



Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India

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ARTICLE INFO

Issue: 2016 (2).

This article was published on: 16 Jan, 2017.

Keywords: Gender, Domestic Violence, Law, Feminist Jurisprudence, India.

ABSTRACT

Domestic violence is a serious issue in India with 37% of women reporting being beaten at some point in their lives in national surveys. While this is likely to be an undercount given the stigma associated with intimate partner violence and women's lack of access to the justice system, it is noteworthy that conviction rates continue to be extremely low even for the those cases that end up in the Courts. Drawing from critical legal anthropology and feminist jurisprudence, I argue that legal language, procedures and discourses attempt to normalise domestic violence by deploying discursive strategies such as consistent and pervasive use of the passive voice diminishing perpetrator responsibility, trivializing violence by avoiding the use of violent attributions in describing violent acts, and shifting blame to victims. Of the 787 cases registered under Section 498(A), disposed by the Bombay High Court between 1998 and 2004, just 6% obtained a conviction where the victim was alive, and 35% to 39% were convicted where victims had committed suicide or had been murdered. Conviction rates were extremely variable with many judges acquitting all the cases that they tried and just two judges convicting a third or more of the cases brought for trial. This disparity was further consolidated by procedural inconsistencies including the treatment of evidence, extent of documentation required to prove a history of abuse, the classification of interested witnesses and retractions by medical examiners, who were seldom cross-examined. The findings present a very troubling picture for gender justice in India, suggesting that what we need are not additional laws but a gender-aware approach to the implementations of existing laws.

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INTRODUCTION

Domestic violence (DV) is a serious problem in India with nearly 39% of women reporting physical, sexual or emotional abuse at some point in their lives (Gupta 2014). However most cases of DV are never reported to the police, as evidenced through the reporting gap between the National Family and Health Surveys, a representative, anonymous reproductive health survey in India and the National Crime Records Bureau, a central repository of all crimes in India (Ghosh 2013). While reported cases of DV have been increasing with a 55% increase between 2005 and 2009, there has been a commensurate decrease in the rates of the police filing a formal complaint by 2%, and arrests from a low of 2.19% to 1.95%. The slight increase in conviction rates for DV, up from 19.58% to 21.02% is negligible, and much lower than the average convictions obtained for all crimes (41.7%) and crimes against women (27.8%)¹.

In the last three years, there has been an expansion of women's protections in India through the legal system; for example new laws have been passed to prosecute sexual harassment at the workplace, acid attacks and stalking. These have been partly as a result of the extensive recommendations of the Justice Verma Committee, constituted after the brutal gang rape and murder of a Delhi student Jyoti Singh in 2012 inside a moving bus². Simultaneously and perhaps as a backlash, there have been demands from Men's Rights Organizations to repeal some of the more progressive laws, for instance Section 498(A), that protects women from DV, by arguing, that most of these cases are false and women are using these to extract alimonies during bitter divorce battles and to secure favourable child custody arrangements (Basu 2016; Oxfam 2013)³. Men's rights groups and conservative groups such as Repeal498A.org and Save the Indian Family are discomfited by the expansion of laws to guarantee women greater rights in India, and argue that they allow for

“persecution of men at every level⁴, including through “fake” rape cases, prosecuting mothers and sisters’ of husbands during “fake” dowry harassment and DV cases and other criminal offences against women. However just 10% of cases filed under Section 498(A) were found to be false in 2009, a much lower percentage compared to other criminal cases and just 0.03% of women who were subjected to DV in 2008, reported it to the police (Swayam 2011). Continuing in the same vein, in this paper I empirically examine domestic violence⁵ in India using a mixed-methods approach that permit us to (a) to interrogate whether the claims of fake cases are real or imagined and (b) establish the relationship between the low rates of convictions for DV offences and discourses advanced during the adjudication of these cases. These questions will illuminate the contestations that result from the tensions between the forces of patriarchy and the demand for greater rights for women.

India's commitment to gender justice needs to be discussed both in the contexts of domestic demands for more gender-equitable laws from women's rights groups as well as India's international obligations as a signatory to the CEDAW and other international instruments. For instance the General Recommendation number 19 at the 11th session of the CEDAW in 1992 specifically addresses issues of violence against women including domestic violence through the following measures: “(a) criminal penalties where necessary and civil remedies in cases of domestic violence; (b) rehabilitation programmes for perpetrators of domestic violence; (c) parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken”⁶. Yet as this article demonstrates the extent of criminality in DV offences are often contentious because of the tensions between feminist

¹ Source: <http://feministlawarchives.pldindia.org/wp-content/uploads/498A-Report-for-NCW-final.pdf>

² Source: <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

³ For further details see websites such as <http://www.saveindianfamily.org/>; <http://mensrightsassociation.org/>; <http://menrights.org/>

⁴ Source: <http://www.mid-day.com/articles/men-are-persecuted-at-every-level-says-founder-of-mens-rights-organisation/15146083>

⁵ I use the term domestic violence loosely to define abuse that a woman is exposed to in her marital household perpetrated by a husband or any of his relatives. Section 498 (A) includes both emotional and physical abuse that may or may not be related to dowry demands.

⁶ Source: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

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jurisprudence and the continuing hold of traditional ideas of gender differentiated behaviour that mandates that women treat marriage as a sacrament, even enduring abuse and violence. As a result, perpetrators of DV are often acquitted, with conviction rates as low as 6%, which this study demonstrates. There are almost no rehabilitation programs for perpetrators of DV and while NCRB records DV, given that marital rape is not a crime in India, there are no legal enumerations of the extent of sexual violence in marriages. However surveys like the NFHS, a nationally representative survey with nearly 100,000 women aged 15-49 indicate that 1 in 10 women report being subject to sexual violence in the last 12 months, with younger women reporting higher percentages (NFHS-3, 2005-2006).

At the 58th Session of the meetings of the CEDAW held with Indian delegates and expert committee, specific questions were asked with reference to the non-criminalization of marital rape. The responses of the delegates were vague and inadequate stating that “marital rape is not considered rape in the Indian constitution” (IDSN 2014, CEDAW 58th Session)⁷. Despite the obligations imposed by the CEDAW, DV in India is often treated as a private, family matter, especially in the absence of dowry related violence. Police are often reluctant to file cases, frequently asking couples to resolve their differences amicably, outside the criminal justice system. The overreaction of the criminal justice system has been so acute that Delhi and Madras High Courts have passed orders, in contravention to the Indian Penal Code that the police do not file complaints unless there are “visible signs of abuse” on the complainant (Reddi 2012). Currently complaints filed under Section 498(A) are non-bailable, non-compoundable and cognizable offences⁸. However

there is a bill pending in the Parliament to make the law non-compoundable, implying that the complainant can withdraw the case at any time. One can only imagine the pressure on women by their families, to withdraw complaints of DV, if this bill were to be passed⁹.

2.0 Methodology and Context

The analysis presented in this paper draws from a year of fieldwork in Mumbai during 2005/06 that employed a mixed-methods approach including archival analysis of the documents generated as part of trials in the Bombay City, Civil and Sessions Court in South Mumbai, statistical analysis of cases and observation of court proceedings, in conjunction with ethnographic fieldwork in a slum in one of the most deprived wards in north-eastern Mumbai¹⁰. Documents reviewed here include judgments, post-mortem reports, First Information Reports (F.I.Rs), Spot *Panchnamas* (reports prepared at the scene of crime) and Inquest *Panchnamas* (reports prepared during autopsies), medical records, dying declarations, witness testimonies including statements of relatives, and other documents produced during the trial. Seven hundred and eighty seven cases for which records could be obtained for, form the basis for the numerical analysis in this study¹¹.

Section 498(A) of the Indian Penal Code prosecutes domestic violence offences and includes within its remit husbands and in-laws of complainants. This analysis suggests that legal language, procedures and discourses, disguise brutal violence normalizing or trivializing these acts through the deployment of specific discursive strategies. Using a feminist and critical anthropological lens I argue that strategies such as the consistent use of the passive voice that

⁷ Source: http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/UN/TB/CEDAW_review_of_India_-_minutes_July_2014_.pdf

⁸ Non-compoundable offences are classified under Section 320 of the Code of Criminal Procedure, CrPC. India. These offences are serious and no compromise can be reached between the victim and the accused under the assumption that these crimes not only affect the private party, but also society at large. Rape, domestic violence, murder, grievous hurt – all lie within the ambit of non-compoundable offences. Cognizable offences are those where the police officers can arrest without a warrant (non-cognizable offences require the procurement of a warrant from a magistrate), produce the accused in a court of law, investigate the crime, make a chargesheet through which the magistrate can demand that the accused be arrested, if the he/she is out on bail (Source: <http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf>)

⁹ Source: <http://indianexpress.com/article/india/india-others/government-plans-to-amend-anti-dowry-harassment-law/> and http://www.498a.org/contents/general/Malimath%20Committee_SelectedSections.pdf

¹⁰ In several Indian cities, the Sessions Court adjudicates on matters related to criminal cases. There are three Sessions Courts in Mumbai, two in the Southern part of the city and one in the western part of the City. Cases on appeal from District Courts in other parts of Maharashtra are tried in the Sessions Court.

¹¹ I had to manually examine all the handwritten registers that are supposed to record every case disposed in the Sessions Court. The register contains five columns that has information on the name of the judge, the section(s) under which the cases are filed, the case number (which records the year it was filed), the outcome of the case (pending, acquitted, convicted, transferred) and details of the conviction.

diminishes perpetrator responsibility, routinisation of violence by the avoidance of violent attributions in describing violent acts, and the portrayal of victims as aggressors undermines the element of violence in domestic violence cases that ultimately discourage convictions for these offences¹². Procedural flaws also contribute to the low conviction rates including the differential standards and treatment of evidence by different judges, sloppy investigations of crimes and the embellishment of non-dowry related cases with a dowry clause that ultimately results in the case losing its credibility¹³. In the selection of case studies, I have excluded dowry related violence because typically trials related to dowry violence conclude quickly and are often accompanied by stringent punishments; however the extent of 'criminality' involved in marital violence where dowry plays little or no role is heavily contested¹⁴.

The findings from this study must be reviewed taking into account that this is just the tip of the iceberg; the reporting rates and subsequent conviction rates for domestic violence cases are extremely low in India. The incidents that are reported to the police usually involve extremely serious cases of domestic violence and often the victims are already dead. Data from the National Crime Records Bureau (NCRB 2010) indicates that despite only a slight difference in reported domestic violence (6.8% in Maharashtra and 7.9% overall for India), the conviction rate is much lower at 2.1% for the state and much higher nationally at 19.1%¹⁵. When NCRB data is compared to NFHS-3,

it appears that in Maharashtra 23% fewer cases are reported to the police, compared to the national average¹⁶. Just 6 % of the 787 cases reviewed in this study involving domestic violence that were tried in the Bombay Sessions Court obtained a conviction. However the conviction rates are extremely variable, with some judges not convicting a single case brought to their attention, while others convicting 33% of cases. Subsequent sections in this paper will explore reasons that may contribute to such large variations in conviction rates including the role of progressive judges in facilitating gender-just outcomes, a critical evaluation of legal procedures and discourses for Section 498(A) cases, inconsistencies in what constitutes clinching evidence and finally the impact of low conviction rates on the normalization of DV as well as reinforcing claims that DV cases lack authenticity.

3.0 Can Judges And Courts Be Instruments Of Social Reform?

It is instructive to bring in Rosenberg's theory of courts and judges as instruments of social reform based on the landmark Supreme Court judgements such as *Roe V Wade* and *Rosa Parks* in the United States into our current discussion (Rosenberg 1991; 2008)¹⁷. Rosenberg theorises two models of the Court: the Constrained Court and the Dynamic Court; the notion of the Constrained Court derives from the belief that courts are unable to effect social reform in the absence of concomitant support from the legislature as well as the wider society. In contrast a Dynamic Court can be an instrument for transformation because courts are free from electoral pressures and thus they can act in the face of public opposition for greater equity. Indeed there are instances when judges (and by extension) courts appear constrained by cultural scripts that allow for the trivialization of domestic violence, and examples when judges act in opposition to these scripts ensuring justice¹⁸.

¹² Camiss (2006) finds similar processes at play with victim testimonies not being accorded the seriousness it deserves and DV cases being tried in Magistrate's Courts in the England and Wales rather than the Crown courts.

¹³ A study in Tamil Nadu in Southern India revealed that in some instances, the police employ a two-tiered approach to crimes involving wife abuse- prosecuting them when they are part of harassment related to dowry, and trivializing them when they are unrelated to dowry demands (Kethineni & Srinivasan, 2009). In some cases, the police embellish domestic violence cases with the anti-dowry laws under the (mistaken) assumption that domestic violence coupled with dowry would enhance the possibility of a conviction. However this ultimately weakens the original case, because in the absence of credible evidence for dowry related harassment, judges are predisposed to disregard the case in its entirety, even if the evidence for marital abuse is strong.

¹⁴ I have included dowry related violence in the statistical examination of cases when they are read with Section 498(A). For a description of the offences which are often registered with domestic violence cases, please see Table 2.

¹⁵ The crime rate is calculated by dividing crimes under Section 498(A) by the mid-year population (based on census data). There is a large disparity in conviction rates across states with some states convicting a

third of cases brought to its attention while others convicting very few cases.

¹⁶ For further discussions on the gap between domestic violence reported in national surveys such as the National Family and Health Surveys and cases registered with the police that make its way to the National Crime Records Bureau, see Ghosh (2013) and Gupta (2014).

¹⁷ The Indian constitution can be usefully compared to elements within the American constitution (Galanter 1992).

¹⁸ For a discussion of these, see the *Shah Bano* case (1985) which awarded a divorced Muslim woman alimony in contravention to

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While Section 498(A) contains a long list of actions which are deemed violent, analysis of verdicts suggest that adjudicators often allow their attitudes towards modernity, patriarchy and familial obligations to influence their assessment of the extent of criminality and brutality involved in these cases (Basu 2012; 2016). Further, while many judges demand extensive medical and forensic documentation before convicting perpetrators, a few judges convict based on eyewitness testimonies, dying declarations and precedents, and the lack of medical documentation proving prior abuse is not deemed necessary to obtain convictions. Thus what counts as evidence in one judge's court may not stand scrutiny in another judge's, exposing inconsistencies involved in the evidentiary processes as well as judges' subjective treatments of domestic violence cases.

3.1 A Feminist Critique of Legal Procedures, Discourses and Outcomes

Whereas the notion of a Dynamic Court suggests that courts are capable of instituting reform and there exist examples of such transformative jurisprudence in India, there are also multiple ways, by which the criminal justice system fails victims of domestic violence, including substantial scholarship that suggest procedural failings, prejudices of the police and poor investigations contribute to low conviction rates in India¹⁹. Procedural shortcomings that fail litigants

are often overt and easily substantiated; for instance, in this study I find in at least half the 40 cases reviewed in-depth, instances of suppression of evidence, intimidation of witnesses and victims, and deliberate delays in hearing and similar strategies. It should be noted that these are not exclusive to domestic violence cases and may also occur with other offences (Bhushan and Pranati 2007; Gangoli 2011; Thakur 2012)²⁰.

However some interventions by the defence with the tacit or direct complicity of the judicial system, assume a form that is often covert and intangible. These are deliberately deployed in cases that have a gender dimension; for instance, systematic invalidations of victims' claims of violence through the use of specific discursive devices such as the passive voice to diminish perpetrators' responsibility, shifting blame from aggressors to victims, and insertions of claims about victims' mental health without any medical substantiation. As one of the case studies in this study illustrates a woman whose death was initially ruled suspicious, then accidental, was finally declared to be "mentally unbalanced" and believed to have committed suicide in the absence of any evidence²¹. While the law claims that everyone is equal, feminist critiques of legal processes and legal discourse force us to question the neutrality of the law²². In the following sections, I will offer examples using case studies that will explicate the ways in which legal discourse trivialises domestic violence as well as the statistical impact of

Islamic Personal Laws in India, though this was withdrawn due to political and religious pressure (Agnes 2001), *Vishakha v/s State or Rajasthan* (1997) which broadened the definition of sexual harassment and recognised it as a violation of fundamental rights, *Om Prakash v/s Dil Bahar* (2006) where the Supreme Court ruled that even in the absence of medical evidence, a rape accused could be convicted, based on the sole testimony of the victims. The Justice Verma Committee report is also another example of the Dynamic Court which led to amendments in the criminal law allowing for specific crimes to be prosecuted, recommended a suite of safety measures for women and suggested stringent punishments for crimes against women contingent on the seriousness of the offence.

¹⁹ Studies indicate that the criminal justice system often fails victims of domestic violence not just by failing to convict perpetrators, but from the time the cases are registered, until the case comes up for trial, consciously and constantly attempting to discredit the victim, so that the complainants can be discouraged from going to trial (Geethadevi, Raghunandan and Shobha, 2000; Jejeebhoy and Cook, 1997). A study of police stations and women's protection cells revealed that biased, shoddy and corrupt investigation by the police as well as deliberately preventing domestic violence cases from being brought to trial by telling women that their injuries are 'simple' and do not need state intervention, are some of the ways by which the system fails victims of domestic violence (Mitra, 2000; Prasad, 1999; Solanki & Post, 2001). For further discussion on the lack of state accountability in delivering gender justice see Agnes (1993), Kapur (2005), Kishwar (1999), Moore (1998) and Sunder Rajan (2003).

²⁰ In at least half of the 40 case files examined in-depth for this study, this was the case.

²¹ Pinto (2014) in her work on mental health facilities in India gives examples of women left in mental health institutions by their husbands or other kin as a result of a marital dissolution, regardless of the medical diagnosis of their conditions. It is not uncommon for institutions to collude to declare women mentally unfit, often at the behest of their marital families.

²² See Baxi 2010, 2014; Frug 2014; Menon, 1998; MacKinnon, 2001 for further discussion. Feminist scholars have argued that laws have often been used to reinforce the social subjugation of women; for instance, MacKinnon argues that liberalism supports state intervention on behalf of women as abstract persons with abstract rights; but in reality 'the state is male in the feminist sense'; abstract rights only 'authorize the male experience of the world' (MacKinnon in Harding, 2004:169). Frug makes three claims about the relationship between women's bodies and the law that reflect the deeply patriarchal spaces that women inhabit: (a) legal rules allow for "terrorization of the female body" and "a body that has learned to scurry, cringe and to submit" (2014:129) (b) legal rules authorize the "maternalization of the female body" and therefore any act that is seen to be in opposition to this nurturing function (sex work for example) is penalized while those in alignment of this function are rewarded (c) legal rules permit the sexualisation of the female body, particularly evident when women's sexual background are brought into question during sexual assault cases.

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normalising domestic violence, comparing the conviction rates of judges to highlight disparities.

4.0 Legal Discourse- The Indian Penal Code and Section 498(A)²³

Section 498(A) is an example of transformative feminist jurisprudence in India, introduced as a result of intense pressure from social activists working towards gender justice and against dowry deaths²⁴. On the 25th of December 1983, a new cognizable offence, cruelty by husband or in-laws came into being, which obligated the police to arrest husbands and in-laws once a complaint had been registered by the victim or any of her relatives. Additionally from 1983 to 1986, there were some notable amendments undertaken including changes to the Indian Evidence Act (Section 113), the Dowry Prohibition Act [Section 304(B)], which made the offer and receipt of dowry a cognizable offence, and the introduction of further provisions to protect women from domestic violence in the marital household.

Section 498(A) states,

‘Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to a fine. For the purpose of this section, "cruelty" means-

(a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to

life, limb or health (whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]’

The law stipulates that the victim or her relatives can file a complaint with the police on grounds of cruelty and brings within its remit the following actions: persistent denial of food, forcing perverse sexual relations on wife, constantly locking her out of the house²⁵, denying her access to children thereby causing mental torture, physical violence, taunting, demoralizing and putting her down with the intention of causing mental torture, confining her at home and not allowing her normal social intercourse, abusing children in their mother's presence with the intention of causing her mental torture, denying paternity of the children with the intention of inflicting mental pain upon the mother, and threatening divorce unless dowry is provided.

4.1 The Limits Of Defining ‘Cruelty’

‘Cruelty’ in the legal parlance brings within its purview the most serious instances of physical and/or mental emotional abuse and does not necessarily capture the frequent and chronic violence that many women experience in their daily marital interactions²⁶. While behaviours such as slaps, kicks, shoving and pulling hair could all be legally defined as ‘cruelty’, in practice, without medical documentation it becomes virtually impossible to establish ‘cruelty’ of the variety which would attract the provisions of this law. Furthermore, emotional abuse which is within the purview of Section 498(A) is nearly impossible to establish through documentation, unless psychological support has been sought by the victims, which may happen in a tiny fraction of the

²³ In October 2006, the Protection of Women from Domestic Violence Act (PWDVA), a new law came into force. The act defines domestic violence as (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. The passage of this law was a watershed moment in Indian feminist activism because it offers protection to not only married women, but also women in non-marital partnerships that involve cohabitation and prosecutes offences committed by one's natal family in the case of crimes such as "honour killings" where a woman and often her partner are killed if they have transgressed religious or caste boundaries in the choice of partners. Since this law came into force after the completion of fieldwork, this analysis does not cover the PWDVA.

²⁴ For further discussion see Danda and Parashar (1999), Deshpande (1984), Kapur and Cossman (1996), Jaising (2001), Solanki & Post (2001), Sunder Rajan (2004).

²⁵ Although a woman has the customary right to remain in the matrimonial home for as long as she is married, there is no law that guarantees this right. If pressurised to leave her matrimonial home, she can request an injunction protecting her from being evicted. However these injunctions and restitution of rights are extremely complicated and difficult to enforce (Basu 1999). Therefore lawyers often advise women, to not leave their matrimonial homes, even if she is being abused.

²⁶ For a discussion of the ways in which women's 'suffering', particularly emotional suffering is negotiated and articulated in the context of marital dissolutions within Indian courts see Sen (2010).

cases, as evidenced in this study and others (Ghosh and Choudhuri 2011). However as the case studies will reveal an established pattern of physical, sexual and/or emotional abuse is sometimes neither necessary, nor sufficient, to convict under Section 498(A). While some judges display a nuanced understanding of 'cruelty' and acknowledge that standards of cruelty are relative, others demand extensive medical documentation before they are willing to convict.

4.2 Eroding the Seriousness of Abuse and Violence

The case studies reveal that far from being neutral, judges often allow their gendered subjectivities and prejudices to slip into their professional judgements of cases. Constrained by regressive ideas about obligations of daughters-in-law, the judiciary assumes the role of an enforcer of patriarchy, deploying language to minimise the seriousness of domestic violence offences. Drawing from critical legal anthropology we observe that law and legal proceedings constitute discourses, acts and processes that are at once powerful and contentious. The legal process can be seen as a paradox- it is simultaneously an arena that oppresses and engenders subtle acts of dominations as well as allows for protest and resistance that permit participants to challenge hegemony despite its naturalization in the social order²⁷. In the examples selected here it is observed that while in some cases the 'iron cage of legal instrumentality' (Riles 2006) as well as judges' predispositions disallow convictions, in a Dynamic Court where a judge is unimpeded by gendered cultural scripts, justice can be delivered.

The four case studies presented at length in this article were selected because they met the analysis criteria: none of them were read with Section 304B (anti-dowry law), they represented a range of socio-economic circumstances, from being very poor to being middle class, and all involved serious domestic violence offences where victims were either hospitalised or dead. I will refer to judgements of lower courts where relevant but will

primarily focus on verdicts delivered at the City, Civil and Sessions Court. The first case is produced at length and in verbatim to demonstrate the strategic utilization of discursive strategies to diminish the seriousness of violent acts. In the second case, a lack of a documented history of abuse leads to a suspicious death being ruled as a suicide, despite the absence of evidence to support the judge's verdict. In the third case the very presence of a documented history of physical and mental abuse does not lead to convictions, and in the fourth case convictions are obtained despite the lack of a documented medical history of abuse because the judge displays a contextual understanding of the social, cultural and economic constraints that victims of domestic violence often encounter in their quest for justice.

Case Study 1

Ramesh Raghavji Shah (husband, accused number one), Raghavji Anandji Shah (father-in-law, accused number two) and Laxmibai Raghavji Shah (mother-in-law, accused number three) V. The State of Maharashtra (Filed 1986)

The facts of the case were as follows: Rashila's husband had started physically abusing her soon after their marriage. Although she claimed that her husband and in-laws demanded a car and jewellery, the documents did not suggest that dowry was the cause of the violence. She fled to her natal family a number of times but was persuaded to return to her matrimonial home, under assurances that she would not be abused. After a year and a half of being married, Rashila went to live with her parents on a semi-permanent basis because her husband did not stop being physically violent. However reconciliation was organized by their Caste Panchayat and she was persuaded to return to her husband²⁸. One of the most important conditions of this mediation was a reduction in contact with her natal family including reducing the frequency of her visits to her parental home in Bombay. On the evening of 4th of May 1986, her husband hit her on the chest while she was undressed and when she tried to scream thrust the four fingers of his right hand which

²⁷ A comprehensive review of critical legal anthropology is beyond the scope of this paper; however for discussions please see (Adelman, 2004; Chouliaraki & Fairclough, 1999; Comaroff & Roberts, 1981; Goodrich, 1987; Hirsch, 1998; Lazarus-Black, 1997; 2001; Lazarus-Black and Hirsch 1994; Lazarus-Black and Merry 2003; MacMartin & Wood, 2005; McEvoy & Conway, 2004; Philips, 1998; Sunderland, 2004; Wodak & Meyer, 2003; Yngvesson, 1993).

²⁸ Mediation in domestic disputes are often taken up by caste panchayats to facilitate reconciliation between couples, thus avoiding divorces in India (Kethineni 2014)

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caused serious injuries to her oropharynx and then tried to throttle her. She somehow managed to escape and her in-laws rescued her and took her to the hospital. The case was filed under Section 498(A) as well as Section 307, which is a charge of grievous hurt and complaints were registered against her husband as the primary accused and her mother-in-law and father-in-law as the co-accused. The case lasted for for 15 years, finally resulting in the conviction of her husband under Section 498(A), but not Section 307. He was sentenced to Rigorous Imprisonment for a month and ordered to pay a fine of Rupees 5000 (roughly 100 USD). It should be noted that during the 15 years it took to deliver the verdict, significantly longer than the average time of 9 years for the cases selected, the charges against the in-laws were dropped on account of their deaths. Additionally the extent of their involvement in this particular act of violence was not clarified in the documents, thus even alive, it is unclear whether a case could have been made against them.

Diminishing Perpetrator Responsibility

Language is specifically deployed to diminish perpetrator responsibility. Note the excerpt below reproduced from the verdict, which describes the incident that led to Rashila being hospitalized and the case being tried under Section 498(A).

‘On the evening of 4th May 1986 after return of the entire family from an outing at about 10.45 p.m. the complainant and accused No.1 retired to their bedroom. On the accused No.1 ... asking the complainant to take off her clothes she complied. Thereupon accused No.1 inflicted a couple of blows on her chest and when she shouted for help the accused No.1 thrust the four fingers of his right hand deep into her mouth and pressed her neck with the other hand. In the course of struggle, the complainants head struck against a wooden cot resulting in [a] bleeding injury above her right eye-lid. The father-in-law accused No.2 ... who was in the adjoining room hearing the commotion forcefully opened the door and finding the complainant naked asked her to dress up and thereafter he asked her to wipe off the

blood stains on the floor. Hearing the shouts of the complainant several occupants of the building collected in the chowk and some of the them ... rushed to the flat and prevented the accused No.1 from further assaulting the complainant²⁹.

A number of important points emerge: firstly, the use of the passive voice, which is employed consistently throughout the judgement. The effect is to diminish the notion that the accused actively tried to injure the victim (the head struck the cot rather than the perpetrator bashed his wife’s head on it). Secondly a distraction is inserted, the nakedness of the victim. It is unclear why the victim’s state of undress is necessary since there are no explicit references to sexual violence or psychological humiliation in any of the documents. It appears to have been employed not out of a legitimate need, but for voyeuristic reasons, not dissimilar to the types of discourses advanced during rape trials (Baxi 2009; 2014). The fact that there was blood on the floor which needed to be “wiped off”, alludes to the extremely serious nature of the assault, corroborated by medical certificates. It is worth noting that the incident probably occurred when the accused and the victim were engaged in sexual intercourse, although there is no specific mention of sexual violence in the documents.

Labelling the Complainant as an Aggressor

In this case and in several others, it is not unusual for defence lawyers to portray women as aggressors rather than victims. While these tactics of the defence are not surprising, what is unusual is for these to bleed into the verdicts of judges. The trial judge at the Lower Court had acquitted all three accused on the grounds that he disbelieved that the victim was subjected to ‘cruelty’ as defined by Section 498(A), despite the seriousness of her injuries. Section 307 which carries a higher sentence was not applied because the judge played on the technicality of the phrase ‘pressed her neck’ instead of ‘strangulation’. While in Hindi the two terms are used by the same phrase (*gala dabana*), the passage below casts doubts on the intentions of Rashila’s husband.

²⁹ PW is an abbreviation for Prosecution Witness.

So far as the charge under section 307 of I.P.C is concerned the learned trial Judge has disbelieved the testimony of the complainant on the ground that the medical evidence does not support the prosecution case that accused No.1 attempted to strangulate or throttle his wife Rashila Shah. Moreover Rashila Shah in her testimony has not even remotely referred to any attempt made by accused No.1 to strangulate her and it is only when she was called to explain the circumstances in which she sustained injuries she stated that her husband had pressed her neck and further reference is made by the learned trial Judge to the statement of the complainant at Exh.10 wherein the complainant has stated that the injury alone was to the right eye consequent upon her fall on the cot in the course of grappling with her husband i.e. accused No.1. In view thereof her testimony before the Court that the accused No.1 caused her eye injury by dashing her against the cot is an improvement. Furthermore the learned trial Judge seems to have been swayed to believe that it was the complainant who was aggressor in view of the fact that accused No.1 ... had suffered nail scratches at the hands of the complainant which has been borne out by the medical certificate at Exh.38; and also 'from the surrounding circumstances it was clear that things happened on the spur of the moment'.

The excerpt above reinforces the earlier observation regarding the pervasive use of the passive voice which diminishes perpetrator responsibility as well as highlights a number of key issues: firstly, the assault is described as 'grappling' which dilutes the vicious nature of the assault. Thrusting four of his fingers into her throat, which abraded her tonsillar pillar (oropharynx) could hardly be classified as 'grappling'; secondly it is not unusual to portray women as aggressors when they try to defend themselves, although the Sessions Court judge reprimanded the Lower Court Judge for this characterisation; thirdly describing the violence as an act 'that happened on the spur of the moment' makes it seem un-premeditated,

conferring an organic quality to it, forcing us to view it as an accident, rather than a planned attack that is meant to inflict physical harm.

Reducing Natal Family Contact

The view of a conflict squarely lays blame on a daughter-in-law's unwillingness or inability to fully integrate with her marital household due to enduring ties with her natal family is not atypical in domestic violence arbitration (Basu 2012; 2016; Kowalski 2016). In Rashila's case too, reconciliation organized by the caste Panchayat made this an important condition. During couples' mediations organized by women's organizations, it was clear that reducing natal family contact was one of the most frequent terms of arrangement during reconciliation. Imposing this condition on a young woman further isolates her from her natal family, potentially exacerbating and not reducing the risk for abuse and also underscores the tensions between what is perceived as a problem of modernity - women demanding greater parity in marital negotiations and frequent contact with their natal families, and traditional views of a woman's responsibilities to her husband's family.

Retraction of Statements

While the Sessions Court Judge did not find sufficient evidence to prosecute the accused under the more serious charge of Section 307, he did convict under Section 498(A) because of the retraction of statements by the attending doctor as well as the Judge's belief that the accused did not 'intend to murder' and 'the quarrel became physical when the accused started boxing the victim on her chest'. In his original statement the attending doctor had termed the injuries 'dangerous' and reported that the victim's life would have been in imminent danger, had she not been rescued. However during cross-examination he retracted his statement and testified that both injuries could have been 'self-inflicted'. Retraction of statements by witnesses, doctors and investigating officers were common occurrences for the cases reviewed and also is the case generally for many criminal cases in India (O'Flaherty and Sethi 2009) and unsurprising given the length of time it took, for this particular case to come to trial at the Sessions Court in Mumbai. This retraction was instrumental in establishing the

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lesser charge of grievous hurt, rather than the more serious offence of attempt to murder.

Case Study 2

Patil V. The State of Maharashtra (Filed 1997)

The facts of the case were as follows: a twenty three year old woman Swati had been married for three years and lived with a two year old son, in a joint family comprising her husband, his parents, older brother and older sister-in-law. On the 4th of December 1995 her mother received a phone call from her mother-in-law saying that Swati was 'ill and had been taken to the hospital'. She rushed to the hospital and found Swati dead. [The a]utopsy report concluded that Swati had died from organophosphorus poisoning, an ingredient commonly found in insecticides and death was ruled not accidental. However her family, in particular her mother was dissatisfied with the investigation and ten months after Swati's death on the 27th of October 1996, Swati's mother requested that the police investigate her death as 'suspicious'. The police treated this request as an First Information Report (FIR). and arrested Swati's in-laws, husband and sister-in-law and seized her Streedhan. All the accused were charge sheeted on the 25th of February, 1997, 14 months after the death of Swati and were booked under Sections 498(A), 306 (Aiding and abetting suicide) and IPC34 (Common Intent) to which they pleaded not guilty.

The prosecution had four witnesses – Swati's mother, maternal uncle, sister and the Police Inspector who investigated the crime and made the following arguments: Swati had a two year old son at the time of her death and suicide was completely out of character; secondly, her in-laws notified her natal family only after Swati's death; thirdly, none of her in-laws or her husband attended her funeral and her final rites were performed by her parents instead of her husband, despite Hindu norms that a married woman's final rites are usually performed by her husband. Swati's mother's suspicions were confirmed when her in-laws refused to respond to her questions surrounding the event and her brother-in-law instead taunted her by saying '...the amount we spent on your daughter's sickness we would have had four marriages in the cost'.

Inadequacy of Evidence, Sloppy Investigation or Judicial Bias?

In this case, the combination of a lack of evidence and a closer examination of evidence that was presented, poor investigation and judicial bias led to the acquittals. While the F.I.R. says '...during investigation it was transpired that that the victim was subjected to cruelty by the accused and in-laws and therefore committed suicide...', it does not identify Swati's mother or another natal family member as specifically to have made the statement and this omission on the part of the police was used by the defence lawyers as proof of a 'cooked-up case'. Secondly the dying declaration was declared inadmissible on the grounds that Swati was brought to the hospital in a semi-conscious state and the judge rejected it on the grounds that it would be prejudicial to the accused. The dying declaration is a statement that the victim records prior to her death in a hospital, in the presence of the medical examiner, the doctor treating the patient and an independent witness, at a time when she is lucid. Thirdly the witnesses in Swati's case were deemed "interested witnesses" and their corroborating statements were not taken seriously by the judge.

At this point it may be worth reviewing the record of the judge, who tried this case. Of the 787 domestic violence cases reviewed here, he tried 52, of which he did not convict a *single* case (Table 1). While this could be coincidental, one cannot help but have misgivings regarding his views on domestic violence if a single case brought for trial is not deemed worthy of a conviction. The argument in favour of judicial bias is strengthened further given that the judge stated that the delay in the filing of the FIR indicates that Swati's family 'were angry because of Swati's premature death and therefore cooked-up this case against her in-laws'. A lack of a documented history of abuse in his view is suggestive of the absence of abuse. He pointedly asks why Swati had 'failed to confide in her parents' and pronounced that because 'there was no documented history of harassment' it indicates 'she had a happy married life'.

At no point in his judgment does he discuss the post-mortem report and reflect on a vital piece of evidence that Swati was, in fact three months pregnant at the time of her death. The fact that the prosecution also do not use this information to build their case is mystifying. While the initial post-

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mortem report had concluded that the ingestion of the poison could not be accidental, during cross-examination the medical examiner retracted his statement and testified that the 'ingestion of poison could be accidental'. This inconsistency benefited the defence who succeeded in portraying Swati as a 'mentally unbalanced woman' who was 'not a victim of harassment by her in-laws or husband'. While the case was ruled as a suicide, no evidence was presented to prove that Swati was indeed 'mentally unbalanced'. Whereas it may appear that a documented history of abuse is adequate to obtain a conviction, the third case study indicates that even with extensive medical documentation and eye witness testimonies, judges often do not convict perpetrators.

Case Study 3

Case Study 3- Shaikh V. The State of Maharashtra (Filed 2000)

The three accused – the husband, the mother-in-law, and the elder sister-in-law were charged under sections 498 (A), 306, with IPC 34. The victim Nazma was a young woman who had died from complications associated with severe burn injuries. The complaint was filed by her father. The trial papers indicated that due to a considerable difference in living standards between the victim and her in-laws, she was often taunted by her mother-in-law and the eldest sister-in-law that 'because she came from a slum she did not know how to cook food and wash clothes properly'. They also warned Nazma against getting pregnant because they wanted her to establish a separate household which her husband could not afford to do at that time. When she reported the abuse to her mother, she was assured using the familiar refrain: 'These are minor things which occur in every house. Do not worry so much about it'³⁰. She often visited her parents and these turned into longer stays when the abuse became too frequent or severe. She had repeatedly confided in her mother that her husband was physically violent during fights. When she became pregnant, her in-

laws pressurised her to abort the child, which she refused. Subsequently they fired the domestic help forcing her to do physically arduous work throughout her pregnancy, resulting in her delivering a still-born child. She recovered for a few days at her parents' but went back under (false) assurances that she would not be abused.

In the weeks prior to the incident, she missed two of her regular visits to her parents' house. The evening of the incident she visited them extremely upset and reported that in the previous week her brother-in-law and sister-in-law had jointly beaten her along with her husband. That evening her husband came to take her back and she returned on the assurance that they will not hit her. The same night her mother rushed to the hospital to find the victim with over 40% burn injuries but conscious. She told her mother she was beaten so badly that she lost consciousness and when she regained sense she discovered that she was on fire which her in-laws were trying to douse. She struggled for a month and five days, prior to succumbing to her injuries.

Corruption in the Criminal Justice System

It seems anomalous that in the absence of any evidence for suicide, the case was registered under Section 306 which is a charge of abetting a person to commit suicide rather than Section 307 which would have been a greater charge of attempt to murder. Technically, this should have been an uncomplicated case; there was an extremely well-documented medical history of abuse including the birth of a stillborn child brought on by forced physical labour six months prior to her death, and ample testimonies from parents, investigating officer and other prosecution witnesses, as well as details of the history of abuse including that her brother-in-law had hit her twice and threatened to set her on fire³¹. One of the prosecution's primary witnesses, the attending doctor, told the court that at the time of hospitalization, the victim was lucid and gave a statement that clearly implicated her husband and in-laws. The landlord confirmed that she had been burnt at her home and the investigating officer testified that the victim had told him that her

³⁰ It is interesting to note that tropes used by families to ensure that the marriage remains intact are very similar to the ones used by judges to undermine brutal domestic violence. The quote here is not a witness statement or a testimony from a deposition but the clerk's paraphrasing of what the mother had said to the victim which found its way into the court documents.

³¹ There are many studies that have established that between domestic violence causes negative reproductive health outcomes for women as well as increased risks of contracting infections such as HIV/AIDS and other STIs (Diop-Sidibe et al 2006; Heise et al 1994; Sinha et al 2012).

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husband and in-laws subjected her to “mental cruelty” using the Marathi word *tras* (trouble) to describe her ordeal.

The judge ruled that the statements of the medical examiner and the investigating officer contradicted each other because while the medical examiner confirmed that the victim had been physically abused by her husband and in-laws, the investigating officer reported that they inflicted mental cruelty on her and he declared them inadmissible. It was his opinion that the fights and quarrels constituted ‘minor wear and tear of family life and were not serious enough to invite the rigours of section 498(A)’ and called the parents ‘interested witnesses’ on whose testimonies he could not convict. The judge drew an artificial difference between emotional abuse and physical abuse; it is obvious that physical abuse naturally involves emotional abuse while emotional abuse may not involve physical violence, but may have a physiological impact on victims. Insisting that Nazma abort her baby and forcing her to do physically arduous tasks during her pregnancy constitute both physical and mental abuse and not ‘minor wear and tear on family life’, as the judge would lead us to believe, in his attempts to normalize violence³². Though speculative, it is likely that Nazma’s family’s financial disadvantage and the perpetrators’ economic advantage played a role in the procurement of lawyers as well as the subsequent judgement in this case³³.

Case Study 4

Case study 4- Bhujbal V. The State of Maharashtra (Filed 1999)

The fourth example is presented to demonstrate that a few judges prosecute and convict family members under Section 498(A) despite little medical evidence. These judges demonstrate a nuanced understanding of the structural, economic

and social constraints that female victims of domestic violence often encounter which perpetuates a culture of silence discouraging them from discussing these matters with even close family members or friends. An illustration of this understanding can be seen in the verdict of *Bhujbal V. The State of Maharashtra*. In this case the victim, a garbage collector had committed suicide unable to endure the daily beatings her husband subjected her to. Further her husband had remarried, without divorcing her (illegal under the Hindu Marriage Act) and she was subjected to emotional abuse by his second wife. They were booked under Sections 498(A), 306 and IPC 34.

Judge Basu used the following rationale to justify her decision

‘It has also been brought on record that Sanjeevani the deceased was not taken to any doctor for treatment after accused number one, the husband assaulted her. On the basis of this evidence the lead advocate for the accused argued that the oral evidence of all these witnesses cannot be relied on in the absence of any documentary evidence. *I do not agree that only because there is no medical evidence, oral evidence of all these witnesses which is clinching evidence can be discarded* (italicized for emphasis). The evidence of these witnesses shows that they were hopeful that the relations between accused number one and the deceased... would improve and therefore might not have thought it necessary to lodge in police complaints. Similarly as stated above deceased and witnesses (are) from poorer strata of society and it might not have occurred to witnesses or the deceased to take treatment for assault. Further the fact that both accused stayed at home while Sanjeevani [the deceased] worked for 12 hours can be constituted as mental harassment. There is no absolute standard of cruelty irrespective of persons concerned. What is to be seen, examined and considered is whether with references to the man and the woman concerned, considering the circumstances, patterns of life, background, behaviour, and other factors, it would be cruelty in their case. The standard is individual and specific, so far as they are concerned. Naturally the

³² The normalizing of violence and the avoidance of violence attributions has been studied in-depth in the study of light sentences of sex offenders in Canada by Macmartin and Wood (2005). The study found that violent attributions were used rarely and sexual explanations were preponderant, despite consensus among forensic experts that sexual assaults are largely the result of power differentials between perpetrators and victims and are not crimes of passion.

³³ Corruption in the Judiciary has been widely reported in Indian and international media. Transparency International in its most recent report has also indicated that judicial corruption in India is common. <http://www.transparencyindia.org>

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consequences would therefore be that no formal straitjacket regarding the standard of the cruelty can be laid down’.

Judge Basu convicted the accused under all three charges. In addition to her astute reasoning, she used the precedent of Laxman Irayya Yengati V. The State of Maharashtra³⁴.

This verdict highlights a number of important issues: firstly an acknowledgement that there is no absolute scale of cruelty; secondly, the presence of medical documentation is not critical for conviction if other supporting evidence such as witness testimonies are available; thirdly there appears to be great latitude in the classification of ‘interested witnesses’, extent of documentation required to establish abuse and the impact of judges’ personal views on the degree of seriousness with which domestic violence is treated³⁵. Judge Basu had a conviction record of greater than 50% of all domestic violence cases involving murder or abetment to suicide and contributed to more than 33% of the total convictions for 1998-2004 (Table 2). She and Judge L Rao were exceptions to the pattern of convictions obtained for domestic violence cases that were reviewed in this study.

5.0 Statistical Impacts of Normalising Domestic Violence

So far we have focussed on the discursive processes by which domestic violence becomes normalised. Naturally, the subjective constitution of serious domestic violence also has large statistical impacts. Table 1 highlights disparities in the conviction rates of judges, clearly demonstrating that the majority of judges are disinclined to convict. There is great variability in judges’ conviction records with some acquitting all the cases brought for trial.

³⁴ The judge in this case (1989) said "Wife is not a chattel to be beaten at whim and caprice of the husband. The beating by the husband to his wife cannot be undermined and ignored. It is not necessary for proving cruelty that there must be many incidents of beating. Proof of some incidence is more than sufficient to prove physical cruelty".

³⁵ Indeed my own experiences with women in a slum community indicate that often abused women do not even confide in their parents or their siblings, rarely seek medical assistance for their injuries and unless dowry harassment is involved, do not report their husbands or in-laws to the police.

Table 1- Judges’ records of convictions (for cases disposed by 2005)

All names anonymised

Names of Judges	Total (n)	Acquittals (n)	Convictions (n)	Convicted (%)
Abc	51	50	1	2%
Def	98	87	11	11.02%
Ghi	11	11	0	0
Klm	45	41	4	8.88%
Nop	94	90	4	4.26%
Qrs	93	63	30	32.25%
Tuv	15	15	0	0
Wxy	22	20	2	9.09
Zab	52	52	0	0
Cde	1	1	0	0**
Fgh	2	1	1	50%**
Ijk	17	16	1	5.80%
Lmn	5	5	0	0
Opq	7	7	0	0
Rst	2	2	0	0
Uww	31	29	2	6.45%
Xyz	23	21	2	8.69%
Cba	2	2	0	0
Fed	1	0	1	100**
Ihg	28	27	1	3.57
Lkj	16	16	0	0
Onm	34	33	1	2.94
Rqp	3	3	0	0
Uts	21	20	1	4.76
Xwv	4	4	0	0
Azy	20	18	2	10
Bdf	1	1	0	0
Hjl	2	2	0	0
Npr	1	0	1	100**
Tvw	63	40	23	36.5
Adg	1	1	0	0
Hkn	6	6	0	0
Oru	9	4	5	45%**
Psw	5	5	0	0
Qtw	1	0	1	100%**

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Total	787	693	94	11.94%
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** indicates sample sizes too small to draw any inference.

Table 2- Convictions Disaggregated By Type Of Charge

Section	No.	% of total cases	Acquittal	Conviction
498(A)	637	81%	94%	6%
498(A) and 302 (Murder)	74	9%	61%	39%
498(A) and 306(Abetment to Suicide)	55	7%	65%	35%
498(A) and 34 (Common Intent)	1	0.10%	100%	100%
498(A) and 324 (Voluntarily causing hurt by dangerous weapons or means)	1	0.10%	0%	100%
498 A and 304 (Dowry Harassment)	12	1.50%	83%	17%
498 A and 120 (Criminal Conspiracy)	4	0.50%	25%	75%
498 A and 307 (Attempt to Murder)	3	0.40%	100%	100%
Total	787			

Table 2 indicates that the average conviction rate for domestic violence when murder or suicide is uninvolved is a low of 6 %. Table 3 underscores the lengthy durations to resolve cases with just 7 % of cases resolved within two years, 34 % resolved between nine to 11 years and nearly a quarter resolved in 12 to 14 years. The impacts of such low conviction rates are multiple: firstly it denies justice to victims of domestic violence, secondly it perpetuates the notion that the majority of domestic violence cases brought to the attention of the courts are spurious and thirdly by not convicting perpetrators it sends the signal that

it is possible to get away with abusing and murdering wives³⁶.

Table 3 – Time taken for Cases to be resolved

Sections	0-2 yrs (%)	3-5 yrs (%)	6-8 yrs (%)	9 - 11 yrs (%)	12- 14 yrs (%)	15 or more yrs (%)	Total
498 (A)	7	17	15	34	24	4	637
498 (A) and 302	15	23	12	19	26	5	74
498 (A) and 306	15	33	13	18	22	0	55
498 (A) and 134	0	0	0	100	0	0	1
498 (A) and 324	8	42	8	17	17	8	1
498 (A) and 304	0	33	33	33	0	0	12
498 (A) and 120	0	25	0	0	75	0	4
498 (A) and 307	0	33	33	33	0	0	3

7.0 Conclusion

The large disparities in conviction rates observed in this study cannot be explained as natural statistical errors in the distribution. One must then examine the discursive archives as well as legal processes to explain this phenomenon. A close reading of the discourses advanced during domestic violence trials reveals that the laws

³⁶ The notion that women ‘misuse’ Section 498(A) to extract hefty alimonies from husbands and settle scores with in-laws is widely prevalent both within and outside of the Judiciary. In fact in a consultative exercise included as part of the 2012 Law Commission Report, 100 of the 244 Judicial Officers consulted (including police officers, Registrars and Directors of Judicial Academies and Officers suggested it should be made a bailable offence. There is no evidence to indicate that there is widespread abuse of this law and in fact a recent study by Oxfam in Odisha conclusively established this to be untrue. Justice Reddi the author of the reported that there was no empirical data to suggest that Section 498 (A) is abused and laid out some recommendations to prevent its misuse. While it cannot be ruled out that a very tiny minority may misuse this law (or any other law for that matter), nationally the poor conviction rates present a dismal picture. Although interesting, a detailed discussion of this issues is beyond the scope of this paper and will be discussed elsewhere.

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cannot be independent forces for change in a context where most judges and lawyers display a woeful lack of understanding of the inequities inherent in gendered power relations. In fact a recent Law Commission of India report has revealed that the Delhi and Madras High Courts have issued orders to the police to delay filing F.I.R.s (unless there are 'visible injuries') until such time that the 'preliminary investigation is done and reconciliation process is completed'³⁷. This is both deeply disappointing and alarming suggesting that despite the lack of conclusive data on its misuse, some judges and courts have pre-decided that women are abusing this law and their desire to keep the marital family intact supersedes their desire to ensure justice for victimised women. This is in no small part due to the pressures from Men's Rights Organizations as well as political parties which are wedded to regressive and patriarchal ideas of the Indian family³⁸. This experience and expediency based law-making carries several risks: firstly a focus on injuries that are 'visible' thus precluding any violence that is not immediately physically evident, the risk of being constitutionally unsound by transforming a non-bailable offence into a bailable one and the suggestion that F.I.R.s be delayed until reconciliation is completed, presumes that reconciliation is both desirable and possible. The matter is currently under consideration by a sub-bench of the Supreme Court which has taken a different view on this issue. The future of 498(A) as well as the 2006 Protection of Women from Domestic Violence Act hinges on this decision³⁹.

In conclusion, using the frameworks of the Dynamic Court and the Constrained Court as well as a critical and feminist analysis of legal discourse, I delineate processes and deconstruct discourses that can shed light on the reasons for the low and highly variable conviction rates for domestic violence. Legal rhetoric and language are strategically deployed to systematically efface

women's claims of violence and to minimise brutality. Unlike other acts of violence, the extent of criminality involved in domestic violence continues to be contested within courts. While it is possible for courts to be agents of social reform and to deliver justice, unless the element of *violence* within domestic violence is made salient and treated with the appropriate degree of seriousness, this will be difficult to accomplish. The findings from this study present a very troubling picture for gender-justice in India.

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³⁷ Reddi 2012:42

³⁸ Recently the Minister for Women and Child Ministry gave reasons for why marital rape could not be criminalized in India including poverty, illiteracy and sanctity of marriage in India: <http://www.thehindu.com/features/metroplus/woman-uninterrupted-the-marital-rape-debate/article8370439.ece>

³⁹ Although more inclusive in its formulation, the PWDA has not brought a reduction in domestic violence cases though the new law has become an alternative for primarily urban victims of domestic violence (Ghosh and Choudhuri, 2011; Ghosh, 2011).

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