizes that violence against women violates and impairs their human rights and fundamental freedoms. Until now, eight out of the ten countries in the ASEAN region have enacted special laws and provisions on domestic violence except Brunei Darussalam and Myanmar. In order to prevent and control future domestic violence, Myanmar has to cooperate with regional counterparts by discussing ways of drafting, implementing and monitoring for domestic violence offences.

Like other countries, recognizing domestic violence as a “real crime” has become an increasingly important part of government policy on crime control in both the United Kingdom and Japan. The degree of handling these cases is only the difference between them. Each of them may have their reasons to do so. Whatever their reasons are, the missions of these laws are absolutely the same which are to protect the victims and to take action against perpetrators effectively. For any country in the world, the models of other countries should be observed to what extent the law can solve the problem of violence. What problems existed in other advanced countries and what solution they have found would also be relevant.

Compared with many other violent crimes, the legal and social dimensions of domestic violence present several complications for effective legal control. Domestic violence is a serious social problem, which has drastic and devastating effects on its victims. There are numerous systemic barriers to victims of domestic abuse which arise out of the intimate nature of the relationship and the inability to escape from that environment. It is necessary to have a legal remedy which is more effective to deal with domestic violence. A new legislation, or reworking of existing laws is needed to be brought about to ensure grant of tangible reliefs for battered women. Adopting new measures to effectively check and monitor the results of domestic violence are needed. Information gathered through monitoring activities can be used to advocate for change

⁴⁵⁷ . The Association of South East Asian Nations was established in 1967, and it is made up of ten member countries today. Myanmar became a full-fledged member of ASEAN on 23 July 1997.

and raise public awareness about domestic violence. Lobbying, community education and media relations are strategies employed by many domestic violence advocates.

The future domestic violence law in Myanmar should include in the statement of objectives reference to international treaties and laws, which recognize explicitly that domestic violence constitutes a breach of human rights, particularly the right to equality and the right to life. Further, a comprehensive definition of “domestic violence” will provide a strong basis for the law. This will determine broader prevention and education programmes aimed at changing societal attitudes and behavior of individuals, including state and non-state actors. Thus, the most suitable law for protection of domestic violence in Myanmar should address specific cultural manifestations of violence.

Complaint mechanisms should be easily accessible, provide immediate protection to the complainant and ensure access to support services. Pre-litigation measures should aim to immediately stop violence. Emergency orders should be available prior to the issuance of a court order to immediately prevent future acts of violence. Access to information on rights and assistance to initiate legal processes are essential to facilitating access to justice. Assisted alternative dispute resolutions at the pre- and post-litigation stages should be attempted only if there is a guarantee of non-violence.

In court proceedings, reliefs available under the law should be elaborated in deciding the nature of orders to be granted. Providing timelines for disposing complaints and applications filed under the laws will ensure speedy processes. Making the violation of court orders a punishable offence will aid their enforcement. The Law should mandate institutionalized, regular training and education of police officers, prosecutors, judiciary, social workers and public officials in protecting survivors of domestic violence and preventing further acts of violence. Judges should be trained to be aware of the issues relating to child custody, economic support and security for survivors in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence. Public awareness campaigns of violence against women are an important measure to eliminate violence and change social attitudes. The law should mention to do periodic review and evaluation exercises so that the systems can be improved. Questions like whether the system is responding to

the needs of women, how many women are using the system, and what are its crucial and perceived benefits need to be asked.

In summing up, deficiencies in legislation, social responses and lack of public awareness have hindered the development of an effective campaign against domestic violence in Myanmar. The pervasive nature of the problem calls for urgent and effective steps to eliminate its incidence. It would be valuable to use the national inter-departmental domestic violence committees to scrutinize forthcoming and existing legislation for its likely impact on women experiencing all forms of violence. To effectively control, prevent and eliminate the epidemic of domestic violence in Myanmar, it has to be built up a comprehensive legislative framework that incorporates criminal sanctions, civil remedies, administrative measures and preventive mechanism in accordance with guideline principles of international documents and lessons learnt from the countries which have much experienced in dealing with such a hidden and horrific offence.

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APPENNDIXES (I)

Family Law Act 1996

Chapter 27

Part IV

Family Homes and Domestic Violence

Rights to Occupy Matrimonial Home

30. — (1) This section applies of—
- (a) one spouse is entitled to occupy a dwelling-house by virtue of—
 - (i) a beneficial estate or interest or contract; or
 - (ii) any enactment giving that spouse the right to remain in occupation; and
 - (b) the other spouse is not so entitled.
- (2) Subject to the provisions of this Part, the spouse not so entitled has the following rights (“matrimonial home rights”)—
- (a) if in occupation a right not to be evicted or excluded from the dwelling-house or any part of it by the other spouse except with the leave of the court given by an order under section 33;
 - (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling-house.
- (3) If a spouse is entitled under this section to occupy a dwelling-house or any part of a dwelling-house, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, mortgage payments or other outgoings affecting the dwelling-house is, whether or not it is made or done in pursuance of an order under section 40, as good as if made or done by the other spouse.
- (4) A spouse’s occupation by virtue of this section—
- (a) is to be treated, for the purposes of the Rent (Agriculture) Act 1976 and the Rent Act 1977 (other than Part V and sections 103 to 106 of that Act), as occupation by the other spouse’s residence, and
 - (b) if the spouse occupies the dwelling-house as that spouse’s only or principle home, is to be treated, for the purpose of the Housing Act 1985 and Part I of the Housing Act 1988, as occupation by the other spouse as the other spouse’s only or principal home.
- (5) If a spouse (“the first spouse”)—
- (a) is entitled under this section to occupy a dwelling-house or any part of a dwelling-house, and
 - (b) marks any payment in or towards satisfaction of any liability of the other spouse (“the second spouse”) in respect of mortgage payments affecting the dwelling-house, the person to whom the payment is made may treat it as having been made by the second spouse, but the fact that person has treated any such payment as having been to made does not affect any claim of the first spouse against the second spouse to an interest in the dwelling-house by virtue of the payment.

- (6) If a spouse is entitled under this section to occupy a dwelling-house or part of a dwelling-house by reason of an interest of the other spouse under a trust, all the provisions of subsections (3) to (5) apply in relation to the trustees as they apply in relation to other spouse.
- (7) This section does not apply to a dwelling-house which has at no time been, and which was at no time intended by the spouses to be, a matrimonial home of theirs.
- (8) A spouse's matrimonial home right continue—
- (a) only so long as the marriage subsists, except to the extent that an order under section 33 (5) otherwise provides; and
 - (b) only so long as the other spouse is entitled as mentioned in subsection (1) to occupy the dwelling-house, except where provision is made by section 31 for those rights to be a charge on an estate or interest in the dwelling-house.
- (9) It is hereby declared that a spouse—
- (a) who has an equitable interest in a dwelling-house or in its proceeds of sale, but
 - (b) is not a spouse in whom there is vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house, is to be treated, only for the purpose of determining whether he has matrimonial home rights, as not being entitled to occupy the dwelling house by virtue of that interest.
31. — (1) Subsections (2) and (3) apply if, at any time during a marriage, one spouse is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest.
- (2) The other spouse' matrimonial home rights are a charge on the estate or interest.
- (3) The charge created by subsection (2) has the same priority as if it were an equitable interest created at whichever is the latest of the following dates—
- (a) the date on which the spouse so entitled acquires the estate or interest;
 - (b) the date of the marriage; and
 - (c) 1st January 1968 (the commencement date of the Matrimonial Homes Act 1967)
- (4) Subsections (5) and (6) apply if, at any time when a spouse's matrimonial home rights are a charge on an interest of the other spouse under a trust, there are, apart from either of the spouses, no persons, living or unborn, who are or could become beneficiaries under the trust.
- (5) The rights are a charge also on the estate or interest of the trustees for the other spouse.
- (6) The charge created by subsection (5) has the same priority as if it were an equitable interest created (under powers overriding the trusts) on the date when it arises.
- (7) In determining for the purposes of subsection (4) whether there are any persons who are not, but could become, beneficiaries under the trust, there is to be disregarded any potential exercise of a general power of appointment exercisable by either or both of the spouses alone (whether or not the exercise of it requires the consent of another person).
- (8) Even though a spouse's matrimonial home rights are a charge on an estate or interest in the dwelling-house, those rights are brought to an end by—
- (a) the death of the other spouse, or

(b) the termination (otherwise than by death) of the marriage, unless the court directs otherwise by an order made under section 33 (5).

(9) If—

- (a) a spouse's matrimonial home rights are a charge on an estate or interest in the dwelling-house, and
- (b) that estate or interest is surrendered to merge in some other estate or interest expectant on it in such circumstances that, but for the merger, the person taking the estate or interest would be bound by the charge, the surrender has effect subject to the charge and the persons thereafter entitled to the other estate or interest are, for so long as the estate or interest surrendered would have endured if not so surrendered, to be treated for all purposes of this Part as deriving title to the other estate or interest under the other spouse or, as the case may be, under the trustees for the other spouse, by virtue of the surrender.

(10) If the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling-house (including any legal estate held by trustees for that spouse) is registered under the Land Registration Act 1925 or any enactment replaced by that Act—

- (a) registration of a land charge affecting the dwelling-house by virtue of this Part is to be effected by registering a notice under that Act; and
- (b) a spouse's matrimonial home rights are not an overriding interest within the meaning of that Act affecting the dwelling house even though the spouse is in actual occupation of the dwelling-house.

(11) A spouse's matrimonial home rights (whether or not constituting a charge) do not entitle that spouse to lodge a caution under section 54 of the Land Registration Act 1925.

(12) If—

- (a) a spouse's matrimonial home rights are a charge on the estate of the spouse or of trustees of the other spouse, and
- (b) that estate is the subject of a mortgage, then if, after the date of the creation of mortgage ("the first mortgage"), the charge is registered under section 2 of the Land Charges Act 1972, the charge is, for the purposes of section 94 of the Law of Property Act 1925, (which regulates the rights of mortgagees to make further advances ranking in priority to subsequent mortgages), to be deemed to be a mortgage subsequent in date to the first mortgage.

(13) It is hereby declared that a charge under subsection (2) or (5) is not registrable under subsection (10) or under section 2 of the Land Charges Act 1972 unless it is a charge on a legal estate.

32. Schedule 4 re-enacts with consequential amendments and minor relating to modifications provisions of the Matrimonial Homes Act 1983.

Occupation Orders

33. — (1) If —

- (a) a person ("the person entitled")—

- (i) is entitled to occupy a dwelling-house by virtue of a matrimonial home beneficial estate or interest or contract or by virtue of any rights, enactment giving him the right to remain in occupation, or
- (ii) has matrimonial home rights in relation to a dwelling house, and

(b) the dwelling house —

- (i) is or at any time has been the home of the person entitled and of another person with whom he is associate, or
- (ii) was at any time intended by the person entitled and any such other person to be their home, the person entitled may apply to the court for an order containing any of the provisions specified in subsections (3), (4) and (5).

(2) If an agreement to marry is terminate, no application under this section may be made by virtue of section 62 (3) (e) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated.

(3) An order under this section may—

- (a) enforce the applicant's entitlement to remain in occupation as against the other person ("the respondent");
- (b) require the respondent to permit the application to enter and remain in the dwelling-house or part of the dwelling-house;
- (c) regulate the occupation of the dwelling-house by either or both parties;
- (d) if the respondent is entitled as mentioned in subsection (1) (a) (i), prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;
- (e) if the respondent has matrimonial home rights in relation to the dwelling-house and the applicant is the other spouse, restrict or terminate those rights;
- (f) require the respondent to leave the dwelling-house or part of the dwelling-house; or
- (g) exclude the respondent from a defined area in which the dwelling-house is included.

(4) An order under this section may declare that the application is entitled as mentioned in subsection (1) (a) (i) or has matrimonial home rights.

(5) If the applicant has matrimonial home rights and the respondent is the other spouse, an order under this section made during the marriage may provide that those rights are not brought to an end by—

- (a) the death of the other spouse; or
- (b) the termination (otherwise than by death) of the marriage.

(6) In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including—

- (a) the housing needs and housing resources of each of the parties and of any relevant child;
- (b) the financial resources of each of the parties;
- (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and
- (d) the conduct of the parties in relation to each other and otherwise.

(7) If it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this section containing one or

more of the provisions mentioned in subsection (3) is not made, the court shall make the order unless it appears to it that—

- (a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and
- (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made.

(8) The court may exercise its power under section (5) in any case where it considers that in all the circumstances it is just and reasonable to do so.

(9) An order under this section—

- (a) may not be made after the death of either of the parties mentioned in subsection (1); and
- (b) except in the case of an order made by virtue of subsection (5) (a) , cease to have effect on the death of either party.

(10) An order under this section may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order.

34. — (1) If a spouse's matrimonial home rights are a charge on the estate or interest of the other spouse —

- (a) an order section 33 against the other spouse has except so far as a contrary intention appears, the same effect against persons deriving title under the other spouse or under the trustees and affected by the charge, and
- (b) section 33(1), (3), (4) and (10) and 30(3) to (6) apply in relation to any person deriving title under the other spouse or under the trustees and affected by the charge as they apply in the relation to the other spouse.

(2) The court may make an order under section 33 by virtue of subsection (1) (b) it considers that in all the circumstance it is just and reasonable to do so.

35. — (1) This section applies if —

- (a) one former spouse is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract, or by virtue of any enactment giving him the right to remain in occupation;
- (b) the other former spouse is not so entitled; and
- (c) the dwelling-house was at any time their matrimonial home or was at any time intended by them to be their matrimonial home.

(2) The former spouse not so entitled may apply to the court for an order under this section against the other former spouse ("the respondent").

(3) If the application is in occupation, an order under this section must contain provision—

- (a) giving the applicant the right not to be evicted or excluded from the dwelling-house or any part of it by the respondent for the period specified in the order; and
- (b) prohibiting the respondent from evicting or excluding the applicant during that period.

(4) If the applicant is not in occupation, an order under this section must contain provision—

- (a) regulate the occupation of the dwelling-house by either or both of the parties;
 - (b) requiring the respondent to permit the exercise of that right.
- (5) An order under this section may also—
- (a) regulate the occupation of the dwelling-house by either or both of the parties
 - (b) prohibit, suspend or restrict the exercise by the respondent of his right to occupy the dwelling-house;
 - (c) require the respondent to leave the dwelling-house or part of the dwelling-house; or
 - (d) exclude the respondent from a defined area in which the dwelling-house is included.
- (6) In deciding whether to make an order under this section containing provision of the kind mentioned in subsection (3) or (4) and (if so) in what manner, the court shall have regard to all the circumstances including—
- (a) the housing needs and housing resources of each of the parties and of any relevant child;
 - (b) the financial resources of each of the parties;
 - (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) or (4), on the health, safety or well-being of the parties and of any relevant child;
 - (d) the conduct of the parties in relation to each other and otherwise;
 - (e) the length of time that has elapsed since the parties ceased to live together;
 - (f) the length of the time that has elapsed since the marriage was dissolved or annulled; and,
 - (g) the existence of any pending proceedings between the parties—
 - (i) for an order under section 23A or 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with divorce proceeding etc.);
 - (ii) for an order under paragraph I (2) (d) or (e) of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or
 - (iii) relating to the legal or beneficial ownership of the dwelling-house.
- (7) In deciding whether to exercise its power to include one or more of the provision referred to in subsection (5) (“a subsection (5) provision”) and (if so) in what manner, the court shall have regard to all the circumstances including the matters mentioned in subsection (6) (a) to (e).
- (8) If the court decides to make an order under this section and it appears to it that, if the order does not include a subsection (5) provision, the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent, the court shall include the subsection (5) provision in the order unless it appears to the court that—
- (a) the respondent or any relevant child is likely to suffer significant harm if the provision is included in the order; and
 - (b) the harm likely to be suffered by the respondent or child that event is as great as or grater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.
- (9) An order under this section—
- (a) may not be made after the death of either of the former spouses; and
 - (b) ceases to have effect on the death of either of them.
- (10) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months.

- (11) A former spouse who has an equitable interest in the dwelling-house or in the proceeds of sale of the dwelling-house but in whom there is not vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house is to be treated (but only for the purpose of determining whether he is eligible to apply under this section) as not being entitled to occupy the dwelling-house by virtue of that interest.
- (12) Subsection (11) does not prejudice any right of such a former spouse to apply for an order under section 33.
- (13) So long as an order under this section remains in force, subsections (3) to (6) of section 30 apply in relation to the applicant—
- (a) as if he were the spouse entitled to occupy the dwelling-house by virtue of that section; and
 - (b) as if the respondent were the other spouse.
36. One cohabitant or former cohabitant with no existing right to occupy.
- (1) This Section applies if—
- (a) one cohabitant or former cohabitant is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation;
 - (b) the other cohabitant or former cohabitant is not so entitled; and
 - (c) that dwelling-house is the home in which they live together as husband and wife or a home in which they at any time so lived together or intended so to live together.
- (2) The cohabitant or former cohabitant not so entitled may apply to the court for an order under this section against the other cohabitant or former cohabitant (“the respondent”).
- (3) If the applicant is in occupation, an order under this section must contain provision—
- (a) giving the applicant the right not to be evicted or excluded from the dwelling-house or any part of it by the respondent for the period specified in the order; and
 - (b) prohibiting the respondent from evicting or excluding the applicant during that period.
- (4) If the applicant is not in occupation, an order under this section must contain provision—
- (a) giving the applicant the right to enter into and occupy the dwelling-house for the period specified in the order; and
 - (b) requiring the respondent to permit the exercise of that right.
- (5) An order under this section may also—
- (a) regulate the occupation of the dwelling-house by either or both of the parties;
 - (b) prohibit, suspend or restrict the exercise by the respondent of his right to occupy the dwelling-house; or
 - (c) require the respondent to leave the dwelling-house or part of the dwelling-house; or
 - (d) exclude the respondent from a defined area in which the dwelling-house is included.
- (6) In deciding whether to make an order under this section containing provision of the kind mentioned in subsection (3) or (4) and (if so) in what manner, the court shall have regard to all the circumstances including—
- (a) the housing needs and housing resources of each of the parties and of any relevant child;
 - (b) the financial resources of each of the parties;

- (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) or (4), on the health, safety or well-being of the parties and of any relevant child;
 - (d) the conduct of the parties in relation to each other and otherwise;
 - (e) the nature of the parties' relationship;
 - (f) the length of time during which they have lived together as husband and wife;
 - (g) whether there are or have been any children who are children of both parties or for whom both parties have or have had parental responsibility;
 - (h) the length of time that has elapsed since the parties ceased to live together; and
 - (1) the existence of any pending proceedings between the parties—
 - (i) for an order under paragraph 1(2)(d) or (e) of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or
 - (ii) relating to the legal or beneficial ownership of the dwelling-house.
- (7) In deciding whether to exercise its powers to include one or more of the provisions referred to in subsection (5) (“a subsection (5) provision”) and (if so) in what manner, the court shall have regard to all the circumstances including—
- (a) the matters mentioned in subsection (6)(a) to (d); and
 - (b) the questions mentioned in subsection (8).
- (8) The questions are—
- (a) whether the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if the subsection (5) provision is not included in the order; and
 - (b) whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.
- (9) An order under this section—
- (a) may not be made after the death of either of the parties; and
 - (b) ceases to have effect on the death of either of them.
- (10) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months.
- (11) A person who has an equitable interest in the dwelling-house or in the proceeds of sale of the dwelling-house but in whom there is not vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house is to be treated (but only for the purpose of determining whether he is eligible to apply under this section) as not being entitled to occupy the dwelling-house by virtue of that interest.
- (12) Subsection (11) does not prejudice any right of such a person to apply for an order under section 33.
- (13) So long as the order remains in force, subsections (3) to (6) of section 30 apply in relation to the applicant—
- (a) as if he were a spouse entitled to occupy the dwelling-house by virtue of that section; and
 - (b) as if the respondent were the other spouse.

- 37.—(1) This section applies if—
- (a) one spouse or former spouse and the other spouse or former spouse occupy a dwelling-house which is or was the matrimonial home; but
 - (b) neither of them is entitled to remain in occupation—
 - (i) by virtue of a beneficial estate or interest or contract; or
 - (ii) by virtue of any enactment giving him the right to remain in occupation.
- (2) Either of the parties may apply to the court for an order against the other under this section.
- (3) An order under this section may—
- (a) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
 - (b) regulate the occupation of the dwelling-house by either or both of the spouses;
 - (c) require the respondent to leave the dwelling-house or part of the dwelling-house; or
 - (d) exclude the respondent from a defined area in which the dwelling-house is included.
- (4) Subsections (6) and (7) of section 33 apply to the exercise by the court of its powers under this section as they apply to the exercise by the court of its powers under subsection (3) of that section.
- (5) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months.

- 38.—(1) This section applies if—
- (a) one cohabitant or former cohabitant and the other cohabitant or former cohabitant occupy a dwelling-house which is the home in which they live or lived together as husband and wife; but
 - (b) neither of them is entitled to remain in occupation—
 - (i) by virtue of a beneficial estate or interest or contract; or
 - (ii) by virtue of any enactment giving him the right to remain in occupation.
- (2) Either of the parties may apply to the court for an order against the other under this section.
- (3) An order under this section may—
- (a) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
 - (b) regulate the occupation of the dwelling-house by either or both of the parties;
 - (c) require the respondent to leave the dwelling-house or part of the dwelling-house; or
 - (d) exclude the respondent from a defined area in which the dwelling-house is included.
- (4) In deciding whether to exercise its powers to include one or more of the provisions referred to in subsection (3) (“a subsection (3) provision”) and (if so) in what manner, the court shall have regard to all the circumstances including—
- (a) the housing needs and housing resources of each of the parties and of any relevant child;
 - (b) the financial resources of each of the parties;
 - (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child;

- (d) the conduct of the parties in relation to each other and otherwise; and
- (e) the questions mentioned in subsection (5).

(5) The questions are—

- (a) whether the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if the subsection (3) provision is not included in the order; and
- (b) whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.

(6) An order under this section shall be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months.

39.—(1) In this Part an “occupation order” means an order under section 33, 35, 36, 37 or 38.

(2) An application for an occupation order may be made in other family proceedings or without any other family proceedings being instituted.

(3) If—

- (a) an application for an occupation order is made under section 33, 35, 36, 37 or 38, and
- (b) the court considers that it has no power to make the order under the section concerned, but that it has power to make an order under one of the other sections, the court may make an order under that other section.

(4) The fact that a person has applied for an occupation order under sections 35 to 38, or that an occupation order has been made, does not affect the right of any person to claim a legal or equitable interest in any property in any subsequent proceedings (including subsequent proceedings under this Part).

40.—(1) The court may on, or at any time after, making an occupation under section 33, 35 or 36—

- (a) impose on either party obligations as to—
 - (i) the repair and maintenance of the dwelling-house; or
 - (ii) the discharge of rent, mortgage payments or other outgoings affecting the dwelling-house;
- (b) order a party occupying the dwelling-house or any part of it (including a party who is entitled to do so by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation) to make periodical payments to the other party in respect of the accommodation, if the other party would (but for the order) be entitled to occupy the dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any such enactment;
- (c) grant either party possession or use of furniture or other contents of the dwelling-house;
- (d) order either party to take reasonable care of any furniture or other contents of the dwelling-house;

(e) order either party to take reasonable steps to keep the dwelling house and any furniture or other contents secure.

(2) In deciding whether and, if so, how to exercise its powers under this section, the court shall have regard to all the circumstances of the case including—

(a) the financial needs and financial resources of the parties; and

(b) the financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child.

(3) An order under this section ceases to have effect when the occupation order to which it relates ceases to have effect.

41.— (1) This section applies if the parties are cohabitants or former cohabitants.

(2) Where the court is required to consider the nature of the parties' relationship, it is to have regard to the fact that they have not given each other the commitment involved in marriage.

Non-molestation orders

42.—(1) In this Part a “non-molestation order” means an order containing either or both of the following provisions—

(a) provision prohibiting a person (“the respondent”) from molesting another person who is associated with the respondent;

(b) provision prohibiting the respondent from molesting a relevant child.

(2) The court may make a non-molestation order—

(a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or

(b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.

(3) In subsection (2) “family proceedings” includes proceedings in which the court has made an emergency protection order under section 44 of the Children Act 1989 which includes an exclusion requirement (as 1989 c. 41 defined in section 44A(3) of that Act).

(4) Where an agreement to marry is terminated, no application under subsection (2) (a) may be made by virtue of section 62(3) (e) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated.

(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being—

(a) of the applicant or, in a case falling within subsection (2)(b), the person for whose benefit the order would be made; and

(b) of any relevant child.

(6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.

- (7) A non-molestation order may be made for a specified period or until further order.
- (8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed.

Further provisions relating to occupation and non-molestation orders

- 43.—(1) A child under the age of sixteen may not apply for an occupation order or a non-molestation order except with the leave of the court.
 - (2) The court may grant leave for the purposes of subsection (1) only sixteen. if it is satisfied that that the child has sufficient understanding to make the proposed application for the occupation order or non-molestation order.
- 44.—(1) Subject to subsection (2), the court shall not make an order under section 33 or 42 by virtue of section 62(3)(e) unless there produced to it evidence in writing of the existence of the agreement to marry.
 - (2) Subsection (1) does not apply if the court is satisfied that the agreement to marry was evidenced by—
 - (a) the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage, or
 - (b) a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.
- 45.—(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.
 - (2) In determining whether to exercise its powers under subsection (1), the court shall have regard to all the circumstances including—
 - (a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately;
 - (b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and
 - (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved—
 - (i) where the court is a magistrates' court, in effecting service of proceedings; or
 - (ii) in any other case, in effecting substituted service.
 - (3) If the court makes an order by virtue of subsection (1) it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.
 - (4) If, at a full hearing, the court makes an occupation order (“the full order”), then—

- (a) for the purposes of calculating the maximum period for which the full order may be made to have effect, the relevant section is to apply as if the period for which the full order will have effect began on the date on which the initial order first had effect; and
- (b) the provisions of section 36(10) or 38(6) as to the extension of orders are to apply as if the full order and the initial order were a single order.

(5) In this section—

“full hearing” means a hearing of which notice has been given to all the parties in accordance with rules of court; “initial order” means an occupation order made by virtue of subsection (1); and “relevant section” means section 33(10), 35(10), 36(10), 37(5) or 38(6).

46.—(1) In any case where the court has power to make an occupation order or non – molestation order, the court may accept an undertaking from any part to the proceedings.

(2) No power of arrest may be attached to any undertaking given under subsection (1).

(3) The court shall not accept an undertaking under subsection (1) in any case where apart from the section a power of arrest would be attached to the order.

(4) An undertaking given to a court under subsection (1) is enforceable as if it were an order of the court.

(5) This section has effect without prejudice to the powers of the High Court and the county court apart from this section.

47.—(1) In this section “a relevant order” means an occupation order or a non-molestation order.

(2) If—

(a) the court makes a relevant order; and

(b) it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child, it shall attach a power of arrest to one or more provisions of the order unless satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest.

(3) Subsection (2) does not apply in any case where the relevant order is made by virtue of section 45(1), but in such a case the court may attach a power of arrest to one or more provisions of the order unless satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest.

(a) that the respondent has used or threatened violence against the applicant or a relevant child; and

(b) that there is a risk of significant harm to the applicant or child, attributable to conduct of the respondent, if the power of arrest is not attached to those provisions immediately.

(4) If, by virtue of subsection (3), the court attaches a power of arrest to any provisions of a relevant order, it may provide that the power of arrest is to have effect for a shorter period than the other provisions of the order.

(5) Any period specified for the purposes of subsection (4) may be extended by the court (on one or more occasions) on an application to vary or discharge the relevant order.

- (6) If, by virtue of subsection (2) or (3), a power of arrest is attached to certain provisions of an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of any such provision.
- (7) If a power of arrest is attached under subsection (2) or (3) to certain provisions of the order and the respondent is arrested under subsection (6)—
- (a) he must be brought before the relevant judicial authority within the period of 24 hours beginning at the time of his arrest; and (b) if the matter is not then disposed of forthwith, the relevant judicial authority before whom he is brought may remand him. In reckoning for the purposes of this subsection any period of 24 hours, no account is to be taken of Christmas Day, Good Friday or any Sunday.
- (8) If the court has made a relevant order but—
- (a) has not attached a power of arrest under subsection (2) or (3) to any provisions of the order, or
 - (b) has attached that power only to certain provisions of the order, then, if at any time the applicant considers that the respondent has failed to comply with the order, he may apply to the relevant judicial authority for the issue of a warrant for the arrest of the respondent.
- (9) The relevant judicial authority shall not issue a warrant on an application under subsection (8) unless.—
- (a) the application is substantiated on oath; and
 - (b) the relevant judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order.
- (10) If a person is brought before a court by virtue of a warrant issued under subsection (9) and the court does not dispose of the matter forthwith, the court may remand him.
- (11) Schedule 5 (which makes provision corresponding to that applying in magistrates' courts in civil cases under sections 128 and 129 1980 c. 43. of the Magistrates' Courts Act 1980) has effect in relation to the powers of the High Court and a county court to remand a person by virtue of this section.
- (12) If a person remanded under this section is granted bail (whether in the High Court or a county court under Schedule 5 or in a magistrates' court under section 128 or 129 of the Magistrates' Courts Act 1980), he may be required by the relevant judicial authority to comply, before release on bail or later, with such requirements as appear to that authority to be necessary to secure that he does not interfere with witnesses or otherwise obstruct the course of justice.
- 48.—(1) If the relevant judicial authority has reason to consider that a medical report will be required, any power to remand a person under section 47(7) (b) or (10) may be exercised for the purpose of enabling a medical examination and report to be made.
- (2) If such a power is so exercised, the adjournment must not be for more than 4 weeks at a time unless the relevant judicial authority remands the accused in custody.
- (3) If the relevant judicial authority so remands the accused, the adjournment must not be for more than 3 weeks at a time.

- (4) If there is reason to suspect that a person who has been arrested—
- (a) under section 47(6), or
 - (b) under a warrant issued on an application made under section 47(8), is suffering from mental illness or severe mental impairment, the relevant judicial authority has the same power to make an order under section 35 of the Mental Health Act 1983 (remand for report on accuser's mental condition) as the Crown Court has under section 35 of the Act of 1983 in the case of an accused person within the meaning of that section.
- 49.—(1) An occupation order or non-molestation order may be varied of or discharged by the court on an application by—
- (a) the respondent, or
 - (b) the person on whose application the order was made.
- (2) In the case of a non-molestation order made by virtue of section 42(2)(b), the order may be varied or discharged by the court even though no such application has been made.
- (3) If a spouse's matrimonial home rights are a charge on the estate or interest of the other spouse or of trustees for the other spouse, an order under section 33 against the other spouse may also be varied or discharged by the court on an application by any person deriving title under the other spouse or under the trustees and affected by the charge.
- (4) If, by virtue of section 47(3), a power of arrest has been attached to certain provisions of an occupation order or non-molestation order, the court may vary or discharge the order under subsection (1) in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order).

Enforcement powers of magistrates' Courts

- 50.—(1) If, under section 63(3) of the Magistrates' Courts Act 1980, a magistrates' court has power to commit a person to custody for breach of a relevant requirement, the court may by order direct that the execution of the order of committal is to be suspended for such period or on such terms and conditions as it may specify.
- (2) In subsection (1) "a relevant requirement" means—
- (a) an occupation order or non-molestation order;
 - (b) an exclusion requirement included by virtue of section 38A of the Children Act 1989 in an interim care order made under section 38 of that Act; or
 - (c) an exclusion requirement included by virtue of section 44A of the Children Act 1989 in an emergency protection order under section 44 of that Act.
- 51.—(1) A magistrates' court has the same power to make a hospital order or guardianship order under section 37 of the Mental Health Act 1983 or an interim hospital order under section 38 of that Act in the case of a person suffering from mental illness or severe mental impairment who could otherwise be committed to custody for breach of a relevant requirement as a magistrates' court has under those sections in the case of a person convicted of an offence punishable on summary conviction with imprisonment.
- 2) In subsection (1) "a relevant requirement" has the meaning given by section 50(2).

Interim care orders and emergency protection orders

52. Schedule 6 makes amendments of the provisions of the Children Act 1989 relating to interim care orders and emergency protection orders.

Transfer of tenancies

53. Schedule 7 makes provision in relation to the transfer of certain tenancies on divorce etc. or on separation of cohabitants.

Dwelling-house subject to mortgage

- 54.—(1) In determining for the purposes of this Part whether a person is entitled to occupy a dwelling-house by virtue of an estate or interest, any right to possession of the dwelling-house conferred on a mortgagee of the dwelling-house under or by virtue of his mortgage is to be disregarded.

- (2) Subsection (1) applies whether or not the mortgagee is in possession.
- (3) Where a person (“A”) is entitled to occupy a dwelling-house by virtue of an estate or interest, a connected person does not by virtue of—
- (a) any matrimonial home rights conferred by section 30, or
 - (b) any rights conferred by an order under section 35 or 36, have any larger right against the mortgagee to occupy the dwelling-house than A has by virtue of his estate or interest and of any contract with the mortgagee.
- (4) Subsection (3) does not apply, in the case of matrimonial home rights, if under section 31 those rights are a charge, affecting the mortgagee, on the estate or interest mortgaged.
- (5) In this section “connected person”, in relation to any person, means that person's spouse, former spouse, cohabitant or former cohabitant.

- 55.—(1) This section applies if a mortgagee of land which consists of or includes a dwelling-house brings an action in any court for the enforcement of his security.

- (2) A connected person who is not already a party to the action is entitled to be made a party in the circumstances mentioned in subsection (3).
- (3) The circumstances are that—
- (a) the connected person is enabled by section 30(3) or (6) (or by section 30(3) or (6) as applied by section 35(13) or 36(13)), to meet the mortgagor's liabilities under the mortgage;
 - (b) he has applied to the court before the action is finally disposed of in that court; and
 - (c) the court sees no special reason against his being made a party to the action and is satisfied—
 - (i) that he may be expected to make such payments or do such other things in or towards satisfaction of the mortgagor's liabilities or obligations as might affect the outcome of the proceedings; or

(ii) that the expectation of it should be considered under section 36 of the Administration of Justice Act 1970.

(4) In this section "connected person" has the same meaning as in section 54.

56.—(1) This section applies if a mortgagee of land which consists, or substantially consists, of a dwelling-house brings an action for the enforcement of his security, and at the relevant time there is—

- (a) in the case of unregistered land, a land charge of Class F registered against the person who is the estate owner at the relevant time or any person who, where the estate owner is a trustee, preceded him as trustee during the subsistence of the mortgage; or
- (b) in the case of registered land, a subsisting registration of—
 - (i) a notice under section 3 1(10);
 - (ii) a notice under section 2(8) of the Matrimonial Homes Act 1983; or
 - (iii) a notice or caution under section 2(7) of the Matrimonial Homes Act 1967.

(2) If the person on whose behalf—

- (a) the land charge is registered, or
- (b) the notice or caution is entered, is not a party to the action, the mortgagee must serve notice of the action on him.

(3) If—

- (a) an official search has been made on behalf of the mortgagee which would disclose any land charge of Class F, notice or caution within subsection (1)(a) or (b),
- (b) a certificate of the result of the search has been issued, and
- (c) the action is commenced within the priority period, the relevant time is the date of the certificate.

(4) In any other case the relevant time is the time when the action is commenced.

(5) The priority period is, for both registered and unregistered land, the period for which, in accordance with section 11(5) and (6) of the Land Charges Act 1972, a certificate on an official search operates in favor of a purchaser.

Jurisdiction and procedure etc.

57.—(1) For the purposes of this Part "the court" means the High Jurisdiction of Court, a county court or a magistrates' court.

(2) Subsection (1) is subject to the provision made by or under the following provisions of this section, to section 59 and to any express provision as to the jurisdiction of any court made by any other provision of this Part.

(3) The Lord Chancellor may by order specify proceedings under this Part which may only be commenced in—

- (a) a specified level of court;
- (b) a court which falls within a specified class of court; or
- (c) a particular court determined in accordance with, or specified in, the order.

- (4) The Lord Chancellor may by order specify circumstances in which specified proceedings under this Part may only be commenced in—
- (a) a specified level of court;
 - (b) a court which falls within a specified class of court; or
 - (c) a particular court determined in accordance with, or specified in, the order.
- (5) The Lord Chancellor may by order provide that in specified circumstances the whole, or any specified part of any specified proceedings under this Part is to be transferred to—
- (a) a specified level of court;
 - (b) a court which falls within a specified class of court; or
 - (c) a particular court determined in accordance with, or specified in, the order.
- (6) An order under subsection (5) may provide for the transfer to be made at any stage, or specified stage, of the proceedings and whether or not the proceedings, or any part of them, have already been transferred.
- (7) An order under subsection (5) may make such provision as the Lord Chancellor thinks appropriate for excluding specified proceedings from the operation of section 38 or 39 of the Matrimonial and Family Proceedings Act 1984 (transfer of family proceedings) or any other enactment which would otherwise govern the transfer of those proceedings, or any part of them.
- (8) For the purposes of subsections (3), (4) and (5), there are three levels of court—
- (a) the High Court;
 - (b) any county court; and
 - (c) any magistrates' court.
- (9) The Lord Chancellor may by order make provision for the principal registry of the Family Division of the High Court to be treated as if it were a county court for specified purposes of this Part, or of any provision made under this Part.
- (10) Any order under subsection (9) may make such provision as the Lord Chancellor thinks expedient for the purpose of applying (with or without modifications) provisions which apply in relation to the procedure in county courts to the principal registry when it acts as if it were a county court.
- (11) In this section "specified" means specified by an order under this section.
58. The powers of the court in relation to contempt of court arising out of a person's failure to comply with an order under this Part may be exercised by the relevant judicial authority.
- 59.—(1) A magistrates' court shall not be competent to entertain any application, or make any order, involving any disputed question as to a party's entitlement to occupy any property by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, unless it is unnecessary to determine the question in order to deal with the application or make the order.
- (2) A magistrates' court may decline jurisdiction in any proceedings under this Part if it considers that the case can more conveniently be dealt with by another court.

(3) The powers of a magistrates' court under section 63(2) of the Magistrates' Courts Act 1980 to suspend or rescind orders shall not apply in relation to any order made under this Part.

60.—(1) Rules of court may provide for a prescribed person, or any person in a prescribed category, (“a representative”) to act on behalf of another in relation to proceedings to which this Part applies.

(2) Rules made under this section may, in particular, authorize a representative to apply for an occupation order or for a non-molestation order for which the person on whose behalf the representative is acting could have applied.

(3) Rules made under this section may prescribe—

(a) conditions to be satisfied before a representative may make an application to the court on behalf of another; and

(b) considerations to be taken into account by the court in determining whether, and if so how, to exercise any of its powers under this Part when a representative is acting on behalf of another.

(4) Any rules made under this section may be made so as to have effect for a specified period and may make consequential or transitional provision with respect to the expiry of the specified period.

(5) Any such rules may be replaced by further rules made under this section.

61.—(1) An appeal shall lie to the High Court against—

(a) the making by a magistrates' court of any order under this Part, or

(b) any refusal by a magistrates' court to make such an order, but no appeal shall lie against any exercise by a magistrates' court of the power conferred by section 59(2).

(2) On an appeal under this section, the High Court may make such orders as may be necessary to give effect to its determination of the appeal.

(3) Where an order is made under subsection (2), the High Court may also make such incidental or consequential orders as appear to it to be just.

(4) Any order of the High Court made on an appeal under this section (other than one directing that an application be re-heard by a magistrates' court) shall, for the purposes—

(a) of the enforcement of the order, and

(b) of any power to vary, revive or discharge orders, be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court.

(5) The Lord Chancellor may by order make provision as to the circumstances in which appeals may be made against decisions taken by courts on questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of any order under section 57(5).

(6) Except to the extent provided for in any order made under subsection (5), no appeal may be made against any decision of a kind mentioned in that subsection.

General

62.—(1) For the purposes of this Part—

- (a) “Cohabitants” are a man and a woman who, although not married to each other, are living together as husband and wife; and
- (b) “Former Cohabitants” is to be read accordingly, but does not include cohabitants who have subsequently married each other.

(2) In this Part, “relevant child”, in relation to any proceedings under this Part, means—

- (a) any child who is living with or might reasonably be expected to live with either party to the proceedings;
- (b) any child in relation to whom an order under the Adoption Act . 1976 or the Children Act 1989 is in question in the proceedings; and
- (c) any other child whose interests the court considers relevant.

(3) For the purposes of this Part, .a person is associated with another person if—

- (a) they are or have been married to each other;
- (b) they are cohabitants or former cohabitants;
- (c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;
- (d) they are relatives;
- (e) they have agreed to marry one another (whether or not that agreement has been terminated); (f) in relation to any child, they are both persons falling within subsection (4); or
- (g) they are parties to the same family proceedings (other than proceedings under this Part).

(4) A person falls within this subsection in relation to a child if—

- (a) he is a parent of the child; or
- (b) he has or has had parental responsibility for the child.

(5) If a child has been adopted or has been freed for adoption by virtue of any of the enactments mentioned in section 16(1) of the Adoption Act 1976, two persons are also associated with each other for the purposes of this Part if—

- (a) one is a natural parent of the child or a parent of such a natural parent; and
- (b) the other is the child or any person—
 - (i) who has become a parent of the child by virtue of an adoption order or has applied for an adoption order, or
 - (ii) with whom the child has at any time been placed for adoption.

(6) A body corporate and another person are not, by virtue of subsection (3)(f) or (g), to be regarded for the purposes of this Part as associated with each other.

63.—(1) In this Part— Interpretation of

“Adoption order” has the meaning given by section 72(1) of the Adoption Act 1976;

“Associated”, in relation to a person, is to be read with section 62(3) to (6);

“Child” means a person under the age of eighteen years;

“Cohabitant” and “former cohabitant” have the meaning given by section 62(1);

“The court” is to be read with section 57;

“Development” means physical, intellectual, emotional, social or behavioral development;

“Dwelling-house” includes (subject to subsection (4))—

- (a) any building or part of a building which is occupied as a dwelling,

- (b) any caravan, house-boat or structure which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to it and occupied with it; “family proceedings” means any proceedings—
 - (a) under the inherent jurisdiction of the High Court in relation to children; or
 - (b) under the enactments mentioned in subsection (2);

“Harm”—

- (a) in relation to a person who has reached the age of eighteen years, means ill-treatment or the impairment of health; and
- (b) in relation to a child, means ill-treatment or the impairment of health or development; “health” includes physical or mental health; “ill-treatment” includes forms of ill-treatment which are not physical and, in relation to a child, includes sexual abuse;

“Matrimonial Home Rights” has the meaning given by section 30;

“Mortgage”, “Mortgagor” and “mortgagee” have the same meaning as in the Law of Property Act

“Mortgage Payments” includes any payments which, under the terms of the mortgage, the mortgagor is required to make to any person;

“Non-molestation Order” has the meaning given by section 42(1);

“Occupation Order” has the meaning given by section 39;

“Parental Responsibility” has the same meaning as in the Children Act 1989;

“Relative”, in relation to a person, means—

- (a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse or former spouse, or
- (b) the brother, sister, uncle, aunt, niece or nephew (whether of the full blood or of the half blood or by affinity) of that person or of that person's spouse or former spouse, and includes, in relation to a person who is living or has lived with another person as husband and wife, any person who would fall within paragraph (a) or (b) if the parties were married to each other;

“Relevant Child”, in relation to any proceedings under this Part, has the meaning given by section 62(2);

“The relevant judicial authority”, in relation to any order under this Part, means—

- (a) where the order was made by the High Court, a judge of that court;
- (b) where the order was made by a county court, a judge or district judge of that or any other county court; or
- (c) where the order was made by a magistrates' court, any magistrates' court.

(2) The enactments referred to in the definition of “family proceedings” are—

- (a) Part II;
- (b) This Part;
- (c) The Matrimonial Causes Act 1973;
- (d) The Adoption Act 1976;
- (e) The Domestic Proceedings and Magistrates' Courts Act 1978;
- (f) Part III of the Matrimonial and Family Proceedings Act 1984;
- (g) Part I, II and IV of the Children Act 1989;
- (h) Section 30 of the Human Fertilization and Embryology Act 1990

(3) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

- (4) For the purposes of sections 31, 32, 53 and 54 and such other provisions of this Part (if any) as may be prescribed, this Part is to have effect as if paragraph (b) of the definition of “dwelling-house” were omitted.
- (5) It is hereby declared that this Part applies as between the parties to a marriage even though either of them is, or has at any time during the marriage been, married to more than one person.

PART. V

SUPPLEMENTAL

64.—(1) The Lord Chancellor may by regulations provide for the separate representation of children in proceedings in England and Wales for which relate to any matter in respect of which a question has arisen, or may arise, under—

- (a) Part II;
- (b) Part IV;
- (c) the 1973 Act; or
- (d) the Domestic Proceedings and Magistrates’ Courts Act 1978

(2) The regulations may provide for such representation only in specified circumstances.

65.— (1) Any power to make rules, orders or regulations which is conferred by this Act is exercisable by statutory instrument, and orders.

(2) Any statutory instrument made under this Act may—

- (a) contain such incidental, supplemental, consequential and transitional provision as the Lord Chancellor considers appropriate; and
- (b) make different provision for different purposes.

(3) Any statutory instrument containing an order, rules or regulations made under this Act, other than an order made under section 5(8) or 67(3), shall be subject to annulment by a resolution of either House of Parliament.

(4) No order shall be made under section 5(8) unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.

(5) This section does not apply to rules of court made, or any power to make rules of court, for the purposes of this Act.

66.—(1) Schedule 8 makes minor and consequential amendments.

(2) Schedule 9 provides for the making of other modifications consequential on provisions of this Act, makes transitional provisions and provides for savings,

(3) Schedule 10 repeals certain enactments.

67.—(1) This Act may be cited as the Family Law Act 1996.

(2) Section 65 and this section come into force on the passing of this Act.

- (3) The other provisions of this Act come into force on such day as the Lord Chancellor may by order appoint; and different days may be appointed for different purposes.
- (4) This Act, other than section 17, extends only to England and Wales, except that—
- (a) in Schedule 8—
 - (i) the amendments of section 38 of the Family Law Act 1986 extend also to Northern Ireland;
 - (ii) the amendments of the Judicial Proceedings (Regulation of Reports) Act 1926 extend also to Scotland; and
 - (iii) the amendments of the Maintenance Orders Act 1950, the Civil Jurisdiction and Judgments Act 1982, the Finance Act 1985 and sections 42 and 51 of the Family Law Act 1986 also extend also to both Northern Ireland and Scotland; and
 - (b) in Schedule 10, the repeal of section 2(1)(b) of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 extends

APPENDICES (II)

Domestic Violence, Crime and Victims Act 2004

CHAPTER 28

An Act to amend Part 4 of the Family Law Act 1996, the Protection from Harassment Act 1997 and the Protection from Harassment (Northern Ireland) Order 1997; to make provision about homicide; to make common assault an arrestable offence; to make provision for the payment of surcharges by offenders; to make provision about alternative verdicts; to provide for a procedure under which a jury tries only sample counts on an indictment; to make provision about findings of unfitness to plead and about persons found unfit to plead or not guilty by reason of insanity; to make provision about the execution of warrants; to make provision about the enforcement of orders imposed on conviction; to amend section 58 of the Criminal Justice Act 2003 and to amend Part 12 of that Act in relation to intermittent custody; to make provision in relation to victims of offences, witnesses of offences and others affected by offences; and to make provision about the recovery of compensation from offenders. [15th November 2004]

Enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART 1

DOMESTIC VIOLENCE ETC

Amendments to Part 4 of the Family Law Act 1996

1. Breach of non-molestation order to be a criminal offence

In Part 4 of the Family Law Act 1996 (c. 27) (family homes and domestic violence), after section 42 insert—

“42A Offence of breaching non-molestation order

- (1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.

- (2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.
- (3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.
- (4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.
- (5) A person guilty of an offence under this section is liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;
 - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.
- (6) A reference in any enactment to proceedings under this Part, or to an order under this Part, does not include a reference to proceedings for an offence under this section or to an order made in such proceedings. “Enactment” includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978 (c. 30).”

2. Additional considerations if parties are cohabitants or former cohabitants

- (1) Section 41 of the Family Law Act 1996 (c. 27) (which requires a court, when considering the nature of the relationship of cohabitants or former cohabitants, to have regard to their non-married status) is repealed.
- (2) In section 36(6)(e) of that Act (court to have regard to nature of parties’ relationship when considering whether to give right to occupy to cohabitant or former cohabitant with no existing right), after “relationship” insert “and in particular the level of commitment involved in it”.

3. “Cohabitants” in Part 4 of 1996 Act to include same-sex couples

In section 62(1)(a) of the Family Law Act 1996 (definition of “cohabitant” for the purposes of Part 4 of that Act), for the words after ““cohabitants” are” substitute “two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship; and”.

4. Extension of Part 4 of 1996 Act to non-cohabiting couples

In section 62(3) of the Family Law Act 1996 (definition of “associated” persons for the purposes of Part 4 of that Act), after paragraph (e) insert—

“(ea) they have or have had an intimate personal relationship with each other which is or was of significant duration;”.

5. The offence

- (1) A person (“D”) is guilty of an offence if—
 - (a) a child or vulnerable adult (“V”) dies as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused V’s death or—
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
- (3) If D was not the mother or father of V—
 - (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V’s death;
 - (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
- (4) For the purposes of this section—
 - (a) a person is to be regarded as a “member” of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;

(b) where V lived in different households at different times, “the same household as V” refers to the household in which V was living at the time of the act that caused V’s death.

- (5) For the purposes of this section an “unlawful” act is one that—
- (a) constitutes an offence, or
 - (b) would constitute an offence but for being the act of—
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

- (6) In this section—

“act” includes a course of conduct and also includes omission;

“child” means a person under the age of 16;

“serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);

“vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

- (7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

6. Evidence and procedure: England and Wales

- (1) Subsections (2) to (4) apply where a person (“the defendant”) is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death (“the section 5 offence”).
- (2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant’s failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
- (a) of murder or manslaughter, or
 - (b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter, even if there would otherwise be no case for him to answer in relation to that offence.

- (3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (unless the section 5 offence is dismissed).
- (4) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).
- (5) An offence under section 5 is an offence of homicide for the purposes of the following enactments—
 - sections 24 and 25 of the Magistrates' Courts Act 1980 (c. 43) (mode of trial of child or young person for indictable offence);
 - section 51A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);
 - section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) (power and duty to remit young offenders to youth courts for sentence).

7. Evidence and procedure: Northern Ireland

- (1) Subsections (2) to (4) apply where a person ("the defendant") is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death ("the section 5 offence").
- (2) Where by virtue of Article 4(4) of the Criminal Evidence (Northern Ireland) Order 1988 (S.I. 1988/1987 (N.I. 20)) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
 - (a) of murder or manslaughter, or
 - (b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter, even if there would otherwise be no case for him to answer in relation to that offence.
- (3) Where a magistrates' court is considering under Article 37 of the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)) whether to commit the defendant for trial for the offence of murder or manslaughter, if there is sufficient evidence to put him upon trial for the section 5 offence there is deemed to be sufficient evidence to put him upon trial for the offence of murder or manslaughter.

- (4) At the defendant's trial the question whether there is a case to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).
- (5) An offence under section 5 is an offence of homicide for the purposes of the following provisions—
Article 17 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I. 9)) (mode of trial of child for indictable offence); Article 32 of that Order (power and duty to remit children to Youth Court for Sentence).

8. Evidence and procedure: courts-martial

- (1) Section 6 (1), (2) and (4) has effect in relation to proceedings before courts-martial with the following adaptations.
- (2) A reference to an offence of murder or manslaughter or an offence under section 5 is to be read as a reference to an offence under—
 - (a) section 70 of the Army Act 1955 (3 & 4 Eliz. 2 c. 18),
 - (b) section 70 of the Air Force Act 1955 (3 & 4 Eliz. 2 c. 19), or
 - (c) section 42 of the Naval Discipline Act 1957 (c. 53),for which the offence referred to in section 6 is the corresponding civil offence (within the meaning of that Act).
- (3) A reference to the court or jury is to be read as a reference to the court.

Domestic homicide reviews

9. Establishment and conduct of reviews

- (1) In this section "domestic homicide review" means a review of the circumstances in which the death of a person aged 16 or over has, or appears to have, resulted from violence, abuse or neglect by—
 - (a) a person to whom he was related or with whom he was or had been in an intimate personal relationship, or
 - (b) a member of the same household as himself, held with a view to identifying the lessons to be learnt from the death.
- (2) The Secretary of State may in a particular case direct a specified person or body within subsection (4) to establish, or to participate in, a domestic homicide review.

(3) It is the duty of any person or body within subsection (4) establishing or participating in a domestic homicide review (whether or not held pursuant to a direction under subsection (2)) to have regard to any guidance issued by the Secretary of State as to the establishment and conduct of such reviews.

(4) The persons and bodies within this subsection are—

(a) in relation to England and Wales—

chief officers of police for police areas in England and Wales;

local authorities;

local probation boards established under section 4 of the Criminal Justice and Court Services Act 2000 (c. 43);

Strategic Health Authorities established under section 8 of the National Health Service Act 1977 (c. 49);

Primary Care Trusts established under section 16A of that Act;

Local Health Boards established under section 16BA of that Act;

NHS trusts established under section 5 of the National Health Service and Community Care Act 1990 (c. 19);

(b) in relation to Northern Ireland—

the Chief Constable of the Police Service of Northern Ireland;

the Probation Board for Northern Ireland;

Health and Social Services Boards established under Article 16 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14));

Health and Social Services trusts established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991 (S.I. 1991/194 (N.I.1)).

(5) In subsection (4) (a) “local authority” means—

(a) in relation to England, the council of a district, county or London borough, the Common Council of the City of London and the Council of the Isles of Scilly;

(b) in relation to Wales, the council of a county or county borough.

(6) The Secretary of State may by order amend subsection (4) or (5).

PART 2
CRIMINAL JUSTICE
Assault, harassment etc

10. Common assault to be an arrestable offence

(1) In Schedule 1A to the Police and Criminal Evidence Act 1984 (c. 60) (specific offences which are arrestable offences), before paragraph 15 (but after the heading “Criminal Justice Act 1988”) insert—

“14A Common assault.”

(2) In Article 26(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I. 12)) (specific offences which are arrestable offences), after paragraph (m) insert—

“(n) an offence under section 42 of the Offences against the Person Act 1861 (c. 100) (common assault etc).”

11. Common assault etc as alternative verdict

In section 6 of the Criminal Law Act 1967 (c. 58) (trial of offences), after subsection (3) (alternative verdicts on trial on indictment) insert—

“(3A) For the purposes of subsection (3) above an offence falls within the jurisdiction of the court of trial if it is an offence to which section 40 of the Criminal Justice Act 1988 applies (power to join in indictment count for common assault etc.), even if a count charging the offence is not included in the indictment.

(3B) A person convicted of an offence by virtue of subsection (3A) may only be dealt with for it in a manner in which a magistrates’ court could have dealt with him.”

12. Restraining orders: England and Wales

(1) In section 5 of the Protection from Harassment Act 1997 (c. 40) (power to make restraining order where defendant convicted of offence under section 2 or 4 of that Act), in subsection (1) omit “under section 2 or 4”.

(2) After subsection (3) of that section insert—

“(3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.”

(3) After subsection (4) of that section insert—

“(4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).”

(4) After subsection (6) of that section insert—

“(7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.”

(5) After that section insert—

“5A Restraining orders on acquittal

(1) A court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

(2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one.

(3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section.

(4) Where—

(a) the Crown Court allows an appeal against conviction, or

(b) a case is remitted to the Crown Court under subsection (3), the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.

(5) A person made subject to an order under this section has the same right of appeal against the order as if—

(a) he had been convicted of the offence in question before the court which made the order, and

(b) the order had been made under section 5.”

13. Restraining orders: Northern Ireland

(1) In Article 7 of the Protection from Harassment (Northern Ireland) Order 1997 (S.I. 1997/1180 (N.I. 9)) (power to make restraining order where defendant convicted of offence under Article 4 or 6 of that Order), in paragraph (1) omit “under Article 4 or 6”.

(2) After paragraph (3) of that Article insert—

“(3A) In proceedings under this Article both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under Article 5.”

(3) After paragraph (4) of that Article insert—

“(4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under paragraph (4).”

(4) After paragraph (6) of that Article insert—

“(7) A court dealing with a person for an offence under this Article may vary or discharge the order in question by a further order.”

(5) After that Article insert—

“7A Restraining orders on acquittal

(1) A court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

(2) Paragraphs (3) to (7) of Article 7 apply to an order under this Article as they apply to an order under that one.

(3) here the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this Article.

(4) Where—

(a) a county court allows an appeal against conviction, or

(b) a case is remitted to the Crown Court under paragraph (3), the reference in paragraph (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.

(5) A person made subject to an order under this Article has the same right of appeal against the order as if—

(a) had been convicted of the offence in question before the court which made the order, and

(b) the order had been made under Article 7.”

APPEDIXES (III)

Act on the Prevention of Spousal Violence and the Protection of Victims

Preamble

In consideration of respect for individuals and equality under the law expressly stipulated in the Constitution, progress has been made in Japan through efforts toward the protection of human rights and the realization of genuine equality between women and men.

Nevertheless, even though spousal violence constitutes a serious violation of human rights, as well as being a crime, efforts to relieve victims have not always been adequate in all instances. In addition, the majority of victims of spousal violence are women. When women who find it difficult to achieve economic self-reliance are subject to violence from their spouses, it adversely affects the dignity of individuals and impedes the realization of genuine equality between women and men.

In order to improve these conditions and to achieve the protection of human rights and the realization of genuine equality between women and men, we must establish measures to prevent spousal violence and protect victims. Such action will be in line with the efforts taken by the international community to eradicate violence against women.

This Act has been framed in order to prevent spousal violence and protect victims through the establishment of a system to deal with spousal violence, providing for notification, counseling, protection and support for self-reliance, etc.

Chapter I – General Provisions

Article 1 – Definitions

(1) The term "spousal violence" as used in this Act means bodily harm by one spouse (illegal attacks threatening the other's life or body; the same shall apply hereinafter) or the words and deeds of one spouse that cause equivalent psychological or physical harm to the other (hereinafter collectively referred to as "bodily harm" in this paragraph), and shall cover cases where, subsequent to being subjected to violence by one spouse, the other spouse has obtained a divorce or annulment of the marriage but continues to be subjected to violence by his/her former spouse.

(2) The term "victim(s)" as used in this Act means a person(s) who has been subjected to spousal violence.

(3) The term "spouse" as used in this Act shall include persons who are in a de facto state of marriage, even if it has not been legally registered, "divorce" shall include the circumstances of persons who were in a de facto state of marriage, even if it were not legally registered, and whose situation has changed to a de facto state of divorce.

Article 2 – Responsibilities of the national government and local public entities

The national government and local public entities shall have the responsibility of preventing spousal violence and providing appropriate protection for victims, including assistance in making them self-reliant.

Chapter I (2) – Basic Policy and Prefectural Basic Plan, etc.,

Article 2-2 (Basic Policy)

(1) The Prime Minister, the National Public Safety Commission, the Minister of Justice and the Minister of Health, Labor and Welfare (hereinafter collectively referred to as the "competent Ministers" in this Article and paragraph 5 of the following Article) shall establish a basic policy concerning measures for the prevention of spousal violence and the protection of victims (hereinafter referred to as the "Basic Policy" in this Article and paragraphs 1 and 3 of the following Article).

(2) The Basic Policy shall establish a guideline for the Prefectural Basic Plans set forth in paragraph 1 of the following Article and the Municipal Basic Plans set forth in paragraph 3 of the same Article with regard to the following:

- (i) Basic matters related to the prevention of spousal violence and the protection of victims;
- (ii) Matters related to the contents of measures for the prevention of spousal violence and the protection of victims;
- (iii) Other important matters related to the implementation of measures for the prevention of spousal violence and the protection of victims.

(3) When establishing or revising the Basic Policy, the competent Ministers shall consult in advance with the heads of the administrative organs concerned.

(4) When establishing or revising the Basic Policy, the competent Ministers shall publicize the contents without delay.

Article 2-3 - (Prefectural Basic Plans, etc.)

(1) In line with the Basic Policy, prefectures shall establish their own basic plans concerning the implementation of measures for the prevention of spousal violence and the protection of victims within their jurisdiction (hereinafter referred to as "Prefectural Basic Plans" in this Article).

(2) Prefectural Basic Plans shall provide the following matters:

- (i) Basic policy related to the prevention of spousal violence and the protection of victims;
- (ii) Matters related to the contents of the actual implementation of measures for the prevention of spousal violence and the protection of victims;
- (iii) Other important matters related to the implementation of measures for the prevention of spousal violence and the protection of victims.

(3) In line with the Basic Policy and by taking into consideration Prefectural Basic Plans, municipalities (including special wards; the same shall apply hereinafter) shall endeavor to establish their own Basic Plans concerning the implementation of measures for the prevention of

spousal violence and the protection of victims within their jurisdiction (hereinafter referred to as "Municipal Basic Plans" in this Article).

(4) When establishing or revising Prefectural Basic Plans or Municipal Basic Plans, prefectures or municipalities shall publicize the contents without delay.

(5) The competent Ministers shall endeavor to provide prefectures or municipalities with the advice and other assistance needed to establish such Prefectural Basic Plans or Municipal Basic Plans.

Chapter II - Spousal Violence Counseling and Support Centers, etc

Article 3 - (Spousal Violence Counseling and Support Centers)

(1) Prefectures shall authorize Women's Consulting Offices or other appropriate facilities which they have established within their jurisdiction to function as Spousal Violence Counseling and Support Centers.

(2) Municipalities shall endeavor to authorize appropriate facilities which they have established within their jurisdiction to function as Spousal Violence Counseling and Support Centers.

(3) In order to prevent spousal violence and protect victims, Spousal Violence Counseling and Support Centers shall undertake the following activities:

- (i) To provide victims with counseling regarding various problems affecting them or to introduce them to Women's Consultants or organizations that provide such counseling;
- (ii) To provide victims with medical or psychological guidance or other required guidance in order to help them recover their psychological and physical health;
- (iii) To secure safety in an emergency and provide temporary protection for victims (in cases where a victim is accompanied by family members, for the family members as well as the victim; the same shall apply in the following item, item 6, Article 5, and Article 8-3);
- (iv) To offer information, advice, and liaison and coordination with concerned organizations, as well as other forms of assistance, concerning measures including employment promotion, housing procurement, and the use of systems for social assistance in order to promote the self-reliance of victims;
- (v) To offer information, advice, and liaison and coordination with concerned organizations, as well as other forms of assistance concerning the use of the protection order system prescribed in Chapter IV;
- (vi) To offer information, advice, and liaison and coordination with concerned organizations, as well as other forms of assistance concerning the use of facilities where victims may live and receive protection.

(4) The temporary protection set forth in item 3 of the preceding paragraph shall be provided directly by Women's Consulting Offices or entrusted to parties that meet the criteria specified by the Minister of the Health, Labor and Welfare.

(5) The Spousal Violence Counseling and Support Centers shall, during the course of their duties, when necessary, endeavor to collaborate with private bodies that are engaged in activities designed to prevent spousal violence and protect victims.

Article 4 - (Counseling by Women's Consultants, etc)

Women's Consultants may provide counseling to victims and undertake guidance

Article 5 - (Protection at Women's Protection Facilities)

Prefectures may provide protection to victims at Women's Protection Facilities.

Chapter III - Protection of Victims

Article 6 - (Notification, etc. by those who detect cases of Spousal Violence)

(1) Those who detect spousal violence (limited to cases of bodily harm by a spouse or former spouse; hereinafter the same shall apply in this Chapter) shall endeavor to notify the fact to a Spousal Violence Counseling and Support Center or a police officer.

(2) Physicians or other medical personnel who detect, during the course of their duties, a person whom they consider to have suffered from injuries or medical conditions resulting from spousal violence may notify the fact to a Spousal Violence Counseling and Support Center or a police officer. In such cases, they shall endeavor to respect the intentions of the person in question.

(3) Provisions of the Penal Code (Act No. 45 of 1907) concerning the unlawful disclosure of confidential information and provisions of other acts concerning confidentiality obligations shall not be construed as those preventing notification under the preceding two paragraphs.

(4) Physicians or other medical personnel who detect, during the course of their duties, a person whom they consider to have suffered from injuries or medical conditions resulting from spousal violence shall endeavor to provide the person with the information at their disposal concerning the use of Spousal Violence Counseling and Support Centers, etc.

Article 7 - (Explanations, etc. about protection provided by Spousal Violence Counseling and Support Centers)

When receiving notification about a victim or consulting with a victim, Spousal Violence Counseling and Support Centers shall offer explanations and advice regarding their duties as Spousal Violence Counseling and Support Centers pursuant to the provisions of Article 3, paragraph 3 and recommend the victim to receive any necessary protection as needed.

Article 8 - (Prevention of harm by the police)

When, following notification or by other means, the police believe that there is a case of spousal violence, they shall endeavor to take any necessary measures pursuant to the provisions of the Police Act (Act No. 162 of 1954), Police Official Duties Execution Act (Act No. 136 of 1948) and other laws and regulations in order to prevent the victim from suffering harm from spousal violence, such as stopping the violence or providing protection to the victim, etc.

Article 8-2 (Assistance Article 8-2 by the Chief of the Prefectural Police Headquarters, etc)

When receiving a request from a victim for assistance in preventing harm from spousal violence on his/her own behalf and finding the request appropriate, the Superintendent General of the Metropolitan Police Department or the Chief of the Prefectural Police Headquarters (or the Chief of the Area Headquarters except for the areas including the location of the Hokkaido Prefectural Police Headquarters; the same shall apply in Article 15, paragraph 3) or the chief of the police station shall advise the victim on measures to prevent the said harm on his/her own behalf and offer other necessary assistance to prevent him/her from suffering harm from spousal violence pursuant to the provisions of the regulations established by the National Public Safety Commission.

Article 8-3 (Support for self-reliance by Welfare Offices)

Offices handling welfare affairs as defined by the Social Welfare Act (Act No. 45 of 1951) (referred to as "Welfare Offices" in the following Article) shall endeavor to take any necessary measures to support victims to become self-reliant pursuant to the provisions of the Public Assistance Act (Act No. 144 of 1950), Child Welfare Act (Act No. 164 of 1947), Mother and Child and Widows Welfare Act (Act No. 129 of 1964) and other laws and regulations.

Article 9 - (Cooperation among concerned organizations to protect victims)

The prefectural or municipal organizations concerned, such as Spousal Violence Counseling and Support Centers, the Prefectural Police and Welfare Offices, and the other organizations concerned shall endeavor to work in collaboration in seeking to provide appropriate protection for victims.

Article 9-2 (Appropriate and prompt processing of complaints)

The concerned organizations set forth in the preceding Article shall, when receiving complaints from victims regarding the performance of duties by personnel in charge of the protection of victims, endeavor to process such complaints in an appropriate and prompt manner.

Chapter IV - Protection Orders

Article 10 - (Protection Orders)

(1) In cases where a victim (limited to a victim who has been subjected to bodily harm or life threatening intimidation, etc. (intimidation through announcing an intention to inflict harm on the life or body of a victim; hereinafter the same shall apply in this Chapter) by a spouse; hereinafter the same shall apply in this Chapter) who has been subjected to bodily harm by a spouse is highly likely to receive serious harm on his/her life or body due to renewed bodily harm by the spouse (including cases where subsequent to being subjected to bodily harm by the spouse, the victim has obtained a divorce or annulment of the marriage but continues to be subjected to bodily harm

by the former spouse; the same shall apply in Article 12, paragraph 1, item 2) or where a victim who has been subjected to life-threatening intimidation, etc. by a spouse is highly likely to receive serious harm on his/her life or body due to bodily harm by the spouse (including cases where subsequent to being subjected to life-threatening intimidation, etc. by the spouse, the victim has obtained a divorce or annulment of the marriage but continues to be subjected to bodily harm by the former spouse; the same shall apply in the same item), the court shall, upon a petition from the victim, find against the spouse (including the former spouse in cases where subsequent to being subjected to bodily harm or life threatening intimidation, etc. by the spouse, the victim has obtained a divorce or annulment of the marriage; hereinafter the same shall apply in this Article, Article 12, paragraph 1, items 3 and 4, and Article 18, paragraph 1) and order the matters listed below the following items in order to prevent harm to the victim's life or body. The matters listed in item 2, however, shall only be applied to cases where the victim and the spouse in question are still living together at the time of the petition:

- (i) To oblige the spouse, for a six-month period from the day the order comes into effect, to refrain from approaching the victim at the victim's domicile (except for the domicile that the victim shares as the main home with the said spouse; hereinafter the same shall apply in this item) or any other place where the victim is staying, or from loitering in the vicinity of the domicile, workplace, or any other location normally frequented by the victim;
- (ii) To oblige the spouse to leave, for a two-month period from the day the order comes into effect, the domicile that the spouse shares as the main home with the victim and to refrain from loitering in the vicinity of the said domicile.

(2) In cases provided in the main clause of the preceding paragraph, the court that issues or has issued an order under item 1 of the same paragraph shall, upon a petition from the victim, find against the spouse and order the spouse to refrain from taking any of the matters listed below the following items against the victim during a period from the day the order comes into effect to the day after six months from the day the order came into effect, in order to prevent harm to the victim's life or body:

- (i) To request a meeting;
- (ii) To tell the victim's matters that suggest that the spouse is monitoring the victim's behaviors or to let be in a situation where the victim may know about it;
- (iii) To use or carry out extremely rude or violent words and deeds;
- (iv) To make a phone call without saying anything, or to make phone calls, transmit messages by fax or send e-mails incessantly, except in cases of urgent necessity;
- (v) To make phone calls, transmit messages by fax or send e-mails between 10 p.m. and 6 a.m., except in cases of urgent necessity;
- (vi) To send filthy materials, animal carcasses or other extremely disgusting or repulsive materials or to let the victim know about it;
- (vii) To reveal matters that harm the victim's dignity or to let the victim know about it;
- (viii) To reveal sexually insulting materials or to let the victim know about it, or send documents, pictures or other sexually insulting materials or to let the victim know about it.

(3) In cases provided in the main clause of paragraph 1, when the victim lives with children who have not reached their majority (hereinafter referred to simply as "children" in this paragraph, the following paragraph and Article 12, paragraph 1, item 3), and when it is found necessary to prevent the victim from being obliged to meet the spouse with regard to the children who live with the victim, by taking into consideration the fact that the spouse uses or carries out words or deeds sufficient to lead to a suspicion that the spouse is likely to take any young children back, or other circumstances, the court that issues or has issued an order under paragraph 1, item 1 shall, upon a petition from the victim, find against the spouse and order the spouse to refrain from approaching the children at their domicile (except for the domicile that the children share as the

main home with the said spouse; hereinafter the same shall apply in this paragraph), the school the children attend or any other place where the children are staying, or from loitering in the vicinity of the domicile, school, or any other locations normally frequented by the children during a period from the day the order comes into effect to the day after six months from the day the order came into effect, in order to prevent harm to the children's lives or bodies. However, if the children in question are 15 years of age or over, this provision shall only apply to cases where the court has obtained the children's consent.

(4) In cases prescribed in the main clause of paragraph 1, when there are certain circumstances such that the spouse visits the domicile of the victim's relative or other person with whom the victim has close relationships in his/her social life (except for children who live with the victim and persons who live with the spouse; hereinafter referred to as a "relative, etc." in this paragraph, the following paragraph, and Article 12, paragraph 1, item 4) and uses or carries out extremely rude or violent words or deeds and therefore it is found necessary to prevent the victim from being obliged to meet the spouse with regard to the relative, etc. in question, the court that issues or has issued an order under paragraph 1, item 1 shall, upon a petition from the victim, find against the spouse and order the spouse to refrain from approaching the relative, etc. at his/her domicile (except for a domicile that the relative, etc. shares as the main home with the said spouse; hereinafter the same shall apply in this paragraph) or any other place where the relative, etc. is staying, or from loitering in the vicinity of the domicile, workplace, or any other location normally frequented by the relative, etc. during a period from the day the order comes into effect to the day after six months from the day the order came into effect, in order to prevent harm to the life or body of the relative, etc.

(5) A petition set forth in the preceding paragraph may be filed only when the said relative, etc. (except for the victim's children under 15 years of age; hereinafter the same shall apply in this paragraph) gives his/her consent (in cases where the relative, etc. is a person under 15 years of age or an adult ward, only when the statutory representative thereof gives consent).

Article 11 - (Court with jurisdiction)

(1) Cases pertaining to a petition for an order under paragraph 1 of the preceding Article shall be within the jurisdiction of the district court which exercises jurisdiction over the area where the opposite party maintains an address (or a place of residence in cases where the opposite party does not have an address in Japan or the address of the opposite party is unknown).

(2) A petition for an order under paragraph 1 of the preceding Article may be filed in a district court that exercises jurisdiction over the areas listed in the following items:

- (i) The address of the petitioner's domicile or residence;
- (ii) The place where the bodily harm or life-threatening intimidation, etc. by the spouse pertaining to the said petition took place.

Article 12 - (Petition for Protection Orders)

(1) A petition for an order under Article 10 paragraphs 1 to 4 (hereinafter referred to as "Protection Order") shall be filed with a document containing the following matters:

- (i) The circumstances under which the victim was subjected to bodily harm or life threatening intimidation, etc. by the spouse;

(ii) Sufficient evidence at the time of the petition to prove that there still exists a grave risk of serious harm to the life or body of the victim resulting from renewed bodily harm by the spouse or bodily harm by the spouse after receiving life threatening intimidation, etc. from the spouse;

(iii) When filing a petition for an order under Article 10, paragraph 3, sufficient evidence at the time of the petition to prove the necessity of issuing an order to prevent the victim from being obliged to meet the spouse on with regard to the Children in question who live with the victim;

(iv) When filing a petition for an order under Article 10, paragraph 4, sufficient evidence at the time of the petition to prove the necessity of issuing the order to prevent the victim from being obliged to meet the spouse with regard to the Relative, etc. in question;

(v) The existence or absence of the victim having sought counseling or asked for assistance or protection from the staff of a Spousal Violence Counseling and Support Center or police personnel concerning the matters listed in the preceding items. In cases such circumstances exist, matters listed below:

(a) The name of the Spousal Violence Counseling and Support Center or the police station to which the police personnel belongs;

(b) The date, time and location that the counseling was sought or the assistance or protection was asked for;

(c) The details of the counseling or the assistance or protection asked for;

(d) The details of the measures taken in response to the counseling or the request from the petitioner.

(2) In the case where the document set forth in the preceding paragraph (hereinafter referred to as "Written Petition") misses any of the matters listed in item 5 (a) to (d) of the same paragraph, the Written Petition shall be submitted with the petitioner's written statements regarding the matters listed in items 1 to 4 of the same paragraph certificated pursuant to the provisions of Article 58-2, paragraph 1 of the Notary Act (Act No. 53 of 1908).

Article 13 - (Prompt judicial decision)

The court shall render a judicial decision promptly with regard to cases pertaining to a petition for a protection order.

Article 14 - (Proceedings for Protection Order cases)

(1) A protection order may not be issued before a fixed date for oral arguments or a hearing that the opposite party may witness; provided, however, that this shall not apply to cases where there are circumstances where waiting for the date will interfere with the fulfillment of the intent of the petition for a protection order.

(2) When a Written Petition contains the matters listed in Article 12, paragraph 1, item 5 (a) to (d), the court shall request the chief of the Spousal Violence Counseling and Support Center or the police station in question to submit a written explanation of the circumstances at the time when the petitioner sought counseling or asked for assistance or protection, as well as the details of the measures taken in response to them. In such cases, the chief of the Spousal Violence Counseling and Support Center or the police station in question shall respond promptly.

(3) The court shall, when it is found to be necessary, ask the chief of the Spousal Violence Counseling and Support Center or the police station set forth in the preceding paragraph or the personnel with whom the petitioner sought counseling or asked for assistance or protection to explain further the matters for which the court requested the submission of written explanations pursuant to the provisions of the same paragraph.

Article 15 - (Decision, etc. on a petition for a Protection Order)

(1) The decision on a petition for a Protection Order shall contain the reasons adduced for it. However, in cases where it is made without going through oral arguments, it would be sufficient to show the gist of the reasons.

(2) A Protection Order shall come into effect when the written decision has been sent to the opposite party or when the decision has been rendered on the date of oral arguments or a hearing at which the opposite party appeared.

(3) The clerk of the court shall, when issuing a protection order, promptly notify the Superintendent General of the Metropolitan Police Department or the chief of the Prefectural Police Headquarters with jurisdiction over the address or place of residence of the petitioner of its gist and contents.

(4) When a Protection Order is issued, and it is known that the petitioner has sought counseling or has requested assistance or protection from the personnel at a Spousal Violence Counseling and Support Center and the Written Petition includes matters listed in Article 12, paragraph 1, item 5 (a) to (d) pertaining to the said fact, the clerk of the court shall promptly notify the gist and contents of the protection order to the chief of the Spousal Violence Counseling and Support Center whose name is entered in the said Written Petition (in cases where the names of more than two Spousal Violence Counseling and Support Centers are entered in the Written Petition, the last one entered where the petitioner sought counseling or asked for assistance or protection from the personnel).

(5) A protection order does not have the power of enforcement.

Article 16 - (Immediate appeals against rulings)

(1) An immediate appeal against a ruling may be lodged against a judgment related to a petition for a protection order.

(2) An immediate appeal against a ruling set forth in the preceding paragraph shall not have any impact on the validity of a protection order.

(3) In the case where an immediate appeal against a ruling has been lodged, and only when there is prima facie evidence showing that there are circumstances that will cause the revocation of the protection order, an appellate court may order, upon a petition, the suspension of the validity of the protection order until the judgment on the immediate appeal against a ruling has come into effect. The court that originally had jurisdiction over the case may also order such a disposition if the case records are still in its possession.

(4) When ordering the suspension of the validity of an order under Article 10, paragraph 1, item 1 pursuant to the provisions of the preceding paragraph, if an order under Article 10, paragraphs 2 to 4 has been issued, the court shall also order the suspension of the validity of the said order.

(5) No appeal may be entered against the judgment pursuant to the provisions of the preceding two paragraphs.

(6) When revoking an order under Article 10, paragraph 1, item 1, if an order under paragraphs 2 to 4 of the same Article has been issued, the appellate court shall also revoke the said order.

(7) Regarding a Protection Order for which a notification has been made pursuant to the provisions of paragraph 4 of the preceding Article, when the court has ordered the suspension of the validity of the order or the appellate court has revoked the order pursuant to the provisions of paragraph 3 or paragraph 4, the clerk of the court shall promptly notify the gist and contents of the suspension or revocation to the chief of the Spousal Violence Counseling and Support Center to which the said notification was made.

(8) The provisions of paragraph 3 of the preceding Article shall apply mutatis mutandis to the cases set forth in paragraph 3 and paragraph 4 and when the appellate court has revoked a Protection Order.

Article 17 - (Revocation of Protection Orders)

(1) The court that has issued a Protection Order shall revoke the order when the person who petitioned for the Order has filed a petition for its revocation. The same shall apply to cases where the person subject to the Order has filed a petition for the revocation of the order and the court has confirmed that the person who petitioned for the said Order does not object, when three months have elapsed from the day the order under Article 10, paragraph 1, item 1 or paragraphs 2 to 4 came into effect or when two weeks have elapsed from the day the Order under paragraph 1, item 2 of the same Article came into effect.

(2) The provisions of paragraph 6 of the preceding Article shall apply mutatis mutandis to cases where the court that has issued an order under Article 10, paragraph 1, item 1 revokes the order pursuant to the provisions of the preceding paragraph.

Article 18 - (Repeated Petition for an order under Article 10, paragraph 1, item 2)

(1) When an order under Article 10, paragraph 1, item 2 has previously been issued and a repeated petition for an order under the same item has been filed on the grounds that the same fact of bodily harm or life threatening intimidation, etc. that was the ground for the petition for the issued order, the court shall issue the order in question only when finding it necessary to reissue the order under the same item, by taking into consideration the fact that the victim who intends to move from the domicile that the victim shares as his/her main home with his/her spouse is unable to complete the move from the domicile within two months from the day the issued order comes into effect due to cause imputable to the victim himself/herself, or other circumstances. However, the court may choose not to issue the order when finding that the issuance of the order will cause extreme hindrance to the spouse's daily life.

(2) With regard to the application of the provisions of Article 12 to cases of filing a repeated petition set forth in the preceding paragraph, the term "the following matters" in the part other than those enumerated in each item of Article 12, paragraph 1 shall be deemed to be replaced with "matters listed in item 1, item 2, and item 5 and circumstances set forth in the main clause of Article 18, paragraph 1," the term "the matters listed in the preceding items" in item 5 of the same paragraph shall be deemed to be replaced with "matters listed in item 1 and item 2 and circumstances set forth in the main clause of Article 18, paragraph 1," and the term "the matters listed in items 1 to 4 of the same paragraph" in paragraph 2 of the same Article shall be deemed to be replaced with "matters listed in item 1 and item 2 of the same paragraph and circumstances set forth in the main clause of Article 18, paragraph 1."

Article 19 - (Inspection, etc. of case records)

With regard to procedures concerning a Protection Order, the party may request the clerk of the court for the inspection or a copy of case records, the delivery of a transcript or an extract thereof, or the issuance of a certificate of matters concerning the case; provided, however, this shall not apply to the opposite party until the date for oral proceedings or a hearing in the presence of the opposite party with regard to the petition for the protection order is designated or until the protection order has been sent to the opposite party.

Article 20 - (Certification of oath by a Secretary in the Ministry of Justice)

When a notary is not available or cannot perform his/her duties within the area of the jurisdiction of the responsible Legal Affairs Bureau, Regional Legal Affairs Bureau, or branch office thereof, the Minister of Justice may authorize a Secretary in the Ministry of Justice who works for the said Legal Affairs Bureau, Regional Legal Affairs Bureau, or branch office thereof to make a certification under Article 12, paragraph 2 (including in cases where the provisions of Article 12, paragraph 2 are applied with a replacement of the terms pursuant to the provisions of Article 18, paragraph 2).

Article 21 - (Application mutatis mutandis of the Code of Civil Procedure)

The provisions of the Code of Civil Procedure (Act No. 109 of 1996) shall apply mutatis mutandis to the procedures concerning a Protection Order, unless the application is inconsistent with the nature thereof, except as otherwise provided for by this Act.

Article 22 - (Rules of the Supreme Court)

In addition to the matters provided for by this Act, any necessary matters with regard to the procedures concerning a Protection Order shall be provided by the Rules of the Supreme Court.

Chapter V – Miscellaneous Provisions

Article 23 - (Consideration, etc. by related officials)

(1) Officials related to the protection of victims, investigations and judicial decisions pertaining to spousal violence (referred to as "related officials" in the following paragraph) shall, in the performance of their duties, take into consideration of the psychological and physical conditions of the victims and their environment, etc., respect their human rights regardless of their nationality or disability, etc., and give due consideration to ensuring their safety and protecting their privacy.

(2) The national government and local public entities shall conduct the training and enlightenment activities necessary to deepen the related officials' understanding concerning the human rights of victims and the characteristics of spousal violence, etc.

Article 24 - (Education and enlightenment)

The national government and local public entities shall endeavor to promote education and enlightenment activities to deepen citizens' understanding concerning the prevention of spousal violence.

Article 25 - (Promotion, etc. of research and study)

In order to contribute to the prevention of spousal violence and the protection of victims, the national government and local public entities shall endeavor to promote research and study concerning methods, etc. for guidance for the rehabilitation of perpetrators and the restoration of the physical and psychological health of victims, as well as to foster personnel pertaining to the protection of victims and enhance their qualifications.

Article 26 - (Assistance to private bodies)

The national government and local public entities shall endeavor to provide the necessary assistance to private bodies that are engaged in activities to prevent spousal violence and protect victims.

Article 27 - (Payment by prefectures and municipalities)

(1) Prefectures shall pay the expenses listed in the following items:

(i) Expenses needed to operate Women's Consulting Offices that perform duties listed in Article 3, paragraph 3 pursuant to the provisions of the same paragraph (excluding expenses listed in the following item);

(ii) Expenses needed for the temporary protection provided by Women's Consulting Offices pursuant to the provisions of Article 3, paragraph 3, item 3 (including cases where duties are entrusted to persons who meet the criteria specified by the Minister of Health, Labor and Welfare as prescribed in paragraph 4 of the same Article);

(iii) Expenses needed for duties performed by Women's Consultants entrusted by prefectural governors pursuant to the provisions of Article 4;

(iv) Expenses needed for the protection by prefectures pursuant to the provisions of Article 5 (including cases where the duties are entrusted to municipalities, social welfare corporations or other persons whom prefectures deem appropriate) and expenses needed for the clerical work necessary for the protection.

(2) Municipalities shall pay expenses needed for duties performed by Women's Consultants entrusted by municipal mayors pursuant to the provisions of Article 4.

Article 28 - (Share of Expenses and Subsidies of the National Government)

(1) Pursuant to the provisions of a Cabinet Order, the national government shall bear five-tenths of the amount of the expenses listed in item 1 and item 2 of paragraph 1 of the preceding Article that have been paid by prefectures pursuant to the provisions of the same paragraph.

(2) The national government may, within budgetary limits, provide subsidies for up to five-tenths of the amount of the expenses listed below:

- (i) Expenses listed in item 3 and item 4 of paragraph 1 of the preceding Article that have been paid by prefectures pursuant to the provisions of the same paragraph;
- (ii) Expenses that have been paid by municipalities pursuant to the provisions of paragraph 2 of the preceding Article.

Chapter VI – Penal Provisions

Article – 29

Persons who have violated a Protection Order shall be punished by imprisonment with work for not more than one year or a fine of not more than one 1,000,000 yen.

Article – 30

Persons who have filed a petition for a Protection Order with a Written Petition that contains a false entry with regard to matters to be entered pursuant to the provisions of Article 12, paragraph 1 (including cases where the provisions of Article 12, paragraph 1 are applied with the replacement of terms pursuant to the provisions of Article 18, paragraph 2) shall be punished by a non-penal fine of not more than 100,000 yen.

Supplementary Provisions [Extract]

Article 1 - (Effective date)

This Act shall come into effect as from the day on which six months have elapsed from the day of promulgation; provided, however, that the provisions of Chapter II, Article 6 (limited to the part pertaining to Spousal Violence Counseling and Support Centers), Article 7, Article 9 (limited to

the part pertaining to Spousal Violence Counseling and Support Centers), Article 27, and Article 28 shall come into force as from April 1, 2002.

Article 2 - (Transitional measures)

With regard to the application of the provisions of Article 12, paragraph 1, item 4 and Article 14, paragraph 2 and paragraph 3 to cases concerning a petition for a Protection Order from the victim who has sought counseling or asked for assistance or protection with regard to bodily harm by the spouse to Women's Consulting Offices by March 31, 2002, the term "Spousal Violence Counseling and Support Center" in these provisions shall be deemed to be replaced with "Women's Consulting Office."

Article 3 - (Review)

With regard to the provisions of this Act, approximately three years after this Act comes into force, a review shall be conducted by taking into consideration the status of the enforcement of this Act and necessary measures shall be taken based on the results thereof.

Supplementary Provisions - [Act No. 64 of 2004]

Article 1 - (Effective date)

This Act shall come into effect as from the day on which six months have elapsed from the day of promulgation.

Article 2 - (Transitional measures)

(1) With regard to cases concerning an order issued prior to the enforcement of this Act pursuant to the provisions of Article 10 of the Act on the Prevention of Spousal Violence and the Protection of Victims prior to the revision by this Act (referred to as the "Old Act" in the following paragraph) pertaining to a petition for an order under the same Article, the provisions then in force shall remain applicable.

(2) With regard to the application of the provisions of Article 18, paragraph 1 of the Act on the Prevention of Spousal Violence and the Protection of Victims revised by this Act (hereinafter referred to as the "New Act") to cases where, after the issuance of an order under Article 10, item 2 of the Old Act, a petition was filed for an order under Article 10, paragraph 1, item 2 of the New Act (limited to the first petition filed after the enforcement of this Act) on the grounds of the same fact of illegal attacks threatening the other's life or body that was the ground for the petition for the said Order, the term "two months" in the same paragraph shall be deemed to be replaced with "two weeks."

Article 3 - (Review)

With regard to the provisions of the New Act, approximately three years after this Act comes into force, a review shall be conducted by taking into consideration the status of the enforcement of the New Act and any necessary measures shall be taken based on the results thereof.

Supplementary Provisions - [Act No. 113 of 2007] [Extract]

Article 1 - (Effective date)

This Act shall come into effect as from the day on which six months have elapsed from the day of promulgation.

Article 2 - (Transitional measures)

With regard to cases concerning an order issued prior to the enforcement of this Act pursuant to the provisions of Article 10 of the Act on the Prevention of Spousal Violence and the Protection of Victims prior to the revision by this Act pertaining to a petition for an order under the same Article, the provisions then in force shall remain applicable.

APPENDIXES (IV)

Questionnaire for Police Station

1. Generally, how many domestic violence cases are handled in every year?
2. What is the most common type of domestic violence cases asked for help to the police station?
3. Who usually request help to the police station? Men or Women?
4. Is there any particular case that men request help from the police for domestic violence?
5. How do the victims of domestic violence claim to the police? By themselves or by phone?
6. When received the information about domestic violence, what do you do for the first instance?
7. How to arrange the withdrawal of domestic violence case by the victims after informing to the police? Is it easily allowed to withdraw the cases?
8. In case of violating the protection orders, when the victims or other persons informed to the police, how to arrange it? Give the treatment to the victims first or take the action to the offenders first?
9. What are the common difficulties in handling domestic violence cases?
10. Do the police receive fully cooperation with victims in domestic violence cases?