



## LEGAL FRAMEWORK FOR INTIMATE PARTNER VIOLENCE IN INDIA: REIMAGINING THE INDIAN LAW

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### I. INTRODUCTION TO THE CONCEPT & PROBLEM: MANY FORMS OF DOMESTIC VIOLENCE

Domestic Violence is an autarkic form of crime. It involves interaction of multivalent patterns involving physical violence, isolation, emotional abuse, sexual abuse etc. The violence is committed by one partner over the other to establish his/her control.<sup>2</sup> Domestic Violence cuts through all barriers of caste, race, gender, sex, cultural or socio-economic group.<sup>3</sup> It pervades in all types of domestic set up and communities. Precisely, batterer uses all means conceivable to retain control over the battered.<sup>4</sup> Given this premise, it is important to understand the concept of domestic violence in same sex relationships and thereafter delve into the central question.

#### A. Evolution in India: Post Navtej Fallout

Domestic Violence Act, 2005 (“DVA, 2005”) forms the umbrella law to protect the victims of such violence and redress their concerns. However, the Act has been made applicable to women only and the extension of it to same sex relationships was expressly excluded by the Supreme Court<sup>5</sup>. Even the DVA, 2005 makes a gender-neutral definition of domestic relationship<sup>6</sup> which is unrestricted to sex, but the provisions clear project women as victims at the front and center in the subsequent enactment. Accordingly, women carry

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<sup>3</sup> MARGI MCCUE, *DOMESTIC VIOLENCE: A REFERENCE HANDBOOK* 86 (2<sup>nd</sup> ed., 2007).

<sup>4</sup> Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 *New ENG. L. REV.* 273, 275-76 (1993).

<sup>5</sup> *Bharti Ben v. State of Gujarat*, (2017) 8 SCC OnLine Guj 9.

<sup>6</sup> *The Domestic Violence Act, 2005* (Act 43 of 2005), §2(f).

considerable protection in legal letters to a greater extent buttressed by judicial decisions.<sup>7</sup> The Court in its ground breaking judgment in Navtej Singh<sup>8</sup>, legalized homosexual relationships, but remained silent on the gender-neutral definition of domestic relationship under the DVA, 2005<sup>9</sup>. Silence in a judgment cannot be panacea protection of victims of same sex domestic relationship.

### *B. Setting The Context of the Problem: Why A New Law*

Bearing the aforesaid narratives in mind, the central question that springs up is on ‘what lines the DVA, 2005 should be amended to cater the needs of victims of same sex domestic violence?’ It is important to clarify that the article would be confined to homosexual minorities only and won’t be engaging with other sexual minorities. The clarification is pertinent since each class of victim requires a different kind of response considering the social placement of each sexual minority class in a given society and temporal space.

Sexual Minorities be it gay or lesbian faced legal exclusion in India till Navtej Singh case<sup>10</sup>. The scenario remains unaltered in effect though the law has been subject to innovative judicial interpretation. There are societal barriers faced by gay and lesbians in a domestic relationship. Society views domestic violence through a feminist prism creating two pronged problems. First, the society views homosexual relationship tainted with immorality, and feels repulsive to them. Second, is specific to lesbians, it is contemplated an archetypal woman is non-violent and would not commit domestic violence on her partner.<sup>11</sup>

The criminal justice system remains stultified and shows extreme apathy towards these victims. The first place of contact with the criminal justice system is the police who have no knowledge of homosexual domestic violence.<sup>12</sup> Police officers do not see same sex relationships as factual realities but conceive them as wild imaginations. The situation could be partly attributed to the nascent stage of law *qua* sexual minorities. The fear of re-victimization by the police adds fuel to fire. This also calls for victim assistance at the first place.

Capitalizing on the above consternation the batterer can always use homophobia and societal ex-communication to threaten the partner. Persuasive convincing on lack of support from hospital, shelter homes, police, family, lawyers etc. is deployed by the perpetrator on the victim.<sup>13</sup> Homosexual nature of the victim becomes a vehicle for the perpetrator to incessantly continue the violence.

Anti-discrimination law by and large protects an individual against autarkic forms of discrimination over which individual has no control like caste, sex, race, religion, place of birth etc. These aren’t the factors in which an individual has choice. Alongside, Butler claims that gender is not matter of choice; instead, it is

<sup>7</sup> See JUSTICE A.B. SRIVASTVA, COMMENTARIES ON PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 WITH ALLIED LAWS (Law Publishers (India) Pvt. Ltd., 2014).

<sup>8</sup> Navtej Singh Johar v. Union of India, (2018) 1 SCC (Cri) 499.

<sup>9</sup> Id., Para 16.

<sup>10</sup> Supra note 7.

<sup>11</sup> Gregory S. Merrill, *Ruling the Exceptions: Same Sex Battering and Domestic Violence Theory*, 4 JG&LSS 9-22 (1996).

<sup>12</sup> Brends Russell, *Police Perceptions in Intimate Partner Violence Cases: The Influence of Gender and Sexual Orientation*, 41 JOUR. CRI. & J 193-205 (2018).

<sup>13</sup> Angelo Pantazis, *Domestic Violence in Lesbian and Gay Relationships*, 115 S. AFRICAN L.J. 379 (1998).

through socialisation that gender is shaped, enacted and reinforced.<sup>14</sup> The society as a larger institution has a role to shape the personality of an individual; thereby it owes a larger responsibility to ensure that domestic violence against that victim does not remain unchecked solely on the grounds of his/her sexual orientation. Claiming this responsibility, the west has legally responded to the full legal accommodation of the sexual minorities in their respective laws.

## II. LEGAL FRAMEWORK: POSITIONING THE SEXUAL MINORITIES

The above section specified why the law needs to respond to domestic violence in same sex relationships. Now the ground is green position the sexual minorities *qua* domestic violence in the International Legal Instruments, the USA, and the UK. This part is divided into four parts. The first one would be dealing with the International Law, second with the US, and the third one would specify English Law on the subject under study and the fourth part would study the Indian trend on the same matter.

### A. *International Legal Instruments*

The United Nations (UN) is against 'anti-propaganda' laws with respect to sexual minorities.<sup>15</sup> The laws which discriminate and ill-afford legal protection to sexual minorities are not in conformity with the international standards. However, the UN has not been explicit in spelling out the concept of sexual minorities and domestic violence but certainly they are covered under the broad umbrella of human rights and sexual minority nexus. It is advised by the UN to protect sexual minorities in family set up, inter alia, through domestic legislation otherwise familial abuse would remain unchecked.<sup>16</sup> This is spacious enough to enfold a law on domestic violence for sexual minorities.

The Yogyakarta Principles provide for universal enjoyment of human rights as a first and foremost principle. The principles of particular relevance pertain to equal treatment, recognition before law, found a family, effective remedies and redress, state protection, legal recognition, and mental and bodily integrity.<sup>17</sup> These principles are mentioned in the nature of rights statements and an ideal national law should provide for them. Now it is pertinent to delve into the domestic laws of US, UK and India and see the extent of recognition grant by these nations to recognize domestic violence.

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<sup>14</sup> J.BUTLER, UNDOING GENDER 19, 75-78 (Routledge, New York & London, 2004).

<sup>15</sup> United Nations, Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity (UNHCR, 2015).

<sup>16</sup> Ibid., Factsheet International Human Rights Law and Sexual Orientation & Gender Identity. Also see, Resolution adopted by the Human Rights Council on 30 June 2016 32/2., Protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/RES/32/2).

<sup>17</sup> Refer to the Yogyakarta Principles 2, 3, 24, 28, 30, 31 & 32 respectively. Yogyakarta Principles are specific to sexual minorities.

### B. USA: A March in The Right Direction

The United States has a patchy framework due to its federal structure. Some states have introduced an inclusive language in their domestic violence laws while in rest other states the sexual minorities are unprotected by law against domestic violence. Some of the states like New Jersey, South Carolina, New York etc. have recognized domestic violence.<sup>18</sup> The USA has been proactive in recognition of victims and thereafter the reforms followed. In 2011, The National Coalition of Anti-Violence programmes received 3930 reports on intimate partner violence between homosexual couples.<sup>19</sup>

The Federal Law, The Violence Against Women Act (VAMA), 1994 was reauthorized by the Congress in 2013 to win the cause of sexual minorities.<sup>20</sup> One of the disempowering moments of the VAMA was handed out by the US Supreme Court whereby the civil remedies under the VAMA were declared to be unconstitutional and the victims remained only with the criminal prosecution.<sup>21</sup> Despite all the developments at the federal level, domestic violence falls within the state family law statutes, but criminal redress is only available in majority of the states akin to the federal law. One of the better examples of victim protection states is California whereby protection orders can be issued on the basis of an affidavit filed by the victim without formal requirement of indictment.<sup>22</sup> The USA in its federal law is trying its best to incorporate the international narratives in domestic law. However, the praxis is somewhat different. There is another set of issues with the execution part which would be studied in the next part.<sup>23</sup>

### C. The United Kingdom: A Simple Yet Complex Approach

The UK has extended the provisions of its principal legislation Domestic Violence, Crime and Victims Act, 2004<sup>24</sup> to same-sex relationship by amending the definition of cohabitants to include them. The Family Law Act, 1996 now *ipso facto* applies to the UK without factoring in any additional provision for the same-sex partners. The needs of same sex partners would be different for the reasons aforementioned, this makes the scenario complex.<sup>25</sup> The approach could have been adopted in India but with the sole difference that in India judiciary may have extended the provisions of DVA, 2005 to the same-sex relationships whereas in UK it is effectuated by the Parliament. The difference that sets UK apart from India is the presence of institutional support. A national organization 'Broken Rainbow' is dedicated to the cause of victim justice of same-sex domestic violence under the broader mandate of protecting LGBT victims of domestic violence. The staffing

<sup>18</sup> WOMENSLAW.ORG, <https://www.womenslaw.org/laws?reset-state=1>.

<sup>19</sup> Meg Townsend et al., Law Enforcement Response To Emergency Domestic Violence Calls For Service, available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/215915.pdf>.

<sup>20</sup> See VAMA, 2013, § 2266.

<sup>21</sup> United States v. Morrison, 529 U.S. 598 (2000). In this case court declared Gender Motivated Violence Act to be unconstitutional, want of authority with the Congress.

<sup>22</sup> California Family Code, § 6218. Also see, Christina Samons, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government*, 22 S. CAL. REV. L. & SOC. JUST. 417 (2013).

<sup>23</sup> See Infra III.

<sup>24</sup> Section 3, Domestic Violence, Crime and Victims Act, 2004, § 3.

<sup>25</sup> See Part I. B.

of the organization involves highly trained staff in LGBT domestic violence counseling to support the victims, their families and friends.<sup>26</sup>

#### *D. India: A Virtuous Baby Crawl*

India started its journey of recognizing the plural conception of gender in *Nalsa case*<sup>27</sup>, whereby the court stated that gender identity is a fluid concept a man may regard himself as woman and vice-a-versa and recognized application of Yogyakarta Principles to accord full protection to their human rights. The ratio of the judgment however was confined to the third gender rights. The position of same-sex person was further strengthened in *Puttaswamy (I)*<sup>28</sup>, where the court stated that privacy is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination. The explicit recognition of homosexual relationship and domestic violence therein was recognized in *Navtej's case*.<sup>29</sup> These judgments certainly are in spirit on international legal instruments and indeed use them for constitutional interpretation but the victims of domestic violence are left destitute due to no intervention mechanisms, undergird by a non-amended law for the lack of parliamentary proactiveness. It is important to see that law is insufficient to deal with this quandary since reality has a different story to tell, and comprehend.

### **III. PRAXIS OF LEGAL LETTERS: NECESSITY FOR INTERVENTIONS**

The precarious state of victims of same-sex domestic violence has been granted limited solace in the legal letters, that is, the protection is facial. This part would revolve around the problems encountered by the victims and the necessary interventions required to make the protection 'as applied'. The problems mentioned may or may not be present in India, one cannot claim anything due to the absence reported cases and meager body of available literature in India. It becomes pertinent to study the problems in foreign jurisdictions and accommodate the cautionary notes highlighted by them in making of Indian law on the matter under deliberation.

<sup>26</sup> BROKEN RAINBOW UK, <https://www.nhsdirect.wales.nhs.uk/localservices/viewlocalservice.aspx?id=1560>.

<sup>27</sup> NALSA v. Union of India, (2014) 5 SCC 438. Para 21, 23, 24 & 25.

<sup>28</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, Para 169.

<sup>29</sup> *Supra* note 8. Possibility of violence was recognized but no further action was taken to address the issue at hand.

### A. Societal & Institutional Barriers: An Extra-Legal Barrier

The same-sex partners have to face the music played by the society, which is, lack of access to social services and inadequate protection by the legal processies. There are very few agencies that operate to protect such class of victims.<sup>30</sup> According to 2009 survey, crisis center staff in the US considers homosexual domestic violence less serious juxtapose the heterosexual one.<sup>31</sup> Many states think that the numbers of such cases are negligible, therefore it is better to invest elsewhere.<sup>32</sup> Daunting responses from the welfare agencies further aloof the victim from prosecuting his/her cause. This lack of social services leads to individual-coping mechanisms including telling everything to family, pray, dial all the number in the cell-phone to the point of satisfaction.<sup>33</sup> The nature of support from friends and family would be insufficient to understand the intricacy of the relationship.<sup>34</sup> These societal barriers tend to influence the legal machineries for protection. The Police have a protracted history of being unresponsive to the sexual minorities and the promise of equal protection of laws remains elusive. Additionally, when the law wouldn't provide how homosexual relationship domestic violence is different from heterosexual one, the police would not be able to identify the aggressor. He may then just detain the both of the parties.<sup>35</sup> These institutional barriers discourage the reporting of domestic violence in same-sex relationship.

### B. Fight Against the Legal Psyche: A Long-Drawn Battle

The courts are ultimate dispensers of justice. A trial must be free in all respects. Often the rape victim has to bear not only burden of proof but burden of performance<sup>36</sup> also. The archetypal conception of victims is equally found in India<sup>37</sup>. When such grave crimes carry a burden to fit in tight moulds, the lesser crime of domestic violence has to have its own predefined structures of victims to fit in. The role of victim to get justice is further perplexed in case of homosexual relationships. The courts in the USA are now recognizing male and sexual minorities as victims of domestic violence.<sup>38</sup> The Battered Wife Syndrome is being increasingly replaced by the courts Battered Spouse Syndrome ("BSS"). Several states of the USA have incorporated the BSS standard to take sexual minorities relationship within the sweep of domestic violence

<sup>30</sup> Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 ST. THOMAS L. REV. 544 (2012).

<sup>31</sup> See Michael J. Brown & Jennifer Groscup, *Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff*, 24 J. FAM. VIOLENCE 87 (2009).

<sup>32</sup> S. Khimm, *Why the Violence Against Women Act is an LGBT Issue*, THE WASHINGTON POST: WONKBLOG (Apr. 30, 2012, 12:50 PM), <http://www.washingtonpost.com/blogs/wonkblog/post/why-the-violence-against-women-act-is-a-gbt-issue/2012/04/30/gIQAe34qrTblog.html>.

<sup>33</sup> Ryan Freeland, Tamar Goldenberg, & Rob Stephenson, *Perceptions of Informal and Formal Coping Strategies for Intimate Partner Violence Among Gay and Bisexual Men*, 12(2) AJMH 302 (2018).

<sup>34</sup> Id.

<sup>35</sup> April Pattavina, *A Comparison of the Police Responses to Heterosexual Versus Same-Sex Intimate Partner Violence*, 13 VIOLENCE AGAINST WOMEN 374 (2007).

<sup>36</sup> Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 CJGL 437 (2006).

<sup>37</sup> *Bharwada B. Girjibhai v. State of Gujarat*, (1983) 3 SCC 217, Paras 224-226. Here the court has defined how a rape victim would behave.

<sup>38</sup> See *Woods v. Horton*, 84 Cal. Rptr. 3d 332 (Cal. Ct. App. 2008). The California regulations were held violative of the Constitution on the ground of prohibiting males from taking publicly funded domestic violence services.

law.<sup>39</sup> The sexual minorities are unable to take BSS as a defence against the batterer because the jury is unable to grasp the power imbalances involved in the relationship<sup>40</sup>, perhaps they focus on physical attributions rather than mental capacities. The testimony of the battered spouse doesn't hold water because expert testimony tends to enforce stereotypes of women.<sup>41</sup> Another reason for failure of BSS would be the gender assignment may not be perfect, the height and weight of the partners may be equal so the jury (judge in India) may find it difficult to enforce the victim into the traditionally defined roles.<sup>42</sup>

This thwarts the very foundation and reason for admitting expert testimony. The fundamental facet of expert testimony must bring out the victim's past, patterns of abuses practiced on him/her. The mentioned phenomenon abridges the fundamental right of the victim to tantamount have a fair trial solely on the basis of sexual orientation.<sup>43</sup>

### C. Interventions, Institutions and Interests: An Intensive Immobility Impasse

Domestic Violence responses should prioritize support, protection and empowerment of the victims. Needless to mention the interventions are required to protect the interests of the victim. Institutions are mushrooming up in this area and victims' interests are being catered. Simultaneously, two points must be borne in mind; first, domestic violence requires healing relations and not punishing the perpetrator. In order to move in that direction, second point requires accused must have access to certain other type of assistance ensuring a balance in remedies; otherwise, an immobile impasse would breed in their relationship. There are a few reasons for not having voluntary perpetrator programme fund. The research is sparse and, far and few in between leading knowledge limited capacities for service deliverance. A major concern is fund diversion from survivor rehabilitation to perpetrators and the problem is stultified by doubts of positive outcomes in behavior of the accused. Akin programmes are made available for heterosexual abusive males.<sup>44</sup>

Domestic violence between same-sex partners is one of the lowest reported crimes due to a host of factors ranging from shame, considering it as an offence unworthy of intervention, wellbeing of pet companions, privacy, lack of shelter homes etc.<sup>45</sup> Fuel is added to the fire when interventions themselves create an impasse. The majority of the counseling and help programmes for domestic violence in same-sex couples are replication of programmes used for heterosexual couples underpinning the values involves in

<sup>39</sup> Nancy Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. (1995).

<sup>40</sup> Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP POL. & Civ. RTs. L. REV. 325 (1999).

<sup>41</sup> Arlaine Rockey, *To Male Jurors, Battered Lesbian Fought Back Once Too Often*, 7 MIAMI REVIEW 8 (1989).

<sup>42</sup> *People v. Huber*, 475 N.E.2d 599 (11. App. Ct. 1985). In this case size of lesbian partner mattered over the size of another lesbian in fixing the liability.

<sup>43</sup> Discrimination on the basis of sexual orientation is unconstitutional. *See supra* note 7.

<sup>44</sup> L. KELLY & N. WESTMARLAND, *DOMESTIC VIOLENCE PERPETRATOR PROGRAMMES: STEPS TOWARDS CHANGE: PROJECT MIRABAL FINAL REPORT* (London Metropolitan University & Durham University, 2015).

<sup>45</sup> Merrill & Wolfe, *Battered Gay Men: An Exploration of Abuse, Help Seeking and Why They Stay*, 39 JOURNAL OF HOMOSEXUALITY 1 (2000).

heterosexuality.<sup>46</sup> The intervention though with best intention becomes of limited use with the risk of repetition of violence.

One of the biggest interventionist impasses is created by the law itself. The only remedy available to the victim is criminal remedy.<sup>47</sup> This serves as a dilemma for the victim. First, until the criminal proceeding is concluded and the batterer is convicted, the victim is forced to live with him. Second, in a criminal prosecution, the necessary order is incarceration. A lower level of violence would invite a jail term. There is no variation in the nature of punishment, though degree of punishment is at the sweet will of the court. There are swathes of instances where civil protection orders are more suitable. Further, the victim may not decide to pursue criminal remedies for a bucket of reasons *like* he may think the violence doesn't warrant criminal sanction, burden of proof is lesser in civil suits, matter remains private in civil remedies etc. This deadlock is created by the law. There is no rationality of choice with the victim. Heterosexual couples on the other hand have the both of the avenues to consider and opt. The legal system<sup>48</sup> is responding in an acontextual form to the same-sex relationship with recognition of only serious forms of domestic violence, albeit implicitly.

Bystander interventions which are widely being mooted in the USA to improve the reporting of crime finds less promotion in India. The 'Ghanti Bajao' (Ring the Bell Campaign)<sup>49</sup> has received immense fame in India but the intervention in the nature advertisement is only confined to heterosexual relationships whereby the bystander or a person suspecting violence in a household should ring the bell and try to approach the victim, for the victim may have been repressed by the perpetrator. The intention behind the intervention is simple; many of these violence or precursors of it occur in presence of other people and the witnessing agents have the capacity to mitigate the social harms.<sup>50</sup> According to a survey one-third of the sexual assaults are reported by the third-party intervention.<sup>51</sup> The intervention recognizes a bystander as a capable guardian of the victim, a third party who may deter wrong-doers behaviour. The victim in the context may find support in third parties which he/she is not finding in the institutional machineries and the social services. Creating bystanders is a difficult task but if achieved, it has a stark success rate.<sup>52</sup> The laws responding to bystander intervention are at its infancy stage in the form of select mandatory reporting provisions.<sup>53</sup> The impasse is created by the irresponsibility of the machineries, they have to take initiative to raise awareness about the intervention programmes at intra and inter institutional levels. Intra-institutional level would involve that the people within

<sup>46</sup> Catherine Donovan, Dr Rebecca Barnes & Dr Catherine Nixon, *The Coral Project* (University of Sunderland and University of Leicester, 2014). Coral Project is a study based in the UK and note 44 is a US study, both point towards similar factors of non-reporting of the crime and overlapping critiques of the intervention programmes.

<sup>47</sup> Caroline Morin, *Re-Traumatized: How Gendered Laws Exacerbate the Harm for Same-Sex Victims of Intimate Partner Violence*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 477 (2014).

<sup>48</sup> American Legal System (Except a few states like Vermont & Massachusetts).

<sup>49</sup> Countering Domestic Violence through Popular Culture: The Bell Bajao Campaign as a Social Initiative, ONE FUTURE (Jan. 10, 2019), <http://onefuturecollective.org/countering-domestic-violence-through-popular-culture-the-bell-bajao-campaign-as-a-social-initiative/>.

<sup>50</sup> Victoria L. Banyard, *Who Will Help Prevent Sexual Violence: Creating an Ecological Model of Bystander Intervention*, 1 PSYCHOL. VIOLENCE 216 (2011).

<sup>51</sup> Sarah McMahon & Victoria L. Banyard, *When Can I Help? A Conceptual Framework for the Prevention of Sexual Violence Through Bystander Intervention*, 13 TRAUMA, VIOLENCE, & ABUSE 3 (2012).

<sup>52</sup> Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975 (2015).

<sup>53</sup> None of the mandatory reporting provisions are embedded in DVA, 2005.



one institution are aware of same-sex domestic violence, whereas inter-institutional level would call in a synergy with other institutions like the courts, social services etc. If a bystander reports to the police, the court should be equally ready to entertain the case. Speaking generally, the police don't recognize same-sex domestic violence and neither the legislature is prioritizing predilections in favour of the same. Irrespective of proactiveness of the bystanders, our system would make him run from pillar to pole for securing justice for another person. These disparaging errands hurdles the intervention.

#### IV. CONCLUSION AND THE WAY FORWARD: A LESSON TO TEACH

The social landscape has shifted post the *Navtej* case, a wave of awareness is witness for the rights of the homosexuals. Recognitions of rights do not necessarily mean recognition of the state responsibility. India has hitherto remained unresponsive to the mentioned ruling (*Navtej*). The 'Progressive Realization of Rights' remains an evading chimera<sup>54</sup>. The offence of domestic violence is a value-oriented offence which can occur across the spectrum of genders which needs recognition in India. The society and institutions collectively augment the access to justice for victims of domestic violence in a homosexual relationship. The law in India has not even begun fledgling. There are lessons to learn from the west but that doesn't mean India should transplant their responses in her legal system without accounting for the pitfalls. The law on the matter in India has become thoroughly disappointed. The US and the UK have carefully built an enviable mark in terms of receptivity of the issue at agitation. Given this, India requires quantum leap in the right direction. She must develop of a law which not only learns from the global west but also reflects on it and develops a law which would be a boon lesson to other nations. Fundamentally, now not having a law that protects victims of same-sex relationship violates the equal protection clause<sup>55</sup> of the Indian Constitution. Equal protection factors into account where a particular individual is situated in the society and how much protection he/she requires. By this token of understanding, such a law is *sine qua non*.

Stating first things first, India needs to amend the DVA, 2005 and make it completely gender neutral and add a chapter on victim support services. Additionally, non-acting state actors should be responded with heavy handed action. The rigor of this protectionist law must prevent domestic violence in all respects. Civil and criminal, the both of the remedies should be captured in the DVA, 2005 itself. If there is forced sexual violence, the partner has to seek relief under section 377 which is against the spirit of *Navtej Singh* case. The choice to move under DVA, 2005 must be available to effect progressive realization of rights. Extending DVA, 2005, would ensure availability of protection officers to the victims and counselors in appropriate cases. Expertise of the counselors must be factored into consideration while allocating the case for counseling. Government in partnership with the LGBTQ rights organization to support the victims. The UK government has been working with the broken rainbow organization. It is just one organization in the UK that is dedicated to support victims of domestic violence of LGBTQ community. This brings another cardinal point to the

<sup>54</sup>Supra note 7. J. D.Y. Chandrachud's judgment, Para 178.

<sup>55</sup> Article 14, Constitution of India, 1950. Ind. CONST. art. XIV.

table; government must ensure that these support organizations have experts trained in counseling same-sex couples, for they have additional needs as aforementioned in the part I.B of the write up. This counselor is a suggested as a voluntary service offered by an NGO, or activist group etc. but the one under DVA, 2005 is a mandate.

One of the current solaces for the mentioned class of victims could be complaint to magistrate on the non-registration of it by the police or in case of inaction by the police.<sup>56</sup> This enumerates a basic need for judicial training on the sensitive issues. As much as judicial training is pressed here; a sensitivity and distinct set of training is required for the police personnel, so that the victims could be treated as “victims” juxtapose fanciful claimants. The government must spread awareness of the victims of same-sex domestic violence and the redress available.

The law on bystander intervention should not associate any risk of potential liability, it would encourage the reporting of the violence without inhibitions. Even if a peripheral damage is caused in rescue operation criminal liability should be kept outside the bounds of action if the case is of emergency and gruesome violence. The awareness programme must teach how to and when to intervene.<sup>57</sup> Merely supplying tools is not essential but equally important is to give out instructions to use them. A good practice of what may be called ‘duty to rescue’ laws would foster responsibility within the community and institutional processessies.

The unwritten social-sub texts pressurize the enforcement of legally recognized rights. The victims should be guaranteed privacy to have a safeguard against the mental shame which one experiences. Their names should not be reported in the judgment. If a need is felt vulnerable witness courtroom should be used in recording the testimony of the victim.

While the domestic violence was earlier under the domain of familial issues has now become a social issue. The same-sex couples witness double discrimination in access to justice. First, stems from them being a sexual minority. Second, category of discrimination occurs due to the non-recognition of domestic violence in their relationship in the larger societal context. The state is evading its duty to legislate which also pushes down the cause of victim justice. In effect, victim is left with no remedy to complaint against the batterer. The state is promoting the evil within and the shame is borne by the victim. The sinner continues to sin. Society ignores the fate of this minuscule minority. A welfare state has a positive obligation to protect the interest of the victims (citizens).

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<sup>56</sup> See Code of Criminal Procedure, 1973 (2 of 1974) §§ 156 (3), 200. Another remedy by of writ petition for compensation under Article 226 of the Constitution of India is available for the physical harm caused. Since same-sex domestic violence has not been legislatively criminalized, the compensation for mental sufferings via judicial route remains in limbo.

<sup>57</sup> Supra note 51.

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